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Baker v. Nationstar Mortg., LLC (In re Baker)

United States Bankruptcy Court for the District of Idaho

July 28, 2017, Decided

Bankruptcy Case No. 17-00044-JDP, Adv. Proceeding No. 17-06010-JDP

Reporter
574 B.R. 184 *; 2017 Bankr. LEXIS 2110 **

In Re: Teresa A. Baker, Debtor.Teresa A. Baker, Plaintiff, vs. Nationstar Mortgage, LLC and Duke Partners II, LLC, Defendants.

Core Terms

foreclosure sale, trustee sale, postpone, equivalent value, insolvent, alleges, argues, fails, deed, motion to dismiss, schedules, bankruptcy petition, bankruptcy case, title company, foreclosure, purchaser, reasons, void

Case Summary

Overview

HOLDINGS: [1]-Plaintiff sufficiently alleged that she was insolvent at the time of the transfer for *11 U.S.C.S. § 548* purposes; [2]-Even if defendant purchased the property for $ 140,282, and plaintiff did not know if defendant knew of the postponement of the sale or communicated with the mortgagee before the sale, under *Idaho Code Ann. § 45-1508*, any failure by the mortgagee to comply with *Idaho Code Ann. § 45-1506* was not a reason to invalidate the sale since plaintiff did not rebut the presumption that the sale was for reasonably equivalent value; [3]-Even if the mortgagee's misrepresentations provided a basis to set aside the sale to defendant, plaintiff did not compare the sale price to the value she would have received at properly conducted foreclosure sale; [4]-Plaintiff failed to state a claim under *11 U.S.C.S. § 544(b)(1)* as defendant was a bona fide purchaser.

Outcome
Motion to dismiss granted, in part, and denied, in part.

LexisNexis® Headnotes

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Dismissal of Adversary Proceedings

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Adversary Proceedings, Dismissal of Adversary Proceedings**

Fed. R. Civ. P. 12(b)(6), made applicable in adversary proceedings by *Fed. R. Bankr. P. 7012(b)*, allows motions to dismiss for failure to state a claim upon which relief may be granted. The bankruptcy court has explained the standard for its consideration of such a motion as follows: The purpose of such a motion is to test a claim's legal sufficiency. To survive a *Rule 12(b)(6)* motion, a complaint must plead sufficient facts, which when accepted as true, support a claim that is plausible on its face. A claim is plausible so long as it is based on a cognizable legal theory and has sufficiently alleged facts to support that theory. Under *Rule 12(b)(6)*, the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A judge ruling on a defendant's motion to dismiss a complaint must accept as true all of the factual allegations contained in the complaint. While the court generally can not consider extraneous materials when

evaluating a motion to dismiss, it may consider exhibits attached to, and documents incorporated by reference in, the complaint.

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > Elements

Real Property Law > Financing > Foreclosures

HN3[] Fraudulent Transfers, Elements

11 U.S.C.S. § 548(a)(1) empowers a trustee to avoid the involuntary transfer of an interest of the plaintiff in property made within two years before the filing of the bankruptcy petition if the plaintiff was insolvent on the date that the transfer was made and she received less than reasonably equivalent value in exchange for the transfer. § 548(a)(1)(B). The term "transfer" is defined in the U.S. Bankruptcy Code to include the kind of involuntary transfer of a debtor's interest that occurs via a trustee's sale to foreclose a creditor's deed of trust lien. 11 U.S.C.S. § 101(54)(C)-(D). While § 548 expressly bestows this avoidance power on the trustee, under §§ 522(g) and (h), a debtor may assert a claim to avoid a transfer of otherwise exempt property if the transfer was not voluntary, the debtor did not conceal the property, and if the trustee does not attempt to avoid the transfer.

Bankruptcy Law > Case Administration > Commencement of Case

HN4[] Case Administration, Commencement of Case

The U.S. Bankruptcy Code defines "insolvent" as a financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of property that may be exempted from property of the estate under 11 U.S.C.S. § 522. *11 U.S.C.S. § 101(32)(A)*.

Civil Procedure > Judgments > Enforcement & Execution > Fraudulent Transfers

Real Property Law > Financing > Foreclosures

Evidence > Inferences & Presumptions > Presumptions > Particular Presumptions

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

HN5[] Enforcement & Execution, Fraudulent Transfers

A prepetition mortgage foreclosure sale conducted in accordance with state law conclusively establishes that the price obtained at that sale was for reasonably equivalent value. A defendant is entitled to judgment as a matter of law that the foreclosure sale was not a fraudulent conveyance so long as all the requirements of the State's foreclosure law have been complied with. A trustee's sale may be set aside only if there was an irregularity in the conduct of the sale that would permit judicial invalidation of the sale under applicable state law. Even if there was such an irregularity, and the presumption is therefore inapplicable, the transfer to the defendant resulting from the trustee's sale may only be avoided by a plaintiff if the price received at the sale was not reasonably equivalent to the price that would have been received if the foreclosure sale had proceeded according to law.

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > Elements

HN6[] Fraudulent Transfers, Elements

While former 11 U.S.C.S. § 548(a)(2)(A) has been renumbered to § 548(a)(1)(B), its substance remains materially the same.

Real Property Law > Financing > Foreclosures

HN7[] Financing, Foreclosures

Idaho Code Ann. tit. 45, ch. 15 governs the foreclosure of trust deeds. Idaho Code Ann. §§ 45-1501-45-1515. Idaho Code Ann. § 45-1506 describes the manner in which a trust deed is to be foreclosed. But Idaho Code Ann. § 45-1508 specifies that any failure to comply with the provisions of § 45-1506 shall not affect the validity of a sale in favor of a purchaser in good faith for value at or after such sale.

Real Property Law > Financing > Foreclosures

HN8[] **Financing, Foreclosures**

The buyer protections afforded by *Idaho Code Ann. § 45-1508* apply only to sales challenged for a failure to comply with the procedural provisions of *Idaho Code Ann. § 45-1506*. And good faith purchasers are not insulated against every claim or reason for voiding a foreclosure sale. *Section 45-1508* does not apply to a foreclosure sale that was void for a lack of default at the time of the sale.

Bankruptcy Law > ... > Avoidance > Prepetition Transfers > Voidable Transfers

HN9[] **Prepetition Transfers, Voidable Transfers**

Under *11 U.S.C.S. § 544(b)(1)*, a trustee may avoid any prebankruptcy transfer that a creditor holding an unsecured claim in the bankruptcy case could have voided under applicable law. *§ 544(b)(1)*. The presence of fraud alone does not render the foreclosure sale to a bona fide purchaser void.

Bankruptcy Law > Procedural Matters > Adversary Proceedings

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Evidence > Inferences & Presumptions > Presumptions > Particular Presumptions

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Dismissal of Adversary Proceedings

HN10[] **Procedural Matters, Adversary Proceedings**

Fed. R. Civ. P. 15(a)(2), made applicable to an adversary proceeding by *Fed. R. Bankr. P. 7015*, provides that the court should freely give leave to amend when justice so requires. In the Ninth Circuit, this policy is to be applied with extreme liberality. Absent prejudice, or a strong showing of any of the remaining Foman factors, there exists a presumption under *Rule 15(a)* in favor of granting leave to amend. The Foman factors include undue delay, bad faith, dilatory motives on the part of the movant, repeated failures to cure deficiencies through earlier allowed amendments, undue prejudice to opposing parties, and futility. Additionally, dismissal with prejudice and without leave to amend is not appropriate unless it is clear that the complaint could not be saved by amendment.

Counsel: [1]** For Plaintiff: Patrick Geile, FOLEY FREEMAN, PLLC, Meridian, Idaho.

For Duke Partners II, LLC, Defendant: James Colborn, NEAL COLBORN, PLLC, Boise Idaho.

Judges: Honorable Jim D. Pappas, United States Bankruptcy Judge.

Opinion by: Jim D. Pappas

Opinion

[*186] MEMORANDUM OF DECISION

Introduction

On May 2, 2017, defendant Duke Partners II, LLC ("Defendant") filed a motion to dismiss this adversary proceeding under Civil *Rule 12(b)(6)*[1] for failure to state a claim. Dkt. No. 8. Plaintiff Teresa A. Baker ("Plaintiff"), the chapter 13 debtor in this bankruptcy case, opposes the motion. Dkt. No. 13.

On June 6, 2017, the Court conducted a hearing concerning the motion at which the parties presented oral argument and responded to questions of the Court. Minute Entry, Dkt. No. 14. Following the hearing, the parties filed supplemental briefing. Dkt. Nos. 18, 19. Having taken the issues under advisement, considered the pleadings, briefs, and arguments of counsel, as well as the applicable law, this Memorandum sets forth the Court's findings, conclusions, and reasons for its disposition of the motion. *Rules 7052*.

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, ***11 U.S.C. §§ 101-1532***, all Rule references are to the *Federal Rules of Bankruptcy Procedure, Rules 1001-9037*, and all Civil Rule references are to the *Federal Rules of Civil Procedure, Rules 1-86*.

Facts[2]

Plaintiff executed a deed of trust on her house ("the Property") in favor of her lender, Nationstar Mortgage, LLC ("Nationstar") on or about July **[**2]** 30, 2002. Compl. at 2, Dkt. No. 1. Sometime later, Plaintiff became delinquent on her payments and a trustee's foreclosure sale was scheduled. To address this, Plaintiff completed a series of loan modification paperwork which she submitted to Nationstar. *Id.* As the trustee's sale date approached, Plaintiff reached out to the federal Department of Housing and Urban Development ("HUD") to determine if a HUD representative could assist her in her efforts to resolve her situation with Nationstar. *Id.* at 3. A HUD representative then facilitated negotiations between Plaintiff and Nationstar to stop the foreclosure and modify the note. *Id.* Plaintiff also retained a bankruptcy attorney to file a chapter 13 bankruptcy petition if arrangement to postpone the trustee's sale could not be made.

On the morning of January 17, 2017, the day of the trustee's sale, Plaintiff contacted a HUD representative, Nationstar, and the title company. *Id.* The Nationstar representative told Plaintiff that the trustee's sale would be postponed. *Id.* Relying on this information, Plaintiff notified her bankruptcy attorney that she did not want a bankruptcy petition to be filed. *Id.* Soon thereafter, a HUD representative contacted **[**3]** Plaintiff regarding postponement of the scheduled sale. *Id.* Plaintiff also spoke with an attorney for the title company who indicated he would get back to her with answers about the postponement of the sale; apparently, he never did. *Id.*

Based upon these communications, Plaintiff assumed that the foreclosure sale had been postponed. *Id.* at 4. But the next day, a notice was posted on the front door **[*187]** from Defendant demanding that she vacate the Property because the foreclosure sale had occurred, and Defendant had purchased the Property at the sale for $158,000. *Id.* at 4- 5. According to her complaint, Plaintiff does not know whether Defendant knew of her attempts to postpone the sale, or whether there were any communications between Defendant and Nationstar prior to the foreclosure sale. *Id.*

Plaintiff contacted HUD and Nationstar. *Id.* at 4. A Nationstar representative told her the sale occurred because Plaintiff had not submitted all of the paperwork necessary to modify the loan and postpone the sale. *Id.* However, the representative also indicated that a deed had not yet been recorded transferring the Property to Defendant. *Id.*

Plaintiff's counsel then contacted the attorney for the title company and verified that a deed had **[**4]** not yet been recorded in Defendant's name. *Id.* An attorney for the title company also confirmed to Plaintiff's lawyer that the title company received no notification from Nationstar to postpone the trustee's sale. *Id.*

On January 20, 2017, Plaintiff filed a chapter 13 bankruptcy petition. *Id.* at 4. In her schedules, she valued the Property at $180,000, and listed the amount of the Nationstar debt secured by the Property as $140,282. *Id.* Plaintiff continues to reside at the Property. *Id.* at 5.

In the bankruptcy case, Defendant filed a motion for relief from the automatic stay, and after Plaintiff objected, the Court denied that motion on condition that Plaintiff promptly file an adversary proceeding to establish her rights to the Property. *Id.*

On April 7, 2017, Plaintiff filed an adversary complaint against Nationstar and Defendant. Dkt. No. 1. In Count One, Plaintiff seeks to avoid the trustee's foreclosure sale to Defendant as a fraudulent transfer under *§ 548(a)*. Compl. at 5. In particular, she alleges that the sale was an involuntarily transfer of her interest in the Property; that Plaintiff was insolvent on the date of the sale; and that Plaintiff did not receive reasonable equivalent value for her interest **[**5]** in the Property. *Id.* at 5-6. She also alleges that a deed to Defendant was not recorded prior to the filing of the bankruptcy petition. *Id.* at 6.

In Count Two, Plaintiff seeks to avoid the sale pursuant to *§§ 544*, *550*, and *522* based upon common law fraud. *Id.* at 6. She argues that the Nationstar representative's false statement to her that the foreclosure sale would be postponed caused her not to seek the protection of the bankruptcy. *Id.* at 7. She alleges that the Nationstar representative knew Plaintiff was awaiting a decision on her application for modification of the loan, and to postpone the sale in order, to decide whether she should file for bankruptcy, and that, by the representative's statements to her that the sale would be postponed, Nationstar intended to induce Plaintiff to not seek bankruptcy protection so the sale could be conducted. *Id.* Plaintiff alleges she had the right to rely

[2] The following facts are based upon the allegations of Plaintiff's complaint and information in the Court's docket in this adversary proceeding.

upon the Nationstar representative's statements while negotiating her delinquency, and that she was proximately injured when her home was sold due to her reliance on those statements. *Id.*

On these theories, Plaintiff asks the Court to set aside the foreclosure sale or, in the event the transfer of the Property cannot be avoided, that Plaintiff **[**6]** recover the value of the Property that was transferred from Nationwide. *Id.* at 8.

On May 2, 2017, Defendant filed the motion to dismiss now before the Court, and on May 26, 2017, Plaintiff filed an opposition. Dkt. Nos. 8, 13. Nationstar filed a pleading entitled "Defendant Nationstar **[*188]** Mortgage, LLC's Joinder to [Defendant's] Motion to Dismiss Count I and Answer to Complaint." Dkt. No. 11. This odd pleading contained no additional argument or explanation of Nationstar's position concerning the motion, or Plaintiff's claims, other than listing "failure to state a claim" as an affirmative defense. Dkt. No. 11 at 5.

Counsel for Defendant and Plaintiff appeared at the hearing on Defendant's motion; despite its joinder, Nationwide was not represented at the hearing. *See* Minute Entry, Dkt. No. 15. Plaintiff and Defendant filed post-hearing briefs. Dkt. Nos. 18, 19. Nationwide did not.

Motion to Dismiss Standard

HN1[] Civil *Rule 12(b)(6)*, made applicable in adversary proceedings by *Rule 7012(b)*, allows motions to dismiss for failure to state a claim upon which relief may be granted. This Court has explained the standard for its consideration of such a motion as follows:

> The purpose of such a motion is to "test a claim's legal sufficiency." **[**7]** *Beach v. Bank of Am. (In re Beach), 447 B.R. 313, 318 (Bankr. D. Idaho 2011)* (citing *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001))*. To survive a *Rule 12(b)(6)* motion, a complaint must plead sufficient facts, which when accepted as true, support a claim that is ″plausible on its face.″ *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is plausible so long as it is based on a cognizable legal theory and has sufficiently alleged facts to support that theory. *In re Beach, 447 B.R. at 318* (citing *Johnson v. Riverside Healthcare Sys., LP, 534 F.3d 1116, 1121-22 (9th Cir. 2008)* (quoting *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)))*.
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> "[Under Civil *Rule 12(b)(6)*], the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Cornelius v. DeLuca, 709 F. Supp. 2d 1003, 1017 (D. Idaho 2010)* (quoting *Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 184, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005))*.

*Hillen v. City of Many Trees, LLC (In re CVAH, Inc.), 570 B.R. 816, 2017 Bankr. LEXIS 1203, 2017 WL 1684119, *3-*4 (Bankr. D. Idaho 2017)*. ***HN2***[] "[A] judge ruling on a defendant's motion to dismiss a complaint must accept as true all of the factual allegations contained in the complaint. *Twombly, 550 U.S. at 572*. While the Court generally can not consider extraneous materials when evaluating a motion to dismiss, it may consider exhibits attached to, and documents incorporated by reference in, the complaint. *Gugino v. Wells Fargo Bank Northwest N.A. (In re Lifestyle Home Furnishings, LLC), 09.2 IBCR 41, 42, 2009 Bankr. LEXIS 3342 (Bankr. D. Idaho 2009)* (citations omitted).

Analysis and Disposition

Defendant argues that Count One should be dismissed because Plaintiff did not allege sufficient specific facts to support the allegation of her insolvency, nor did she **[**8]** include sufficient facts or legal theories to support her claim that she received less than reasonably equivalent value as a result of the trustee's sale. Mot. to Dismiss at 4, Dkt. No. 9. Defendant argues Count Two should be dismissed as against Defendant because none of the allegations involve Defendant, but instead reference only co-defendant Nationstar. *Id.* at 9.

A. Count One - *§ 548*

As relevant here, ***HN3***[] *§ 548(a)(1)* empowers a trustee, and here, Plaintiff,[3] to avoid the **[*189]**

[3] While *§ 548* expressly bestows this avoidance power on the trustee, under *§§ 522(g)* and *(h)*, a debtor may assert a claim to avoid a transfer of otherwise exempt property if the transfer

involuntary transfer of an interest of Plaintiff in property made within two years before the filing of the bankruptcy petition if Plaintiff was insolvent on the date that the transfer was made and she received less than reasonably equivalent value in exchange for the transfer. § 548(a)(1)(B). The term "transfer" is defined in the Code to include the kind of involuntary transfer of a debtor's interest that occurs via a trustee's sale to foreclose a creditor's deed of trust lien. *§ 101(54)(C)-(D)*.

1. Insolvency at the Time of the Transfer

Defendant argues that Plaintiff's complaint does not allege sufficient facts to support her claim that she was insolvent at the time of the transfer, the trustee's sale. Plaintiff argues that her bankruptcy schedules, which she incorporated **[**9]** in the complaint by reference, establish that she was insolvent when the sale occurred a few days before her bankruptcy filing.

HN4[] The Code defines "insolvent" as a

> financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of . . . property that may be exempted from property of the estate under section 522 of this title.

§ 101(32)(A); *see also* Hopkins v. D.L. Evans Bank (In re Fox Bean Co., Inc.), 287 B.R. 270, 282 (Bankr. D. Idaho 2002), *subsequently aff'd sub nom*, 144 Fed. Appx. 697 (9th Cir. 2005) (applying *§ 101(32)(A)* to a § 548 analysis).

In a conclusory fashion, Plaintiff alleges only that "[Plaintiff] was insolvent at the time of the transfer." Compl. at 5. But that allegation musts be viewed in context with Plaintiff's schedules of her assets and debts filed in the bankruptcy case which indicate that, as of the petition date, Plaintiff's assets had a total value of $358,585.73 and her debts totaled $235,365.30. *In re Baker*, Case No. 17-00044-JDP, Dkt. No. 18 at 1. In addition, Plaintiff has claimed exemptions in her property, which have not been contested, exceeding $200,000. *Id.* at 12-13. As a result, Plaintiff is correct that, for these purposes, she was "insolvent", **[**10]** at least on the petition date. Because Plaintiff filed her petition only three days after the transfer of the Property, for purposes of the motion, the information in Plaintiff's bankruptcy schedules adequately supports her allegation that she was insolvent at the time of the transfer of the Property to Defendant.

2. Receipt of Reasonably Equivalent Value

Defendant also argues Plaintiff's complaint fails to adequately allege that she did not receive reasonably equivalent value for the transfer because Plaintiff fails to allege that any procedural irregularities occurred in the trustee's foreclosure sale, or to otherwise explain how she can overcome the conclusive presumption arising under applicable case law that she received reasonably equivalent value from that sale. Plaintiff argues that Nationstar's alleged fraud, if proven to be true, constitutes **[*190]** sufficient grounds to overcome the case law presumption.

a. *BFP v. Resolution Trust Corporation*

To evaluate Defendant's argument, a review of pertinent case law is in order. "In [*BFP v. Resolution Trust Corporation*] the Supreme Court held that ***HN5***[] a prepetition mortgage foreclosure sale conducted in accordance with state law conclusively established **[**11]** that the price obtained at that sale was for reasonably equivalent value." Tracht Gut, LLC v. L.A. Cty. Treasurer & Tax Collector (In re Tracht Gut, LLC), 836 F.3d 1146, 1152 (9th Cir. 2016) (citing BFP v. Resolution Trust Corp., 511 U.S. 531, 114 S.Ct. 1757, 128 L. Ed. 2d 556 (1994)).[4] Thus, under *BFP*, Defendant is "entitled to judgment as a matter of law that the foreclosure sale was not a fraudulent conveyance so long as 'all the requirements of the State's foreclosure law have been complied with.'" Lindsay v. Beneficial Reinsurance Co. (In re Lindsay), 59 F.3d 942, 948 (9th Cir. 1995) (quoting BFP, 114

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was not voluntary, the debtor did not conceal the property, and if the trustee does not attempt to avoid the transfer. Here, Plaintiff alleged the transfer was involuntary, that she disclosed the Property in her bankruptcy schedules, and that, she believes, the trustee will not seek to avoid the transfer. Compl. at 6, Dkt. No. 1. These allegations are sufficient to establish Plaintiff's standing to pursue the avoidance claim; Defendant has not argued otherwise.

[4] *BFP* addressed § 548(a)(2)(A), the predecessor to § 548(a)(1)(B). But ***HN6***[] while the Code provision's section number has changed, "its substance remains materially the same." Batlan v. Bledsoe (In re Bledsoe), 569 F.3d 1106, 1111 n.3 (9th Cir. 2009).

S.Ct. at 1757). In other words, here, the trustee's sale may be set aside only if there was "an irregularity in the conduct of the sale that would permit judicial invalidation of the sale under applicable state law." *Id.* (quoting BFP, 114 S.Ct. at 1757). Of course, even if there was such an irregularity, and the presumption is therefore inapplicable, the transfer to Defendant resulting from the trustee's sale may only be avoided by Plaintiff if the price received at the sale was not reasonably equivalent to "the price that would have been received if the foreclosure sale had proceeded according to law." *Id.* (quoting BFP, 114 S.Ct. at 1757).

b. Idaho Foreclosure Law

Plaintiff's sole contention in her complaint is that the sale can be set aside under Idaho law because it was tainted by fraud. Defendant argues that, as a good faith purchaser for value, any failure by Nationstar or its agents to comply with state law should not result **[**12]** in invalidation of the sale by the Court, nor would it overcome the conclusive presumption that reasonably equivalent value was received by Plaintiff through the sale.

HN7[] Idaho Code chapter 15, title 45 governs the foreclosure of trust deeds. Idaho Code §§ 45-1501-15. Idaho Code § 45-1506 describes the manner in which a trust deed is to be foreclosed. But Idaho Code § 45-1508 specifies that "any failure to comply with the provisions of section 45-1506, Idaho Code, shall not affect the validity of a sale in favor of a purchaser in good faith for value at or after such sale . . . . "

Plaintiff does not allege in her complaint that Defendant did not acquire the Property in good faith for value. Rather, Plaintiff states only that Defendant purchased the Property for $140,282, and that she does not know if Defendant was aware of the potential postponement of the sale, or if Defendant had any communication with Nationstar prior to the sale. Thus, even assuming the facts are as Plaintiff alleges, under Idaho Code § 45-1508, any failure by Nationwide or its agents to comply with Idaho Code § 45-1506 would not constitute a reason to invalidate the sale to Defendant. Accordingly, under *BFP*, the facts Plaintiff alleges are insufficient to overcome the conclusive presumption that the sale to Defendant was for reasonably equivalent value.

[*191] But Plaintiff **[**13]** is not asking the Court to set aside the trustee's sale based upon a failure to comply with the procedural requirements of Idaho Code § 45-1506. Instead, Plaintiff asserts that the sale should be set aside because it was tainted by Nationstar's fraudulent misrepresentations.

HN8[] The buyer protections afforded by Idaho Code § 45-1508 apply only to sales challenged for a failure to comply with the procedural provisions of Idaho Code § 45-1506. Taylor v. Just, 138 Idaho 137, 59 P.3d 308, 313 (Idaho 2002). And good faith purchasers are not insulated against every claim or reason for voiding a foreclosure sale. *See, e.g.,* Taylor, 59 P.3d at 313 (holding that Idaho Code § 45-1508 does not apply to a foreclosure sale that was void for a lack of default at the time of the sale).

Even so, Plaintiff has cited no binding legal authority to support her position that, under Idaho law, if proven, Nationstar's misrepresentations would constitute good cause to invalidate the sale to Defendant, even as a good faith purchaser. Instead, Plaintiff cites to a decision from the California Court of Appeals that provides, under California law, courts may set aside a sale if "there has been fraud in the procurement of the foreclosure decree or where the sale has been improperly, unfairly, or unlawfully conducted, or is tainted by fraud . . . . " Plaintiff's Resp. at 6 (citing **[**14]** 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc., 85 Cal.App.4th 1279, 1285, 102 Cal. Rptr. 2d 711 (Cal. App. 2001)). But the Court cannot apply this decision to these facts because it does not interpret Idaho law; the court in *6 Angels* relies on an older California Supreme Court decision, Bank of America Nat'l Tr. Assn. v. Reidy, 15 Cal.2d 243, 248, 101 P.2d 77 (Cal. 1940)). Moreover, the vitality of the *6 Angels* holding is questionable since the California Civil Code now contains specific provisions rendering a trustee's sale voidable when fraud or misstatements are involved. *See* In re Ulberg, No. 10-53637-E-13, 2011 Bankr. LEXIS 4532, 2011 WL 6016131, at *9 (Bankr. E.D. Cal. Nov. 29, 2011) (citing California Civil Code §§ 1695.13-14). Importantly, as near as the Court can discern, there are no similar Idaho decisions or Idaho Code provisions offering Plaintiff relief.

Simply put, Plaintiff has not shown that, even if Nationstar did defraud her, such fraud is a sufficient reason to set aside the foreclosure sale to Defendant under Idaho law. As a result, under BFP, as a matter of law, the purchase price Defendant paid at the foreclosure sale is conclusively presumed to be "reasonably equivalent value" and Plaintiff's § 548(a) avoidance claim fails.

Moreover, even assuming Nationstar's misrepresentations do provide a basis to set aside the trustee's sale to Defendant, under *BFP*, whether Plaintiff in fact received reasonably equivalent value via the sale is measured by comparing the sale price to the **[**15]** value Plaintiff would have received at properly conducted foreclosure sale. Because Plaintiff's complaint refers only to the Property's "market value," and not the value of the Property at a properly conducted foreclosure sale, it fails to adequately allege a claim for relief against Defendant.

In sum, the Court concludes that Count One of the complaint should be dismissed as to Defendant. In addition, although Nationstar did not appear at the hearing or submit its own briefing, it is clear that, for the same reasons, Count One also fails against Nationstar. Based upon Nationstar's "joinder" in Defendant's motion, Count One will also be dismissed as to Nationstar.

[*192] B. Count Two - § 544(b)(1)

Defendant argues in Count Two that she has been the victim of common law fraud. However, the complaint alleges that Nationstar, not Defendant, perpetrated that fraud. Defendant therefore seeks dismissal of Count Two against it. However, while Plaintiff is not claiming that Defendant committed fraud, she is arguing that because Nationstar lied to her the trustee's sale may be set aside, thereby giving a bankruptcy trustee, or Plaintiff in this case, the power to avoid the transfer under § 544(b)(1).

HN9[] Under § 544(b)(1), a trustee may **[**16]** avoid any prebankruptcy transfer that a creditor holding an unsecured claim in the bankruptcy case could have voided under applicable law. § 544(b)(1). Here, Plaintiff claims the foreclosure sale is avoidable under § 544(b)(1) because an unsecured creditor would have been able to void that sale using Idaho's common law of fraud. But as explained above, the presence of fraud alone does not render the foreclosure sale to a bona fide purchaser void. Again, Plaintiff has not alleged that Defendant is not a bona fide purchaser. Thus, it appears that Plaintiff cannot use § 544(b)(1) to avoid the transfer of the Property to Defendant.

Count Two, as pled in the complaint, must also be dismissed as to Defendant.[5] Because the complaint requests monetary relief in the event the sale transfer is not avoided, Count Two will not be dismissed against Nationstar.

C. Count Three

Under Count Three, Plaintiff requests an award of attorney's fees and costs incurred for pursing this action and in the prosecution of the bankruptcy case. While Defendant did not seek dismissal of this Count, dismissal of Counts One and Two as to Defendant would necessarily compel dismissal of Count Three as to Defendant.

D. Dismissal Without Prejudice

HN10[] Civil Rule 15(a)(2), **[**17]** made applicable here by Rule 7015, provides that the Court should "freely give leave [to amend] when justice so requires." In the Ninth Circuit, this policy is "to be applied with extreme liberality." Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (citations omitted). "Absent prejudice, or a strong showing of any of the remaining *Foman* factors,[6] there exists a presumption under Rule 15(a) in favor of granting leave to amend ." Eminence Capital, 316 F.3d at 1052. Additionally, "[d]ismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could not be saved by amendment." Id. at 1052 (citations omitted).

It is not clear that Plaintiff's complaint cannot be saved by amendment. There is also no showing of prejudice to Defendant, **[*193]** nor do the other Foman factors support dismissal with prejudice. For these reasons,

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[5] During the motion argument, and in her post-hearing brief, Plaintiff raised additional arguments concerning the effect and timing of when Defendant received the trustee's deed, and when that deed was recorded. However, the dates of these two occurrences, and Plaintiff's theory of recovery based upon these events, were not clearly plead in the complaint. Therefore, any rights Plaintiff may have to attack the sale based upon such events are not, at this time, properly before the Court, and will not be addressed.

[6] The *Foman* factors include undue delay, bad faith, dilatory motives on the part of the movant, repeated failures to cure deficiencies through earlier allowed amendments, undue prejudice to opposing parties, and futility. Sonoma Cty. Ass'n of Retired Employees v. Sonoma Cty., 708 F.3d 1109, 1117 (9th Cir.2013) (citing Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962))

Plaintiff may, if she chooses, file an amended complaint, within fourteen (14) days. If she fails to timely do so, upon request, the claims against Defendant shall be dismissed with prejudice.

Conclusion

For these reasons, a separate order will be entered granting Defendant's motion to dismiss. Count One will be dismissed as to both Defendant and Nationstar. Counts Two and Three will be dismissed only as to Defendant.

Dated: **[**18]** July 28, 2017

/s/ Jim D. Pappas

Honorable Jim D. Pappas

United States Bankruptcy Judge

ORDER GRANTING MOTION TO DISMISS

For the reasons set forth in the Court's Memorandum of Decision filed herein, and for other good cause,

IT IS HEREBY ORDERED THAT Defendant's Motion to Dismiss, Dkt. No. 8, and Nationstar's joinder to Defendant's Motion to Dismiss Count One, Dkt. No. 11, are **GRANTED**. Counts One, Two, and Three are **DISMISSED** as to Defendant. Plaintiff may, if she chooses, file an amended complaint within fourteen (14) days of entry of this order. If she fails to timely do so, upon request, the Court will enter an order that the dismissal be with prejudice.

Dated: July 28, 2017

/s/ Jim D. Pappas

Honorable Jim D. Pappas

United States Bankruptcy Judge

User Name: Jeremy Bass
Date and Time: Wednesday, November 6, 2024 7:22:00 AM PST
Job Number: 237933963

Document (1)

1. *Breckenridge Prop. Fund 2016, LLC v. Wally Enter.*

Client/Matter: -None-
Search Terms: Breckenridge Prop. Fund 2016,. LLC v. Wally Enterprises, Inc.
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
	-None-

Breckenridge Prop. Fund 2016, LLC v. Wally Enter.

Supreme Court of Idaho

August 22, 2022, Filed

Docket Nos. 48489 & 48703

Reporter
170 Idaho 649 *; 516 P.3d 73 **; 2022 Ida. LEXIS 96 ***; 2022 WL 3581124

BRECKENRIDGE PROPERTY FUND 2016, LLC, a Delaware limited liability company, Plaintiff-Appellant, v. WALLY ENTERPRISES, INC., a Kansas corporation dba WE SERVE IDAHO; WEINSTEIN & RILEY, P.S., a Washington professional corporation; CORNERSTONE PROPERTIES, LLC, an Idaho limited liability company, Defendants-Respondents, and JOHN DOES 1-10, and CORPORATIONS XYZ, Defendants,CORNERSTONE PROPERTIES, LLC, an Idaho limited liability company, Cross-Claimant, v. WEINSTEIN & RILEY, P.S., a Washington professional corporation, Cross-Defendant,

Prior History: [*1]** Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bonneville County. Bruce L. Pickett, District Judge.

Disposition: The decision of the district court is affirmed in part and vacated in part.

Core Terms

district court, bid, commercial transaction, auction, attorney's fees, conditions, notice, gravamen, negligence per se, bidder, argues, court's decision, summary judgment, estoppel, lawsuit, purchaser, parties, checks, trust deed, announced, award of attorney's fees, highest bidder, foreclosure, concealed, complied, binding, equitable estoppel, terms of the sale, prevailing party, form of payment

Case Summary

Overview
HOLDINGS: [1]-In a suit concerning the legality of an auctioneer providing the terms of sale at the time of the foreclosure sale, including acceptable methods of payment, without providing earlier notice to potential bidders, the printed conditions of the foreclosure sale were binding on plaintiff when announced by the auctioneer, whether it knew of the conditions beforehand or not; [2]-The Court noted that plaintiff alleged no other failure in relation to the pre-sale procedure.

Outcome
District court affirmed in part and vacated in part.

LexisNexis® Headnotes

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Notice Requirement

HN1[] **Pretrial Judgments, Judgment on Pleadings**

After the pleadings are closed, but early enough not to delay trial, a party may move for judgment on the pleadings. *Idaho R. Civ. P. 12(c)*. On such a motion, if matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under *Idaho R. Civ. P. 56* where all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion. *Idaho R. Civ. P. 12(d)*. A judgment on the pleadings is reviewed under the same standard as a ruling on summary judgment.

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine

Disputes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN2[] Summary Judgment, Entitlement as Matter of Law

The Supreme Court of Idaho employs the same standard as the district court when reviewing rulings on summary judgment motions. Summary judgment is proper if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Idaho R. Civ. P. 56(a). A moving party must support its assertion by citing particular materials in the record or by showing the materials cited do not establish the presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the facts. Idaho R. Civ. P. 56(c)(1)(B). Summary judgment is improper if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented. A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment.

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3[] Standards of Review, De Novo Review

The Idaho Supreme Court exercises free review over questions of law, which includes whether the district court correctly determined that a case is based on a commercial transaction for the purpose of Idaho Code § 12-120(3).

Governments > Legislation > Interpretation

HN4[] Legislation, Interpretation

If the statute is not ambiguous, the Court does not construe it, but simply follows the law as written. The Idaho Supreme Court has consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature. Ambiguity occurs where reasonable minds might differ as to interpretations. However, ambiguity is not established merely because the parties present differing interpretations to the court.

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN5[] Appeals, Appellate Briefs

The Idaho Supreme Court will not consider arguments raised for the first time in the appellant's reply brief. A reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the respondent has an opportunity to respond in the respondent's brief.

Governments > Courts > Rule Application & Interpretation

HN6[] Courts, Rule Application & Interpretation

In the context of the timing of a search, there are few circumstances in which rigid rules are proper.

Real Property Law > Financing > Mortgages & Other Security Instruments > Definitions & Interpretation

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

HN7[] Mortgages & Other Security Instruments, Definitions & Interpretation

The whole premise of Idaho Code § 45-1506(9) is to

ensure immediate closure to resolve the uncertain status of the property. Indeed, the nature of these proceedings is that of expediency, which is why, unlike its judicial foreclosure counterpart that permits a one-year right to redemption, a deed of trust affords a creditor the right to nonjudicial foreclosure and a shorter 120-day period of cure. That said, the procedures to foreclose on trust deeds outside of the judicial process provide the express-lane alternative to foreclosure in the judicial system.

Governments > Legislation > Interpretation

HN8 **Legislation, Interpretation**

No matter how other courts have interpreted forthwith, the Idaho Supreme Court must give the word its plain, usual, and ordinary meaning and, if that definition is unambiguous, the Court does not construe it, but simply follows the law as written.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN9 **Foreclosures, Private Power of Sale Foreclosure**

Before the auction begins, trustees can impose reasonable restrictions on the acceptable forms of payment in which a bid can be made at a trustee's sale.

Real Property Law > Priorities & Recording > Elements > Bona Fide Purchasers

HN10 **Elements, Bona Fide Purchasers**

A trustee's sale to a good-faith purchaser for value is final, despite a violation of Idaho Code § 45-1506.

Estate, Gift & Trust Law > ... > Trustees > Duties & Powers > Sales

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN11 **Duties & Powers, Sales**

Discussing the sale of property at a trustee's sale, the Idaho Supreme Court has explained the sale is final once the trustee accepts the bid as payment in full unless there are issues surrounding the notice of the sale. This finality, echoed in Idaho Code § 45-1508, refers to actual notice, and it serves the legislature's interest in preserving the finality of title to real property. As for Idaho Code § 45-1506, it is more reasonable to infer that the legislature did not intend for a sale to be set aside once the trustee accepts the credit bid as payment in full. As a result, the sale is final once the trustee accepts the bid as payment in full unless there are issues surrounding the notice of the sale.

Torts > ... > Proof > Violations of Law > Ordinances

Torts > ... > Proof > Violations of Law > Rules & Regulations

Torts > ... > Proof > Violations of Law > Statutes

Torts > ... > Proof > Violations of Law > Standards of Care

Torts > ... > Proof > Violations of Law > Safety Codes

HN12 **Violations of Law, Ordinances**

To show common law negligence, a party must prove: (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage. Self-evident in the formulation of these elements is that a party cannot be held liable for negligence when there was no legal duty imposed under the circumstances. In Idaho, it is well established that statutes and administrative regulations may define the applicable standard of care owed, and that violations of such statutes and regulations may constitute negligence per se. Establishing negligence per se through a violation of a statute or regulation conclusively establishes the first two elements of a cause of action in negligence.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Estoppel

Contracts Law > ... > Estoppel > Equitable Estoppel > Elements of Equitable Estoppel

Governments > Legislation > Statute of Limitations > Equitable Estoppel

HN13 **Affirmative Defenses, Estoppel**

The elements of equitable estoppel are as follows: (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that the person to whom the representation was made, or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Estoppel

HN14 **Entitlement as Matter of Law, Appropriateness**

The doctrine of equitable estoppel assumes the existence of a complete agreement, which is not unenforceable as vague or incomplete. Failing to establish even one element subjects the claim to dismissal at summary judgment.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN15 **Foreclosures, Private Power of Sale Foreclosure**

Idaho law does not require the conditions for a sale to be posted in the notice for a public sale of a deed of trust.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN16 **Standards of Review, Abuse of Discretion**

The awarding of attorney fees and costs is within the discretion of the district court and is subject to the abuse of discretion standard of review. When this Court considers whether the district court abused its discretion, it applies a four-part test: (1) whether the court correctly perceived the issue as discretionary; (2) whether the court acted within the outer boundaries of its discretion; (3) whether the court acted consistently with the legal standards applicable to the specific choices available; and (4) whether the district court reached its decision by an exercise of reason.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > English Rule

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN17 **Basis of Recovery, English Rule**

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. *Idaho Code § 12-120(3)*. Under the statute, a court must award attorney fees to the prevailing party in an action to recover on a commercial transaction. In this context, the term commercial transaction is defined to mean all transactions except transactions for personal or household purposes. *§ 12-120(3)*. Whether a party can recover attorney fees under § 2-120(3) depends on whether the gravamen of a claim is a commercial transaction. A gravamen is the material or significant part of a grievance or complaint.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > English Rule

HN18 **Basis of Recovery, English Rule**

Courts analyze the gravamen claim by claim. To determine whether the significant part of a claim is a commercial transaction, the court must analyze whether a commercial transaction (1) is integral to the claim and (2) constitutes the basis of the party's theory of recovery on that claim.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > English Rule

HN19 **Basis of Recovery, English Rule**

For example, under one line of cases, the test is whether the commercial transaction comprises the gravamen of the lawsuit.

Governments > Legislation > Statute of Limitations > Time Limitations

HN20 **Statute of Limitations, Time Limitations**

The lawsuit and the causes of action must be based on a commercial transaction.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > English Rule

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN21 **Basis of Recovery, English Rule**

Whether a party can recover attorney fees under *Idaho Code § 12-120(3)* depends on whether the gravamen of a claim is a commercial transaction.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > English Rule

HN22 **Basis of Recovery, English Rule**

There are two stages of analysis to determine whether a prevailing party could avail itself of *Idaho Code § 12-120(3)*: (1) there must be a commercial transaction that is integral to the claim; and (2) the commercial transaction must be the basis upon which recovery is sought.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > English Rule

HN23 **Basis of Recovery, English Rule**

An award of attorney's fees is not warranted every time a commercial transaction is remotely connected with the case. Rather, the test is whether the commercial transaction comprises the gravamen of the lawsuit. Attorney's fees are not appropriate under *Idaho Code § 12-120(3)* unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > English Rule

HN24 **Basis of Recovery, English Rule**

Building on Garner, the Idaho Supreme Court has held that a party can be estopped from denying a commercial transaction in a case when the allegations in the complaint that the parties entered into a commercial transaction and that the complaining party is entitled to recover based upon that transaction, are sufficient to trigger the application of *Idaho Code § 12-120(3)*.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > English Rule

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN25 **Basis of Recovery, English Rule**

Where there are multiple claims in an action, and only some qualify for a fee award under *Idaho Code § 12-120(3)*, attorney's fees are properly denied if those claims are inseparably intertwined. A district court's denial of attorney's fees under *section 12-120(3)* was appropriate where the district court determined the fees associated with claims that satisfied *section 12-120(3)* were inseparably intertwined with those that did not. When a party has prevailed on claims for which it is statutorily entitled to an award of attorney's fees and claims upon which it is not, this Court has held that the prevailing party must apportion the fees between the claim upon which it was entitled to recover and the claim upon which it was not. Where fees were not apportioned between a claim that qualifies under *§ 12-120(3)* and one that does not, no fees are to be awarded.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > ... > Attorney Fees &

Expenses > Basis of Recovery > Statutory Awards

Civil Procedure > Appeals > Costs & Attorney Fees

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > English Rule

HN26[] **Basis of Recovery, Bad Faith Awards**

An award of attorney fees under *Idaho Code § 12-121* will be awarded to the prevailing party on appeal only when this Court is left with the abiding belief that the entire appeal was brought, pursued, or defended frivolously, unreasonably, or without foundation. An award of fees under *Idaho Code section 12-120(3)* is mandatory to the prevailing party in civil actions involving commercial transactions. *§ 12-120(3)*.

Civil Procedure > Appeals > Costs & Attorney Fees

HN27[] **Appeals, Costs & Attorney Fees**

Where both parties prevail in part on appeal, the Idaho Supreme Court may deny fees.

Counsel: Stover, Gadd & Associates, PLLC, Twin Falls, attorneys for Breckenridge Property Fund 2016, LLC. David Gadd argued.

Holden, Kidwell, Hawn & Crapo, PLLC, Idaho Falls, attorneys for Cornerstone Properties, PLLC. D. Andrew Rawlings argued.

Brassey Crawford, PLLC, Boise, attorneys for Wally Enterprises, Inc. Ryan Janis argued.

Judges: BEVAN, Chief Justice. Justices BRODY, STEGNER, MOELLER, and ZAHN CONCUR.

Opinion by: BEVAN

Opinion

[*653] **[**77]** BEVAN, Chief Justice

This appeal is about the legality of an auctioneer providing the terms of sale at the time of the foreclosure sale, including acceptable methods of payment, without providing earlier notice to potential bidders. Andrew Ashmore, agent for appellant Breckenridge Property Fund 2016, LLC, ("Breckenridge") arrived at a foreclosure sale with endorsed checks to support Breckenridge's bid. Jesse Thomas, agent for Cornerstone Properties, LLC, ("Cornerstone") was also present. Before the auction, the auctioneer provided Ashmore and Thomas a packet of paperwork. The last page **[***2]** contained a requirement that endorsed checks would not be accepted as payment for a bid. Because Ashmore only had endorsed checks, the auctioneer gave Ashmore one hour to cure the payment defect, but the auction eventually proceeded with Ashmore unable to secure a different form of payment. The property ultimately sold to Cornerstone. Breckenridge filed a complaint against the two respondents and a third defendant, alleging: (1) violations of *Idaho Code section 45-1506*; (2) estoppel; and (3) negligence/negligence per se, seeking mainly to void the sale to Cornerstone. Breckenridge also recorded a lis pendens against the property. The district court ultimately entered summary judgment for all defendants and quashed the lis pendens. Breckenridge timely appealed to this Court. We affirm in part and reverse in part.

I. Factual and Procedural Background

A. Factual Background

Weinstein & Riley, P.S., a Washington professional corporation ("W&R") was the trustee for property subject to a deed of trust in Ammon, Idaho (Bonneville County).[1] W&R posted notice of the foreclosure sale and scheduled the auction for June 19, 2020, at 1:00 p.m. in Idaho Falls, Idaho. W&R hired Gary's Processing Service ("Gary's") to assist with **[***3]** the sale. Gary's subcontracted with Wally Enterprises, Inc., a Kansas corporation doing business as We Serve Idaho ("Wally") to hire an auctioneer and post notice of the sale on its website. Wally hired Kathy Cook, an independent contractor, as the auctioneer. Before the sale, Wally posted notice of the property's location along with the date, time, and location of the sale on its website. The information on the website gave no other details about the sale, nor did it include any restrictions or information about the form of payment that would be accepted.

Breckenridge is a Delaware limited liability company. It buys real property at foreclosure sales, improves the property, and then sells it for a profit. On the date of the foreclosure sale, Ashmore attended the public auction

[1] W&R is not participating in this appeal.

as an agent for Breckenridge. Before the sale, Breckenridge had given Ashmore cashier's checks in various amounts made payable to an entity affiliated with Breckenridge. If Breckenridge turned out to be the highest bidder, Ashmore planned to endorse and deliver the cashier's checks to the trustee as payment. Ashmore confirmed the date, time, and location of the auction by emailing W&R the day before the sale. **[***4]** Ashmore also visited the auctioneer's website and noted no restrictions on payment methods listed.

When Ashmore arrived at the sale, Cook provided him with a packet of documents that included a payment condition for the auction: "NO ENDORSED CHECKS[.] CHECKS MADE PAYABLE TO WEINSTEIN & RILEY PS." (Capitalization in original). Ashmore objected to this condition. He had no checks from Breckenridge that were payable to W&R. As a result, Cook agreed to postpone the auction for one hour so Ashmore could attempt to remedy the situation. Breckenridge failed to obtain checks payable to W&R in the time available. **[**78]** **[*654]** As a result, Ashmore was not able to register to bid.

At about 2:00 p.m., Cook went ahead with the auction. At the time, Thomas and Ashmore were the only people in attendance. The opening bid from Cook was $194,000. Thomas bid $194,001. Ashmore tried to bid $195,000, but Cook would not acknowledge his bid. Thus, Cornerstone was the winning bidder at the auction. Thomas gave Cook a $200,000 certified check payable to W&R for the property. W&R later executed a trustee's deed conveying the property to Cornerstone. W&R refunded Cornerstone $5,999.00.

B. Procedural Background

On June 24, 2020, **[***5]** Breckenridge recorded a lis pendens against the property. Breckenridge also filed a complaint against Cornerstone, Wally, and W&R alleging violations of *Idaho Code section 45-1506*, and claims for estoppel, negligence/negligence per se, and attorney fees. Each defendant answered the complaint. Cornerstone included a counterclaim, crossclaim, and demand for jury trial. Relevant to this appeal, Cornerstone counterclaimed against Breckenridge seeking a declaratory judgment or to quiet title. On August 24, 2020, Cornerstone recorded its deed in Bonneville County.

Cornerstone moved for judgment on the pleadings and to quash the lis pendens. In response, Breckenridge moved for summary judgment on Count I of its complaint (violation of *Idaho Code section 45-1506* by Wally and W&R) and Claim I of Cornerstone's crossclaim (breach of contract against W&R for failing to convey the property to Cornerstone). W&R joined in opposing Breckenridge's motion for summary judgment. Wally also filed a cross-motion for summary judgment and an opposition to Breckenridge's motion for summary judgment.

The district court ultimately granted partial summary judgment to Cornerstone and certified the judgment as final under *Idaho Rule of Civil Procedure 54(b)*. On December 4, 2020, Breckenridge timely **[***6]** filed its first notice of appeal. Soon after, the district court granted Wally's motion for summary judgment and entered judgment dismissing Breckenridge's claims against Wally. Both Cornerstone and Wally moved for attorney fees and costs against Breckenridge, which the district court granted over Breckenridge's objections. After entry of amended judgments in favor of Cornerstone and Wally, Breckenridge filed its amended second notice of appeal.

II. Issues on Appeal

1. Did the district court err in concluding the trustee's agent had the discretion to reject Breckenridge's bid?

2. Did the district court err in concluding that W&R and Wally complied with the provisions of *Idaho Code section 45-1506*?

3. Did the district court err in concluding that it could not set aside the sale?

4. Did the district court err in dismissing Breckenridge's claims of estoppel, negligence, and negligence per se?

5. Did the district court err in awarding attorney fees to Cornerstone and Wally under *Idaho Code section 12-120(3)*?

6. Are any of the parties entitled to attorney fees on appeal?

III. Standards of Review

HN1[↑] "After the pleadings are closed, but early enough not to delay trial, a party may move for judgment on the pleadings." *I.R.C.P. 12(c)*. On such a motion, "[i]f ... matters **[***7]** outside the pleadings are

presented to and not excluded by the court, the motion must be treated as one for summary judgment under [Idaho Rule of Civil Procedure] 56 [where] [a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." I.R.C.P. 12(d). "A judgment on the pleadings is reviewed under the same standard as a ruling on summary judgment." Elsaesser v. Gibson, 168 Idaho 585, 590, 484 P.3d 866, 871 (2021) (quoting State v. Yzaguirre, 144 Idaho 471, 474, 163 P.3d 1183, 1186 (2007)).

HN2[] "This Court employs the same standard as the district court when reviewing rulings on summary judgment motions." Owen v. Smith, 168 Idaho 633, 640, 485 P.3d 129, 136-37 (2021) (quoting Trumble v. Farm Bureau Mut. Ins. Co. of Idaho, 166 Idaho 132, 140-41, **[**79]** **[*655]** 456 P.3d 201, 209-10 (2019)). "Summary judgment is proper 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id* (quoting I.R.C.P. 56(a)). "A moving party must support its assertion by citing particular materials in the record or by showing the 'materials cited do not establish the. . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact[s].'" *Id* (quoting I.R.C.P. 56(c)(1)(B)). "Summary judgment is improper 'if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented.'" Owen, 168 Idaho at 641, 485 P.3d at 137 (quoting Trumble, 166 Idaho at 141, 456 P.3d at 210). A "mere scintilla of evidence or only slight doubt as to the facts is not sufficient **[***8]** to create a genuine issue of material fact for the purposes of summary judgment." *Id.*

HN3[] This Court exercises free review over questions of law, which includes whether the district court correctly determined that a case is based on a "commercial transaction" for the purpose of Idaho Code section 12-120(3). Great Plains Equip., Inc. v. Nw. Pipeline Corp., 136 Idaho 466, 470, 36 P.3d 218, 222 (2001).

IV. Analysis

A. The district court correctly concluded that W&R and Wally properly rejected Breckenridge's bid.

Breckenridge argues the district court erred in holding that W&R and Wally could refuse to accept Breckenridge's bid. From this, Breckenridge puts forth two ancillary arguments. First, Breckenridge claims Kivett v. Owyhee Cnty., 58 Idaho 372, 74 P.2d 87 (1937), which the district court partly relied on below, does not support the court's findings. Second, Breckenridge argues the district court erred in holding it was not reasonable to require W&R and Wally to allow Breckenridge forty-eight hours to pay for its bid. For the reasons below, we affirm the district court's decision.

1. Kivett v. Owyhee County *supports the district court's decision*.

In the district court's memorandum decision on Breckenridge's motion for summary judgment, the court held a trustee at a nonjudicial foreclosure sale could reject a bid based on terms announced at the beginning of the **[***9]** sale. The district court based its analysis, in part, on this Court's decision in Kivett. The district court concluded *Kivett's* rationale supported its interpretation of Idaho Code section 45-1506(8) that the printed conditions of a sale are binding on the buyer and seller at a public auction. The district court also concluded that notice of the payment condition is not required before the auction. Breckenridge maintains the conditions the trustee imposed improperly restricted who could bid at the sale. We disagree. The conditions announced at the sale limited the *form* of the bid—not the *bidder*. The *terms* of a bid—if any—that the trustee must accept are the issue here. We have addressed this before in Kivett, though under a different statutory provision.

In Kivett, this Court considered whether the sale of property at a public auction on credit was valid when the sale was advertised to occur in cash. The statute at issue in Kivett required notice to the homeowner that property deeded to the county because of delinquent taxes would be auctioned so the owner could exercise the right of redemption. Id. at 375, 74 P.2d at 88. The clerk who conducted the sale for the county commissioners was aware of the cash payment term and orally noted the requirement for cash **[***10]** bids before the auction. *Id.* The winning bidder, however, made a credit bid for $1,660.00 to be paid in installments, which the clerk accepted. *Id.* Kivett, the property owner, challenged the sale, ultimately before this Court, arguing the sale was invalid under Idaho Code sections 30-708, 30-712 and 30-713. Kivett claimed she had $1,000 in cash and argued if she were allowed to bid on credit, she would have had another $5,000 to bid on the property. Id. at 379, 74 P.2d at 90. This Court agreed with Kivett's argument and vacated the sale. Id. at 383, 74 P.2d at 92. The Court held the

sale violated the statute because the county commissioners **[**80]** **[*656]** did not authorize the terms of the sale under which it occurred and concluded it violated public policy because the bidders were not bidding on equal terms. *Id. at 381, 74 P.2d at 91*.

In the *Kivett* decision, this Court adopted language from the *Corpus Juris*, which explains:

> (19) Printed conditions under which a sale proceeds are binding on both buyer and seller, and cannot be varied, although they may be explained by verbal statements of the auctioneer made at the time of the sale. Thus an auctioneer may, at the time of the sale, explain the meaning of advertisements published before the sale.
>
> (20) *The conditions of a public sale, announced by the auctioneer at the* ***[***11]*** *time and place of the sale, are binding upon a purchaser, whether he knew them or not*. So also, where it is the custom to post up the conditions in the auctioneer's room, and the auctioneer announces that the conditions are as usual, a purchaser is bound by the conditions, whether he sees them or not.

Kivett, 58 Idaho 372, 383, 74 P.2d at 91 (quoting 6 C.J. 827, 828, §§ 19 and 20) (emphasis added).

While *Kivett* addressed a different statutory provision than the section at issue here, the above referenced language this Court adopted speaks to the broader circumstances at play during a public auction. This Court adopted the language that specifies "conditions of a public sale, announced by the auctioneer at the time and place of the sale, are binding upon a purchaser, whether he knew them or not." *Id.*

At the sale here, which was public, Cook handed out a packet to Ashmore and Thomas that contained the payment conditions *before* the auction began; those were the terms of the sale announced by the auctioneer at the time and place of the sale. Those terms complied with *Kivett* because they were announced before the sale and were, therefore, binding on Breckenridge. Although Cook gave Ashmore time to secure a form of payment that complied with the conditions of the sale, **[***12]** Breckenridge's failure to obtain the proper form of payment, whether it had notice of the condition or not, does not negate the binding nature of the term.

The district court properly applied *Kivett* to illustrate how this Court has analyzed payment conditions at public auctions. The district court analyzed the facts under the relevant statute and ultimately rejected Breckenridge's interpretation of *Idaho Code section 45-1506(8)*. The district court's reliance on *Kivett* was correct, and Breckenridge failed to put forth an argument explaining why the decision from the district court was erroneous, aside from an effort to distinguish *Kivett* on its facts.

Consistent with our adoption of sections 19 and 20 of *Corpus Juris* in *Kivett*, the printed conditions of the foreclosure sale were binding on Breckenridge when announced by the auctioneer, whether Breckenridge knew of the conditions beforehand or not. Breckenridge has alleged no other failure in relation to the pre-sale procedure. For these reasons, we conclude the district court did not err.

2. The district court did not err in holding it would have been unreasonable to require W&R and Wally to allow Breckenridge 48 hours to pay for its bid.

Breckenridge also argues the district court erred in concluding **[***13]** it would have been unreasonable to require W&R and Wally to allow Breckenridge forty-eight hours to pay its bid. Breckenridge contends the district court inaccurately characterized its position when it concluded, "[t]o infer that *section 45-1506(9)* somehow limits the trustee's discretion to require bidders to provide acceptable payment on the day of the auction is unreasonable." Breckenridge maintains it was not arguing that trustees could not require acceptable payment on the date of the auction, but the trustee must advertise before the sale what payment methods will be accepted. If the trustee does not advertise what payment methods are accepted before the sale, Breckenridge contends the winning bidder must be afforded reasonable time to pay the bid.

Cornerstone urges this Court to adhere to the strict application of unambiguous **[*657]** **[**81]** statutes, arguing that *Idaho Code section 45-1506* unambiguously specifies the necessary contents of the notice of sale. To that end, Cornerstone contends there is no cause for this Court to add "any restriction on the form of payment" to the statute's notice requirements. It is the role of the legislature—not this Court—to craft additional requirements about how such notice is provided. Wally adds, **[***14]** based on the plain and unambiguous language in *Idaho Code section 45-1506(9)*, the district court properly determined Breckenridge's request to delay the sale for forty-eight hours to obtain alternative payment contradicted the

plain language of the statute.[2] Instead, Wally posits that the language in the statute, which requires that the purchaser "shall forthwith pay the price bid," is unambiguous, and urges this Court to adhere to its plain meaning.

> The interpretation of a statute must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. ***HN4***[⬆] If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written. We have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature.

Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (internal quotations and citations omitted). "Ambiguity occurs where reasonable minds might differ as to interpretations." *Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho 307, 312, 109 P.3d 161, 166 (2005)* (internal citation omitted). "However, ambiguity is not established merely because the parties present differing interpretations **[***15]** to the court." *Id.*

The district court explained in its memorandum decision that Cook was not required to accept bids from Breckenridge "where it did not have checks that conformed to the payment conditions for the auction." The court continued that "[u]nder Breckenridge's interpretation [of *Idaho Code section 45-1506(9)*], the trustee would be required to accept bids from any person alleging that they could provide conforming payments for property sold at an auction in the future."

On appeal, Breckenridge claims that its position to allow reasonable time to secure adequate payment reflects the spirit of *section 45-1506*, which requires the high bidder to "forthwith pay the price bid[.]" Because no Idaho cases interpret the meaning of "forthwith," Breckenridge proposes this Court look to *United States v. Bradley, 428 F.2d 1013 (5th Cir. 1970)* for guidance. There, that court explained "forthwith" was "deliberately undefined...to allow courts to interpret it in the context of 'reasonableness,' on a case-by-case basis." *Id. at 1015-16*. The Fifth Circuit decided "'forthwith' requires no more or less than reasonable promptness, diligence or dispatch[.]" *Id.* While Breckenridge concedes Cornerstone had the funds on hand, it contends it would have taken Breckenridge forty-eight hours to satisfy W&R's requirement **[***16]** to obtain cashier checks payable to W&R. As a result, Breckenridge argues it satisfied the statutory requirement to "forthwith pay the price bid," and the district court erred in holding it was not entitled to sufficient time to tender payment.

Breckenridge's position is unavailing for two reasons. First, *Bradley* is distinguishable from the facts here. In *Bradley*, the Fifth Circuit considered whether officers validly executed a search warrant when the officers delayed the search, despite the warrant's requirement that officers search "forthwith" for the wanted person. *Id. at 1016*. The Fifth Circuit rejected a rigid test that required the search warrant to be executed in ten days, holding that "*[Federal] Rule [of Criminal Procedure] 41(d)* sets a maximum time within **[**82]** **[*658]** which a warrant must be executed and returned; and the 'forthwith requirement...usually requires...less than this ten-day period." *Id.* ***HN6***[⬆] In the context of the timing of a search, there are few circumstances in which rigid rules are proper. But here, the context with which the legislature used the term "forthwith" was to tender payment at an auction. ***HN7***[⬆] The whole premise of the statute is to ensure immediate closure to resolve the uncertain status of the property. Indeed, the nature of these proceedings **[***17]** is that of expediency, which is why, unlike its judicial foreclosure counterpart that permits a one-year right to redemption, "a deed of trust affords a creditor the right to nonjudicial foreclosure and a shorter 120-day period of cure[.]" Kelly Arthur Anthon, *Buyer (& Debtor) Beware*, 50 THE ADVOCATE 28 (2007) (citing *I.C. §§ 45-1503*, *45-1506*, *45-1508*, *11-401*, *11-402*). That said, "[t]he procedures to foreclose on trust deeds outside of the judicial process provide the *express-lane alternative* to foreclosure in the judicial system[.]" *Fed. Home Loan Mortg. Corp. v. Appel, 143 Idaho 42, 46 n.1, 137 P.3d 429, 433 n.1 (2006)* (emphasis added). Thus, "forthwith" as used in *section 45-1506* does not embrace Breckenridge's suggestion that a 48-hour delay to secure funds should have been permitted.

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[2] Breckenridge argues for the first time in its Reply Brief that *section 45-1506(9)* is ambiguous. ***HN5***[⬆] This Court "'will not consider arguments raised for the first time in the appellant's reply brief.'" *Bell v. Idaho Dept. of Lab., 157 Idaho 744, 749, 339 P.3d 1148, 1153 (2014)* (quoting *Myers v. Workmen's Auto Ins. Co., 140 Idaho 495, 508, 95 P.3d 977, 990 (2004)*. "'A reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the respondent has an opportunity to respond in the respondent's brief.'" *Id.* (quoting *Suitts v. Nix, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005)*).

Second, we reject Breckenridge's position because, as stated above, interpreting a statute begins with its literal words. *Verska, 151 Idaho at 893, 265 P.3d at 506*. ***HN8***[] No matter how other courts have interpreted "forthwith," this Court must give the word its "plain, usual, and ordinary meaning" and, if that definition is unambiguous, the Court "does not construe it, but simply follows the law as written." *Id.*

In short, this Court first examines the literal words of *section 45-1506* to determine whether they support the parties' differing interpretations. *Section 45-1506* provides:

> The purchaser at the sale shall forthwith **[***18]** pay the price bid and upon receipt of payment the trustee shall execute and deliver the trustee's deed to such purchaser, provided that in the event of any refusal to pay purchase money, the officer making such sale shall have the right to resell or reject any subsequent bid as provided by law in the case of sales under execution.

I.C. § 45-1506(9). In this setting, the statute does not support Breckenridge's interpretation. The plain meaning of "forthwith" is "[i]mmediately; without delay[.]" *Forthwith*, BLACK'S LAW DICTIONARY (11th ed. 2019). As Cornerstone and Wally argue, even under a liberal definition, the term must account for the circumstances of its application. Indeed, within the context of a trustee's sale, a delay long enough to retrieve a pen and write a check would be "forthwith"; a delay of forty-eight hours is not. *See Fed. Home Loan Mortg. Corp., 143 Idaho at 46 n.1, 137 P.3d at 433 n.1* (discussing the express nature of nonjudicial foreclosures); *Trotter v. Bank of New York Mellon, 152 Idaho 842, 847, 275 P.3d 857, 862 (2012)* ("a trustee may initiate nonjudicial foreclosure proceedings on a deed of trust without first proving ownership of the underlying note or demonstrating that the deed of trust beneficiary has requested or authorized the trustee to initiate those proceedings.").

Therefore, we hold the district court did not err **[***19]** in concluding W&R was not required to either (1) accept Breckenridge's bid or (2) give Breckenridge forty-eight hours to remit proper payment.

B. The district court did not err in concluding that Wally and W&R complied with the requirements of *Idaho Code section 45-1506* by selling the property to Cornerstone.

Breckenridge alleges W&R and Wally violated the requirements of *section 45-1506* that the property be sold to the highest bidder and violated its duty to get the highest price for the property. Breckenridge asserts that, when read together, two sentences in *Idaho Code section 45-1506* create simple requirements for the conduct of a sale: (1) "anyone may bid at the sale," and (2) "the property must be sold to the highest bidder." Breckenridge argues these requirements are absolute and the trustee must comply with them because, otherwise, the property could sell for less than the highest bid, which violates the trustee's duty.

[*659] **[**83]** We first start with the language of *Idaho Code section 45-1506(8)*. The statute, in pertinent part, provides:

> (8) The sale shall be held on the date and at the time and place designated in the notice of sale or notice of rescheduled sale as provided in *section 45-1506A*, Idaho Code, unless the sale is postponed as provided in this subsection or as provided in *section 45-1506B*, Idaho Code, **[***20]** respecting the effect of an intervening stay or injunctive relief order. The trustee shall sell the property in one (1) parcel or in separate parcels at auction to the highest bidder.

I.C. § 45-1506(8).

The issue at the sale was with the form of Breckenridge's bid. Nothing in this subsection, or anywhere else under *section 45-1506*, requires a trustee to accept every bid made. But Breckenridge maintains that, despite arriving with endorsed checks and being unable to register as a bidder, it was the highest bidder at the sale. We disagree. ***HN9***[] Before the auction begins, trustees can impose reasonable restrictions on the acceptable forms of payment in which a bid can be made at a trustee's sale. *Kivett, 58 Idaho at , 74 P.2d at 91*. Breckenridge's claim that it was the highest bidder disregards the undisputed fact that it was unable to make a qualifying bid.

Below, the district court explained, "Breckenridge was not recognized to bid based on its inability to obtain checks on the day of the sale that conformed to the payment conditions set for the sale. Cornerstone was the only recognized bidder at the sale, and the auctioneer accepted Cornerstone's bid as the highest bid." Breckenridge acknowledged this when it moved for summary judgment: "Had Cook not ignored **[***21]** Ashmore's bid and *Breckenridge been recognized as*

the highest bidder, Ashmore could have delivered to Cook checks payable to W&R within two (2) business days, if not sooner." (Emphasis added).

Because Breckenridge failed to establish it was registered to bid, let alone the high bidder, we affirm the district court's decision that Wally and W&R complied with *Idaho Code section 45-1506* in selling Cornerstone the property.

C. The district court did not err by refusing to set aside the sale.

Breckenridge broadly contends the district court erred in refusing to set aside the sale. As part of this argument, Breckenridge also asserts that *Idaho Code section 45-1508* authorizes the district court to set aside a trustee's sale when the trustee violated that section and when the purchaser was not a "purchaser in good faith for value."

Under *Idaho Code section 45-1508*: "any failure to comply with the provisions of *section 45-1506*, Idaho Code, shall not affect the validity of a sale in favor of a purchaser in good faith for value at or after such sale, or any successor in interest thereof." ***HN10***[] This provision makes clear that a trustee's sale to a good-faith purchaser for value is final, despite a violation of *Idaho Code section 45-1506*.

HN11[] Discussing the sale of property at a trustee's sale, this Court has explained "the **[***22]** sale is final once the trustee accepts the bid as payment in full unless there are issues surrounding the notice of the sale." *Spencer v. Jameson, 147 Idaho 497, 504, 211 P.3d 106, 113 (2009)*. This finality, echoed in *Idaho Code section 45-1508*, refers to *actual* notice, and it serves "the legislature's interest in preserving the finality of title to real property." *Id.* As for *Idaho Code section 45-1506*, "it is more reasonable to infer that the legislature did not intend for a sale to be set aside once the trustee accepts the credit bid as payment in full." *Id. at 504, 211 P.3d at 113*. As a result, "the sale is final once the trustee accepts the bid as payment in full unless there are *issues surrounding the notice of the sale* (which are admittedly not present in this case). This interpretation promotes the legislature's interest in preserving the finality of title to real property." *Id.* (emphasis added). The issues surrounding the notice of the sale, referenced in *Spencer*, refers to actual notice, not the form of the notice.

Breckenridge claimed no defects in the notice of sale. It alleges only that W&R did not provide sufficient notice of the payment restrictions, which is not required by **[*660]** *section 45-1506*. **[**84]** *Section 45-1508*, as its title verifies, promotes finality. Even if *section 45-1506* were violated, the sale remains final. There was no such violation here and therefore whether **[***23]** Cornerstone was a purchaser in good faith for value is immaterial and we need not reach that issue.

D. The district court did not err in dismissing Breckenridge's claims against Wally for negligence, negligence per se, and equitable estoppel.

Breckenridge argues the district court erred in dismissing its claims against Wally for negligence, negligence per se and estoppel. Breckenridge challenges two aspects of this portion of the district court's decision on appeal. First, Breckenridge asserts the district court erred in dismissing its negligence claims by holding W&R and Wally did not violate *Idaho Code section 45-1506*. Second, Breckenridge argues the district court erred in dismissing its estoppel claims because it argues Wally had to give prior notice of the payment terms and the district court's ruling is contrary to public policy because it allows a trustee to accept less than the highest bid for the subject property. For the reasons below, we hold the district court did not err in dismissing Breckenridge's claims against Wally.

1. The district court's decision to dismiss Breckenridge's negligence and negligence per se claims is affirmed.

Breckenridge argues the district court's decision to dismiss its claims **[***24]** for negligence and negligence per se was erroneous because a trustee has a duty to provide advance public notice of the terms of the sale, and W&R and Wally failed to do so. Wally responds that it complied with the statutory notice requirements and carried out the terms of the sale set by W&R.

HN12[] To show common law negligence, a party must prove:

> (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage." [] Self-evident in the formulation of these elements is that a party cannot be held liable for negligence when there was no legal duty imposed under the circumstances.

Oswald v. Costco Wholesale Corp., 473 P.3d 809, 819, 167 Idaho 540, 550 (2020) (citing *Stevens v. Fleming, 116 Idaho 523, 525, 777 P.2d 1196, 1198 (1989)*. "[I]n Idaho, it is well established that statutes and administrative regulations may define the applicable standard of care owed, and that violations of such statutes and regulations may constitute negligence per se." *O'Guin v. Bingham Cnty., 142 Idaho 49, 52, 122 P.3d 308, 311 (2005)* (internal quotations omitted). "Establishing negligence per se through a violation of a statute or regulation conclusively establishes the first two elements of a cause of action in negligence." *Obendorf v. Terra Hug Spray Co., Inc., 145 Idaho 892, 898, 188 P.3d 834, 840 (2008)* (citing *O'Guin, 142 Idaho at 52, 122 P.3d at 311*).

Below, the district **[***25]** court dismissed Breckenridge's negligence/negligence per se claim against Wally after concluding that W&R and Wally had not violated *section 45-1506*. The district court determined that because W&R and Wally had not violated that section, Breckenridge could not prove its claim of negligence or negligence per se because Wally had breached no duty to Breckenridge.

Breckenridge alleged the following as to its negligence claim:

> 50. Pursuant to *Idaho Code § 45-1506*, W&R and Wally owed a duty to Breckenridge to acknowledge Breckenridge's bid and convey title to the Subject Property to Breckenridge.
> 51. W&R and Wally have breached their duty to Breckenridge, which breach has directly and proximately cause Breckenridge to incur damages in an amount to be proven at trial, but which exceed $10,000.

While we have already held that the district court did not err in ruling against Breckenridge on its claim that W&R and Wally violated *Idaho Code section 45-1506*, the district court built on that reasoning in its memorandum decision on negligence. The district court evaluated the respective duties that Wally had once it became clear that **[**85]** **[*661]** Breckenridge did not have available means of payment that complied with the sale conditions. The court explained, "proceeding **[***26]** with the auction was not a violation of *section 45-1506* because Breckenridge could not provide payment in an acceptable form. Wally was not required to accept bids from Breckenridge[ ] simply because Breckenridge attended the sale." The district court concluded that without a violation of *Idaho Code section 45-1506*, there could be no breach of a duty owed to Breckenridge:

> Since Wally did not violate *Idaho Code section 45-1506*, it cannot establish its claim for negligence/negligence per se. Breckenridge argues that *section 45-1506* sets forth the statutory duty for its negligence claim. However, Breckenridge cannot demonstrate that Wally violated a statutory duty contained in *section 45-1506*. Breckenridge also has not argued nor demonstrated that Wally violated any specified common law duty owed to Breckenridge. Where the [c]ourt has found that Wally did not violate *Idaho Code section 45-1506*, Breckenridge's basis for its negligence/negligence per se claims also fail. Thus, the [c]ourt finds even when construing the undisputed evidence in favor of the non-moving party, Breckenridge cannot establish its claims for negligence/negligence per se against Wally.

We agree with the district court's analysis. Breckenridge cannot show a violation of *section 45-1506* to establish negligence per se and it has not shown Wally owed any **[***27]** common law duty to it to support its claim for negligence. Accordingly, the district court's decision dismissing Breckenridge's claim for negligence and negligence per se is affirmed.

2. The district court's decision dismissing Breckenridge's equitable estoppel claim is affirmed.

Breckenridge next claims the district court erred in dismissing its claim of equitable estoppel because it is the trustee's duty to give public notice of the terms of the sale, and that the prospective bidder has no obligation to inquire into each term that may be imposed. Breckenridge posits that such a requirement unfairly advantages those who guess the correct questions over those who do not, which contradicts the policy established by the legislature and this Court.

HN13[↑] The elements of equitable estoppel are as follows:

> (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that the person to whom the representation was made, or from whom the facts were concealed, relied **[***28]** and acted upon the representation or concealment

to his prejudice.

Silicon Int'l Ore, LLC v. Monsanto Co., 155 Idaho 538, 548-49, 314 P.3d 593, 603-04 (2013) (quoting *Ogden v. Griffith, 149 Idaho 489, 495, 236 P.3d 1249, 1255 (2010)*).

HN14[↑] The doctrine of equitable estoppel "assumes the existence of a complete agreement," which is not unenforceable as vague or incomplete. *Lettunich v. Key Bank Nat'l Ass'n, 141 Idaho 362, 367, 109 P.3d 1104, 1109 (2005)*. Failing to establish even one element subjects the claim to dismissal at summary judgment. *See Idaho Title Co. v. American States Ins. Co., 96 Idaho 465, 468, 531 P.2d 277, 230 (1975)*. The district court explained below:

> The undisputed facts show that Wally did not make a false representation or conceal the payment conditions from Breckenridge. First, there is no allegation or evidence showing that Wally's notice contained false statements about the payment conditions. The notice did not say that the sale did not have any payment conditions. . . . ***HN15***[↑] Idaho law does not require the conditions for a sale to be posted in the notice for a public sale of a deed of trust. The conditions may be provided to potential bidders at the time and place of the sale. Thus, even in construing all reasonable inferences in favor of the non-moving party, Breckenridge cannot establish that Wally made any misrepresentation to Breckenridge.
>
> **[**86]** **[*662]** Breckenridge also cannot show that information about the payment conditions was concealed by Wally. As set forth above, the public notices posted **[***29]** by Wally were not varied from the notice it received from W&R. Wally was not required to provide advance[ ] notice of the payment conditions for the sale. Breckenridge also did not contact Wally regarding the existence of any conditions. Thus, even when drawing all reasonable inferences in favor of the non-moving party, the Court finds that Breckenridge cannot establish that Wally concealed facts about the payment conditions from Breckenridge. Therefore, the Court finds that Breckenridge cannot establish its estoppel claim against Wally.

On appeal, Breckenridge makes no argument that addresses the elements of equitable estoppel. Breckenridge does not suggest Wally made a false representation nor does it contend it could not discover the purchase conditions. To the contrary, as Wally notes on appeal, "the actions of [Cornerstone's agent] unequivocally demonstrated through relatively minimal efforts in reading the sale website and contacting Wally[,]" Breckenridge could discover the purchase conditions. Thus, Breckenridge has failed to establish either of these elements was met here.

Beyond that, Breckenridge provided no argument to support why the district court's decision to dismiss **[***30]** its claim for estoppel against Wally was in error. *See Bach v. Bagley, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010)* ("A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue."). Accordingly, we affirm the district court on this ground as well.

E. The district court abused its discretion in awarding attorney fees to Cornerstone and Wally under *Idaho Code section 12-120(3)*.

Breckenridge next argues the district court erred in awarding attorney fees to Cornerstone and Wally. Breckenridge contends there was no commercial transaction alleged between the parties nor was recovery sought based on a commercial transaction. Since the opposing parties are only indirectly related, Breckenridge argues that *section 12-120(3)* does not provide a basis for attorney fees.

Cornerstone responds that the district court correctly awarded attorney fees under *Idaho Code section 12-120(3)* because the gravamen of Breckenridge's case was a commercial transaction relating to the sale of the property. Cornerstone submits that the district court appropriately exercised its discretion. Wally similarly claims that there "should be no dispute" that a commercial transaction was at the very "center and heart of this lawsuit."

HN16[↑] The awarding of **[***31]** attorney fees and costs is within the discretion of the district court and is subject to the abuse of discretion standard of review. *Idaho Transp. Dep't v. Ascorp, Inc., 159 Idaho 138, 140, 357 P.3d 863, 865 (2015)*. When this Court considers whether the district court abused its discretion, it applies a four-part test: (1) whether the court correctly perceived the issue as discretionary; (2) whether the court acted within the outer boundaries of its discretion; (3) whether the court acted consistently with the legal standards applicable to the specific choices available; and (4)

whether the district court reached its decision by an exercise of reason. *Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)*.

HN17[↑] "[I]n 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." *I.C. § 12-120(3)*. Under the statute, "[a] court must award attorney fees to the prevailing party in an action to recover on a 'commercial transaction.'" *Troupis v. Summer, 148 Idaho 77, 81, 218 P.3d 1138, 1142 (2009)* (citations omitted). In this context, "[t]he term 'commercial transaction' is defined to mean all transactions except transactions for personal or household purposes." *I.C. § 12-120(3)*.

> "[W]hether a party can recover attorney fees under *Idaho Code section 12-120(3)* depends on whether the gravamen of a **[**87]** **[*663]** claim is a commercial transaction." **[***32]** *Stevens v. Eyer, 161 Idaho 407, 410, 387 P.3d 75, 78 (2016)*. "A gravamen is 'the material or significant part of a grievance or complaint.'" *Id.* (quoting Merriam Webster's Collegiate Dictionary 509 (10th ed. 1993)). ***HN18***[↑] "[C]ourts analyze the gravamen claim by claim." *Id.* (citation omitted). "To determine whether the significant part of a claim is a commercial transaction, the court must analyze whether a commercial transaction (1) is integral to the claim and (2) constitutes the basis of the party's theory of recovery on that claim." *Id.* (citation omitted).

SilverWing at Sandpoint, LLC v. Bonner Cnty., 164 Idaho 786, 799-800, 435 P.3d 1106, 1119-20 (2019).

We begin by noting that this Court's jurisprudence on *Idaho Code section 12-120(3)* has left reason for confusion in this facially straightforward area of the law. Over the years our cases have continued to focus on the standards set forth above, while reaching divergent outcomes. ***HN19***[↑] For example, under one line of cases, "the test is whether the commercial transaction comprises the gravamen of the *lawsuit*." *Simono v. House, 160 Idaho 788, 792, 379 P.3d 1058, 1062 (2016)* (citing *E.I. DuPont De Nemours & Co., 117 Idaho 780, 784, 792 P.2d 345, 349 (1990)* (emphasis added)); *see also Brower v. E.I. DuPont De Nemours & Co., 117 Idaho 780, 784, 792 P.2d 345, 349 (1990)* (first pronouncing that "the test is whether the commercial transaction comprises the gravamen of the lawsuit."). In line with this analysis, this Court in *Garner v. Povey*, held that a case involving claims of wrongful interference with easement rights and wrongful conveyance of real **[***33]** property to a third party were treated as commercial because the plaintiffs had asserted a commercial transaction as "an actual basis of the complaint. . . . ***HN20***[↑] [T]he lawsuit and the causes of action must be based on a commercial transaction. . . . '[T]he gravamen of the lawsuit,' was the basis on which [the plaintiff] was attempting to recover." *151 Idaho 462, 469, 259 P.3d 608, 615 (2011)* (quoting *Great Plains Equip., Inc. v. Northwest Pipeline Corp., 136 Idaho 466, 470, 471, 36 P.3d 218, 223, 224 (2001)* (*Great Plains Equip. II*)).

The second line of cases clarifies and limits this broad approach. ***HN21***[↑] Under this analysis, "[w]hether a party can recover attorney fees under *Idaho Code section 12-120(3)* depends on whether the gravamen of a *claim* is a commercial transaction." *SilverWing, 164 Idaho at 799-800, 435 P.3d at 1119-20* (citing *Stevens v. Eyer, 161 Idaho 407, 410, 387 P.3d 75, 78 (2016)* (emphasis added)); *see also Knudsen v. J.R. Simplot Co., 168 Idaho 256, 272, 483 P.3d 313, 329 (2021)*. This point was made over twenty years ago in *Great Plains Equip. II*:

> [I]f more than one claim is pled, there can be more than one "gravamen," and attorney fees can still be awarded for a specific claim, if a claim is of the type covered by *I.C. § 12-120(3)* "even though a claim is covered by other theories that would not have triggered application of the statute."

136 Idaho at 472, 36 P.3d at 224 (quoting *Brooks v. Gigray Ranches, Inc., 128 Idaho 72, 79, 910 P.2d 744, 751 (1995)*). Thus, the notion of focusing on the gravamen of the *lawsuit* can be confounding. The analysis requires a deeper dive into the gravamen of the claims in the case and the basis for the lawsuit itself. It is **[***34]** not enough that a commercial transaction was tangentially involved in a particular litigation.

HN22[↑] There are "two stages of analysis to determine whether a prevailing party could avail itself of *I.C. § 12-120(3)*: (1) there must be a commercial transaction that is integral to the *claim*; and (2) the commercial transaction must be the basis upon which recovery is sought." *Id. at 471, 36 P.3d at 223* (emphasis added) (internal quotations omitted) (quoting *Brooks, 128 Idaho at 78, 910 P.2d at 750*)). We emphasized this distinction long ago in *Brower v. E.I. DuPont De Nemours & Co., 117 Idaho 780, 792 P.2d 345 (1990)*. The case involved a farmer who made a

claim for damages to his land because of his use of an experimental herbicide. *Id. at 780, 792 P.2d at 345*. The complaint sought relief from the manufacturer based on the claim that the manufacturer's representation induced his reliance. *Id. at 784, 792 P.2d at 349*. However, the product was purchased from a local co-op, not from the manufacturer. *Id. at 780, 792 P.2d at 345*. Although there was a commercial **[*664]** **[**88]** transaction involved—the purchase of the manufacturer's product—the commercial transaction was too far removed from the theory of recovery to warrant application of *I.C. § 12-120(3)*.

> [An] award of attorney's fees is not warranted every time a commercial transaction is remotely connected with the case. ***HN23***[⬆] Rather, the test is whether the commercial transaction comprises the gravamen of the lawsuit. **[***35]** Attorney's fees are not appropriate under *I.C. § 12-120(3)* unless the commercial transaction is integral to the *claim*, and constitutes the basis upon which the party is attempting to recover. To hold otherwise would be to convert the award of attorney's fees from an exceptional remedy justified only by statutory authority to a matter of right in virtually every lawsuit filed.

Id. at 784, 792 P.2d at 349 (emphasis added).

Following this authority, analysis of the gravamen of Breckenridge's claims as well as the gravamen of the lawsuit convinces us that attorney fees were improperly awarded here. Breckenridge's complaint against Cornerstone and Wally alleged a violation of *Idaho Code section 45-1506*, negligence/negligence per se, and estoppel. The claims certainly spun out of a *potential* commercial transaction that Breckenridge hoped to make through a successful bid. Yet its lawsuit was based, not on any transaction, but on independent allegations of equity and tort law.

Count I, alleging a violation of *Idaho Code section 45-1506*, requested an order from the district court setting aside the sale between Wally and Cornerstone, and requiring Wally and W&R to conduct another sale at which Breckenridge would be permitted to bid. Alternatively, Breckenridge requested an order compelling **[***36]** Wally and W&R to accept its bid, or a judgment against Wally and W&R for damages. Such claims are quintessentially equitable. *See Smutny v. Noble, 78 Idaho 628, 631, 308 P.2d 591, 592 (1957)* (explaining the power to set aside a judgment is equitable relief).

Count II, alleging estoppel, requested W&R and Wally be estopped from restricting the form of payment at a future sale, and requested an order from the district court requiring W&R and Wally to convey title to the property to Breckenridge after it paid for the property. This claim is also an equitable one. *See Boesiger v. Freer, 85 Idaho 551, 559-61, 381 P.2d 802, 806-07 (1963)* (identifying estoppel as an equitable doctrine).

Count III, alleging negligence/negligence per se against Wally and W&R requested an order voiding any instrument conveying title to Cornerstone while granting a judgment against W&R and Wally for damages. Once again, claims in negligence sound in tort, not in contract. Thus, the statutory availability of attorney fees is also unavailable on this claim.

In sum, the gravamen of these claims was not a commercial transaction. And while a commercial relationship existed between Cornerstone and Wally, and between Wally and W&R, Breckenridge had no commercial relationship with either Cornerstone or Wally. Indeed, Breckenridge's efforts to establish **[***37]** a relationship with Wally failed because its bid was rejected. From that limited connection, Wally and Cornerstone cannot prevail under *12-120(3)* against Breckenridge for fees.

The district court found that Breckenridge's attempt to set aside a commercial transaction between W&R and Cornerstone made it a party to a commercial transaction:

> [T]he gravamen of Breckenridge's claims attempted to enforce a commercial transaction for the sale of the subject property against W&R by attempting to invalidate the commercial transaction between W&R and Cornerstone. Thus, for purposes of determining attorney fees under *I.C. § 12-120(3)*, the Court finds that a commercial transaction was alleged between Breckenridge and Cornerstone.

We disagree with this analysis. There was never a commercial transaction attempted or intended between Cornerstone and Breckenridge. These two entities were in competition against each other—they were never engaged in a commercial transaction *with* each other. As to Wally, as noted above, Breckenridge's claims were not commercial in nature.

In addition, Breckenridge's complaint did not assert a right to attorney fees under *section 12-120(3)*, **[*665]** **[**89]** nor did it assert any other "commercial transaction" as the basis **[***38]** for its alleged relief.

We have held that such allegations can support an award of 12-120(3) fees. *See* Garner v. Povey, 151 Idaho at 469, 259 P.3d at 615 (defendants were entitled to attorney fees because the plaintiff's alleged in their complaint that the parties had engaged in a commercial transaction). Cornerstone asserts that Breckenridge's passing reference in its complaint to being awarded attorney fees under "Idaho Code §§ 12-120 and 12-121 and such other laws as may apply" estops Breckenridge from denying the transaction between them was commercial in nature. There is authority which, at first blush, supports this claim. **HN24**[↑] Building on Garner, we have held that a party can be estopped from denying a commercial transaction in a case when the "[a]llegations in the complaint that the parties *entered into a commercial transaction* and that the complaining party is entitled to recover based upon that transaction, are sufficient to trigger the application of I.C. § 12-120(3)." Carter v. Gateway Parks, LLC, 168 Idaho 428, 441, 483 P.3d 971, 984 (2020) (emphasis added) (quoting Garner v. Povey, 151 Idaho 462, 470, 259 P.3d 608, 616 (2011)). But this is not that case. The complaint here was anything but *clear* about the basis for claimed attorney fees; in fact, subsection three of section 12-120 is not pleaded at all, and we decline to extend this reasoning based on the general language in Breckenridge's complaint. Indeed, in Garner we **[***39]** made this point while referencing *Great Plains Equip. II*:

> Great Plains thus attempted to clarify that *a mere request for attorney fees pursuant to I.C. § 12-120(3), without more, is not sufficient to trigger the commercial transaction prong of that section*. In other words, neither a claim or request in the prayer of a complaint for fees under I.C. § 12-120(3), nor a request or claim for attorney fees in a memorandum of costs and fees, is sufficient to trigger application of that fee provision. A party seeking fees based on a mere request under I.C. § 12-120(3) must show that a commercial transaction was the gravamen of the action before a court may award fees.

151 Idaho at 470, 259 P.3d at 616 (emphasis added).

We now follow this reasoning precisely. Breckenridge's complaint simply made a passing reference to "12-120," without even mentioning section 12-120(3) specifically. While Cornerstone rightly pointed out that Breckenridge's reference to 12-120, without more, could not have meant anything but 12-120(3), we rely on the distinction made in Great Plains that a "mere request for attorney fees pursuant to" section 12-120 is insufficient to estop Breckenridge in this case.

We caution that this result does not mean that commercial claims that are intertwined with non-commercial claims precludes an award of attorney fees. **[***40]** **HN25**[↑] As we explained recently in Knudsen v. J.R. Simplot Co.:

> [W]here there are multiple claims in an action, and only some qualify for a fee award under section 12-120(3), attorney's fees are properly denied if those claims are "inseparably intertwined." *See* Brooks v. Gigray Ranches, Inc., 128 Idaho 72, 77-79, 910 P.2d 744, 749-51 (1996) (concluding that a district court's denial of attorney's fees under section 12-120(3) was appropriate where the district court determined the fees associated with claims that satisfied section 12-120(3) were "inseparably intertwined" with those that did not). When a party has prevailed on claims for which it is statutorily entitled to an award of attorney's fees and claims upon which it is not, this Court has held "that the prevailing party must apportion the fees between the claim upon which it was entitled to recover ... and the claim upon which it was not." Advanced Med. Diagnostics, LLC v. Imaging Ctr. of Idaho, LLC, 154 Idaho 812, 815, 303 P.3d 171, 174 (2013). "Where fees were not apportioned between a claim that qualifies under I.C. § 12-120(3) and one that does not, no fees are to be awarded." Rockefeller v. Grabow, 136 Idaho 637, 645, 39 P.3d 577, 585 (2001) (citing Brooks, 128 Idaho at 79, 910 P.2d at 752).

168 Idaho 256, 273, 483 P.3d 313, 330 (2021).

Our analysis here clarifies, once again, the potentially disparate reasoning of several cases involving fees awardable under Idaho Code section 12-120(3). **[*666]** **[**90]** Here, there was no commercial transaction ever alleged between Breckenridge and the others. As a result, while the district court recognized the issue as one of discretion, and acted within the **[***41]** outer bounds of its discretion, we conclude the district court acted inconsistent with applicable legal standards and abused its discretion in awarding Cornerstone and Wally fees under Idaho Code section 12-120(3). We reverse the award of attorney fees to Cornerstone and Wally.

F. Attorney fees are not awarded on appeal.

Both respondents request attorney fees under Idaho Code section 12-120(3). Breckenridge likewise requests

fees under that statute if this Court "disagrees with Breckenridge's analysis of the [non-]applicability of section 12-120(3). . . ." Breckenridge also relies on I.A.R. 35 and 41. Wally and Cornerstone request fees under Idaho Code section 12-121, and Wally separately requests fees and costs under I.A.R. 35(b)(5), 40, and 41(a) and I.R.C.P. 54(e)(2).

HN26[] "An award of attorney fees under [Idaho Code section 12-121] will be awarded to the prevailing party on appeal only when this Court is left with the abiding belief that the entire appeal was brought, pursued, or defended frivolously, unreasonably, or without foundation." Am. Semiconductor., Inc. v. Sage Silicon Sols., LLC, 162 Idaho 119, 127, 395 P.3d 338, 346 (2017) (citations omitted). An award of fees under Idaho Code section 12-120(3) is mandatory to the prevailing party in civil actions involving commercial transactions. I.C. § 12-120(3).

Since we have reversed the district court's award of attorney fees based on the lack of a commercial transaction, we decline to award fees to any of the parties under Idaho Code section 12-121 or Idaho Appellate Rules 40 and **[***42]** 41 as all parties prevailed in part on appeal. HN27[] "Where both parties prevail in part on appeal, this Court may deny fees." Huber v. Lightforce USA, Inc., 159 Idaho 833, 855, 367 P.3d 228, 250 (2016) (quoting Caldwell v. Cometto, 151 Idaho 34, 41, 253 P.3d 708, 715 (2011)).

VI. Conclusion

For the reasons set forth above, we affirm the district court's decision dismissing Breckenridge's claims against Wally, W&R, and Cornerstone. The district court's judgment awarding attorney fees to Wally and Cornerstone under Idaho Code section 12-120(3) is vacated for the reasons set forth above. No party is entitled to fees or costs on appeal.

Justices BRODY, STEGNER, MOELLER, and ZAHN CONCUR

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1. *Erickson v. Erickson*
   Client/Matter: -None-
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   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
	-None-

Erickson v. Erickson

Supreme Court of Idaho

December 14, 2022, Opinion Filed

Docket No. 48335

Reporter
171 Idaho 352 *; 521 P.3d 1089 **; 2022 Ida. LEXIS 146 ***; 2022 WL 17658181

AMY J. ERICKSON, Petitioner/Respondent, v. JOSHUA ERICKSON, Respondent/Appellant.

Prior History: [*1]** Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Annie McDevitt, Magistrate Judge. Gerald F. Schroeder, Senior District Judge.

Disposition: The district court decision is affirmed in part, reversed in part, and remanded.

Core Terms

separate property, marriage, magistrate's court, district court, community property, retirement account, discovery, documents, funds, attorney's fees, commingled, deposited, tracing, parties, pretrial, argues, memorandum, acquisition of property, reasonable certainty, account balance, retirement, affirming, sanctions, joint checking account, bank account, particularity, frivolous, date of marriage, trial court, mandatory disclosure

Case Summary

Overview

HOLDINGS: [1]-The district court did not err in affirming the discovery sanctions the magistrate court imposed against the husband because he failed to comply with the scheduling order, failed to show up at the pretrial conference when his presence had been mandated, failed to comply with his wife's discovery requests, and failed to timely produce documents to support his separate property claim; [2]-The district court did not err under *Idaho Code Ann. § 32-906* in affirming the magistrate court's application of the community property presumption because the husband's testimony that he owned the retirement accounts before marriage could not prove his assertion with reasonable certainty and particularity.

Outcome

District court decision affirmed in part; reversed in part; remanded.

LexisNexis® Headnotes

Governments > Legislation > Statute of Limitations > Time Limitations

HN1 **Statute of Limitations, Time Limitations**

Under Idaho's Family Law Procedural Rules, parties are required to make mandatory disclosures to each other within 35 days after the filing of a responsive pleading. I.R.F.L.P. 401(a).

Family Law > ... > Property Distribution > Classification > Bank Accounts

Real Property Law > ... > Present Estates > Marital Estates > Community Property

Family Law > ... > Property Distribution > Characterization > Community Property

Family Law > ... > Property Rights > Characterization > Community Property

Family Law > ... > Property Distribution > Classification > Tracing

HN2 **Classification, Bank Accounts**

Where the parties have commingled their separate and

community funds in a bank account, and treat them as one, it all becomes community property. The commingling doctrine is a special application of the general presumption that all property acquired during the marriage is community property.

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

HN3[] Magistrates, Pretrial Referrals

When the Supreme Court of Idaho reviews the decision of a district court sitting in its capacity as an appellate court, the standard of review is as follows: The Supreme Court reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, the district court's decision will be affirmed as a matter of procedure. Thus, the supreme court does not review the decision of the magistrate court. Rather, it is procedurally bound to affirm or reverse the decisions of the district court.

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Family Law > ... > Property Distribution > Characterization > Community Property

HN4[] Standards of Review, Questions of Fact & Law

The characterization of property as either community or separate presents a mixed question of law and fact. Although the manner and method of acquisition of property are questions of fact for the trial court, the characterization of an asset in light of the facts found is a question of law over which free review is exercised.

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

HN5[] Discovery, Misconduct During Discovery

Idaho R. Civ. P. 37 permits a court to sanction a party by prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence. *Rule 37(b)(2)(A)(ii)*.

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

HN6[] Discovery, Misconduct During Discovery

In Idaho, two general rules guide a trial court in imposing sanctions. The trial court must balance the equities by comparing the culpability of the disobedient party with the resulting prejudice to the innocent party and consider whether lesser sanctions would be effective.

Civil Procedure > Appeals > Record on Appeal

HN7[] Appeals, Record on Appeal

Without an adequate record on appeal to support an appellant's claims, error will not be presumed. Rather, the missing portions of the record are to be presumed to support the action of the trial court.

Civil Procedure > Pretrial Matters > Conferences > Scheduling Conferences

Governments > Courts > Authority to Adjudicate

HN8[] Conferences, Scheduling Conferences

A district court has authority to sanction parties for non-compliance with scheduling orders, including prohibiting parties from introducing untimely disclosed evidence.

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Family Law > ... > Property Distribution > Characterization > Community Property

Family Law > ... > Property

Rights > Characterization > Separate Property

Family Law > ... > Property
Distribution > Characterization > Separate Property

HN9 **Standards of Review, Questions of Fact & Law**

The characterization of property as either community or separate presents a mixed question of law and fact. Although the manner and method of acquisition of property are questions of fact for the trial court, the characterization of an asset in light of the facts found is a question of law over which free review is exercised. Whether a specific piece of property is characterized as community or separate property depends on when it was acquired, and the source of the funds used to purchase it. The character of property vests at the time the property is acquired.

Family Law > ... > Property
Rights > Characterization > Community Property

Real Property Law > ... > Present Estates > Marital Estates > Community Property

Family Law > ... > Property
Distribution > Characterization > Community Property

Family Law > ... > Property
Distribution > Characterization > Separate Property

Family Law > ... > Property
Rights > Characterization > Separate Property

HN10 **Characterization, Community Property**

Idaho Code Ann. § 32-903 states that all property owned by a spouse before marriage remains that spouse's separate property. That said, all other property acquired after marriage, including income on separate property, is community property. Idaho Code Ann. § 32-906. In Idaho, income derived during a period of marriage from the efforts, labor, and industry of the parties constitutes community assets. Because all property acquired during marriage is presumed to be community property, a party wishing to show that assets acquired during marriage are separate property bears the burden of proving with reasonable certainty and particularity that the property is separate.

Family Law > ... > Property
Rights > Characterization > Community Property

Real Property Law > ... > Present Estates > Marital Estates > Community Property

Family Law > ... > Property
Distribution > Characterization > Community Property

Family Law > ... > Property
Distribution > Classification > Tracing

Family Law > ... > Property
Distribution > Characterization > Separate Property

HN11 **Characterization, Community Property**

With regard to divorce proceedings, separate property may be converted to community property through commingling. Even so, commingling of separate and community property does not convert the separate property to community property where the separate property can be identified through either direct tracing or accounting. When separate and community property are commingled so that tracing is impossible, it is presumed to be community property, and the burden is on the person asserting the separate character of the property.

Family Law > ... > Property
Distribution > Classification > Bank Accounts

Real Property Law > ... > Present Estates > Marital Estates > Community Property

Family Law > ... > Property
Distribution > Characterization > Community Property

Family Law > ... > Property
Rights > Characterization > Community Property

Family Law > ... > Property Distribution > Inferences & Presumptions > Community Property

HN12 **Classification, Bank Accounts**

With regard to divorce proceedings, where the parties have commingled their separate and community funds in a bank account, and treat them as one fund, it all

becomes community property. The commingling doctrine is a special application of the general presumption that all property acquired during the marriage is community property.

Family Law > ... > Property Rights > Characterization > Community Property

Real Property Law > ... > Present Estates > Marital Estates > Community Property

Family Law > ... > Property Distribution > Characterization > Community Property

Family Law > ... > Classification > Retirement Benefits > Pensions

HN13 **Characterization, Community Property**

With regard to divorce proceedings, retirement benefits, to the extent earned during marriage, are deemed community property. Generally, community property will be divided in a substantially equal manner unless there are compelling reasons which justify otherwise. *Idaho Code Ann. § 32-712(1)*. Therefore, absent compelling reasons which justify otherwise, it is settled beyond dispute that there shall be a substantially equal division of pension benefits which were acquired during the time of the marriage.

Evidence > Burdens of Proof > Allocation

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

Family Law > ... > Property Distribution > Characterization > Separate Property

HN14 **Burdens of Proof, Allocation**

With regard to divorce proceedings, a party asserting a separate property interest bears the burden of proving that interest with reasonable certainty and particularity.

Family Law > ... > Property Rights > Characterization > Community Property

Real Property Law > ... > Present Estates > Marital Estates > Community Property

Family Law > ... > Property Distribution > Characterization > Community Property

Family Law > ... > Property Distribution > Classification > Tracing

Family Law > ... > Property Distribution > Inferences & Presumptions > Community Property

HN15 **Characterization, Community Property**

With regard to divorce proceedings, when separate and community property are commingled so that tracing is impossible, it is presumed to be community property, and the burden is on the person asserting the separate character of the property.

Family Law > ... > Property Distribution > Inferences & Presumptions > Community Property

Real Property Law > ... > Present Estates > Marital Estates > Community Property

Family Law > ... > Property Distribution > Characterization > Community Property

Family Law > ... > Property Distribution > Classification > Tracing

Family Law > ... > Property Distribution > Characterization > Separate Property

HN16 **Inferences & Presumptions, Community Property**

With regard to divorce proceedings, the commingling doctrine is a special application of the general presumption that all property acquired during marriage is community property. That said, commingling of separate and community property does not convert the separate property to community property where the separate property can be identified through either direct tracing or accounting. However, when separate and community property are commingled so that tracing is impossible, it is presumed to be community property, and the burden is on the person asserting the separate character of the property to prove otherwise. That party may prove separate property through accounting

evidence or direct tracing.

Civil Procedure > Appeals > Record on Appeal

HN17 **Appeals, Record on Appeal**

Without an adequate record, the Supreme Court of Idaho presumes that the admitted portion of a case supports the lower court's decision.

Family Law > ... > Property Rights > Characterization > Community Property

Real Property Law > ... > Present Estates > Marital Estates > Community Property

Family Law > ... > Property Distribution > Characterization > Community Property

Family Law > ... > Property Distribution > Characterization > Separate Property

Family Law > ... > Property Rights > Characterization > Separate Property

HN18 **Characterization, Community Property**

Idaho Code Ann. § 32-903 states that all property owned by a spouse before marriage remains that spouse's separate property. But there is a rebuttable presumption that all property acquired during marriage is community property is community property. Idaho Code Ann. § 32-906. When the increased value of a retirement account results from inflation or other market factors, it is considered separate property. When the increase was from income from the separate property investment, it is considered community property.

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN19 **Standards of Review, Questions of Fact & Law**

The Supreme Court of Idaho can only consider the record submitted by the parties to determine whether substantial evidence supports the lower court's conclusion. (the manner and method of acquisition of property are questions of fact for the trial court.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > English Rule

Civil Procedure > Appeals > Costs & Attorney Fees

HN20 **Standards of Review, Abuse of Discretion**

A district court's denial of fees under Idaho Code Ann. § 12-121 will not be overturned absent an abuse of discretion. As long as the court correctly perceived the issue as one of discretion, acted within the outer boundaries of its discretion, acted consistently with the legal standards applicable to the specific choices available to it, and reached its decision by the exercise of reason, the decision will not be disturbed on appeal.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > English Rule

Civil Procedure > Appeals > Costs & Attorney Fees

HN21 **Basis of Recovery, Bad Faith Awards**

Attorney fees may not be awarded under Idaho Code Ann. § 12-121 when the case involves an issue of first impression.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Procedure > Appeals > Costs & Attorney Fees

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > English Rule

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN22 **Basis of Recovery, Bad Faith Awards**

Idaho Code Ann. § 12-121 allows attorney fees in a civil action if the appeal merely invites the court to second-guess the findings of the lower court. Attorney fees may also be awarded under § 12-121 if the appeal was brought or defended frivolously, unreasonably, or without foundation. An award of fees under § 12-121 is within the court's discretion.

Civil Procedure > Appeals > Costs & Attorney Fees

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN23 **Appeals, Costs & Attorney Fees**

Idaho Code Ann. § 12-123 does not apply on appeal; thus, an award of fees on this basis is not appropriate.

Counsel: Rainey Law Office, Boise, attorney for Appellant. Rebecca Rainey argued.

Eismann Law Offices, Nampa, attorney for Respondent. Ryan Martinat argued.

Judges: BEVAN, Chief Justice. Justices MOELLER, and ZAHN CONCUR. STEGNER, J., concurring in part and dissenting in part.

Opinion by: BEVAN

Opinion

[1093]** **[*356]** BEVAN, Chief Justice.

This appeal concerns the proper legal standards for assessing discovery sanctions against trial counsel, and for proving the character of property during divorce proceedings. Appellant Josh Erickson argues the magistrate court erred by applying the community property presumption to three retirement accounts[1] he owned prior to marriage. Josh[2] argues that he failed to produce documents during discovery that could have established these accounts were his separate property because the Respondent, Amy Erickson, did not give timely notice that she was seeking an interest in the retirement accounts. Josh argues the magistrate court then imposed inequitable sanctions **[***2]** at trial for his alleged discovery violations by preventing him from presenting evidence relevant to the claims Amy was permitted to make outside the discovery window. Josh appealed the magistrate court's decision to the district court, which affirmed. Josh now appeals to this Court. Amy cross-appeals the district court's denial of her request for attorney fees.

I. Factual and Procedural Background

Josh and Amy were married on September 29, 2017. At the time of marriage, Josh worked for Slayden Construction in Spokane, Washington. Before marriage, Josh worked for T-O Engineers from 2012 to 2014, and McMillan and Associates from 2014 to shortly before his marriage in 2017. On February 12, 2019, less than two years after their marriage, Amy filed for divorce citing irreconcilable differences. As to the parties' property, Amy's petition pleaded that "community property and incurred community debts . . . should be determined, valued and equitably divided between the petitioner and the respondent as provided in Idaho Code Section 32-712 as amended." She also sought that "[t]he separate property of the respondent should be identified and confirmed to be the separate property of the respondent."

Josh filed an answer, **[***3]** requesting that the parties' respective separate property and debt be confirmed to them, and the parties be awarded an equitable division of their community property and debt. Soon after, the magistrate court entered a scheduling order setting the trial date for September 10, 2019. The order required several things of both parties. First, the order designated that all discovery be completed no later than 42 days before trial, which was July 30, 2019. It also required the parties to "comply with the automatic

[1] The three accounts are referred to as: the Capital One/E-Trade Roth IRA, the Capital One/E-Trade Individual Account, and the T-O Engineer's 401k account. Although the parties and lower courts often refer to the accounts collectively as "retirement accounts," we note that the E-Trade Individual Account is actually an investment account.

[2] We use each party's first name for ease of reference since both had the same surname when the divorce petition was filed.

disclosure provisions set forth in *Idaho Rules of Family Law Procedure 401*," including the admonition that "failure to do so may, in the [c]ourt's discretion, subject the non-compliant party to sanctions, including those sanctions set forth in Idaho Rules of Family Law Procedure Rules 444 and 447 [now *Rule 417*]." The order also required the parties to file a pretrial memorandum "**no later than 7 days before** the pre-trial conference." (Emphasis in original.) Finally, as relevant to this appeal, the magistrate court ordered **"[t]he parties and their respective counsel shall appear before this [c]ourt on [**1094] [*357] August 22, 2019 at 1:30 PM for a pre-trial conference**." (Emphasis in original.)

HN1[↑] As the magistrate court ordered, under Idaho's Family Law Procedural Rules (Rules), both Amy and **[***4]** Josh are required to make mandatory disclosures to each other "within 35 days after the filing of a responsive pleading." *I.R.F.L.P. 401(a)*. Of note here, Josh had to provide "complete copies of the following documents":

> (2) *all* monthly or periodic bank, checking, savings, brokerage, and security account statements in which any party has or had an interest for the period commencing 6 months prior to the filing of the petition and through the date of the disclosure; [and]
>
> (3) *all* monthly or periodic statements and documents showing the value of all pension, retirement, stock option, and annuity balances, including Individual Retirement Accounts, 401(k) accounts, and all other retirement and employee benefits and accounts in which any party has or had an interest for the period commencing 6 months prior to the filing of the petition and through the date of the disclosure, or if no monthly or quarterly statements are available during this time period, the most recent statements or documents that disclose the information . . . .

I.R.F.L.P. 401(f)(2) and *(3)* (emphasis added).

Aside from the mandatory disclosure required by the Rules, Amy served discovery requests on Josh. Regrettably, other than a few pages of documents attached **[***5]** to an affidavit filed by Amy's counsel, the record contains no responses from Josh to Amy's request for production.[3] From what we can glean from the record available, Amy apparently requested that Josh produce "all physical evidence relating to [his] retirement plans." Josh's answer conveyed that he produced documents related to his retirement accounts in response to the discovery request and previously via mandatory disclosures. Whatever documents Josh produced were not made part of the record, but it appears they were deficient, given that Amy's counsel sent a meet and confer letter to Josh's counsel on June 21. The letter stated that Josh's response failed to include documents for these accounts and time periods:

> a. E-Trade Securities Individual[4] - September 29, 2017 through and including October 31, 2018.
> b. E-Trade Securities — Individual — April 1, 2019 through current.
> c. E-Trade Securities — ROTH IRA — September 29, 2017 through and including September 30, 2018.
> d. McMillen Jacobs Associates, Inc., 401K — September 29, 2017 through and including September 30, 2018.
> e. T-O Engineers 401K — September 29, 2017 through and including September 30, 2018.
>
> f. JUB 401K — No documents produced. **[***6]**

A subsequent email from Josh's counsel explained that some documents were produced in response; however, they are not in the record. On appeal, Amy contends "the discovery supplement was still deficient in relation to [the request for documents related to Josh's retirement plans or investment account]. Josh had failed to produce many of the documents requested in Amy's counsel's June 21st letter."

As required by the magistrate court's scheduling order, Amy filed her pretrial memorandum seven days before the pretrial conference. Josh did not file his pretrial memorandum until nearly six hours after the pretrial conference. In Amy's memorandum, she explained that she was seeking an interest in Josh's retirement accounts:

> The parties disagree on the character of certain assets as to whether such asset is community

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[3] Josh's answers to Amy's interrogatories are included as an exhibit in the record.

[4] Josh had two Capital One accounts. During these proceedings, E-Trade bought out Capital One, resulting in a name change of each account. As mentioned above, the accounts are referred to as the Capital One/E-Trade Roth IRA and the Capital One/E-Trade Individual Account. However, the lower courts continued to refer to the accounts together as the "Capital One Accounts."

property or separate property. The respondent has several investment and retirement accounts. The respondent has moved significant amounts of money **[**1095]** **[*358]** around between bank accounts, retirement accounts, and investment accounts during the marriage. The source of the transferred funds is not known, which thereby calls into question the character of the asset as to whether it is community **[***7]** or separate property. . . . .

The petitioner asserts that funds in the parties' joint bank accounts, retirement accounts, and investment accounts were comingled as explained above. The respondent appears to claim that the investment accounts and retirement accounts are his separate property. The respondent has the burden of proof to show that the retirement accounts and investment accounts are his separate property. In *Batra v. Batra, 135 Idaho 388, 395, 17 P.3d 889 (Ct. App. 2001)*, the Idaho Court of Appeals cited the law on commingling as follows:

> ***HN2***[↑] Where the parties have commingled their separate and community funds in a bank account, and treat them as one, it all becomes community property. *Gapsch v. Gapsch, 76 Idaho 44, 277 P.2d 278 (1954)*. The commingling doctrine is a special application of the general presumption that all property acquired during the marriage is community property. *Houska v. Houska, 95 Idaho 568, 512 P.2d 1317 (1973)*. The party who asserts that the property is separate has the burden of persuasion, and must prove the property is separate with reasonable certainty and particularity.[5]

Attached to Amy's pretrial memorandum was a property and debt schedule that confirmed that she was seeking a community property interest in all of Josh's retirement accounts. At first, Amy only sought a $22,907 equalization payment; however, the property **[***8]** and debt schedule admitted as an exhibit at trial increased that amount to $53,915.94. Josh's late-filed pretrial memorandum did not address Amy's commingling claims, nor did it attempt to trace his separate property, or include a property and debt schedule.

The pretrial conference was held as scheduled. Amy and her counsel appeared, while neither Josh nor his trial counsel appeared. As a result, the conflicting claims over the accounts listed in the meet and confer letter were not discussed and the conference was of little utility. On the eve of trial, September 9, 2019, the magistrate court held another pretrial conference hearing via telephone at Josh's counsel's request. Both counsel participated. Josh asked for a continuance based on his concern that Amy submitted a property and debt schedule claiming a "$61,000 equalization payment" that was never mentioned during the mandatory disclosures or during the informal discovery requests. Amy responded that she had no information on Josh's retirement accounts during discovery; thus, she could not provide detailed schedules about her claims. But Amy suggested her pretrial memorandum put Josh on notice of her position (as set forth above) **[***9]** that Josh had commingled bank accounts, retirement accounts, and investment accounts, placing the burden on Josh to prove each was separate property. Amy claimed Josh was trying to provide proof at the last minute by disclosing many items as exhibits that had not been previously disclosed in discovery.

The magistrate court declined to continue the trial, explaining:

> I'm inclined to go forward with trial tomorrow. I find that [Josh] has been put on notice. It would strike me as though he may be in a different position if the surprise was that there was a separate property claim. But, nonetheless, it also sounds like there's [sic] opportunities — the pretrial conference is really an opportunity to try to vet this stuff out, and it wasn't utilized as such.

As mentioned above, Josh's mandatory disclosures are not in the record and, as noted, **[**1096]** **[*359]** the discovery requests and responses in the record are incomplete. That said, the portion of the discovery responses included in the record show that Amy requested documents related to Josh's retirement accounts during the discovery period, even if she failed to affirmatively state her intention to pursue a community property claim at that time.

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[5] On appeal, Josh claims "[f]ive days prior to trial" Amy disclosed she would seek a community property interest in Josh's retirement accounts, also terming it an "eve-of-trial revelation." In truth, Amy alleged in her pretrial memorandum filed on August 15, seven days before the pretrial conference, that Josh "moved significant amounts of money around between bank accounts, retirement accounts, and investment accounts during marriage," challenging the character of the assets more than two weeks before trial. It was Josh who then waited until the eve of trial to object to Amy's claims.

During **[***10]** trial, the magistrate court issued an order limiting the admissible evidence at trial to documents timely disclosed during discovery. The court also prohibited Josh from testifying on matters relating to items requested in discovery by Amy, which were not produced by Josh. The court explained:

> [Josh], it's your burden to make a separate property claim. In this situation, you're trying to make a separate property claim, but yet you failed to provide the information that was requested to support your separate property claim in discovery.
>
> Therefore, while I would allow [Josh] to testify extremely broadly about such matters, we're getting to a very specific — we're trying to basically circumvent what I see is your failure to disclose and remedy it through [Josh's] testimony, because we're getting very specific on certain dates and dollar amounts and times and where things came from.
>
> So I'm going to exclude the testimony with regards to the questions now, the two that you've asked, of where the specific documents supporting those deposits — or where those deposits came from.

At trial, Amy testified that she "was never allowed to have knowledge about what was going on with [the parties'] finances" **[***11]** during the marriage, and that she was unaware Josh had moved money from their joint checking account to his retirement accounts. Amy testified that when she asked Josh for bank statements in discovery, he replied "[t]he account was closed and he didn't have access to them." Amy obtained the bank statements herself and testified that Josh had made withdrawals from the joint checking account which went to the Capital One retirement accounts. She also said the earliest statement received from Josh in discovery was from January 2018. Amy denied knowing how much money was in the accounts before marriage.

Josh admitted he deposited money from his Capital One accounts into the joint checking account, and deposited money from the joint checking account into his Capital One accounts. He explained that he moved the extra money from the joint checking account into his Capital One accounts to earn a better interest rate. Josh testified that during the marriage, the difference between the money he deposited and withdrew between the joint checking account and his retirement account was "$100 or $150."

The magistrate court issued an oral ruling a short time after trial. Relative to the Capital One **[***12]** accounts (also known as E-Trade IRA and Individual accounts), the court held:

> [T]here was no evidence presented as to the balance of either Capital One account at the date of marriage, which is 9-29-2017. The earliest balance we have is January 2018, which was post marriage. . . . The respondent must prove his separate property claim with reasonable certainty and particularity. The respondent has not met his burden, as he did not establish the balance of the accounts prior to marriage.
>
> Alternatively, respondent commingled these funds with what became their joint checking account . . . . Respondent withdrew money from the Capital One accounts and deposited the money into the joint account for joint expenses.
>
> But what's more relevant to the commingling issue is that he took money from the community US Bank account and deposited it into the Capital One accounts. He testified he did this when they had extra money in the US Bank account, and stated he put the money in what he called a savings until he needed it. This comingled the accounts.
>
> Respondent has not met his burden of proving his separate property claim through accounting evidence or direct tracing. Therefore, the Capital One accounts **[***13]** is [sic] community property and shall be divided 50/50.

As for the T-O Engineers 401(k), the magistrate court determined that it had a zero **[**1097]** **[*360]** balance as of the date of marriage, and as of May 23, 2019, the balance was $21,867.35. The court found that any positive balance on the account occurred during marriage, as such, it was community property that would be divided 50/50.

The magistrate court entered a judgment of divorce awarding Amy a one-half interest in the E-Trade IRA, the E-Trade Individual account, and the T-O 401(k). Josh apparently filed a motion for reconsideration, a motion for amendment of findings of court, motion for new trial and/or amendment of judgment; however, none of these documents are in the record. On December 11, 2019, the magistrate court denied Josh's motions. The magistrate court affirmed its prior rulings, and held that the E-Trade IRA, the E-Trade Individual account, and the T-O 401(k) were community property reiterating that Josh failed to meet his burden of establishing them as separate property. The magistrate court determined that Josh commingled the accounts and he failed to sufficiently trace his personal property with reasonable certainty and particularity. **[***14]** As for Josh's claim that he was unaware of Amy's assertion

that Josh's separate property was community property, the court explained:

> On September 9, 2019, the parties requested a status conference. Both parties appeared by phone. Josh requested a continuance of the September 10, 2019, trial date. Josh stated that Amy had failed to timely disclose her community property interest in Josh's retirement funds. Amy responded by referencing Josh's failure to disclose relevant retirement account information during discovery. She further stated that she disclosed her interest in the retirement accounts within her August 15th Pretrial Memorandum. Had Josh raised his pre-trial disclosure concerns at the Pre-Trial conference, the [c]ourt could have addressed the issues weeks before trial. Amy objected to a continuance on the eve of trial and the [c]ourt denied Josh's request. The [c]ourt reasoned that Josh received notice of Amy's community property claim.

Josh filed a timely notice of appeal to the district court. Except for Amy supplementing the record before us with her Respondent's Brief, there are no filings from the proceedings that took place before the district court in the record. The **[***15]** district court entered its opinion on appeal affirming the magistrate court. The district court summarized Josh's arguments as:

> 1. The magistrate erred by forcing [Josh] to go to trial, excluding his exhibits which were not disclosed within the court's scheduling order, and restricting his testimony as a discovery sanction.
> 2. The magistrate erred by classifying [Josh's] Capital One Roth IRA and Individual Retirement [sic] account, as well as his T-O Engineers 401(k), as community property.

The district court first determined that the magistrate court did not abuse its discretion in imposing sanctions against Josh, limiting the admissibility of several documents and Josh's testimony about those documents because Josh violated the scheduling order. The district court recognized that Amy had requested information on Josh's retirement account statements from the date of the marriage and had not received a response by the time she filed her mandatory disclosures. Amy also made Josh aware in her pretrial memorandum that she believed Josh had commingled the accounts. The district court found that Josh had an adequate opportunity to address these allegations during the pretrial conference, but **[***16]** he did not attend or file his own timely pretrial memorandum.

Next, the district court addressed the magistrate court's classification of Josh's retirement accounts as community property. The district court found that the magistrate court correctly applied the community property presumption to Josh's Capital One accounts given Josh's testimony he had moved money between the joint bank account and the retirement accounts, as well as his failure to provide the account balance as of the date of marriage. The district court reasoned that Josh's attempt to shift the burden of proving which funds were his separate property among commingled accounts to Amy conflicted with Idaho law and that Josh was required to prove "with reasonable certainty and particularity" which portion of the funds **[**1098]** **[*361]** remained his separate property. The district court held absent evidence of the Capital One account balance before marriage and a full accounting of the account activity during the marriage, Josh's separate property could not be readily identified.

The district court also affirmed the magistrate court's characterization of the T-O Engineers 401(k) as community property because the account had a zero balance **[***17]** at the time of marriage, and the account value increased during the marriage, even though Josh had not worked with T-O Engineers during the marriage and he testified that only his employer could contribute to the account. Although Amy was the prevailing party, the district court denied Amy's request for attorney fees after concluding that she provided no authority or argument to support her request. Josh filed a notice of appeal. Amy cross-appealed the district court's denial of her attorney fees.

II. ISSUES ON APPEAL

1. Did the district court err in holding the magistrate court did not abuse its discretion imposing sanctions against Josh at trial?

2. Did the district court err in affirming the magistrate court's application of the community property presumption to the retirement accounts at issue?

3. Did the district court err in affirming the magistrate court's determination that Josh failed to prove that the three retirement accounts at issue were his separate property?

4. Did the district court abuse its discretion in declining to award Amy attorney fees below?

5. Is Amy entitled to attorney fees on appeal?

III. Standard of Review

HN3[] When this Court reviews the decision of a district court **[***18]** sitting in its capacity as an appellate court, the standard of review is as follows:

> The Supreme Court reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure.
>
> Thus, this Court does not review the decision of the magistrate court. Rather, we are procedurally bound to affirm or reverse the decisions of the district court.

Med. Recovery Servs., LLC v. Eddins, 169 Idaho 236, 494 P.3d 784, 789-90 (2021) (quoting *Medrain v. Lee, 166 Idaho 604, 607, 462 P.3d 132, 135 (2020)*).

HN4[] "The characterization of property as either community or separate presents a mixed question of law and fact." *Papin v. Papin, 166 Idaho 9, 24, 454 P.3d 1092, 1107 (2019)* (quoting *Kawamura v. Kawamura, 159 Idaho 1, 3, 355 P.3d 630, 632 (2015)*). "Although the manner and method of acquisition of property are questions of fact for the trial court, the characterization of an asset in light of the facts found is a question of law over which we exercise free review." *Id.*

IV. Analysis

A. The district court did not err in affirming the discovery sanctions the magistrate court imposed against Josh.

This appeal, and the issues **[***19]** before us, are largely grounded in resolving this initial question: Did the magistrate court abuse its discretion in the way it handled Josh's attempted use of untimely produced evidence at trial? We hold that the district court did not err in affirming the magistrate court's exercise of discretion

At trial, the magistrate court restricted admissible evidence to only those documents that were properly disclosed during discovery. The magistrate court found Josh maintained exclusive access to his retirement account information and failed to disclose that data to Amy within the established discovery deadlines. To avoid prejudice to Amy, the court required Josh to establish his separate property interest with only the documents **[**1099]** **[*362]** that had been properly disclosed in a timely manner.

On intermediate appeal, the district court found this limitation, which it characterized as a discovery sanction, was not an abuse of discretion because the magistrate court (1) perceived its ability to limit testimony and exhibits as discretionary and (2) acted within the outer boundaries of its discretion when it elected to sanction Josh. Citing *Idaho Rules of Civil Procedure 16(e)(1)* and *37(b)(2)(A)(ii)*, the district court affirmed the magistrate court's decision **[***20]** to prohibit specific testimony about dates and dollar amounts supporting any separate property claim by Josh where documents had not been provided in discovery. *Rule 16(e)(1)* states: "The court may sanction any party or attorney if a party or attorney: (A) fails to obey a scheduling or pretrial order; (B) fails to appear at a scheduling or pretrial conference; (C) is substantially unprepared to participate in a scheduling or pretrial conference; or (D) fails to participate in good faith." *I.R.C.P. 16(e)(1)*. HN5[] In addition, *Rule 37* permits a court to sanction a party by "prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence." *I.R.C.P. 37(b)(2)(A)(ii)*. We note that the magistrate court's scheduling order also specifically referenced the rules governing family law proceedings relative to potential sanctions for violating the mandatory disclosure requirements or discovery rules. *See I.R.F.L.P. 417* (2022).

HN6[] "In Idaho, two general rules guide a trial court in imposing sanctions. The trial court must [1] balance the equities by comparing the culpability of the disobedient party with the resulting prejudice to the innocent party and [2] consider whether lesser sanctions would be **[***21]** effective." *Noble v. Ada Cnty. Elections Bd., 135 Idaho 495, 499-500, 20 P.3d 679, 683-84 (2000)* (internal quotation and citation omitted). Josh argues that both parties failed to meet discovery deadlines, and when balancing the equities of the two violations, the magistrate court abused its discretion by failing to acknowledge Amy's noncompliance. Josh extends this argument to the district court, arguing that the district court erred in affirming that abuse.

Josh maintains Amy inadequately disclosed that she would be claiming a $50,000 equalization payment to reflect community interest in the accounts owned by Josh before marriage. He maintains that his alleged discovery violations—failing to establish account balances as of the date of marriage and failing to provide documents of his accounts—were both harmless and substantially justified given Amy's failure to make any claim to the accounts Josh owned before marriage during discovery. Josh maintains that he had no reason to believe there would be any dispute over these accounts and so to produce documents showing the amount of funds would have been irrelevant and unnecessary.

Josh's position fails to account for two things. First, his argument is defeated by his failure to include Amy's discovery requests or his **[***22]** or her responses in the record on appeal; thus, the full extent of Amy's requests for his retirement account information during discovery is unknown. We also have no way to determine the extent to which Josh provided adequate answers or disclosures to Amy in this case. Instead, we have only the meet and confer letter and later statements by Amy's counsel. We also have the magistrate court's findings that Josh failed to provide adequate information about his private accounts on time. As to Amy's supposed failure to make her claims to Josh's separate property known, Amy claims that because Josh did not produce many of the documents relating to his retirement accounts until July 15, 2019, she did not have the necessary information to form a position about the retirement accounts when she responded to Josh's discovery. Further, as the magistrate court found, Josh handled the parties' finances during marriage. Thus, Amy only discovered that certain money was moved around by Josh after receiving his discovery responses or obtaining the bank records herself. ***HN7***[⬆] Without an adequate record on appeal to support the appellant's claims, we will not presume error. Rather, "the missing portions of **[***23]** that record are to be presumed to support the action of the trial court." *Groveland Water & Sewer, Dist. v. City of Blackfoot, 169 Idaho 936, 505 P.3d 722, 728 (2022)* (citations omitted).

[1100] [*363]** Second, the magistrate court's scheduling order required Josh to provide: "*all* monthly or periodic bank, checking, savings, brokerage, and security account statements," as well as "*all* monthly or periodic statements and documents showing the value of all pension, retirement, stock option, and annuity balances, including Individual Retirement Accounts, 401(k) accounts, and all other retirement and employee benefits and accounts in which any party has or had an interest for the period commencing 6 months prior to the filing of the petition. . . ." (Quoting *I.R.F.L.P. 401(f)(2)* and *(3)* (emphasis added). "All" means all. Thus, Josh's subjective belief about Amy's failures in discovery or in mandatory disclosures does nothing to justify his own failure to adequately respond to discovery requests or mandatory disclosures. Put another way, Josh cannot unilaterally determine what he believes to be relevant and only respond to discovery in a limited way, particularly considering the sweeping mandate of the magistrate court's scheduling order that *all* documents be produced *automatically*.

As recognized by the district court, **[***24]** Josh was in the best position to know whether *he* had a separate property claim. This is especially true given Amy's testimony that Josh controlled nearly all the family finances during marriage and her allegation that Josh regularly moved money between the accounts without giving Amy access to the joint checking account until months after their marriage.

Josh tries to shift his evidentiary burdens to Amy, suggesting that the magistrate court should have sanctioned Amy for failing to timely disclose she would be seeking an interest in his retirement accounts. Josh also states his attorney invited Amy's attorney to reach out if anything more was needed after the meet and confer letter. Amy's attorney did not reach out, leaving the impression that Amy had received enough to satisfy whatever inquiries she was making in discovery. This argument once again misplaces the burden of production that remained on Josh throughout this case. Amy was not required to continue to request Josh comply with her discovery requests when she was receiving insufficient responses, nor was she obligated to confirm she would be seeking an interest in Josh's accounts when he had not provided her adequate information **[***25]** to state such a claim.

This Court has regularly upheld a trial court's exclusion of evidence as a sanction for late or nondisclosure. ***HN8***[⬆] In *Easterling v. Kendall*, we explained that a "district court has authority to sanction parties for non-compliance with scheduling orders, including prohibiting parties from introducing untimely disclosed evidence." *159 Idaho 902, 910, 367 P.3d 1214 (2016)*. Likewise, in *McKim v. Horner*, we upheld a district court's exclusion of a lay witness who was not timely disclosed. *143 Idaho 568, 571, 149 P.3d 843 (2006)*. Unfortunately, the conduct by Josh's counsel in preparation for trial is an

occurrence that we witness all-too-often in the family law arena. For whatever reason, these types of lawsuits are often treated in a less formal way, with one or both parties failing to heed the requirements of scheduling orders and the rules governing such proceedings. This case is a poster child for that approach. Josh has now appealed twice seeking to assign blame on his opponent — Amy — or upon the court when the failure rests with him. It was his failure to comply with the scheduling order, his failure to show up at the pretrial conference when his presence had been mandated (in bold) by the court's order, his failure to comply with Amy's discovery **[***26]** requests, and his failure to timely produce documents to support his separate property claim. All of this led to the magistrate court's discretionary decision to limit the evidence he could produce to support his separate property claims. The magistrate court's decision limiting Josh's presentation of evidence is well supported on this record. None of the four *Lunneborg* factors were breached here. *See Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)*. We affirm the district court.

B. The district court did not err in affirming the magistrate court's application of the community property presumption to the E-Trade IRA and E-Trade Individual accounts after Amy alleged the accounts were commingled.

Josh argues that the district court and magistrate court erred in treating the E-Trade **[**1101]** **[*364]** IRA and the E-Trade Individual accounts jointly rather than evaluating each on its own individual evidence and merits. That said, Josh submits the same law applies to each account and the lower courts erred by applying a community property presumption to property owned prior to marriage. Amy responds that Josh is trying to shift the burden of proving his separate property claims to Amy and asking this Court to re-weigh the magistrate court's factual findings.

We begin **[***27]** our analysis of these principles by noting that Josh's argument is built upon a foundation that presumes the magistrate court abused its discretion in limiting his presentation of evidence. Since we have affirmed the district court's conclusion on that point, our discussion here will focus on the evidence the magistrate court had before it when making its decisions.

HN9[] "The characterization of property as either community or separate presents a mixed question of law and fact." *Papin, 166 Idaho at 24, 454 P.3d at 1107* (quoting *Kawamura, 159 Idaho at 3, 355 P.3d at 632*). "Although the manner and method of acquisition of property are questions of fact for the trial court, the characterization of an asset in light of the facts found is a question of law over which we exercise free review." *Id.* "Whether a specific piece of property is characterized as community or separate property depends on when it was acquired, and the source of the funds used to purchase it. The character of property vests at the time the property is acquired." *Id.* (quoting *Kawamura, 159 Idaho at 4, 355 P.3d at 633*).

HN10[] *Idaho Code section 32-903* states that all property owned by a spouse before marriage remains that spouse's separate property. That said, all other property acquired after marriage, including income on separate property, is community property. *I.C. § 32-906*. In Idaho, **[***28]** "income derived during a period of marriage from the efforts, labor[,] and industry of the parties constitutes community assets." *Hiatt v. Hiatt, 94 Idaho 367, 368, 487 P.2d 1121, 1122 (1971)*. Because all property acquired during marriage is presumed to be community property, a party wishing to show that assets acquired during marriage are separate property bears the burden of proving with reasonable certainty and particularity that the property is separate. *Barton v. Barton, 132 Idaho 394, 396, 973 P.2d 746, 748 (1999)*.

HN11[] Alternatively, "[s]eparate property may be converted to community property through commingling." *Robirds v. Robirds, 169 Idaho 596, 609, 499 P.3d 431, 444 (2021)*. Even so, "[c]ommingling of separate and community property does not convert the separate property to community property where the separate property can be identified through either direct tracing or accounting." *Id.* (quoting *Papin v. Papin, 166 Idaho 9, 25, 454 P.3d 1092, 1108 (2019)*). "When separate and community property are commingled so that tracing is impossible, it is presumed to be community property, and the burden is on the person asserting the separate character of the property." *Id. at 609-10, 499 P.3d at 444-45*.

Josh relies on an Idaho Court of Appeals case, *Josephson v. Josephson, 115 Idaho 1142, 1145, 772 P.2d 1236, 1239 (Ct. App. 1989)*, *abrogated on other grounds by Bell v. Bell, 122 Idaho 520, 835 P.2d 1331 (Ct. App. 1992)*, to argue that "[w]here financial accounts are at issue, a party can establish that community expenditures did not change the character of an asset by showing that there is no possible **[***29]** way that community property funded the account." In

Josephson, the Court of Appeals recognized:

> ***HN12***[↑] Where the parties have commingled their separate and community funds in a bank account, and treat them as one fund, it all becomes community property. *Gapsch v. Gapsch, 76 Idaho 44, 277 P.2d 278 (1954)*. The commingling doctrine is a special application of the general presumption that all property acquired during the marriage is community property. *Houska v. Houska, 95 Idaho 568, 512 P.2d 1317 (1973)*. The party who asserts that the property is separate has the burden of persuasion, and must prove the property is separate with reasonable certainty and particularity. *Id.* This may be accomplished through evidence of tracing or accounting. *See Evans v. Evans, 92 Idaho 911, 453 P.2d 560 (1969)*.

[1102]** **[*365]** *Id.* The Court of Appeals cited *Houska* and *Evans* for the principle that if community expenditures during the marriage equal or exceed community income, any added purchases or acquisitions exceeding the community income necessarily are separate property. *Id.* While these are valid points of law, they do not support Josh's position based on the record before us.

Josh argues that by applying this accounting principle, it is easy to determine that the funds in the E-Trade IRA and E-Trade Individual account at the time of the divorce could not have come from community **[***30]** property sources. Josh claims during the marriage, the community earned about $60,000/year and it was undisputed that throughout the marriage community expenses exceeded community income. Amy disputes Josh's calculation, alleging that Josh testified he was making about $6,000 a month *after taxes*, which "over two years would likely have been well over $200,000."[6]

Relying in part on this Court's decision in *Maslen v. Maslen*, the district court rejected Josh's argument, pointing out that "[r]etirement benefits, to the extent earned during marriage, are deemed community property." ***HN13***[↑] In *Maslen*, this Court recognized:

> Retirement benefits, to the extent earned during marriage, are deemed community property. *Griggs v. Griggs, 107 Idaho 123, 686 P.2d 68 (1984)*; *Shill v. Shill, 100 Idaho 433, 599 P.2d 1004 (1979)*; *Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975)*. Generally, community property will be divided in a substantially equal manner unless there are compelling reasons which justify otherwise. *I.C. § 32-712(1)*; *Rice v. Rice, 103 Idaho 85, 645 P.2d 319 (1982)*. Therefore, absent compelling reasons which justify otherwise, it is settled beyond dispute that there shall be a substantially equal division of pension benefits which were acquired during the time of the marriage.

121 Idaho 85, 88, 822 P.2d 982, 985 (1991).

Josh maintains the district court erred because neither the E-Trade IRA nor the E-Trade Individual account were "retirement benefits **[***31]** earned during the marriage." We agree. However, the district court's error in relying on *Maslen* and the community property presumption does not ultimately provide Josh the relief he seeks, given Josh's admission that the E-Trade accounts were commingled with community funds. Once the commingling of these funds was established, the burden was on Josh to prove, either through direct tracing or accounting that the funds in those accounts were his separate property. *Robirds, 169 Idaho 596, 609, 499 P.3d 431, 444*

At trial, the magistrate court found "there was no evidence presented as to the balance of either Capital One [E-Trade] account at the date of marriage, which is 9-29-2017. The earliest balance we have is January 2018, which is post marriage." Josh argues that he testified directly to this point, and that his testimony was the only evidence in the record about this issue. The district court affirmed the magistrate's conclusion that Josh's testimony, standing alone, without documentary proof of the account's balance on the date of marriage, was insufficient to overcome the community property presumption. This is particularly the case where Josh admitted to commingling community funds from the U.S. Bank account with both Capital **[***32]** One accounts.

Amy put Josh on notice that she might claim an interest in his retirement accounts as community property. The record before the Court does not include the entirety of Amy or Josh's discovery requests and responses; however, Amy asked Josh for documents related to his retirement accounts on at least two occasions in addition to the mandatory disclosures he had to make under the Rules. Amy then affirmatively stated her intent to pursue a community interest in the retirement accounts in her pretrial memorandum based on the

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[6] It is unclear how Amy arrived at this calculation, other than to note that Amy calculated Josh's income before taxes. Again, there is little in the record to support Josh's claims with the certainty required to prove a separate property claim.

information then-available to her, through her property and debt schedule.

[1103]** **[*366]** HN14[↑] A party asserting a separate property interest bears the burden of proving that interest with reasonable certainty and particularity. Houska, 95 Idaho at 568, 512 P.2d at 1317. Thus, even if Josh's retirement accounts were his separate property and untouched during the marriage, he had the burden to submit evidence (through tracing or accounting) to prove as much. Based on the magistrate court's ruling that we affirm today, Josh's testimony that he owned the retirement accounts before marriage could not prove his assertion with "reasonable certainty and particularity." As found by the magistrate court, Josh needed to produce **[***33]** documentation establishing how much, if anything, was in the accounts at the time of marriage to equitably divide the community property from separate property. He would also have to account for how his commingling affected the account balances, because, as stated, when commingled funds cannot adequately be traced, all such funds are community funds. To adopt Josh's approach would allow a spouse to subjectively claim a piece of property as separate without requiring any evidence other than testimony to support the character of the property. We have clearly held that more is required in these commingling cases. *See* Robirds, 169 Idaho at 609-10, 499 P.3d at 444-45 HN15[↑] ("When separate and community property are commingled so that tracing is impossible, it is presumed to be community property, and the burden is on the person asserting the separate character of the property."). The district court did not err in affirming the magistrate court's application of the community property presumption given the facts in this case.

C. The district court did not err in affirming the magistrate court's determination that the Capital One accounts were community property.

Having concluded the lower courts appropriately applied the community property presumption **[***34]** to Josh's retirement accounts, we next consider whether Josh proved with reasonable certainty and particularity that the accounts were his separate property. *See* Houska, 95 Idaho at 568, 512 P.2d at 1317. Although Josh's ability to present documents and testimony was limited by the magistrate court's sanction, Josh contends several documents admitted by Amy could still prove that the retirement accounts were his separate property.

As we have noted, separate property may be converted to community property through commingling. HN16[↑] "The commingling doctrine is a special application of the general presumption that all property acquired during marriage is community property." Houska, 95 Idaho at 570, 512 P.2d at 1319 (citing Stahl v. Stahl, 91 Idaho 794, 797, 430 P.2d 685, 687 (1967)). That said, "[c]ommingling of separate and community property does not convert the separate property to community property where the separate property can be identified through either direct tracing or accounting." Papin, 166 Idaho at 25, 454 P.3d at 1108 (quoting Baruch, 154 Idaho at 741, 302 P.3d at 366). However, "[w]hen separate and community property are commingled so that tracing is impossible, it is presumed to be community property, and the burden is on the person asserting the separate character of the property" to prove otherwise. *Id.* (quoting Martsch v. Martsch, 103 Idaho 142, 146, 645 P.2d 882, 886 (1982)). That party may prove separate property through accounting evidence or direct **[***35]** tracing. Houska, 95 Idaho at 570, 512 P.2d at 1319.

At several points in Josh's appellate brief he attempts to trace the transfers between the community U.S. Bank account and his allegedly separate retirement accounts. Amy argues that this Court should not consider Josh's belated tracing efforts because they were not performed below. Indeed, the record fails to establish that Josh provided this tracing analysis before the magistrate court. Josh's pretrial memorandum did not address Amy's commingling claims, it did not attempt to trace his separate property, nor did it include a property and debt schedule. In denying Josh's motion to reconsider, the magistrate court determined that Josh's tracing efforts were undermined by his failure to establish a beginning balance of the E-Trade accounts:

> Josh exclusively controlled the E-Trade accounts, yet he neglected to disclose or **[**1104]** **[*367]** admit a single document establishing the balance of his accounts at the start of marriage. Josh bore the burden of proving his separate interest, yet he failed to provide the information necessary for the [c]ourt to determine if there was any balance in these accounts at the time of marriage. Without a starting value for the accounts, the [c]ourt used its discretion **[***36]** to divide community assets according to an equal percentage.
>
> We will review this analysis and Josh's claims related to each account in turn below.

1. E-Trade IRA

Josh argues the magistrate court abused its discretion and committed reversible error when it refused to consider admitted evidence establishing the amounts deposited in his E-Trade IRA account prior to marriage. Josh contends that the district court erred in affirming that decision with its holding that "[a]bsent evidence of the Capital One account balance prior to marriage and a full accounting of the account activity during the marriage, the Appellant's separate property cannot be readily identified."

Josh cites Exhibit 13 (E-Trade IRA statements), admitted by Amy at trial, to establish a beginning balance for the E-Trade IRA account:

> Admitted Exhibit 13 shows that prior to the marriage, Josh owned the E-Trade IRA. The 2017 Statement shows a year-end balance of $15,497.08. The 2017 year-end statement lists every single change in balance, deposit and withdrawal relating to the account. The only balance changes that occurred between the date of marriage and January 1, 2018 was a $13.02 dividend on 11/13/2017 and a $18.04 dividend **[***37]** on 11/16/2017.

Josh argues this statement is substantial and competent evidence that his separate property funded the E-Trade IRA prior to marriage.

Amy asks this Court to reject Josh's effort to indirectly establish the value of the IRA account at the date of marriage because he did not make this argument to the lower court. Amy also cites several transactions that Josh omitted from his recitation: "There were sales of stock on October 18, 2017, and December 7, 2017. There were also purchases of stock on October 18, 2017 (twice) and December 7, 2017." Amy alleges that these sales and purchases of stock further complicate the issue of identifying a value on the date of marriage.

Josh did not include his motion to reconsider or memorandum in support in the record. At any rate, in denying Josh's motion to reconsider, the magistrate court rejected Josh's belated attempts to trace the accounts with reasonable certainty and particularity. Indeed, just because Exhibit 13 was admitted at trial does not mean that the magistrate court was obligated to trace the accounts on Josh's behalf. The magistrate court determined:

> A motion to reconsider should not be used as a tool to present testimony that **[***38]** one party simply neglected to disclose or elicit during trial. From a public policy standpoint, such a practice could allow parties to withhold key information throughout the entire discovery and trial process, yet still present it to the court as evidence.

Ultimately, the magistrate court determined that Josh's testimony at trial did not clearly separate the commingled funds. When asked if he had reimbursed the community funds with his personal retirement assets, Josh responded that he had gotten "within $100 or $150." The magistrate court found this degree of specificity was insufficient when considering the multiple deposits and withdrawals between the accounts.

On intermediate appeal, the district court agreed with the magistrate court and found Josh was attempting to shift the burden to Amy to prove which funds were his separate property among commingled accounts. The district court determined that Josh had the burden of proof on that point; he must prove "with reasonable certainty and particularity" which portion of the funds in his accounts remained his separate property, and he failed to do so. Without evidence of the Capital One account balances before marriage and an accounting **[***39]** of the account activity during marriage, Josh's separate property cannot be **[**1105]** **[*368]** readily identified. Josh's effort to establish the beginning account balance on appeal is untimely and the district court decision on the E-Trade IRA account is affirmed. *See* *Herr v. Herr, 169 Idaho 400, 405, 496 P.3d 886, 891 (2021)* (holding that appellant's post-trial tracing efforts were too late).

2. E-Trade Individual Account

Josh likewise argues that the magistrate court abused its discretion when it refused to consider substantial and competent evidence that the E-Trade Individual account was funded with separate property. At trial Amy admitted the E-Trade Individual account statements into evidence. The earliest statement showed an account balance of $9,828 as of January 1, 2018. Like the E-Trade IRA account, the magistrate court found Josh's failure to prove the account balance for the E-Trade Individual account as of the date of marriage fatal to his separate property claim.

Josh claims the magistrate court placed too high a burden on him to prove the balance. He argues that there were no community funds that could have been used for the $9,828 deposit as of January 1, 2018, because the only community income the couple had between September 27, 2017, and January **[***40]** 1,

2019, was from Josh's employment with Slayden, which was deposited directly into the joint U.S. Bank account. Amy counters that Josh's claim is unsupported by the record. Because Josh did not provide any information about the beginning balance of the account in discovery, Amy claims there is no way to know whether the account was funded with community or individual funds. Indeed, as Amy points out, the couple received about $7,000 in cash in wedding gifts that Josh allegedly took for himself. Amy also testified that Josh received a $5,000 bonus after marriage when the parties moved to Spokane. Thus, there are other community sources that could have funded the account.

Still, Josh highlights several transfers between the E-Trade Individual account and the U.S. Bank account in an effort to trace his separate property. That said, identifying that at least six transfers occurred between the accounts weakens Josh's argument that there was no commingling and that Amy somehow bore the burden of proving Josh's separate property. During trial, Josh admitted he deposited money from his Capital One accounts into the joint checking account, and deposited money from the joint checking account **[***41]** into his Capital One accounts. He explained that he moved the extra money from the joint checking account into his Capital One accounts to earn a better interest rate. Josh testified that during the marriage, the difference between the money he deposited and withdrew between the joint checking account and his retirement account was "$100 or $150." The magistrate court found that this evidence was insufficient considering the nature of the commingling between the accounts. The district court affirmed and held that Josh's separate property could not be readily identified. We affirm that conclusion.

Josh also claims that a February 2019 deposit of $22,000 coincided with Amy's agreement to reimburse Josh for a $22,000 down payment on their residence that Josh made with his separate property. The magistrate court agreed with Josh in this regard and found that the down payment proceeds were Josh's separate property, entitling him to a reimbursement of $21,657.34 from the sale of the home. The parties were to evenly split the remaining proceeds. Josh argues this award was nullified when the magistrate court subsequently awarded Amy a 50% interest in the E-Trade Individual account where Josh **[***42]** ostensibly had deposited the proceeds from the sale of the house. Amy suggests this argument should not be considered because it was not made to the magistrate court and that Josh did not receive an adverse ruling from the magistrate court. Neither the magistrate court's order denying Josh's motion to reconsider nor the district court's opinion on appeal discusses what happened with the down payment proceeds. Josh did not include his motion to the magistrate court, or his memorandum submitted to the district court with the record on appeal, leaving this Court with no ability to verify whether this argument was made below. ***HN17***[↑] Without an adequate record, this Court presumes the omitted portion supports the lower court's **[**1106]** **[*369]** decision. *See* *Groveland Water & Sewer, Dist. v. City of Blackfoot, 169 Idaho 936, 505 P.3d 722, 728 (2022)* (citations omitted). Josh did not preserve this narrow argument for review. Thus, we affirm the district court's decision on the E-Trade Individual account.

3. T-O Engineers 401(k)

Josh also argues that the magistrate court erred by classifying retirement income received during the marriage for work performed before the marriage as community property. It is unclear what the proper presumption is when property was *earned* prior to marriage but was *acquired* after **[***43]** marriage. ***HN18***[↑] *Idaho Code section 32-903* states that all property owned by a spouse before marriage remains that spouse's separate property. But "[t]here is a rebuttable presumption that all property acquired during marriage—in this case, contributions and increases in the account—is community property." *Maslen v. Maslen, 121 Idaho 85, 90, 822 P.2d 982, 987 (1991)* (citing *I.C. § 32-906*; *Shumway v. Shumway, 106 Idaho 415, 679 P.2d 1133 (1984)*; *Eliasen v. Fitzgerald, 105 Idaho 234, 668 P.2d 110 (1983)*). When the increased value of a retirement account results "from inflation or other market factors," it is considered separate property. *Id.* When "the increase was from 'income' from the separate property investment," it is considered community property. *Id.*

Josh worked for T-O Engineers from 2012 to 2014. Josh and Amy were married on September 29, 2017. At the time of marriage, the T-O 401(k) plan had a balance of $0. On November 10, 2017, $20,293.16 was deposited into the account. Josh failed to explain why T-O Engineers funded the 401(k) nearly three years after his employment with them ended, but he testified that only his employer could contribute to the account. By May 2019, the account balance was $21,867.35. The magistrate court weighed Josh's testimony that he held the account before marriage against the balance of the account at the time of marriage. From the evidence, the court concluded **[***44]** the $21,867.35 increase all

took place during marriage, and before marriage there were zero dollars in the account. The magistrate court found that Josh provided no adequate explanation of where the money came from and concluded, based on the presumption cited above, "any positive balance on this account occurred during the marriage." Thus, the court awarded Amy a 50% community property interest in that amount. The district court affirmed and held the magistrate court did not err by classifying the increased income as community property and dividing it equally.

Although Josh did not work for T-O Engineers during the marriage, he failed to prove with reasonable certainty that the money that went into the account was his separate property and no community funds contributed to the account. The dissent weighs the evidence and testimony from Josh to conclude that such testimony is sufficient to overcome the presumption relied upon by the magistrate court in making its findings. We cannot agree. ***HN19***[⬆] This Court can only consider the record submitted by the parties to determine whether substantial evidence supports the lower court's conclusion. *Papin, 166 Idaho at 24, 454 P.3d at 1107* (quoting *Kawamura, 159 Idaho at 3, 355 P.3d at 632*) (the manner and method of acquisition **[***45]** of property are questions of fact for the trial court). The magistrate court weighed the facts and found against Josh. Without speculating, this Court cannot determine what occurred. The dissent admits as much, noting "we do not know the specifics of why T-O Engineers deposited the funds into the account when it did." Were these funds, deposited some three years after Josh stopped working for T-O Engineers, a form of delayed salary paid during the marriage? If so, they were community property. *Martsch v. Martsch, 103 Idaho 142, 147, 645 P.2d 882, 887 (1982)* ("All salaries are community property[.]"). We simply cannot tell from the record. Ultimately it was Josh's burden to trace the 401(k) amounts with sufficient specificity to remove this issue from speculation. He failed to do that to the trial court's satisfaction and the district court affirmed. We affirm the district court's conclusion that the magistrate did not err by classifying the T-O Engineers 401(k) as community property.

[1107] [*370] D. The district court abused its discretion in denying Amy's request for attorney fees on intermediate appeal.**

Amy cross-appeals from the district court's decision, arguing it erred in denying her request for an award of attorney fees. ***HN20***[⬆] A district court's denial of fees under **[***46]** *Idaho Code section 12-121* will not be overturned absent an abuse of discretion. *Garner v. Povey, 151 Idaho 462, 468, 259 P.3d 608, 614 (2011)* (citing *Chavez v. Barrus, 146 Idaho 212, 225, 192 P.3d 1036, 1049 (2008)*). "As long as the court correctly perceived the issue as one of discretion, acted within the outer boundaries of its discretion, acted consistently with the legal standards applicable to the specific choices available to it, and reached its decision by the exercise of reason, we will not disturb the decision on appeal." *Allen v. Campbell, 169 Idaho 125, 129, 492 P.3d 1084, 1088 (2021)* (quoting *Wadsworth Reese, PLLC v. Siddoway & Co., PC, 165 Idaho 364, 369, 445 P.3d 1090, 1095 (2019)*).

The district court denied Amy's request for attorney fees because Amy "failed to provide any authority or argument to support her request for attorney fees." However, in her Respondent's Brief filed before the district court, Amy stated the following in support of her request for attorney fees:

> Amy requests an award of attorney's fees on appeal pursuant to *Idaho Code § 12-121* and IRFLP 908. Amy was required to employ counsel to represent her in opposing this appeal. Amy requests that she recover from Josh the attorney fees incurred by Amy in defending against this appeal.
>
> Amy requests her attorney's fees pursuant to *Idaho Code section § 12-121* and IRFLP 908 on the grounds that this appeal is frivolous, unreasonable and without foundation. Josh is simply asking on appeal to have this Appellate Court re-weigh evidence and reach a different conclusion than the **[***47]** trial court. Josh has failed to identify any legitimate legal grounds for reversing the trial court's decision.
>
> The trial court errors alleged by Josh are, in actuality, directly attributable to one or more of the following: (1) Josh failed to disclose the documents necessary to support his separate property claims; (2) Josh seemingly [sic] failed to timely review documents filed in the case, specifically Amy's Pretrial Memorandum; (3) Josh failed to attend the pretrial; and (4) Josh failed to adequately support his case at trial in light of the arguments being made in this appeal.
>
> Josh's decisions were consciously and voluntarily made. As explained below, Josh's attempt to present new arguments on appeal and to repair his deficiencies in discovery and at trial are frivolous,

> unreasonable and without foundation. Amy should recover from Josh her attorney's fees incurred in opposing this appeal.
>
> Amy also requests her attorney's fees pursuant to Idaho Code § 12-123 for sanctions on the grounds that Josh's conduct in filing this appeal is frivolous for the same reasons described above and below. Amy should recover from Josh her attorney's fees incurred in opposing this appeal.

Amy contends this is sufficient **[***48]** argument and authority to support an award of attorney fees. Amy cited four specific reasons why Josh's conduct warranted an award of attorney fees, many of which were mentioned by the district court in affirming the magistrate court's decision and rejecting Josh's arguments. Josh claims that Amy's bare assertions do not satisfy the requirement that a request for fees be supported by analysis or authority explaining why Josh's appeal is frivolous. In support, Josh suggests that this distinction is made clear in Thomas v. Madsen, 142 Idaho 635, 132 P.3d 392 (2006):

> In Madsen, the Supreme Court conducted an analysis regarding whether the district court erred in finding that the arguments were "frivolous." Reversing the district court, the Supreme Court noted that the argument, while not a winning argument, was not "frivolous" because "No appellate court in Idaho has addressed whether there should be an inference or presumption that one family member's use of a road across another family member's property is permissive." Id. at 639, 132 P[.3d] at 396. Addressing the second issue, the Supreme Court looked at whether the argument **[**1108]** **[*371]** regarding whether the parcel was "landlocked" was frivolous. *Id.* Finding that it was not entirely irrelevant to the **[***49]** analysis, the Supreme Court found that this defense was not "frivolous."

HN21[↑] This passage from Madsen merely stands for the principle that attorney fees may not be awarded under Idaho Code section 12-121 when the case involves an issue of first impression. *See* McCann v. McCann, 152 Idaho 809, 823, 275 P.3d 824, 838 (2012) (affirming a district court's denial of attorney fees under section 12-121 where an issue of first impression was raised). Here, the district court denied Amy's request based on its determination she failed to present sufficient argument or authority to support an attorney fee award. Based on the above-quoted statement from Madsen in her brief, Amy provided adequate support for her request; thus, the district court abused its discretion. We reverse the district court's denial of Amy's request for attorney fees and remand for consideration of the merits of her request.

E. Amy is awarded attorney fees on appeal.

Amy requests attorney fees on appeal under Idaho Code section 12-121 and IRFLP 908[7] for the same reasons identified before the district court. HN22[↑] Idaho Code section 12-121 allows attorney fees in a civil action if the appeal merely invites the Court to second-guess the findings of the lower court. Owen v. Smith, 168 Idaho 633, 647, 485 P.3d 129, 143 (2021) (citing Bach v. Bagley, 148 Idaho 784, 797, 229 P.3d 1146, 1159 (2010)). Attorney fees may also be awarded under section 12-121 "if the appeal was brought or defended frivolously, unreasonably, or without foundation." **[***50]** Id. at 647-48, 485 P.3d at 143-44. An award of fees under section 12-121 is within this Court's discretion. *Id.*

Amy argues that Josh's appeal is frivolous, unreasonable, and without foundation. Amy contends Josh is simply asking this Court re-weigh the evidence and reach a different conclusion than the trial court without identifying any legitimate grounds for reversing the decision. Josh argues that Amy's request for attorney fees on appeal should be denied for the same reasons the district court denied it below.

We grant a portion of Amy's attorney fees under section 12-121 on appeal. Josh has presented arguments that were not properly raised to the lower courts to help trace the money in the retirement accounts as his separate property, he also continued to attempt to shift the burden of proof to Amy for the obligation to establish the separate nature of his property. This burden remains his and any argument to the contrary is unreasonable and without foundation. That said, Josh did raise arguments about the proper scope of a magistrate court's sanctions and the propriety of limiting his proof given the community spending more money than it took in, citing Josephson v. Josephson, 115 Idaho 1142, 1145, 772 P.2d 1236, 1239 (Ct. App. 1989), *abrogated on other grounds by* Bell v. Bell, 122 Idaho 520, 835 P.2d 1331 (Ct. App. 1992). This was not a frivolous argument and merited consideration **[***51]** by this Court on appeal. As a result, we will apportion a fee award to Amy of

[7] IRFLP 908 has been renumbered as IRFLP 902.

75%, determined in our discretion, of the reasonable attorney fees Amy expended in defending against Josh's appeal to this Court. *See* Lola L. Cazier Revocable Tr. v. Cazier, 167 Idaho 109, 123, 468 P.3d 239, 253 (2020) (quoting Galvin v. City of Middleton, 164 Idaho 642, 648, 434 P.3d 817, 823 (2019) (this Court apportioned attorney fees awarded under section 12-121, applying "a more holistic view to examine whether the non-prevailing party argued the issues in 'good faith' or 'without a reasonable basis in fact or law.'").

Separately, Amy requests her attorney fees under Idaho Code section 12-123 as a sanction against Josh, alleging that his conduct in filing this appeal is frivolous for the same reasons described above. ***HN23***[↑] This Court has held that section 12-123 does not apply on appeal; thus, an award of fees on this basis is not appropriate. "[Idaho Code section 12-123] does not apply on appeal." Papin v. Papin, 166 Idaho 9, 43, 454 P.3d 1092, 1126 (2019) (citing Tapadeera, LLC v. Knowlton, 153 Idaho 182, 189, 280 P.3d 685, 692 (2012); *see also* Spencer v. Jameson, 147 Idaho 497, 507, ***[**1109] [*372]*** 211 P.3d 106, 116 (2009) ("[A]ttorney fees are not awardable under I.C. § 12-123 for the appellate process.").

V. Conclusion

We affirm the district court's determination that Josh failed to establish that the retirement accounts were his separate property. We reverse the district court's denial of Amy's request for attorney fees and remand for consideration on the merits. We apportion an award of Amy's attorney fees as noted above, and we award costs on appeal to **[***52]** Amy as the prevailing party.

Justices MOELLER, and ZAHN **CONCUR**.

Concur by: STEGNER (In Part)

Dissent by: STEGNER (In Part)

Dissent

STEGNER, J., concurring in part and dissenting in part.

I concur with most of the majority opinion. However, I take exception to the conclusion that Josh Erickson's 401(k) account is community property. I do not think the majority's conclusion that the 401(k) account is community property is supported by the record. Therefore, I respectfully dissent.

In general, "[t]he characterization of property as either community or separate presents a mixed question of law and fact." Papin v. Papin, 166 Idaho 9, 24, 454 P.3d 1092, 1107 (2019) (quoting Kawamura v. Kawamura, 159 Idaho 1, 3, 355 P.3d 630, 632 (2015)). "Although the manner and method of acquisition of property are questions of fact for the trial court, the characterization of an asset in light of the facts found is a question of law over which we exercise free review." *Id.* Thus, on review, this "Court reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings." Med. Recovery Servs., LLC v. Eddins, 169 Idaho 236, 241-42, 494 P.3d 784, 789-90 (2021) (quoting Medrain v. Lee, 166 Idaho 604, 607, 462 P.3d 132, 135 (2020)).

"Whether a specific piece of property is characterized as community or separate property depends on when it was acquired **[***53]** and the source of the funds used to purchase it. The character of property vests at the time the property is acquired." Papin, 166 Idaho at 4, 454 P.3d at 1107 (quoting Kawamura, 159 Idaho at 3, 355 P.3d at 632). "[A]ll property owned by a spouse before marriage and property acquired after marriage with the proceeds of separate property remain that spouse's separate property." *Id.* (quoting Baruch v. Clark, 154 Idaho 732, 737, 302 P.3d 357, 362 (2013)) (alteration in original). "However, all other property acquired after marriage—including income on separate property—is community property." *Id.* "Therefore, there is a rebuttable presumption that all property acquired during marriage is community property." *Id.* "[A] party wishing to show that assets acquired during marriage are separate property bears the burden of proving with reasonable certainty and particularity that the property is separate." *Id.* (quoting Baruch, 154 Idaho at 737, 302 P.3d at 362).

The magistrate court's legal conclusion that Josh's 401(k) account is community property does not follow from the court's factual findings. While this Court is bound by the record before us, we freely review the magistrate court's conclusions of law based upon that record. Id. at 3, 355 P.3d at 632 ("[T]he characterization of an asset in light of the facts found is a question of law over which we exercise free review."). The only piece of **[***54]** evidence in the record supporting the conclusion that the 401(k) account is community

property is when the funds were acquired: I readily acknowledge that the funds were deposited in the 401(k) account during the marriage. However, every other piece of evidence in the record cuts directly against the conclusion that the account is a community asset. The record shows that Josh worked for T-O Engineers from 2012 to 2014, prior to his marriage to Amy. Three years after his employment with T-O Engineers ended, Josh and Amy were married. Josh did not work for T-O Engineers at the time he was married, nor at any other point during the marriage. In addition, Josh testified without contradiction that T-O Engineers was the only entity that could deposit funds into the 401(k) account. It is undisputed that he could not personally contribute to the account. Thus, while we do not know the **[**1110]** **[*373]** specifics of why T-O Engineers deposited the funds into the account when it did, we do know that T-O Engineers deposited the funds due to Josh's pre-marital employment with T-O Engineers and that Josh's employment relationship with T-O Engineers ended several years prior to the marriage. Freely reviewing the **[***55]** magistrate court's conclusion of law based on this undisputed evidence, I conclude that the 401(k) account is Josh's separate property.

The date that property is acquired is important in determining its characterization; however, it is not the end of the analysis. Based on all the evidence in the record, I would conclude that the retirement funds earned by Josh three years prior to his marriage to Amy were Josh's separate property. In my view, Josh met his burden to show that the 401(k) was his separate property and, therefore, the district court erred in affirming the magistrate court's conclusion to the contrary. Accordingly, I respectfully dissent.

Justice BRODY CONCURS.

User Name: Jeremy Bass
Date and Time: Thursday, October 24, 2024 6:54:00 PM PDT
Job Number: 236934116

Document (1)

1. *Hastings v. Idaho Dep't of Water Res.*
   Client/Matter: -None-
   Search Terms:
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
	-None-

Hastings v. Idaho Dep't of Water Res.

Supreme Court of Idaho

April 24, 2024, Opinion Filed

Docket No. 50273

Reporter
547 P.3d 1190 *; 2024 Ida. LEXIS 42 **

JOHN HASTINGS, JR., Plaintiff-Counterdefendant-Appellant, v. IDAHO DEPARTMENT OF WATER RESOURCES, a political subdivision of the STATE OF IDAHO, Defendant-Counterclaimant-Respondent.

Prior History: [1]** Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Lynn G. Norton, District Judge.

Disposition: The order of the district court is affirmed.

Core Terms

consent order, district court, restoration, parties, statute of limitations, judicial notice, deadline, discovery, summary judgment, terms, alteration, enforcement action, conditions, motion for continuance, channel, civil penalty, compliance, stream, River, streambank, argues, notice, two-year, stipulated facts, counterclaim, completion, contends, refund, additional discovery, file a petition

Case Summary

Overview

HOLDINGS: [1]-The Idaho Department of Water Resources was properly awarded summary judgment because its enforcement action was not time-barred under *Idaho Code Ann. § 42-3809*; [2]-The district court did not err in taking judicial notice of the conditional permit because the permit was an official document evidencing an official act of the Department under *Idaho Code Ann. § 9-101(3)*; by referring to the conditional permit only to establish the date of its expiration and confirm the notice given to plaintiff of his right to request a hearing, the court did not consider facts outside the scope of the bifurcated proceeding; [3]-The district court did not err in denying plaintiff's motion to continue summary judgment for the purpose of conducting discovery; he failed to meet his burden to show what further discovery would reveal that was essential to justify his opposition.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1 **Summary Judgment, Burdens of Proof**

When reviewing a trial court's ruling on summary judgment, an appellate court applies the same standard of review used by the trial court in ruling on the underlying motion. The court must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Idaho R. Civ. P. 56(a)*. All facts are read in the light most favorable to the nonmoving party, with reasonable inferences drawn in

that party's favor. The moving party bears the burden to prove no genuine issues of material fact exist. Where there are no disputed issues of material fact, what remains is a question of law, over which the appellate court exercises free review.

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Governments > Legislation > Interpretation

HN2 **Standards of Review, Questions of Fact & Law**

Statutory interpretation is a question of law over which an appellate court exercises free review. The objective of statutory interpretation is to give effect to the legislative intent. A court begins with an examination of the literal words of a statute, and gives words their plain, usual, and ordinary meanings. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the court need not consider rules of statutory construction. Likewise, when the language in a contract is clear and unambiguous, its interpretation is a question of law and the language will be given its plain meaning.

Governments > State & Territorial
Governments > Property > Water Rights

Real Property Law > Water Rights > Administrative Allocations

HN3 **Property, Water Rights**

The Idaho Stream Channel Alteration Act protects Idaho's stream channels and environments for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. *Idaho Code Ann. § 42-3801*. Under *Idaho Code Ann. § 42-3809*, the Director of the Idaho Department of Water Resources is vested with the power and authority to enforce the provisions of the chapter and rules and regulations promulgated pursuant to it. No alteration of any stream channel can be made without the Director's approval under the Act. *Idaho Code Ann. § 42-3803(a)*. The Director is also vested with authority to commence enforcement actions against any person who is in substantial violation of the Act, provided the action is brought within two years of the Director's actual or constructive knowledge of the violation.

Governments > Legislation > Statute of Limitations > Time Limitations

Real Property Law > Water Rights > Administrative Allocations

Governments > State & Territorial
Governments > Property > Water Rights

Real Property Law > Water Rights > Appropriation Rights

HN4 **Statute of Limitations, Time Limitations**

A statute of limitations does not begin to run until a cause of action has accrued. Under *Idaho Code Ann. § 42-3809*, an enforcement action cannot be brought until the Director of the Idaho Department of Water Resources has knowledge or ought reasonably to have had knowledge of the violation. The two-year period begins to run at that time.

Governments > State & Territorial
Governments > Property > Water Rights

Real Property Law > Water Rights > Administrative Allocations

Real Property Law > Water Rights > Appropriation Rights

Real Property Law > Water Rights > Water Dispute Procedures

HN5 **Property, Water Rights**

Under the administrative rules of the Idaho Department of Water Resources, a permit applicant has a right to seek a hearing on a limited or conditioned permit. *Idaho Admin. Code r. 37.03.07.070*.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Judicial Notice > Adjudicative Facts

HN6[] Standards of Review, Abuse of Discretion

Whether a district court erred in taking judicial notice is an evidentiary question reviewed under an abuse of discretion standard. There is no abuse of discretion where a trial court (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

Evidence > Judicial Notice > Adjudicative Facts > Judicial Records

HN7[] Adjudicative Facts, Facts Generally Known

Pursuant to Idaho R. Evid. 201, a court may take judicial notice on its own initiative or it must take judicial notice if a party requests it and the court is supplied with the necessary information. Idaho R. Evid. 201(c). The rule governs judicial notice of adjudicative facts that are not subject to reasonable dispute. Idaho R. Evid. 201(a) and (b). An adjudicative fact is a controlling or operative fact, rather than a background fact; a fact that concerns the parties to a judicial or administrative proceeding and that helps the court or agency determine how the law applies to those parties. In the case of stipulations, stipulated facts admitted by the parties are the facts and the consideration of additional evidence that could be introduced for the purpose of changing or altering said facts is improper.

Civil Procedure > Pretrial Matters > Continuances

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN8[] Pretrial Matters, Continuances

A court has discretion to grant or deny a motion for a continuance to conduct further discovery. Thus, an appellate court reviews the denial of a motion to continue for an abuse of discretion. For summary judgment purposes, a court may continue the hearing for good cause shown, Idaho R. Civ. P. 56(b)(3), or grant a nonmoving party relief from summary judgment where the nonmovant shows it cannot present facts essential to justify its opposition, Rule 56(d). For additional discovery, the party seeking a continuance bears the burden of establishing what further discovery would reveal that is essential to justify their opposition, making clear what information is sought and how it would preclude summary judgment. In ruling on the motion, the court may consider the moving party's prior lack of diligence in pursuing discovery.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > English Rule

Governments > Local Governments > Claims By & Against

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Governments > State & Territorial Governments > Claims By & Against

HN9[] Basis of Recovery, English Rule

Idaho Code Ann. § 12-117(1) mandates that a court shall award attorney fees to the prevailing party in any proceeding involving as adverse parties a state agency or a political subdivision and a person, where the court determines that the non-prevailing party acted without a reasonable basis in fact or law. The statute is the exclusive basis for awarding attorney fees in a case between a person and a governmental entity as adverse parties.

Counsel: J. Kahle Becker, Attorney at Law, Boise, for

Appellant. J. Kahle Becker argued.

Raúl R. Labrador, Idaho Attorney General, Boise, for Respondent. Meghan M. Carter argued.

Judges: MOELLER, Justice. Chief Justice BEVAN, Justices BRODY, ZAHN and MEYER concur.

Opinion by: MOELLER

Opinion

[*1193] MOELLER, Justice.

This appeal arises from litigation between the Idaho Department of Water Resources (the "Department") and John Hastings, Jr., a landowner in Blaine County who made unauthorized alterations to the Big Wood River. Hastings appeals from the district court's decision to award summary judgment to the Department on the issue of a statute-of-limitations defense and the partial judgment entered against him. He contends that the Department was barred from pursuing an enforcement action against him based on the statute of limitations set forth in *Idaho Code section 42-3809*. For the reasons explained below, we affirm the district court.

I. Factual and Procedural Background

Hastings owns real property in Ketchum, Idaho, adjacent to the Big Wood River and upstream from the Warm Springs Bridge. **[**2]** During a period of high spring runoff and summer flooding in 2017, Hastings placed rock armoring, or "emergency riprap," along 193 feet of the streambank to stabilize it. While initially done with verbal approval from the city, the work ultimately removed riparian vegetation and discharged fill material below the mean high-water mark of the Big Wood River without a permit from the Department for altering the channel.

On September 11, 2017, the Department issued a notice of violation to Hastings for unauthorized alterations to the Big Wood River. Hastings was ordered to cease all unauthorized work below the mean high-water mark of the river. He was also ordered to submit a streambank bioengineering plan for river restoration, including "measures for replanting the riparian area(s)" with native trees and shrubs "and measures to restore fish and wildlife habitat."

Hastings and the Department met for a compliance conference on October 3, 2017. On January 26, 2018, Hastings and the Department entered into a consent order and agreement (the "Consent Order") under *Idaho Code section 42-1701B*. The Consent Order required Hastings to pay a civil penalty and submit a restoration plan for the streambank. The Consent Order **[**3]** laid out the following terms:

> 1) By February 15, 2018, Respondent shall pay a civil penalty in the amount of $10,000 and submit a Joint Application for Permit ("application") to the Department that proposes a plan to restore the streambank at the subject lands. The restoration plan must be designed to reduce further erosion and help restore more functional riverine conditions and include the following minimum requirements:
>
> a. bioengineering treatments to incorporate large woody material along the streambank (e.g. root wad engineered log jam and brush or tree revetment)
>
> b. a planting plan to help re-establish a native riparian buffer between the Big **[*1194]** Wood River and the upland parcel at the subject lands.
>
> 2) Respondent shall comply with the terms and conditions of any permit the Department issues subsequent to the submittal of an acceptable application and restoration plan pursuant to Order paragraph no. 1.
>
> 3) Respondent shall contact the Department immediately after completing the restoration plan at the subject lands. The Department shall inspect the completed work within 14 days after notification of completion to determine if the work meets the criteria and conditions of the restoration **[**4]** plan.
>
> 4) The Department agrees to refund Respondent $7,500 of the civil penalty if the Respondent successfully completes the restoration plan by December 31, 2018, and meets the requirements of Order paragraphs 1-3. If there are circumstances beyond the control of Respondent, he will contact the Department by November 30, 2018, to request an extension of the deadline stated above.
>
> 5) Upon execution of this agreement, the Department's receipt of the agreed civil penalty described above, and full compliance with the terms contained herein, NOV no. E2017-1236 will be considered resolved.

Hastings paid the $10,000 civil penalty pursuant to the Consent Order. Brockway Engineering, on behalf of Hastings, filed a proposed restoration plan with the

Department, which it rejected. Over the next few months, two revised plans were submitted but were each rejected for failing to comply with the terms of the Consent Order. Although not at issue in this appeal, Hastings maintains that all of his proposals were in compliance with the Consent Order.

Immediately following the rejection of Brockway Engineering's revised plans, Hastings contacted Aaron Golart, the Department's Stream Channel Coordinator, **[**5]** to request an extension of time to complete the restoration required by the Consent Order. Golart granted the extension in an email to Hastings's attorney on November 2, 2018. Golart's email stated: "With respect to the time extension you have requested, [the Department] is willing to grant the request to extend the time to complete construction on the restoration until March 15, 2019." The parties agree that, aside from the extension of the deadline, the terms of the Consent Order were not modified and no new agreement was entered. The parties also agree that this email was a valid extension of the deadline originally set forth in the Consent Order.

Brockway Engineering then submitted a third revised plan that addressed the Department's concerns for the river restoration. Hastings and his corporation, Embassy Auditoriums, Inc., also submitted a joint application to the Department seeking a stream channel alteration permit for streambank stabilization. The Department conditionally approved Hastings's restoration plan by issuing a "Conditional Permit," which imposed several conditions related to completion of the restoration work required in the Consent Order. However, Hastings opposed **[**6]** these conditions and filed a petition for a hearing on May 21, 2019, as authorized by the Department's Administrative Rule 37.03.07.70, which was adopted pursuant to the Idaho Rules of Administrative Procedure ("IDAPA"). Hastings's petition stated that "[c]ertain requirements [in the Conditional Permit]. . . are inconsistent with the Consent Order and the agreement that led to the filing of the Restoration Plan." In the same petition, Hastings also stated that he "would be willing to participate in an informal meeting to discuss resolution of this matter" to avoid unnecessary delay or litigation. While a declaration provided by a Department employee indicated that the Department entered "discussions on the conditional terms of the [Conditional] Permit" with Hastings, the Department also noted that the parties eventually "reached an impasse."

The record is silent concerning what, if anything, happened for the next two years, until November 15, 2021, when Hastings filed an action in Ada County District Court seeking a declaratory judgment against the Department. In his complaint, he sought a ruling from the court declaring that the Department could no longer pursue an enforcement action against him. Hastings asserted **[*1195]** **[**7]** that the two-year statute of limitations set forth in *Idaho Code section 42-3809*, the statute authorizing the director of the Department to commence an administrative enforcement action for violation of an order governing the alteration of a stream channel, had run. In the alternative, Hastings argued that he was entitled to a declaratory judgment clarifying his rights and obligations in conducting restoration activities on the properties identified in the Consent Order.

Four days later, the Department initiated an administrative proceeding pursuant to *Idaho Code section 42-3809* naming Hastings as a party. On December 21, 2021, it filed an answer and counterclaim in Hastings's district court action seeking specific performance in accordance with *Idaho Code sections 42-1701B(4)* and *42-3809*, which would require Hastings to comply with the Consent Order. Hastings filed an answer to the counterclaim asserting numerous affirmative defenses, including the two-year statute of limitations under *Idaho Code section 42-3809*. None of the pleadings filed in the district court action to this point were verified.

The parties agreed to bifurcate the issues in the district court action to first address the statute of limitations defense. To that end, both sides stipulated to a set of facts limited to just that issue. **[**8]** The district court granted their request. The stipulated facts were filed with the court, and the parties subsequently filed cross-motions for summary judgment. The Department's motion for summary judgment attached a certified copy of the Conditional Permit and asked the district court to take judicial notice of it. The 32-page attachment included: a certified copy of the Conditional Permit, the Department's IDAPA rules pertaining to the Stream Channel Alteration Act and the Conditional Permit's approval, and Hastings's joint application for the Conditional Permit, including his proposed restoration plan by Brockway Engineering. In response to the Department's request for judicial notice, Hastings filed an objection and a motion to strike the Conditional Permit from the record. Hastings also filed a motion to continue so that he could pursue additional discovery and he requested sanctions under *Rule 11 of the Idaho Rules of Civil Procedure*.

After reviewing the motions, the district court denied the motion to strike and determined that, for summary judgment purposes, it would take judicial notice of the Conditional Permit. It determined that the Department did not submit "the [Conditional Permit] as evidence [for] proof of matters **[**9]** related to the damages of the riverbed or needed restoration," but it was instead submitted "as evidence of the dates for the expiration of the [Conditional] Permit, that [Hastings] was informed he was entitled to request a hearing on any objections to the [Conditional] Permit pursuant to administrative rules, and that any hearing request was therefore not a violation of the Consent Order." Further, the district court found that the Conditional Permit was "an official document" appropriate for judicial notice under *Idaho Code section 9-101(3)* and *Idaho Rule of Evidence 201* "since it is not subject to reasonable dispute that this is the Conditional Permit referenced by the parties . . . ." The court also granted Hastings's motion to continue in part, but did not allow Hastings to complete additional discovery. The parties filed supplemental briefing, and Hastings verified his earlier pleadings. Hastings then filed a motion to reconsider the district court's decision taking judicial notice of the Consent Order and denying a continuance for further discovery.

The district court heard oral arguments on the cross-motions for summary judgment on July 25, 2022. Hastings argued that the statute of limitations began to run either: (1) when he **[**10]** failed to complete construction by the extended deadline of March 15, 2019,[1] or (2) when he filed a petition for hearing on May 21, 2019, to express his disagreement with the terms of the Conditional Permit. Because the Department did not bring an enforcement action until it filed its counterclaim on December 21, 2021, Hastings argued that the enforcement action was untimely and barred by the two-year statute of limitations regardless of which date applied. **[*1196]** The Department disagreed, arguing that a cause of action did not accrue until Hastings filed for declaratory judgment on November 15, 2021. Up to that point, the Department maintains that it believed that Hastings intended to complete the stream channel restoration work in accordance with the terms and conditions of the Consent Order.

In a written decision following the hearing, the district court denied Hastings's motion for reconsideration on taking judicial notice and denying a continuance. The district court found that Hastings recognized the Conditional Permit as "a true and correct Conditional Permit issued after the joint application was filed on March 15, 2019." In concluding that it could take judicial notice of the Conditional **[**11]** Permit, the district court explained that it would only consider the document "to the extent it addresses whether the filing of the Petition for Hearing triggered the statute of limitations." The court also determined that a continuance for "additional" discovery was unwarranted, noting that Hastings "has still not served any discovery requests . . . ."

The district court then granted summary judgment to the Department on the statute of limitations issue. In reaching this conclusion, the district court first considered the plain language of the Consent Order and whether it set a firm construction deadline for the restoration work. The district court determined that it did not. The court reasoned that while the Consent Order listed a deadline, it was not for completion of the required restoration; rather, it set a deadline for Hastings to qualify for a partial refund of the civil penalty it imposed. Thus, Hastings's failure to meet the Consent Order's deadline was not a violation of the agreement that would trigger the statute of limitations—it only meant that Hastings was not entitled to a $7500 reduction of the fine. Additionally, the Conditional Permit advised Hastings of his right **[**12]** to request a hearing and object to the Conditional Permit's terms. Thus, the court determined that the "use of an appeal right provided for by regulatory rule to object to certain terms of the Conditional Permit was not a violation of the Consent Order." The district court explained: "It was reasonable for the Department to interpret Hastings's request for a hearing as an attempt to resolve disputes between Hastings and the Department so that Hastings could comply with the Consent Order."

In examining when the statute of limitations began to run, the district court determined that "the earliest possible date that the Department 'ought to have reasonably known' that Hastings violated the Consent Order was December 31, 2019," because that was the "proposed completion date" Hastings listed in his permit application. Because the Department filed its counterclaim within two years of this date, the district court found the enforcement action timely. Based on this analysis, the district court entered a partial judgment against Hastings on just the statute of limitations issue pursuant to *Idaho Rule of Civil Procedure 54(b)*. He timely appealed and the remaining issues in the case were stayed pending a decision from this Court. **[**13]** At the time Hastings brought this appeal, he had not

[1] The district court's order mistakenly states the extended deadline as "March 15, 2021," which is a typographical error inconsistent with the record and stipulated facts of the parties.

commenced restoration of the streambank and the Department had not refunded any portion of the $10,000 penalty.

II. Standards of Review

HN1[] When reviewing a trial court's ruling on summary judgment, we apply the same standard of review used by the trial court in ruling on the underlying motion. Krinitt v. Idaho Dep't of Fish & Game, 162 Idaho 425, 428, 398 P.3d 158, 161 (2017) (citation omitted). "The court must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). All facts are read in the light most favorable to the nonmoving party, with reasonable inferences drawn in that party's favor. Gagnon v. W. Bldg. Maint., Inc., 155 Idaho 112, 114-15, 306 P.3d 197, 199-200 (2013) (citation omitted); Ticor Title Co. v. Stanion, 144 Idaho 119, 122, 157 P.3d 613, 616 (2007). The moving party bears the burden to prove no genuine issues of material fact exist. Gagnon, 155 Idaho at 114-15, 306 P.3d at 199-200. Where there are no disputed issues of material fact, "what remains is a question of law, over **[*1197]** which this Court exercises free review." Krinitt, 162 Idaho at 428, 398 P.3d at 161.

This appeal also raises issues of interpretation—both statutory and contractual. HN2[] Statutory interpretation is a question of law over which we exercise free review. Smith v. Excel Fabrication, LLC, 172 Idaho 725, 728, 535 P.3d 1098, 1101 (2023). The objective of statutory interpretation is to give effect to the legislative intent. St. Luke's Health Sys., Ltd. v. Bd. of Comm'rs of Gem Cnty., 168 Idaho 750, 755-56, 487 P.3d 342, 347-48 (2021) (quoting St. Alphonsus Reg'l Med. Ctr. v. Elmore Cnty., 158 Idaho 648, 652, 350 P.3d 1025, 1029 (2015)). This Court "begins with **[**14]** an examination of the literal words of a statute," and gives words "their plain, usual, and ordinary meanings." *Id.* (quoting St. Alphonsus Reg'l Med. Ctr., 158 Idaho at 652-53, 350 P.3d at 1029-30).

> Provisions should not be read in isolation, but must be interpreted in the context of the entire document. . . . [T]he Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

Id. (citation omitted). Likewise, "[w]hen the language in a contract is clear and unambiguous, its interpretation is a question of law and the language will be given its plain meaning." Harris v. State ex rel. Kempthorne, 147 Idaho 401, 405, 210 P.3d 86, 90 (2009).

Additional standards of review will be addressed in turn.

III. Analysis

The primary issue before this Court is whether the district court erred in its application of the two-year statute of limitations period codified in Idaho Code section 42-3809 for enforcement actions under Idaho's Stream Channel Alteration Act, Idaho Code sections 42-3801 to 42-3811. More specifically, this appeal asks this Court to determine when the Department knew, or reasonably ought to have known, that Hastings was in violation of the Consent Order—the triggering event to start the statute **[**15]** of limitations. In addition to this key issue, Hastings argues that the district court erred by (1) taking judicial notice of the Conditional Permit and (2) denying his motion to continue proceedings for discovery.

A. The Department's enforcement action against Hastings is not barred by the statute of limitations.

Hastings suggests that this is a case of first impression inasmuch as Idaho Code section 42-3809 has not been previously interpreted by this Court. He contends that the Department was on notice that he would not comply with the Consent Order when he either (1) failed to complete construction by the extended deadline of March 15, 2019, or (2) filed a petition for hearing on May 21, 2019, to express his disagreement with the terms of the Conditional Permit. Because the Department did not file an enforcement action until it lodged its counterclaim on December 21, 2021, Hastings argues that the action is untimely and barred by the two-year statute of limitations. The Department responds that the statute of limitations in Idaho Code section 42-3809 begins to run when a party substantially violates the terms of a consent order. The Department argues that since Hastings was in compliance with the Consent Order until he filed his action **[**16]** for a declaratory judgment, the statute of limitations did not begin to run until he commenced this litigation. We agree with the Department's analysis.

HN3[] The Stream Channel Alteration Act protects Idaho's stream channels and environments "for the

protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality." I.C. § 42-3801. Under Idaho Code section 42-3809, the Director of the Department is "vested with the power and authority to enforce the provisions of this chapter and rules and regulations promulgated pursuant to it." No alteration of any stream channel can be made without the Director's approval under the Act. *Id.*; I.C. § 42-3803(a). The Director is also vested with authority to commence enforcement actions **[*1198]** against any person who is in substantial violation of the Stream Channel Alteration Act, provided the action is brought within two years of the Director's actual or constructive knowledge of the violation:

> When the director of the department of water resources determines that any person is in substantial violation of any provision of this chapter or any rule, permit, certificate, condition of approval or order issued or promulgated pursuant to this chapter, the director may commence an administrative **[**17]** enforcement action by issuing a written notice of violation in accordance with the provisions of section 42-1701B, Idaho Code. Provided however, that no civil or administrative proceeding may be brought to recover for a violation of any provision of this chapter or a violation of any rule, permit or order issued or promulgated pursuant to this chapter *more than two (2) years after the director had knowledge or ought reasonably to have had knowledge of the violation*.

I.C. § 42-3809 (emphasis added).

HN4[↑] Importantly, a "statute of limitations does not begin to run until the cause of action has accrued." Sallaz v. Rice, 161 Idaho 223, 228, 384 P.3d 987, 992 (2016). As noted above, under Idaho Code section 42-3809, an enforcement action cannot be brought until "the director had knowledge or ought reasonably to have had knowledge of the violation." I.C. § 42-3809. The two-year period begins to run at that time. *See* Sallaz, 161 Idaho at 228, 384 P.3d at 992. Also important to our analysis is that the parties entered the Consent Order under Idaho Code section 42-1701B. This section provides that a "consent order shall be effective immediately upon signing by both parties and shall preclude a civil enforcement action for the same alleged violation." I.C. § 42-1701B(4). However, "[i]f a party does not comply with the terms of the consent order, the director may seek and obtain in any appropriate district court, **[**18]** specific performance of the consent order and other relief as authorized by law." *Id.*

Here, Hastings has offered two potential dates for when the "the director had knowledge or ought reasonably to have had knowledge of the violation" of his Consent Order. First, Hastings argues that the statute of limitations began to run on March 15, 2019, when he failed to complete construction by the extended deadline. The Consent Order's applicable terms for this date read as follows: "The Department agrees to refund Respondent $7,500 of the civil penalty if the Respondent successfully completes the restoration plan by December 31, 2018 . . . ." The construction deadline was extended by the Department from December 31, 2018, to March 15, 2019, when Golart sent an email to Hastings's former attorney consenting to the extension.

While Hastings is correct that he did not complete construction by either the December 31st or March 15th deadlines, he has misconstrued the plain language of the Consent Order. While the agreement contains a December 31, 2018, deadline for completing construction, this deadline was only for the purpose of receiving a $7,500 refund of his civil penalty. The same logic applies **[**19]** to the extended deadline of March 15th. In other words, while the Consent Order created a financial incentive for Hastings to complete the project within a specified time—a 75% reduction of the civil penalty if the project was completed by either deadline—that provision did not establish a construction completion date. Hastings even conceded this point in his reply brief when he stated that "[t]he parties agree that the Consent Order does not have a specified deadline for completion of construction." Thus, we cannot agree with Hastings's contention that the Director "had knowledge or ought reasonably to have had knowledge" that Hastings was in violation of the Consent Order on December 31, 2018, or March 15, 2019. Indeed, Hastings still lacked a final permit from the Department, which was essential before he could even begin construction. I.C. § 42-3803(a). Hastings cannot argue that the Department should have known he was in violation of the Consent Order by failing to *finish construction* when he was still actively working with the Department to modify the very permit that would allow him to *begin construction*.

The second potential date offered by Hastings for commencing the statute of limitations **[*1199]** **[**20]** is May 21, 2019, when he filed a petition for a hearing to express his formal disagreement with the terms of the Department's conditional approval for a permit. He argues that the filing of his petition put the Department

and its Director on notice of a substantial violation of the Consent Order. We agree with the Department that this argument "ignores the statutory and regulatory framework behind the permit process."

HN5[] Under the Department's administrative rules, a permit applicant has a right to seek a hearing on a limited or conditioned permit. IDAPA 37.03.07.070. The provision states:

> Any applicant who is granted a limited or conditioned permit, or who is denied a permit, may seek a hearing on said action of the Director by serving on the Director written notice and request for a hearing before the Board within fifteen (15) days of receipt of the Director's decision.

Id. Hastings's decision to exercise his right to seek a hearing put the Department on notice that he opposed the conditions imposed through the limited approval of *the Conditional Permit*. However, the petition for a hearing did not constitute a violation of *the Consent Order* or put the Department on notice of an anticipatory breach. If anything, **[**21]** the fact that he was trying to amend the terms of the Conditional Permit suggests he was still attempting to comply with it. Further, if we accepted Hastings's argument on this score, then the inverse would also have to be true—if Hastings could be deemed out of compliance by merely filing the petition for reconsideration of the terms of the Conditional Permit, then Hastings could have only remained in compliance by *not* exercising his right to object. This cannot be. Such an application of the rule would essentially allow a consent order to prevent an applicant like Hastings from exhausting his administrative remedies, thereby unlawfully restricting his due process rights under IDAPA 37.03.07.070.

Hastings's arguments also fail to account for the surrounding circumstances of his ongoing dealings with the Department. Hastings met with the Department for a compliance conference on October 3, 2017, and then entered into the Consent Order. He later submitted revised restoration plans through Brockway Engineering until the Department issued its conditional approval through the Conditional Permit. He also sought an extension to the Consent Order's deadline for a potential refund. Even when he objected to the **[**22]** conditions imposed by the Department in the Conditional Permit, Hastings stated that he "would be willing to participate in an informal meeting to discuss resolution of this matter" to avoid unnecessary delay or litigation.

It is concerning to this Court that the stipulated facts and missing documents have effectively left a two-year gap in the appellate record following these events. At oral argument, both sides suggested that there were additional documents that would shed light on what was happening during the two years, but they had not been made a part of the record and could not be referenced at this stage of the proceedings. Of course, the silence in the record cuts both ways. Both parties point to it, arguing over whether the silence should be interpreted as the Department failing to recognize that Hastings had breached the terms of the Consent Order or as proof the Department reasonably believed it did not need to do anything because Hastings was still working towards complying with the order. Either way, it is not determinative in this case. Hastings's argument ultimately asks this Court to conclude that the Department should have known Hastings violated, or even intended **[**23]** to violate, the Consent Order despite the fact that the documents we have in the record indicate that he was working with the Department to find solutions outside of litigation and *pursuant to* the Consent Order. That part of the record is clear. Therefore, we decline Hastings's invitation to use the Department's forbearance and cooperation against it, particularly where the record demonstrates no actual breach of the Consent Order.

When examining these facts in the light most favorable to Hastings, the earliest possible date that the Department "ought to have reasonably known" that Hastings did not intend to comply with the Consent Order was when he filed the underlying declaratory judgment action on November 15, 2021. We **[*1200]** agree with the district court's conclusion that, until then, Hastings was in compliance with the Consent Order and had given every indication that he was attempting to remain in compliance. Because Hastings filed a petition for reconsideration of the conditions imposed in the Conditional Permit, the permit was not final and, therefore, did not authorize Hastings to commence alterations on the Big Wood River. Likewise, the Consent Order did not impose a performance **[**24]** deadline for the restoration work on the streambank. There was more work for both parties to do before obtaining a final permit, and, until filing this action, Hastings had shown himself to be a cooperative party who intended to comply with the Consent Order. Because the Department's enforcement action is not time-barred by the statute of limitations under Idaho Code section 42-3809, it was entitled to summary judgment as a matter of law on this issue. Accordingly, we affirm the district court's award of partial summary judgment to the Department.

B. The district court did not abuse its discretion by taking judicial notice of the Conditional Permit.

Hastings next contends that the district court erred in taking judicial notice of the Conditional Permit, arguing that it contained information beyond those facts stipulated by the parties. He argues that the court's consideration of the Conditional Permit created "a lopsided factual record." While the Department agrees that the stipulation was binding on the parties, the Department argues that the stipulation did not preclude the introduction of the Conditional Permit into the record—particularly where the terms of the Conditional Permit are central to the case and **[**25]** it was not admitted for the purpose of contradicting any of the facts presented in the stipulation.

HN6[⬆] Whether a district court erred in taking judicial notice is an evidentiary question reviewed under an abuse of discretion standard. *Bass v. Esslinger, 171 Idaho 699, 704, 525 P.3d 737, 742 (2023)*. There is no abuse of discretion where a trial court "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)*.

HN7[⬆] Pursuant to *Idaho Rule of Evidence 201*, a court "may take judicial notice on its own" initiative or it "must take judicial notice if a party requests it and the court is supplied with the necessary information." *I.R.E. 201(c)*. This rule governs judicial notice of adjudicative facts that are "not subject to reasonable dispute." *I.R.E. 201(a)* and *(b)*. "An 'adjudicative fact' is . . . '[a] controlling or operative fact, rather than a background fact; a fact that concerns the parties to a judicial or administrative proceeding and that helps the court or agency determine how the law applies to those parties.'" *Bass, 171 Idaho at 704-05, 525 P.3d at 742-43* (brackets in original) (quoting *State v. Lemmons, 158 Idaho 971, 974, 354 P.3d 1186, 1189 (2015)*). In the case of stipulations, stipulated facts admitted **[**26]** by the parties "are the facts" and this Court has previously held that the consideration of additional evidence that "could be introduced for the purpose of changing or altering said facts" is improper. *Andrews v. Moore, 14 Idaho 465, 470, 94 P. 579, 580-81 (1908)*.

Here, nothing in the stipulation barred consideration of the Conditional Permit, particularly where its existence and authenticity are acknowledged in the stipulation.[2] The Department maintains that the Conditional Permit was not introduced "for the purpose of changing or altering" the stipulated facts, but to help establish a timeline for calculating the accrual date of the statute of limitations. *See id.* at 470, 94 P. at 580-81. Importantly, Hastings has failed to establish which facts, if any, were changed or altered by admitting the Conditional Permit.

For these reasons, we conclude that the district court correctly determined that the Conditional Permit was an official **[*1201]** document evidencing an official act of the Department under *Idaho Code section 9-101(3)*. Thus, it was proper for judicial notice under *Idaho Rule of Evidence 201* since it is "not subject to reasonable dispute" that this is the Conditional Permit referenced by the parties. Additionally, we conclude that by referring to the Conditional Permit only to (1) establish the **[**27]** date of the Conditional Permit's expiration and (2) confirm the notice given to Hastings of his right to request a hearing, the district court did not consider facts outside the scope of the bifurcated proceeding. The district court only referenced the Conditional Permit for a limited and permissible purpose. The district court's consideration of the document resulted in no alteration of the stipulated facts, nor did its submission create a "lopsided" record, as Hastings contends. Thus, judicial notice was appropriate here and well within the district court's reasoned discretion.

C. The district court did not abuse its discretion in denying Hastings's motion for a continuance to conduct discovery.

Hastings next argues that the district court erred in denying his motion to continue the summary judgment hearing for the purposes of conducting "meaningful discovery." He contends that he was precluded from conducting further discovery so that he could introduce new evidence after the Department failed to adhere to the parties' stipulation, thereby giving the Department "the unilateral ability to augment the stipulated record . . . ." We agree with the Department that Hastings has failed to **[**28]** establish a need for additional discovery or show how it would have aided him in addressing the statute of limitations issue.

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[2] The joint stipulation, signed by counsel for both parties, states: "On May 17, 2019, the Department issued its Conditional Approval of Joint Application for Permits (S37-20565) . . . ."

HN8[] A court has discretion to grant or deny a motion for a continuance to conduct further discovery. Bass, 171 Idaho at 704, 525 P.3d at 742. Thus, this Court reviews the denial of a motion to continue for an abuse of discretion. *Id.;* Est. of Ekic v. Geico Indem. Co., 163 Idaho 895, 899, 422 P.3d 1101, 1105 (2018). For summary judgment purposes, a court may continue the hearing "for good cause shown," I.R.C.P. 56(b)(3), or grant a nonmoving party relief from summary judgment where the nonmovant shows "it cannot present facts essential to justify its opposition," I.R.C.P. 56(d). For additional discovery, the party seeking a continuance bears the burden of establishing "'what further discovery would reveal that is essential to justify their opposition,' making clear 'what information is sought and how it would preclude summary judgment.'" Fagen, Inc. v. Lava Beds Wind Park, LLC, 159 Idaho 628, 632, 364 P.3d 1193, 1197 (2016) (quoting Jenkins v. Boise Cascade Corp., 141 Idaho 233, 239, 108 P.3d 380, 386 (2005)). In ruling on the motion, the court may consider "the moving party's prior lack of diligence in pursuing discovery." *Id.* (citation omitted).

This issue stems from the district court's taking judicial notice of the Conditional Permit, which we discussed above. After the court admitted the Conditional Permit, Hastings filed a motion to continue the hearing and conduct **[**29]** limited discovery "about matters in the thirty-two pages of documents attached to the Department's statements of facts (the [Conditional] Permit) as they relate to the applicability of the statute of limitations . . . ." The court granted Hastings's motion to continue in part and denied it in part. The court did not permit Hastings to pursue additional discovery, but it continued the summary judgment hearing for supplemental briefing from the parties on whether the court could take judicial notice of the Conditional Permit, ultimately finding that judicial notice was appropriate.

On appeal, Hastings contends that he would have pursued discovery on several matters had the district court granted his motion for a continuance. Hastings asserts that he would have sought discovery on (1) the Department Director's knowledge of the Conditional Permit, referring to it as the "alleged amendment," and (2) whether there was consideration for this "alleged modification of the [Consent] Order . . . ." Yet the parties had stipulated that there was no amendment or modification to the Consent Order. Hastings also maintains that he would have pursued discovery on Golart's "credibility and bias" for "authentication **[**30]** of a document which he apparently prepared." Again, **[*1202]** Hastings has provided no reason to doubt the authenticity of the Consent Order. Indeed, he conceded its authenticity before the district court. Additionally, Hastings claims he needed time to discover whether the Department "wrongfully induced [him] to sign the Consent Order" through false representations. However, these lines of discovery would not only contradict the parties' stipulated facts that acknowledge the Conditional Permit existed and was issued by the Department, but also Hastings's admission before the district court that the Conditional Permit was accurate and authentic.

The additional reasons for discovery raised by Hastings are too vague to ascertain what information would be sought and how it would preclude summary judgment. Importantly, Hastings has failed to specify how any of the desired evidence, if pursued and discovered, would have changed the statute of limitations analysis; thus, he failed to meet his burden to show "'what further discovery would reveal that is essential to justify [his] opposition,' making clear 'what information is sought and how it would preclude summary judgment.'" Fagen, 159 Idaho at 632, 364 P.3d at 1197 (citing Jenkins v. Boise Cascade Corp., 141 Idaho 233, 239, 108 P.3d 380, 386 (2005)). Accordingly, **[**31]** we can only view these requests, as the district court concluded, to be a "fishing expedition" for evidence that might somehow help his case in an unknown way. Hastings's answers at oral argument did little to persuade us otherwise. Therefore, we conclude that the district court did not abuse its discretion in denying Hastings's motion to continue summary judgment for the purpose of conducting discovery.

D. The Department is not entitled to attorney fees on appeal.

The Department requests an award of attorney fees under Idaho Code section 12-117, arguing that Hastings "ignore[s] the plain reading of the Consent Order and Stipulation, advances nonsensical arguments which are not relevant to the statute of limitations issue, and misrepresents the relevant law in two instances." HN9[] Idaho Code section 12-117(1) mandates that a court "shall award" fees to the prevailing party "in any proceeding involving as adverse parties a state agency or a political subdivision and a person," where the court determines that "the nonprevailing party acted without a reasonable basis in fact or law." This statute is "the exclusive basis" for awarding attorney fees in a case between a person and a governmental entity as adverse parties. Idahoans for Open Primaries v. Labrador, 172

Idaho 466, , 533 P.3d 1262, 1287 (2023).

While Hastings has lost **[**32]** this appeal, his arguments concerning the commencement date for the statute of limitations raised some important factual and legal questions that merited further review. Thus, although the Department is the prevailing party, we do not agree that Hastings acted without a reasonable basis in fact or law. Accordingly, we conclude that the Department is not entitled to an award of attorney fees.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court's award of summary judgment to the Department and hold that the enforcement action filed against Hastings in the Department's counterclaim was timely under *Idaho Code section 42-3809*. Likewise, we conclude that the district court committed no error when it took judicial notice of the Conditional Permit and denied Hastings's motion for a continuance. While the Department is not awarded attorney fees, it is entitled to costs as a matter of right as the prevailing party. *I.A.R. 40(a)*.

Chief Justice BEVAN, Justices BRODY, ZAHN and MEYER concur.

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Document (1)

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   Narrowed by:

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	-None-

Idaho Power Co. v. Benj. Houseman Co.

Supreme Court of Idaho

April 29, 1993 ; April 29, 1993, Filed

No. 20083, 1993 Opinion No. 46

Reporter
123 Idaho 674 *; 851 P.2d 970 **; 1993 Ida. LEXIS 100 ***

IDAHO POWER COMPANY, an Idaho corporation, Plaintiff-Respondent, v. The BENJ. HOUSEMAN COMPANY, Successor in Interest to the Zachreson Company, Defendant-Appellant

Subsequent History: [*1]** Released for Publication May 21, 1993.

Prior History: Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. George D. Carey, District Judge.

Appeal from summary judgment.

Disposition: Affirmed.

Core Terms

mortgage, foreclosure, senior deed, weatherization, proceedings, sales, deficiency judgment, fair market value, agree to pay, real estate, conveyance, foreclose, costs, mortgage foreclosure, mortgaged property, foreclosure sale, summary judgment, debt secured, trustee sale, no right, unrecorded, mortgagee, valueless, decree

Case Summary

Procedural Posture
Defendant mortgagor challenged the judgment of the District Court of the Fourth Judicial District (Idaho), which granted summary judgment in favor of plaintiff mortgagee, power company, in the mortgagee's action for the amount that the mortgagor's predecessor agreed to pay for weatherization of buildings.

Overview

The mortgagee obtained a mortgage on each of eleven properties of the mortgagor's predecessor as security for payment for weatherization. The trustee of the two senior deeds of trust to which the mortgages were subject instituted foreclosure proceeding and sold all the property. The mortgagee filed an action against the mortgagor for the amount due on the debt. The trial court granted summary judgment in favor of the mortgagee. On appeal, the court affirmed the grant of summary judgment. It held that the mortgagee was not precluded from suing to collect the debt secured by the mortgage where the debt was not due and where there was no basis to foreclose the mortgage at the time the property was sold to the third party by the trustee for less than the fair market value. The court noted that the mortgagee had no right to foreclose its mortgages before the trustee sold the property and no right to redeem the property from the purchaser at the foreclosure sale pursuant to *Idaho Code § 45-1508*. The court concluded that once the mortgage became valueless the mortgagee had the right to file the direct action on the debt secured by the mortgage.

Outcome
The court affirmed the grant of summary judgment in favor of the mortgagee in the mortgagee's action for the amount that the mortgagor's predecessor agreed to pay for the weatherization of buildings.

LexisNexis® Headnotes

Real Property
Law > Financing > Foreclosures > General Overview

HN1[] **Financing, Foreclosures**

A mortgagee may bring a direct action on a debt secured by the mortgage, if the mortgage is valueless.

Counsel: Lojek, Gabbert & Strother, Chtd., of Boise, for defendant-appellant. Jeffrey A. Strother argued.

Ellis, Brown and Sheils, Chtd., of Boise, for plaintiff-respondent. Martin T. Neils argued.

Judges: Johnson, Justice. McDevitt, C.J., Bistline and Trout, JJ., and Judd, J., Pro Tem, concur.

Opinion by: JOHNSON

Opinion

[*674] **[**970]** This is a collection case. We hold that a mortgagee is not precluded from suing to collect the entire debt secured by a mortgage where the debt was not due and where there was no basis to foreclose the mortgage at the time the property was sold to a third party by the trustee of prior deeds of trust for less than the fair market value of the property.

I.

THE BACKGROUND AND PRIOR PROCEEDINGS.

On May 12, 1981, The Zachreson Company (Zachreson) entered into eleven weatherization agreements with Idaho Power Company. Each agreement required Idaho Power to weatherize a building owned by Zachreson. Zachreson agreed to pay for this work on July **[***2]** 12, 1991, or whenever the weatherized property was transferred, whichever occurred first. Zachreson agreed to pay a total of $ 17,651.76. Idaho Power did not require Zachreson to pay interest.

To secure payment, Zachreson gave Idaho Power a mortgage on each of the eleven properties. Each of the eleven mortgages was subject to one or the other of two senior deeds of trust. In 1988, the trustee of the two senior deeds of trust instituted non-judicial foreclosure proceedings on all eleven parcels. The trustee gave Idaho Power notice of the foreclosure sales, but Idaho Power did not participate in any of the sales. The sales took place on July 5, 1988.

The successful bids at the foreclosure sales totaled $ 455,679.57. The fair market value of the property sold was at least **[*675]** $ 495,000.00. According to these figures, which are not disputed on appeal, the fair market value of the property exceeded the total of the amount secured by the senior deeds of trust and the debt secured by Idaho Power's mortgages.

The Benj. Houseman Company (Houseman) is the successor in interest to Zachreson. Neither Zachreson nor Houseman ever paid any part of the $ 17,651.76 owed to Idaho Power. **[***3]** Idaho Power sued Houseman for the amount Zachreson agreed to pay for the weatherization. The trial court granted summary judgment to Idaho Power, rejecting Houseman's arguments that the single-action statute (*I.C. § 6-101*) and the statute limiting deficiency judgments in mortgage foreclosures (*I.C. § 6-108*) barred Idaho Power's action. Houseman appealed.

II.

NEITHER *I.C. § 6-101* NOR *I.C. § 6-108* BAR IDAHO POWER'S ACTION.

Houseman asserts that *I.C. §§ 6-101* and *6-108* bar Idaho Power's right to recover from Houseman. We disagree.

The two statutes upon which Houseman premises its appeal provide:

> **6-101. Proceedings in foreclosure -- Effect of foreclosure on holder of unrecorded lien. --** There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the incumbered property (or so much thereof as may be necessary) and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due to the plaintiff; and sales **[***4]** of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in the case of sales under execution; (and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt), and it becomes a lien on the real estate of such judgment debtor, as in other cases on which execution may be issued.
>
> No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a

> lien thereon, which conveyance or lien does not appear of record in the proper office at the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.
>
> **6-108. Deficiency judgments -- Amount restricted. --** No court in the state of Idaho shall have jurisdiction to enter a deficiency judgment in any case involving a foreclosure of a mortgage on real property in any amount greater than the difference between the mortgage **[***5]** indebtedness, as determined by the decree, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property, to be determined by the court in the decree upon the taking of evidence of such value.

Neither of these statutes applies to this case. Under the terms of the mortgages, Zachreson's obligation to Idaho Power did not become due until the property was sold by the trustee of the senior deeds of trust. Therefore, Idaho Power had no right to foreclose its mortgages before the trustee sold the property. The sales by the trustee foreclosed and terminated all interest Idaho Power had in the property, and Idaho Power had no right to redeem the property from the purchaser at the trustee's sales. *I.C. § 45-1508*. Idaho Power's mortgage lien on the property became valueless at the time of the trustee's sale. *Warner v. Bockstahler, 48 Idaho 419, 423, 282 P. 862, 863 (1929)*.

HN1[⬆] A mortgagee may bring a direct action on a debt secured by the mortgage, if the mortgage is valueless. *Clark v. **[*676]** , 24 Idaho 142, 152, 132 P. 795, 798 (1913)*.

III.

CONCLUSION.

We **[***6]** affirm the trial court's summary judgment in favor of Idaho Power.

We award costs to Idaho Power on appeal, together with attorney fees pursuant to *I.C. § 12-120(3)*.

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La Bella Vita, LLC v. Shuler

Supreme Court of Idaho

July 13, 2015, Filed

Docket No. 42092, 2015 Opinion No. 65

Reporter
158 Idaho 799 *; 353 P.3d 420 **; 2015 Ida. LEXIS 179 ***; 165 Lab. Cas. (CCH) P61,609

LA BELLA VITA, LLC, an Idaho limited liability company, Plaintiff-Appellant, v. AMANDA SHULER and EIKOVA SALON AND SPA, LLC, an Idaho limited liability company, Defendant-Respondent, and CASSIE MOSER, BRITNEY HARRINGTON, KORTNI ELLETT, JARA DALEY, and EMILY COFFIN, Defendants.

Subsequent History: Decision reached on appeal by, Remanded by, Costs and fees proceeding at, Request granted *La Bella Vita, LLC v. Shuler, 2018 Ida. App. Unpub. LEXIS 329 (Idaho Ct. App., Oct. 15, 2018)*

Prior History: [*1]** Appeal from the District Court of the Sixth Judicial District of the State ofIdaho, Bannock County. Hon. Robert C. Naftz, District Judge.

Disposition: The district court's grant of summary judgment is reversed. This case is remanded for further consideration consistent with this Opinion. The award of fees and costs to respondent is vacated.

Core Terms

shower, baby, client list, district court, confidential, summary judgment, employees, confidentiality agreement, salon, trade secret, misappropriation, invitations, supplemental brief, customers, confidential information, attorney's fees, customer list, client-related, supplemental, lists, deposition, costs, summary judgment motion, discovery, qualifies, genuine, opened, grant summary judgment, motion to strike, front desk

Case Summary

Overview

HOLDINGS: [1]-A district court did not err in striking the supplemental brief offered in opposition to summary judgment and the affidavits offered in response to the motion to strike where the salon failed to contest the alternative ground relied upon by the district court in striking those materials; [2]-The district court erred in granting a competitor and former employee summary judgment on the salon's misappropriation of trade secrets claim where there were genuine issues of fact as to whether a baby shower list and the salon's client list and client-related information qualified as confidential and trade secret under *Idaho Code Ann. § 48-801(5)* and whether the information was taken or used for the competitor's benefit; [3]-The award of attorney fees and costs to the competitor and former employee was vacated as they had not prevailed as required by *Idaho Code Ann. § 12-120(3)*.

Outcome

Judgment reversed, attorney fees and cost award vacated.

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN1[] **Summary Judgment, Evidentiary Considerations**

Summary judgment proceedings are decided on the basis of admissible evidence. The admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold matter to be addressed before applying the liberal construction and reasonable inferences rule to determine whether the evidence creates a genuine issue of material fact for trial.

Civil Procedure > ... > Summary

Judgment > Appellate Review > Standards of Review

HN2 **Appellate Review, Standards of Review**

The Supreme Court of Idaho applies an abuse of discretion standard when determining whether testimony offered in connection with a motion for summary judgment is admissible. A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason.

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN3 **Appellate Review, Standards of Review**

When reviewing a ruling on a summary judgment motion, the Supreme Court of Idaho applies the same standard used by the district court.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN4 **Entitlement as Matter of Law, Appropriateness**

Under *Idaho R. Civ. P. 56(c)*, summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. If a review of the evidence reveals no disputed issues of material fact, then summary judgment should be granted.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN5 **Burdens of Proof, Movant Persuasion & Proof**

The burden of establishing the absence of a genuine issue of material fact is on the party moving for summary judgment.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN6 **Summary Judgment, Evidentiary Considerations**

The Supreme Court of Idaho will construe the record in the light most favorable to the party opposing the motion for summary judgment, drawing all reasonable inferences in that party's favor.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

HN7 **Entitlement as Matter of Law, Appropriateness**

Summary judgment is improper if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented. However, a mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment.

Civil Procedure > Appeals > Record on Appeal

HN8 **Appeals, Record on Appeal**

The party appealing a decision of the district court bears the burden of ensuring that the Supreme Court of Idaho is provided a sufficient record for review of the district court's decision. When a record or exhibit not included in the record on appeal is unavailable to the party who wishes to make it part of the record for appeal, it is incumbent on that party to move the district court, or petition the Supreme Court, to order augmentation of the record on appeal with the relevant record(s) or exhibit(s). When a party appealing an issue presents an incomplete record, the Supreme Court will presume that the absent portion supports the findings of the district court. The Supreme Court will not presume error from a silent record or from the lack of a record.

See *Idaho Code Ann. § 48-801(5)*.

Civil Procedure > Appeals > Record on Appeal

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN9 **Appeals, Record on Appeal**

In the context of summary judgment, the Supreme Court of Idaho has repeatedly held that an appellant's failure to address an independent ground for a grant of summary judgment is fatal to the appeal. The fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the other grounds.

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN10 **Summary Judgment, Appellate Review**

When reviewing a summary judgment ruling on appeal, the Supreme Court of Idaho's review is limited to the pleadings, depositions, and admissions on file, together with any affidavits, to determine whether there exists any genuine or disputed issue as to any material fact. *Idaho R. Civ. P. 56(c)*.

Trade Secrets Law > Civil Actions > Burdens of Proof

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Existence & Ownership

HN11 **Civil Actions, Burdens of Proof**

To prevail in a claim brought under the Idaho Trade Secrets Act, a plaintiff must show that a trade secret actually existed. *Idaho Code Ann. § 48-801*.

Trade Secrets Law > Trade Secret Determination Factors > General Overview

HN12 **Trade Secrets Law, Trade Secret Determination Factors**

Trade Secrets Law > Trade Secret Determination Factors > General Overview

HN13 **Trade Secrets Law, Trade Secret Determination Factors**

To help determine whether information qualifies as a trade secret, the Supreme Court of Idaho relied on the Restatement of Torts and looked at the following six factors: (1) the extent to which the information is known outside [the plaintiff's] business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. All of these factors address the issue of whether the information in question is generally known or readily ascertainable.

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Existence & Ownership

Trade Secrets Law > Trade Secret Determination Factors > General Overview

HN14 **Elements of Misappropriation, Existence & Ownership**

To prevail in a claim brought under the Idaho Trade Secrets Act, a plaintiff must show that a trade secret actually existed. *Idaho Code Ann. § 48-801*. To determine whether information qualifies as a trade secret, the Supreme Court of Idaho looks at six factors, all of which address the issue of whether the information in question is generally known or readily ascertainable.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN15 **Basis of Recovery, Statutory Awards**

Idaho Code Ann. § 12-120(3) allows for the recovery of attorney fees by the prevailing party in a civil action to

recover on any commercial transaction.

Civil Procedure > Appeals > Costs & Attorney Fees

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN16[] **Appeals, Costs & Attorney Fees**

A prerequisite to an award of attorney fees under *Idaho Code Ann. § 12-120(3)* is that the party prevails.

Counsel: Maguire Law, P.C., Pocatello, attorneys for appellant. David Maguire argued.

Racine, Olsen, Nye, Budge & Bailey, Chtd., Pocatello, attorneys for respondent. Lane V. Erickson argued.

Judges: W. JONES, J. Chief Justice BURDICK, Justices EISMANN, J. JONES and HORTON CONCUR.

Opinion by: W. JONES

Opinion

[*801] [422]** W. JONES, J.

I. Nature of the Case

This is a misappropriation of trade secrets case arising out of a dispute between two competing businesses providing spa and salon services in Pocatello, Idaho, La Bella Vita, LLC (La Bella Vita) and Eikova Salon and Spa, LLC (Eikova). In February 2011, a number of employees left their employment at La Bella Vita to open Eikova, a new salon nearby. La Bella Vita brought suit alleging that these employees took its confidential client information to create and promote Eikova. After conducting discovery, La Bella Vita voluntarily dismissed all of the defendants except **[***2]** Amanda Shuler and Eikova, as well as all of the claims except the violation of the Idaho Trade Secrets Act and breach of the confidentiality agreement. On motion by **[**423] [*802]** the remaining defendants, the district court granted summary judgment against La Bella Vita on these remaining issues. La Bella Vita appeals the district court's decision to strike a supplemental brief offered in opposition to summary judgment, and also argues that disputed issues of material fact should have precluded the entry of summary judgment.

II. Factual and Procedural Background

Candy Barnard-Davidson (Davidson) is the owner and founder of La Bella Vita. Davidson started La Bella Vita in 1998 and has owned it to the present day. The individually named defendants in this action, Amanda Shuler (Shuler), Cassie Moser (Moser), Britney Harrington (Harrington), Kortni Ellett (Ellett), Jara Dalley (Dalley), and Emily Coffin (Coffin), are all former employees of La Bella Vita. While employed there, they held the following titles: Shuler was a Hair Stylist, Salon Manager, Co-Manager, and Trainer; Moser was a Hair Stylist; Harrington was a Hair Stylist; Ellett was a Front Desk Receptionist; Dalley was Front Desk Receptionist; **[***3]** and, Coffin was a Receptionist and Front Desk Manager. These individuals left their employment with La Bella Vita in mid-February 2011 to work for Eikova, a new spa and salon founded by Shuler. The circumstances of this collective departure give rise to this action.

Shuler and the other individually named defendants gave their notice of termination to Davidson in early February and left their employment with La Bella Vita on or about February 16, 2011. At the time of their joint departure, they constituted approximately half of La Bella Vita's employees. On February 22, 2011, Shuler opened Eikova for business at a location just around the corner from La Bella Vita. Eikova immediately began servicing clients, including some customers who were previously regular patrons of La Bella Vita.

On January 23, 2013, La Bella Vita filed suit in district court alleging that Shuler and the other defendants took protected or confidential information from La Bella Vita which they used to create and promote Shuler's new business, Eikova. In addition to the individual defendants, Eikova was named as a defendant in the action. Specifically, La Bella Vita alleged that these former employees wrongfully **[***4]** took and used its confidential client lists, calendars, scheduling lists, client contact information, and other information regarding products, services, and client preferences in the creation and promotion of Eikova. The defendants jointly answered the complaint on March 8, 2013, denying the allegations and raising affirmative defenses.

None of the defendants signed a non-compete agreement in favor of Davidson or La Bella Vita; however, all but one of the individually named

defendants[1] signed a "Confidentiality Agreement" whereby they promised to keep certain information confidential. Confidential information was defined in the agreement as including the following:

> [La Bella Vita's] trade secrets and confidential or proprietary information, such as client lists, client prospect material, price lists, rate structures, client service records, salon appointment books, payroll information, sales and profit data, marketing strategies and information, chemical information and formulas and any other information of a technical, financial or business nature that is unique to [La Bella Vita] and/or provides [La Bella Vita] with a competitive advantage in the marketplace. Confidential information **[***5]** does not include any information or material that is generally known by the public.

On July 31, 2013, Shuler and the other defendants jointly moved for summary judgment on all claims alleged in the complaint.[2] **[**424]** **[*803]** La Bella Vita timely opposed this motion, and oral argument was heard by the district court on October 7, 2013. At the outset of this hearing, however, La Bella Vita conceded that all of the defendants except Shuler and Eikova should be dismissed from the action. Given this oral representation, as well as La Bella Vita's written opposition to the summary judgment motion, the district court dismissed Moser, Harrington, Ellett, Dalley, and Coffin from the suit. In addition, La Bella Vita represented to the court at the hearing that only two issues remained in the action, an alleged violation of the Idaho Trade Secrets Act (ITSA) and an alleged breach of the confidentiality agreement signed by Shuler as a condition of her employment at La Bella Vita. As such, the court dismissed the remaining claims set forth in the complaint. For these reasons, the summary judgment hearing focused only on these two claims against **[***6]** the remaining defendants, Shuler and Eikova.

At the conclusion of the summary judgment hearing, La Bella Vita requested an opportunity to supplement the record with certain outstanding discovery items. Shuler and Eikova did not object to this request, so long as no additional briefing or argument would be submitted by La Bella Vita. La Bella Vita agreed to this condition and represented that no additional argument would be offered. On the issue of supplementation, the court ruled from the bench, permitting the submission of the **[***7]** outstanding discovery materials while cautioning the parties that additional argument would not be considered. The court explained that the motion would be taken under advisement as of the date the supplemental items were received.

On October 21, 2013, the district court received the additional information, which included Shuler's outstanding discovery responses, Eikova's business formation papers filed with the Secretary of State, as well as an affidavit from La Bella Vita's attorney. In addition, La Bella Vita filed a document entitled, "Supplemental Brief in Opposition to Motion for Summary Judgment." In response, Shuler and Eikova moved the court to strike the supplemental brief, arguing it violated both the rules governing summary judgment and also the court's ruling memorializing the agreement between the parties that no additional argument would be provided or considered. For the reasons outlined in greater detail below, the court struck the supplemental brief, as well as affidavits filed in response to the motion to strike.

Turning to the substance of the summary judgment motion, and after receiving and reviewing the outstanding discovery items, the district court addressed the **[***8]** two claims that remained in the operative complaint, an alleged breach of the confidentiality agreement and an alleged violation of the ITSA. La Bella Vita argued that Shuler and Eikova violated the ITSA and confidentiality agreement in two ways: one was the wrongful use of a "baby shower list," and the other was the improper accessing of La Bella Vita's official client list. The district court went through the affidavits offered in support of, and in opposition to, summary judgment and found that La Bella Vita failed to demonstrate the existence of a "trade secret" under the ITSA, and that even if some of the disputed information could conceivably qualify as confidential, there was no evidence to establish that Shuler actually took or used

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[1] Every defendant except Coffin signed the "Confidentiality Agreement."

[2] La Bella Vita failed to include in the appellate record the underlying moving papers and memoranda in support of, and in opposition to, the summary judgment motion, the transcript of the hearing on the same, and a related motion to strike supplemental briefing offered in opposition to summary judgment. Therefore, the facts surrounding these filings and the arguments advanced are derived from the register of actions and the district court's recital in its memorandum decision and order granting summary judgment against La Bella Vita. *Gibson v. Ada Cnty., 138 Idaho 787, 790, 69 P.3d 1048, 1051 (2003)*. La Bella Vita did include in the record, however, the affidavits filed in support and opposition of the summary judgment motion.

any of the allegedly confidential information in the creation of Eikova's client list.

In granting summary judgment, the district court rejected La Bella Vita's argument that the only way Eikova's client list could have been composed was through the misappropriation of La Bella Vita's confidential client list. Specifically, the court found that the affidavit testimony offered in support of the motion sufficiently described the alternative and independent **[***9]** methods and sources used to generate Eikova's client list, and that La Bella Vita provided only conjecture, assumptions, and beliefs, not evidence, in opposition to this affidavit testimony. The district court further declared that the finding of no trade secret dispensed of the second issue, breach of confidentiality agreement. Without a trade secret, the district court reasoned that there could be no breach of the confidentiality agreement. For these reasons, the court granted summary judgment **[**425]** **[*804]** on the two remaining claims in favor of Shuler and Eikova.

On November 27, 2013, La Bella Vita filed a motion entitled "Motion to Amend or Alter Decision on Summary Judgment."[3] La Bella Vita brought its motion on four grounds, specifically *Rules 11(a)(2)(B)*, *52(b)*, *60(b)*, and *61 of the Idaho Rules of Civil Procedure.* Shuler and Eikova opposed this motion, oral argument was heard on January 13, 2014, and the district court took the matter under advisement at the conclusion of the hearing. The district court entered a memorandum decision and order on February 3, 2014, wherein it addressed each theory of relief and rejected all arguments advanced. Specifically, the court found that La Bella Vita again failed to provide any specific facts or concrete evidence regarding **[***10]** Shuler's alleged misappropriation of information, and that the "newly acquired evidence" provided was not new and had already been considered by the court in its previous decision.

Shuler and Eikova filed a motion seeking attorney fees and costs prior to the resolution of the reconsideration motion, and filed a supplemental memorandum of costs after receiving the court's written order on reconsideration. On April 8, 2014, the district court entered a memorandum and order awarding attorney fees and costs to Shuler and Eikova pursuant to *Idaho Rule of Civil Procedure 54(e)(1)* and *Idaho Code section 12-120(3)*, finding that this action qualified as a commercial transaction.

La Bella Vita appeals the district court's decisions (1) striking its supplemental opposition brief in response to summary judgment and the affidavits offered in response to the motion to strike, (2) granting summary judgment in favor of Shuler **[***11]** and Eikova, and (3) awarding attorney fees to Shuler and Eikova. Shuler and Eikova argue the district court properly struck the additional filings, granted summary judgment, and awarded fees and costs. Shuler and Eikova seek attorney fees and costs on appeal.

III. Issues on Appeal

1. Whether the district court abused its discretion in striking the supplemental brief offered in opposition to summary judgment and the affidavits submitted in response to the motion to strike.

2. Whether the district court erred in granting summary judgment against La Bella Vita.

3. Whether the district court erred in granting attorney fees and costs to Shuler and Eikova.

4. Whether Shuler and Eikova are entitled to attorney fees and costs on appeal

IV. Standard of Review

A. Motion to Strike

HN1[⬆] "Summary judgment proceedings are decided on the basis of admissible evidence." *Campbell v. Kvamme, 155 Idaho 692, 696, 316 P.3d 104, 108 (2013)*. "The admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold matter to be addressed before applying the liberal construction and reasonable inferences rule to determine whether the evidence creates a genuine issue of material fact for trial." *Fragnella v. Petrovich, 153 Idaho 266, 271, 281 P.3d 103, 108 (2012)*. ***HN2***[⬆] "This Court **[***12]** applies an abuse of discretion standard when determining whether testimony offered in connection with a motion for summary judgment is admissible."

[3] La Bella Vita failed to include in the appellate record its motion for reconsideration. For this reason, the following facts surrounding reconsideration are surmised from the register of actions, the district court's recitation of facts and arguments in its memorandum decision and order denying this motion, and the briefs submitted on appeal.

Gem State Ins. Co. v. Hutchison, 145 Idaho 10, 15, 175 P.3d 172, 177 (2007). "A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason." O'Connor v. Harger Constr., Inc., 145 Idaho 904, 909, 188 P.3d 846, 851 (2008).

B. Summary Judgment

HN3[] "When reviewing a ruling on a summary judgment motion, this Court applies **[**426] [*805]** the same standard used by the district court." Wesco Autobody Supply, Inc. v. Ernest, 149 Idaho 881, 890, 243 P.3d 1069, 1078 (2010). HN4[] "Under Rule 56(c) of the Idaho Rules of Civil Procedure, summary judgment is proper if 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Silicon Int'l Ore, LLC v. Monsanto Co., 155 Idaho 538, 544, 314 P.3d 593, 599 (2013) (quoting I.R.C.P. 56(c)). If a review of the evidence reveals no disputed issues of material fact, then summary judgment should be granted. Smith v. Meridian Joint Sch. Dist. No. 2, 128 Idaho 714, 718-19, 918 P.2d 583, 587-88 (1996).

HN5[] "The burden of establishing the absence of a genuine issue of material fact is on the moving party," and HN6[] this Court "will construe the record in the light most favorable to the party opposing the motion for summary judgment, drawing all reasonable inferences in that party's **[***13]** favor." Wesco Autobody, 149 Idaho at 890, 243 P.3d at 1078. Given these standards, HN7[] summary judgment is improper "if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented." McPheters v. Maile, 138 Idaho 391, 394, 64 P.3d 317, 320 (2003). However, a "mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment." Van v. Portneuf Med. Ctr., 147 Idaho 552, 556, 212 P.3d 982, 986 (2009).

C. Record on Appeal

HN8[] The party appealing a decision of the district court bears the burden of ensuring that this Court is provided a sufficient record for review of the district court's decision. When a record or exhibit not included in the record on appeal is unavailable to the party who wishes to make it part of the record for appeal, it is incumbent on that party to move the district court, or petition this Court, to order augmentation of the record on appeal with the relevant record(s) or exhibit(s). When a party appealing an issue presents an incomplete record, this Court will presume that the absent portion supports the findings of the district court. We will not presume error from a silent record or from the lack of a record.

Gibson v. Ada Cnty., 138 Idaho 787, 790, 69 P.3d 1048, 1051 (2003) (citations and quotations omitted).

V. ANALYSIS

A. The district court did not err in striking the supplemental [*14] brief offered in opposition to summary judgment and the affidavits offered in response to the motion to strike.**

At the conclusion of the hearing on Shuler and Eikova's motion for summary judgment, La Bella Vita moved the court for permission to supplement the summary judgment record with certain outstanding discovery items. Shuler and Eikova did not oppose the request, so long as additional argument was not permitted. La Bella Vita agreed to this condition on the record and the court ruled from the bench. Specifically, the court allowed for the submission of the outstanding discovery materials, but cautioned the parties that additional argument would not be considered. The district court received the additional information, which included an affidavit from La Bella Vita's attorney, Shuler's discovery responses establishing the precise dates Eikova began making and inputting client appointments prior to its February 22, 2011 opening, as well as Eikova's business formation papers. However, in addition to the agreed-upon discovery responses, La Bella Vita also filed a "Supplemental Brief in Opposition to Motion for Summary Judgment." In response to this supplemental opposition, Shuler **[***15]** and Eikova moved to strike the brief, arguing it violated the procedural rules governing summary judgment, the parties' agreement, and the court's ruling memorializing the parties' agreement.

La Bella Vita opposed the motion to strike, supported by new affidavits from Davidson and one of its customers, Shannon McCarrel (McCarrel). La Bella Vita argued that supplemental briefing was necessary because the outstanding discovery responses revealed **[**427]** **[*806]** new information material to the summary judgment analysis. After reviewing the motion to strike and the response, the district court struck the supplemental brief and the additional affidavits filed in opposition to the motion to strike. The district court reached its decision on dual grounds. For one, and citing *Idaho Rule of Civil Procedure 56*, the district court found that "there is no rule of civil procedure allowing a party opposing a motion for summary judgment to file a second, supplemental brief in opposition." Specifically, it found that *Rule 56(c)* "does not provide for a party opposing summary judgment to file a second opposition brief." Instead, the district court found that the Rule provides the adverse party "one opportunity to submit opposing affidavits and/or an answering **[***16]** brief," documents which must be filed "'at least 14 days prior to the date of the hearing.'" Second, and alternatively, the district court found that La Bella Vita's filing of a supplemental brief was in violation of the court's order and the parties' agreement that supplementation would be permitted so long as no additional argument was submitted. Because La Bella Vita violated this order, the district court found good cause to strike the supplemental brief and additional affidavits.

On appeal, La Bella Vita contends that the district court erred in striking its supplemental opposition brief and the affidavits offered in response to the motion to strike. Specifically, La Bella Vita argues that the court erred in finding that the filing of a supplemental brief is not permitted under the civil rules. Whereas the district court found nothing in *Rule 56* permits the filing of a supplemental opposition brief, La Bella Vita asserts that "there is nothing in the Rules of [Civil] Procedure that [prohibits] the supplementation." This Court need not reach this issue, however, because the district court based its ruling on two grounds and La Bella Vita has failed on appeal to challenge an alternative **[***17]** and independent ground for the court's decision. Specifically, the district court granted the motion to strike on two alternative grounds: procedure, and second, violation of the court's order memorializing the parties' agreement.

HN9[↑] In the context of summary judgment, the Court has repeatedly held that "an appellant's failure to address an independent ground for a grant of summary judgment is fatal to the appeal." *Weisel v. Beaver Springs Owners Ass'n, Inc., 152 Idaho 519, 525-26, 272 P.3d 491, 497-98 (2012)*. "[T]he fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the other grounds." *Andersen v. Prof'l Escrow Servs., Inc., 141 Idaho 743, 746, 118 P.3d 75, 78 (2005)* (citation and quotations omitted). These same principles apply here. La Bella Vita failed to contest the alternative ground relied upon by the district court in striking the supplemental brief and affidavits, specifically the parties' agreement and La Bella Vita's violation of the court's order memorializing this agreement. This provides an adequate and independent basis for the decision to strike. By failing to raise and challenge this ground on appeal, La Bella Vita has waived this issue and conceded a valid basis for the court's decision. As such, the court's grant of the motion to strike stands.

B. The district court [*18] erred in finding no disputed issues of material fact in granting summary judgment in favor of Shuler and Eikova.**

HN10[↑] When reviewing a summary judgment ruling on appeal, this Court's review is limited to the pleadings, depositions, and admissions on file, together with any affidavits, to determine whether there exists any genuine or disputed issue as to any material fact.[4] **[**428]** **[*807]** *I.R.C.P. 56(c)*. Based upon a thorough review of these items, and for the reasons outlined in greater detail below, this Court holds that the affidavit and deposition testimony, when viewed in a light most

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[4] Because appellant La Bella Vita failed to include in the appellate record the moving and opposing papers surrounding summary judgment, and because neither party disputes the district court's characterization of the arguments in its memorandum decision and order granting summary judgment, this Court's analysis is based upon the district court's recital of the arguments below. Furthermore, at the outset of the summary judgment hearing, La Bella Vita stipulated to the dismissal of all defendants except Shuler and Eikova and all claims except **[***19]** for the breach of confidentiality agreement and violation of ITSA. La Bella Vita does not appeal the dismissal of these parties or claims. Lastly, because it is held in section V(A), *supra*, that the district court did not err in striking the supplemental brief in opposition to summary judgment as well as the additional affidavits filed by La Bella Vita in response to the motion to strike, this Court's review is limited to the original moving and opposing summary judgment papers, memoranda, affidavits, and deposition transcripts attached as exhibits to the same. The Davidson affidavit dated October 22, 2013 and the McCarrel affidavit dated October 25, 2013 will not be considered.

favorable to La Bella Vita, supports the vacation of the summary judgment for Shuler and Eikova.

In the complaint, La Bella Vita alleges that Shuler violated the confidentiality agreement and ITSA by taking and using proprietary and confidential client information. On summary judgment, the district court found that La Bella Vita failed to demonstrate that the information at issue was confidential or constituted a trade secret. Notwithstanding this finding, the district court further determined that La Bella Vita failed to submit any evidence to show that Shuler actually took and used any of the allegedly confidential **[***20]** information for Eikova's benefit. As framed by the district court in granting summary judgment, its analysis of the ITSA claim also disposed of the breach of confidentiality claim. The district court reasoned that "when there is no evidence of any misappropriation of trade secrets, there can be no breach of a confidentiality agreement." Thus, the court's findings and conclusions on summary judgment as to both claims were based almost entirely on its determination of the ITSA claim.

HN11[] To prevail in a claim brought under the ITSA, "[a] plaintiff must show that a trade secret actually existed." *Basic American, Inc. v. Shatila, 133 Idaho 726, 734, 992 P.2d 175, 183 (1999)*; *Idaho Code § 48-801*. Pursuant to the ITSA:

> **HN12**[] "Trade secret" means information, including a formula, pattern, compilation, program, computer program, device, method, technique, or process, that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Idaho Code § 48-801(5). **HN13**[] To help determine whether information qualifies as a trade secret, the *Basic American* Court relied on the **[***21]** Restatement and looked at the following six factors:

> (1) the extent to which the information is known outside [the plaintiff's] business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Basic American, 133 Idaho at 735, 992 P.2d at 184 (quoting *Restatement of Torts § 757 cmt. b* (1939)) (alteration in original). "All of these factors address the issue of whether the information in question is generally known or readily ascertainable." *Wesco Autobody Supply, Inc. v. Ernest, 149 Idaho 881, 898, 243 P.3d 1069, 1086 (2010)*.

There are genuine factual disputes regarding the nature of the information at issue in this case, specifically whether it qualifies as confidential and trade secret. Furthermore, there is a dispute as to whether this information was misappropriated, or taken and used, for Eikova's benefit. In moving for and opposing summary judgment, the parties supported their positions primarily with affidavit testimony from numerous employees and customers. Although there are numerous **[***22]** affiants, the testimony was substantially similar with certain important distinctions.

For example, in opposing summary judgment, La Bella Vita relies on affidavit testimony from many of its clients describing how they were notified by representatives of Eikova **[**429]** **[*808]** about its opening. These clients all assert that they keep their contact information confidential, but attest that La Bella Vita had this information. Because they consider their information to be non-public, they each were surprised when they were contacted by Eikova representatives without solicitation. Although lacking any direct evidence of misappropriation, these affiants each imply that Eikova could have only obtained this information from the records kept at La Bella Vita.

In support of summary judgment, Shuler and Eikova rely on affidavit testimony from a number of La Bella Vita's former employees—parties who transitioned to employment with Eikova. These employees all unambiguously assert that they never took or misappropriated, in any form, La Bella Vita's client lists, scheduling lists, client calendars, client information, or any other information of any type for any advertising or client outreach in the creation, promotion, **[***23]** or opening of Eikova. Instead, each affiant describes a more organic process for the development of Eikova's client list. Specifically, Shuler and her new employees generated their own advertising lists from people they already knew, both socially and professionally. These

lists were allegedly created from a variety of other sources, including: cell phone and email contacts, church membership directories, social media connections, suggestions and referrals from family and friends, public phone books, online directories, internet searches, word of mouth, and use of referral cards. Eikova employees also participated in local fundraisers and craft shows as a way of introducing Eikova to the community.

Furthermore, Shuler specifically testified in her affidavit:

> ... I had many clients and customers who specifically sought me out when they learned that I was no longer employed by [La Bella Vita]. Many of my clients and customers did not receive any advertising directly from me, my employees[,] or [Eikova][,] but came to me at my new salon anyway when they learned that I had opened my own salon.

Based upon a thorough review of the record, there are three genuine disputes of material fact which **[***24]** render this case inappropriate for summary adjudication. First, there is a dispute surrounding the "baby shower list," specifically whether Davidson authorized the use and release of La Bella Vita's official client list in generating or supplementing the invitation list for the baby shower being thrown in Shuler's honor. Second, there is a dispute about La Bella Vita's business practices and whether these practices compromised the confidentiality of its official client list and other client-related information. Third, there is a dispute regarding whether Shuler actually took and used any confidential information in the creation and promotion of Eikova.

1. Baby Shower List

The factual dispute regarding the baby shower list is most clearly demonstrated through a comparison of Davidson's testimony and the testimony of Shuler and Amy Comstock-Combs (Combs). The dispute revolves around the creation and use of the baby shower list utilized to send out invitations for Shuler's shower. At the center of the baby shower is Combs, a mutual client and friend of both Davidson and Shuler. Combs met Davidson at a craft show when Davidson was new to Pocatello and before she started La Bella Vita. Combs **[***25]** was one of Davidson's original clients when La Bella Vita opened. However, on a date Davidson had overbooked herself, Davidson referred Combs to Shuler. Satisfied with Shuler's work, Combs elected for Shuler to be her regular stylist. While Shuler was still employed at La Bella Vita, she became pregnant and a baby shower was held in her honor. These facts are all not in dispute.

It is further undisputed that La Bella Vita's official client list was used to create or supplement a mailing list for Shuler's baby shower invitations. There is a genuine dispute, however, as to whether Davidson authorized the use of La Bella Vita's client list for this purpose.

Combs testified regarding the inception and creation of the baby shower list as follows:

> **[**430] [*809]** When I found out [Shuler] was pregnant I thought it would be fun to have a baby shower for her. I discussed this with [Davidson]. We talked about if we should have it at the salon or at someplace else. We decided to have it at the [s]crapbook store [where] I was working at [the time] because the salon would still be open at the time we were having the shower and that might not be the best thing for customers still having services. Also parking would be an issue. **[***26]**
> I was in charge of the invitations for the baby shower for [Shuler] and I enlisted the help of my sister Tam[my] Comstock who also had worked at the salon. [Davidson] said she would get me a Client/Customer list of names and information so I could send out invitations for the shower. I distinctly remember [Davidson] instructing the receptionist to get me a Client/Customer list of names and information for the invitations. I used the Client/Customer list of names and information that was given to me at [Davidson's] direction to create the invitations for the baby shower that [Davidson] and I held for Mandi Shuler together.
> [Davidson] never asked me to return or to give back the Client/Customer list of names and information that was given to me. Further, [Davidson] never asked me to keep the Client/Customer list of names and information confidential in any way. She simply directed that it be given to me.
> Corroborating Combs' testimony, Shuler asserted in her affidavit as follows:
>
> While I was employed by [La Bella Vita] and prior to a baby shower that was being given for me, [La Bella Vita] Owner, Candy Barnard-Davidson[,] directed me to clean up the Client/Customer list. She told me that the Client/Customer **[***27]** list was being given to Amy Comstock-Combs[,] a non-employee friend[,] so that invitations could be sent out for the baby shower. Candy Barnard-Davidson later admitted to me that she gave the

> Client/Customer list to Amy Comstock-Combs and that the invitations in fact were sent out from the information contained in [La Bella Vita's] Client/Customer list.

Shuler reiterated in her deposition, "[Davidson] gave permission for two of my clients [Combs and Comstock] to take my client list and put on a baby shower for me."

Further, Shuler testified about cleaning up La Bella Vita's client list so that the same could be used for baby shower invitations. In pertinent part, Shuler stated:

> Jodi Espindola and I printed a client list for me. So you can --- in the computer system [at La Bella Vita], you can [for example] go in and specify clients of Mand[i] Shuler and print off a list according to dates. And [Davidson] didn't want invitations sent to men or multiple invitations being sent to [the same household], so I just went through and combined --- if there was a mother with two daughters, I would put parentheses around them and write "daughters" next to two daughters --- like daughter and whoever the **[***28]** mother was.
>
> And then after I was done with that, [Davidson] was in town, and she looked over the list. We thought the amount of invitations looked correct, and [Combs] came and picked the baby shower list up from [Davidson].

It was Shuler's understanding that Combs then "gave the list to Tammy [Comstock], [who] is [Combs'] sister, and Tammy typed the list up in label format[,] ... printed [those] labels[,] and sent out mailers."

The testimony of Combs and Shuler regarding the baby shower list, however, is directly contradicted by Davidson's affidavit testimony. In opposition to summary judgment, Davidson testified that "[Shuler] was never directed by me to 'clean up' the La Bella Vita customer list and give it to [Combs] for the purpose of sending out invitations for the baby shower." Further, Davidson unequivocally declared, "I never stated or admitted to anyone that the client list was given to [Combs] for the purpose of sending out baby shower invitations," and that "use of [the client] list for that purpose was not authorized." Thus, Davidson flatly denies authorizing use of La Bella Vita's client list for the purpose of developing the invitation list for Shuler's baby shower.

[431]** T**[*810]** he**[***29]** conflicting testimony regarding the genesis of the baby shower list creates a genuine factual dispute which simply cannot be construed against La Bella Vita on summary judgment.

2. La Bella Vita's Client List and Client-Related Information

As to La Bella Vita's official client list and related information, there is also a factual dispute as to whether this information qualifies as confidential and trade secret, specifically regarding whether La Bella Vita took the steps necessary to protect this information. Davidson addressed La Bella Vita's confidentiality and privacy practices, testifying in pertinent part:

> [La Bella Vita's] data system included the names, phone numbers, physical addresses, email addresses, special dates (birthday, anniversaries), services and product profiles used by the client, color formulas, personal intake forms for spa services, and referral information. This information was generated for the specific purpose of keeping the clients as customers and maintaining good client relations. I was careful to ensure that all of this information was included as part of our confidentiality contract with our employees. The importance of keeping this information confidential **[***30]** was discussed in the confidentiality contract as well as the employee handbook.
>
> ... All [employees] were trained to know that the customers of La Bella Vita were customers and clients of La Bella Vita and not [customers of] the employees.
>
> I hired Amanda Shuler as the Salon Manager in February of 2006. Initially she shared the Salon Manager responsibilities with Christina Entzel. Ultimately [Shuler] became the overall Salon Manager in April 2010. Her responsibilities included overseeing the entire operation of the business, including: a) hiring employees; b) training employees; c) assuring the employees were familiar with the Employee Handbook and the Confidentiality Agreement which they needed to sign in order to work at the salon; d) protection of our intellectual property including the types of services that we provided and the client contact information.
>
> Amanda Shuler had been trained and was instructed to carefully guard the information which we had concerning our clients and I specifically reviewed with her the procedures that were to be followed in the spa when I was not there to [e]nsure that the employees did not disclose this confidential information to anyone.

The client information **[***31]** was made available

> to employees in order to allow them to use it for salon/spa business and promotions, as for example sending "Thank You" cards or notifying them of promotions that the spa was offering. We also would use the client list to update [our] current client information. This was all done inside the La Bella Vita premises and was supposed to be done in a way that the information did not become public. Most of our clients are women and, in my experience, they do not like to have their personal information shared with anyone else. They want their information that is given to La Bella Vita kept at that location and not to be used for any other purpose.
> ...
> With respect to the allegations that I compromised my client list, scheduling list, client calendars, client information and any other information that was declared confidential under the Confidentiality Agreement, I state unequivocally that at no time did I ever authorize any of these documents to be released to anybody.
> ...
>
> Employees were given daily scheduling lists but these lists were never shown or placed in a location where a client or third party could see them. Employees of La Bella Vita were specifically instructed not **[***32]** to disclose this information or to make it visible to the eyes of customers or third parties inside the premises at any time. It was the specific responsibility of Amanda Shuler to ensure that the calendars, scheduling lists and client lists were not readily available to anyone other than employees of La Bella Vita. At the end of each day the employees of La Bella Vita were required to return their daily calendars with **[**432] [*811]** the information contained thereon, and any information that the employees had added, to the front desk. These lists were supposed to be shredded by the employees at the front desk. Amanda Shuler was responsible for making sure this got done. This was done to [e]nsure that the information was not left lying around. It was also the responsibility of the front desk employees to obtain additional updated information regarding the client to be added to the computer system.

Furthermore, current La Bella Vita employee Christina Entzel stated, "During my time working at La Bella Vita, [Davidson] [has] had a very strict business practice [of keeping] client lists confidential. . . . [She] was extremely careful with respect to confidentiality of the lists and did not allow anyone to use **[***33]** it for any purpose outside La Bella Vita."

Providing a contrary view, and in support of summary judgment, Shuler and other former La Bella Vita employees testified that this client-related information was loosely protected and often left out in public spaces in the salon, allowing patrons and other visitors easy access to it. Specifically, Shuler and the individually named defendants submitted identical affidavit testimony regarding the handling of client information and the institutional steps taken by La Bella Vita to safeguard the confidentiality of this information. The affiants testified as follows:

> Additionally, while I was employed by [La Bella Vita], I personally observed that it was the common practice for [La Bella Vita] employees to print copies of [La Bella Vita's] Client/Customer list, client information and scheduling lists out on the front desk, or in their work areas to write thank you cards and for other reasons. I also personally observed that people who were not employed by [La Bella Vita], including customers, friends and/or family of the employees, were in these locations throughout the day. Anyone in these areas, including non-employees[,] could pick up, look at, **[***34]** review or even take a copy of [the] Client/Customer list at any time. [La Bella Vita's] owner saw this happening and never took any action to correct it.
> Further, it was also the practice of [La Bella Vita] to have its employees prepare a written schedule for each day and to have the written schedule taped up or sitting out at their work station area. Any person receiving services during that day, or any family or friends who happened to be in the salon could see the names and information of all of the customers who were scheduled for services. [La Bella Vita's] owner saw this happening and never took any action to correct it.

Thus, there is directly conflicting testimony regarding La Bella Vita's practices with respect to its treatment and protection of client information. This creates a disputed issue as to one of six factors discussed in *Basic American*, specifically the third factor which considers "the extent of measures taken ... to guard the secrecy of the information."

However, even with Shuler's affidavit testimony purporting to undermine La Bella Vita's privacy practices, Shuler admits during her deposition that she understood this client material was intended to be

confidential **[***35]** and proprietary to La Bella Vita. The following exchange during Shuler's deposition is instructive in this regard:

> Q: All right. Is there anything in the confidentiality agreement that you disagree with in hindsight?
> A (Shuler): No.
> Q: I mean, you agree[d] to be bound by its terms?
> A: Correct.
> Q: What did you understand you were signing when you signed the confidentiality agreement?
> A: That I would not take a client list from [La Bella Vita] and use it or give it away or sell it or anything that way.
> Q: Is it your contention that the confidentiality agreement was limited to a client list?
> A: People that I could have access to only by La Bella Vita, yes.
> Q: I'm not sure I understand your answer.
>
> **[**433] [*812]** A: We couldn't take [Davidson's] confidential information that was in her computer, client list, a printed list or a written list of formulas, addresses, phone numbers, any of her information, any notes from message therapists, anything like that.

Shuler further articulated her understanding that the confidentiality agreement came into existence as a condition of employment at La Bella Vita in response to a former employee who took the client list when she was terminated. While Davidson denies any knowledge of **[***36]** any prior theft of La Bella Vita's client list by a disgruntled former employee, Davidson agrees the information is meant to be proprietary and confidential to La Bella Vita and that the purpose of the confidentiality agreement is to protect client-related information from outside use and dissemination.

Furthermore, the deposition testimony of Dalley lends support for the proposition that La Bella Vita employees understood that their primary obligation under the confidentiality agreement was to keep the personal and service-related information of clients confidential. It is worth noting that it was Shuler, as Dalley's supervisor, who discussed and explained the confidentiality agreement to Dalley at the time she signed the document.

The consistent testimony from Davidson, Shuler, and La Bella Vita's current and former employees regarding their understanding of the confidentiality agreement and its coverage of the salon's official client information, together with the conflicting testimony on La Bella Vita's business practices, creates a genuine factual dispute as to the confidential nature of La Bella Vita's client list and client-related information. This factual dispute cannot be construed **[***37]** against La Bella Vita on summary judgment.

3. Misappropriation

Setting aside whether the information at issue is confidential, there are genuine disputes regarding misappropriation. On summary judgment, the district court found insufficient evidence to establish Shuler actually took and used confidential information belonging to La Bella Vita. However, this finding was built upon the court's unsupported determination that the baby shower list did not contain any confidential information. In section V(B)(1), *supra*, this Court holds that there are in fact disputed issues as to the confidential nature of the baby shower list. Furthermore, and although the trial court made no direct findings as to the nature of La Bella Vita's official client information, this Court further holds in section V(B)(2), *supra*, that there are disputed issues as to whether this information qualifies as confidential. For the reasons outlined below, this Court further holds that there is conflicting evidence on the issue of misappropriation.

As to La Bella Vita's client list and related information, Shuler and the other former La Bella Vita employees unequivocally deny taking any of La Bella Vita's official client-related **[***38]** information, but also aver that the La Bella Vita client list was compromised by sloppy business practices. Despite these assertions, Shuler and these former employees do not dispute that, under the terms of the confidentiality agreement, this client-related information was intended to be confidential and proprietary to La Bella Vita. As to the baby shower list, it is undisputed that this list was derived, at least in part, directly from La Bella Vita's official client list. It is further undisputed that Shuler utilized the baby shower list in the creation or supplementation of Eikova's client list. What is disputed is whether this use of the baby shower list constitutes a misappropriation of a trade secret.

Shuler and others at her direction admit to using the baby shower list in the creation of Eikova's client list. These same individuals, however, deny taking or using any of La Bella Vita's official client information, specifically stating that the information they used did not come directly from La Bella Vita's computer system. This is a distinction without a difference, and the following exchanges during Shuler's deposition illustrate

this point:

> Q: Do you know what happened to **[***39]** the --- this [baby shower] list after the baby shower invitations were printed?
>
> **[**434] [*813]** A (Shuler): After the baby shower, Tammy [Comstock] gave me the list in label format so I could send thank you cards to my clients.
> Q: Okay. How about the [baby shower] list itself?
> A: I don't know what happened to it.
> Q: Did you make any effort to retrieve it?
> A: No. It could have ended up at the salon and shredded. I'm not sure.
> ...
> Q: So just to make sure I have this in the record, you are telling me that you did not use any client list or any derivation of a client list for the purpose of contacting any of your clients that went with you to Eikova?
> A: I still had the baby shower list Tammy Comstock had given me.
> Q: Do you have that [baby shower] list today?
> A: No, I don't.
> Q: What happened to it?
> A: I threw it away.
> Q: Do you remember when you threw it away?
> A: Yeah. I had a notebook that I transferred most of the information to that I could --- I kind of put as many of my clients in alphabetical order that I could think of at home, and as soon as I transferred the people on that list I still serviced, which I didn't service all of them anymore, I threw it away.
>
> Q: When did you decide that you were entitled to use **[***40]** the baby shower list as a basis for contacting people to let them know you were moving to Eikova?
> A: I don't think I felt like I was entitled to it. It was given to me.
> Q: But didn't you still consider that to be confidential information up until the time you left?
> A: No. It was given to me from an outside party. My clients' names --- many of them weren't even spelled on it correctly.
> Q: The fact that it had been prepared for your daughter's --- your daughter's baby shower, you didn't --- you decided at that point in time it was no longer confidential?
> A: Tammy [Comstock] could have given that list to anyone.

Dalley corroborates Shuler's testimony that the baby shower list was used to generate or supplement Eikova's client list. A pertinent portion of Dalley's deposition transcript reads as follows:

> Q: I would like to have you tell me what information you have regarding that --- that [baby shower] list. I mean, what can you tell me about it?
>
> A (Dalley): I was not employed at La Bella Vita at the time that list was given or printed. I have seen the list after we had opened Eikova. That's --- we used that information --- a lot of it were [Shuler's] friends, family, people that she already knew, **[***41]** because it was her baby shower. There wouldn't be people that she wasn't familiar with.
> Q: I see. So the information you have about the baby shower list is information that other people told you?
> A: I've seen the list of the baby shower.
> Q: You've seen the list. Oh, all right. Do you know where that list is today?
> A: I don't.
> Q: Where was the last place you saw it?
> A: When [Shuler] compiled the information from it and gave it to us to use to contact people at Eikova once it had opened.
> Q: Okay. What information was on the list?
> A: Names and addresses of [Shuler's] friends and family.
> Q: How many people were on the list?
> A: I'm not sure.
> Q: How many pages was the list?
> A: I believe it was two or three pages.
> Q: Did you get the list from Amanda Shuler?
> A: I never had my own copy of the list.
> Q: Oh. What did you have?
>
> **[**435] [*814]** A: We had one --- like, at the salon, so it was never mine. It was at Eikova. It was just there, and it was at the very beginning.
> ...
> Q: So you had possession of a list when you were at the front desk?
> A: Sure. Yes.
> Q: And you used that list and entered it in the computer ---
> A: Yes.
> Q: --- and contacted the people that were on the list?
> A: Yes.
>
> Q: And you were told by Amanda Shuler that the list **[***42]** was from her baby shower?

A: Information from the --- yes.
Q: Okay. I'm just trying to figure out what she told you so that you knew what the list was.
A: It had all of that information on it, baby shower --- baby shower names and then [the stuff that] she had added to it from her own information. Does that make sense?
Q: Yes.
A: Okay.
Q: So there were names on there that were from a baby shower list, as well as additional names that Amanda Shuler had placed on the list?
A: Yes.
Q: But that was a list that Amanda Shuler gave you?
A: That was at the salon, yes.

Thus, the testimony of Shuler and Dalley demonstrates that the baby shower list was at least partially derived from La Bella Vita's official client list and also used as a primary source in the creation of Eikova's client list. This goes to the heart of misappropriation.

Lastly, the affidavit testimony of La Bella Vita clients offered in opposition to summary judgment provides circumstantial evidence of misappropriation. The affidavit testimony of these clients is substantially similar in most respects, with each affiant stating that their contact information is private and non-public and implying that Eikova could have only obtained this **[***43]** information from La Bella Vita's official records. The district court dismissed these accusations as too tenuous and speculative to survive summary judgment because there was not any direct evidence of misappropriation. The district court's characterization of this testimony as conjecture is not entirely misplaced. A person's contact information can be ascertained in a variety of ways, including through the involuntary sharing or selling of information. It is nearly impossible to completely control these other avenues and there are a variety of methods Eikova could have utilized to obtain this information, even though these clients considered the same to be non-public and confidential.

However, Margaret Beatty's (Beatty) testimony deviates in one significant way from the testimony of the other clients: specificity. Beatty had an appointment at La Bella Vita in February 2011, the same month Eikova opened. Shortly after Eikova's opening, Beatty testified, "I was contacted by someone from Eikova at the front desk to tell me that my appointment with [Harrington] had been moved from La Bella Vita to Eikova. This was done without my knowledge or consent." This testimony creates a disputed **[***44]** issue as to misappropriation, as it provides a sufficiently definite nexus between La Bella Vita's internal appointment calendar and Eikova's. This testimony supports the assertion that Eikova took and used La Bella Vita's confidential client contact and scheduling information.

For all of these reasons, there are genuine disputes on the issue of misappropriation, disputes which cannot be construed against La Bella Vita on summary judgment.

4. District Court's Memorandum Decision and Order on Summary Judgment

The district court made many key findings on summary judgment, findings which are undercut by the genuine factual disputes discussed above. In granting summary judgment against La Bella Vita, the district court determined that La Bella Vita failed to "come forward with sufficient evidence to **[**436]** **[*815]** raise a question of fact regarding a violation of a trade secret." First, the district court found that La Bella Vita failed to keep the information contained in the baby shower list confidential given that non-employees Combs and Comstock received certain client information in the planning of Shuler's baby shower and that the baby shower list is still unreturned. Considering Davidson's testimony **[***45]** unequivocally denouncing this use of La Bella Vita's information, this finding does not rest on solid ground. Notwithstanding Davidson's testimony, the trial court reasoned that because this information was released and remains unconfined, it is no longer confidential. This rationale presents only half of the story.

It is undisputed that everyone at La Bella Vita understood or considered this client-related information to be confidential, at least at the inception of their respective terms of employment. There are disputes as to whether sloppy business practices compromised this intent, and also whether the official client list was properly accessed in the creation of the baby shower list. The district court found that despite these disputed facts, because this baby shower list was created, distributed, and remains at large, these acts suggest this information is not and was never confidential. The outcome of this lawsuit will likely rest in large part on whether this baby shower list was properly created and released in the first place. The district court's rationale fails to account for the discrepancies over whether the client-related information was intended or understood as confidential **[***46]** and the steps taken to prevent a

leak of the same.

Second, the district court found that under the ITSA, information qualifies as confidential only if it cannot be derived from other means. The court cited Shuler's testimony that she and her Eikova employees generated their own lists from a variety of sources, including word or mouth from friends, family, and acquaintances, social media contacts, church directories, and internet databases and searches. This analysis, however, fails to account for, or even acknowledge, Shuler's heavy reliance on the baby shower list as a source of inspiration in the creation of Eikova's list. Given this reliance on the baby shower list, it is unclear from the record whether Shuler and the other Eikova employees would have been capable of deriving or recreating the same information utilizing these others means. While the district court dismissed as speculative the client testimony that the only way Eikova could have obtained their information was by taking all or some of La Bella Vita's client list, the trial court failed to acknowledge the use of the baby shower list, a list which is an undisputed derivative of the client list.

Lastly, and "notwithstanding **[***47]** the finding that the information contained on the baby shower list was not confidential," the district court also found that La Bella Vita failed to meet its burden of establishing whether Shuler "actually used any of the information contained in the baby shower list" or whether Shuler "wrongfully took or used any other 'confidential' information." This finding, however, is contradicted by Shuler's affidavit testimony wherein she expressly admits to using information contained in the baby shower list in the creation of Eikova's new client list. Shuler testified, "I had a notebook [where] I transferred most of the information ... [from the baby shower list]." More specifically, she stated that she created an Eikova list in her notebook by "put[ting] as many of [her] clients in alphabetical order that [she] could think of [while brainstorming] at home," and that she supplemented this notebook list with most of the information from the baby shower list. Shuler concluded, "[A]s soon as I transferred the people on [the baby shower] list I still serviced, [since] I didn't service all of them anymore, I threw it away."

Regarding La Bella Vita's claim that Shuler breached the confidentiality agreement, **[***48]** the court failed to squarely address this issue, reasoning that without a violation of the ITSA, there could not be a breach of the agreement. Because this Court holds that there are genuine factual issues as to the existence of a trade secret and a misappropriation of the same, there remains an issue as to whether the confidentiality agreement was breached by Shuler and Eikova.

[437] [*816] 5. Summary of Disputed Issues Precluding Summary Judgment**

When viewed in a light most favorable to La Bella Vita, there are numerous disputed factual issues regarding whether the information at issue in this case qualifies as confidential and trade secret. These disputed issues render this case inappropriate for summary judgment against La Bella Vita. As to La Bella Vita's client list and client-related information, the affidavit and deposition testimony of Davidson and current and former La Bella Vita employees conflicts as to the salon's practices regarding the safeguarding of this information. There is no dispute, however, that La Bella Vita employees understood the same information as being confidential and proprietary to La Bella Vita, signing a confidentiality agreement to that end.[5] As to the baby shower **[***49]** list, there is a genuine dispute as to whether Davidson authorized the accessing and use of La Bella Vita's official client list to assist in the creation of the shower list. Davidson emphatically denies granting such permission, while Shuler and Combs testify to the contrary.

As stated above, ***HN14***[] to prevail in a claim brought under the ITSA, "[a] plaintiff must show that a trade secret actually existed." *Basic American, Inc. v. Shatila, 133 Idaho 726, 734, 992 P.2d 175, 183 (1999)*; *I.C. § 48-801*. To determine whether information qualifies as a trade secret, this Court looks at six factors, "[a]ll of [which] address the issue of whether the information in question is generally known or readily ascertainable." *Wesco Autobody Supply, Inc. v. Ernest, 149 Idaho 881, 898, 243 P.3d 1069, 1086 (2010)*. The emphatic denials by Shuler and the other named defendants that they did not take La Bella Vita's client list or any derivation of the same are rendered meaningless by admissions from the same that the baby shower list was utilized in the creation of Eikova's client list. It is undisputed that La Bella **[***50]** Vita's client-related information was intended and understood by its employees and management to be confidential and proprietary to La

[5] All employees except Coffin signed the Confidentiality Agreement. This raises an additional question regarding whether La Bella Vita's client-related information was properly protected, given that Coffin had access to this information but was not constrained by the agreement.

Bella Vita. While there is a dispute about whether this information is actually confidential and trade secret, or might have been initially but otherwise lost its confidential character over time, all parties expressed an understanding that the purpose underlying the confidentiality agreement signed by Shuler and the other La Bella Vita employees was to protect this information. Shuler and Eikova admit that the baby shower list was, at least in part, derived from this official information, and also used to generate Eikova's list. The aforementioned disputes over whether Davidson authorized use of this official information in the creation of the baby shower list and whether La Bella Vita's business practices somehow compromised the confidentiality of its client information preclude resolution of this action on summary judgment. The law is settled that these sorts of factual disputes defeat a motion for summary judgment. *Petricevich v. Salmon River Canal Co., 92 Idaho 865, 868-69, 452 P.2d 362, 365-66 (1969)*.

Further, there are disputes regarding misappropriation. Shuler admitted to taking and using the baby shower list in the creation of **[***51]** Eikova's client list. The baby shower list is a derivation of La Bella Vita's formal client list, and the affidavit testimony, viewed in a light most favorable to La Bella Vita, establishes that official information was accessed in the creation of the shower list. Beyond the baby shower list, however, there is no concrete evidence of Shuler taking client information directly from La Bella Vita's system. While the testimony of La Bella Vita clients is mostly circumstantial, Beatty's testimony regarding the unsolicited phone call she received from Eikova regarding her "new" appointment at Eikova provides some evidence that Eikova improperly accessed La Bella Vita's official appointment calendar.

Lastly, it is worth noting that the district court never squarely reached the issue of whether La Bella Vita's client list and other client-related information is confidential—both at the inception of defendants' terms of employment and also whether it maintained **[**438]** **[*817]** its intended confidential character over time. Instead, the court focused solely on the character and nature of the baby shower list. However, an analysis of the baby shower list cannot be conducted in a vacuum. A proper analysis of the **[***52]** baby shower list, by necessity, implicates the character and nature of the official client information from which it was derived.

C. The award of attorney fees and costs to Shuler and Eikova is vacated.

HN15[↑] *Idaho Code section 12-120(3)* allows for the recovery of attorney fees by the prevailing party in a civil action to recover on any commercial transaction. After the grant of summary judgment in favor of Shuler and Eikova, the district court entered a memorandum and order awarding attorney fees and costs to Shuler and Eikova pursuant to *Idaho Rule of Civil Procedure 54* and *Idaho Code section 12-120(3)*, finding this action qualifies as a commercial transaction. Given the reversal of the district court's decision, Shuler and Eikova are no longer the prevailing parties in this case. Thus, the award of attorney fees is vacated.

D. Shuler and Eikova are not entitled to attorney fees on appeal.

Shuler and Eikova seek attorney fees on appeal pursuant to *Idaho Code section 12-120(3)*. ***HN16***[↑] A prerequisite to an award of attorney fees under this section is that the party prevails. Shuler and Eikova are not the prevailing party in this appeal. Therefore, they do not qualify for an award of attorney fees. La Bella Vita does not seek fees on appeal.

VI. Conclusion

The district court's grant of summary judgment in favor of **[***53]** Shuler and Eikova is reversed, and this case is remanded for further consideration consistent with this decision. The award of fees and costs in favor of Shuler and Eikova is also vacated. Costs on appeal are awarded to La Bella Vita.

Chief Justice BURDICK, Justices EISMANN, J. JONES and HORTON CONCUR.

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1. *Reclaim Idaho v. Denney (In re Writ of Prohibition)*
   Client/Matter: -None-
   Search Terms:
   Search Type: Natural Language
   Narrowed by:

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	-None-

Reclaim Idaho v. Denney (In re Writ of Prohibition)

Supreme Court of Idaho

August 23, 2021, Opinion

Docket Nos. 48784 and 48760

Reporter
169 Idaho 406 *; 497 P.3d 160 **; 2021 Ida. LEXIS 143 ***; 2021 WL 3720965

In Re: Petition for Writ of Prohibition.RECLAIM IDAHO, and the COMMITTEE TO PROTECT AND PRESERVE THE IDAHO CONSTITUTION, INC., Petitioner, v. LAWERENCE DENNEY, in his official capacity as the Idaho Secretary of State; and STATE OF IDAHO, Respondents, and SCOTT BEDKE in his official capacity as Speaker of the House of Representatives of the State of Idaho; CHUCK WINDER, in his official capacity as President Pro Tempore of the Idaho State Senate; SIXTY-SIXTH IDAHO LEGISLATURE, Intervenors-Respondents.In Re: Petition for Writ of Mandamus.MICHAEL STEPHEN GILMORE, a Qualified Elector of Ada County, Petitioner, v. LAWERENCE DENNEY, Idaho Secretary of State, in his official capacity, Respondent, and SCOTT BEDKE in his official capacity as Speaker of the House of Representatives of the State of Idaho; CHUCK WINDER, in his official capacity as President Pro Tempore of the Idaho State Senate; SIXTY-SIXTH IDAHO LEGISLATURE, Intervenors-Respondents.

Prior History: [*1]** Petition for Writ of Prohibition (Reclaim Idaho v. Denney, Docket No. 48784). Petition for Writ of Mandamus (Gilmore v. Denney, Docket No. 48760).

Disposition: The Petition for Writ of Prohibition is granted in part and denied in part.

The Petition for Writ of Mandamus is dismissed.

Core Terms

initiative, signatures, ballot, referendum, legislative district, qualify, voters, statewide, referenda, declarations, conditions, fundamental rights, strict scrutiny, rights, registered voter, repeal, original jurisdiction, election, referendum power, geographic, effective date, gathered, urgent, enact, veto, legislate, reserved, workable, polls, constitutional violation

Case Summary

Overview

HOLDINGS: [1]-*Idaho Code Ann. § 34-1805(2)* violates *Idaho Const. art. III, § 1* because the initiative and referendum powers are fundamental rights, reserved to the people of Idaho, to which strict scrutiny applies. A compelling state interest for limiting that right was not presented, the Legislature's solution is not a narrowly tailored one, and the court bars SB 1110 from taking effect and restores the previous version of *Idaho Code Ann. § 34-1805*; [2]-*Idaho Code Ann. § 34-1813(2)(a)*, which allows the legislature to set the effective date for initiatives as July 1 of the year following passage, violates *Idaho Const. art. III, § 1* because it infringes on the people's reserved power to enact legislation independent of the legislature.

Outcome

Petition for writ of prohibition granted in part and denied in part. Petition for writ of mandamus dismissed.

LexisNexis® Headnotes

Evidence > ... > Testimony > Lay Witnesses > Personal Knowledge

HN1[] **Lay Witnesses, Personal Knowledge**

Idaho R. Evid. 602 requires that witnesses have personal knowledge of the evidence of the matter to which they testify.

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN2 **Expert Witnesses, Qualifications**

While the test for determining whether a witness is qualified as an expert is not rigid. Practical experience or special knowledge must be shown to bring a witness within the category of an expert.

Civil Procedure > Pleading & Practice > Pleadings > Supplemental Pleadings

HN3 **Pleadings, Supplemental Pleadings**

Typically, a motion to file a supplemental declaration is granted with a showing of good cause.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Constitutional Law > Separation of Powers

Civil Procedure > ... > Writs > Common Law Writs > Prohibition

HN4 **Common Law Writs, Mandamus**

Idaho Const. art. V, § 9 vests the Idaho Supreme Court with original jurisdiction to issue writs of mandamus and prohibition, as well as all writs necessary or proper to the complete exercise of its appellate jurisdiction. This original jurisdiction is limited only by the separation of powers provisions contained in Idaho Const. art. II, § 1 and the Court's own rules. Any person may apply to the Court for the issuance of any extraordinary writ or other proceeding over which the Court has original jurisdiction. Idaho App. R. 5(a). The procedural guidelines over special writs are outlined in Rule 5. Once the Court asserts its original jurisdiction, it may issue writs of mandamus and/or prohibition. Idaho case law demonstrates that the Court has accepted original jurisdiction in matters where the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Constitutional Law > The Judiciary > Case or Controversy > Advisory Opinions

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Immediacy

Civil Procedure > ... > Justiciability > Ripeness > Immine nce

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Adverse Legal Interests

HN5 **Case & Controversy Requirements, Actual Controversy**

A party must present a justiciable controversy in order to invoke the original jurisdiction of the Idaho Supreme Court and seek declaratory relief. A prerequisite to a declaratory judgment action is an actual or justiciable controversy. Justiciability is generally divided into subcategories—advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions. Concepts of justiciability, including standing, identify appropriate or suitable occasions for adjudication by a court. A justiciable controversy should be distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Civil Procedure > ... > Justiciability > Standing > Persona l Stake

HN6 **Standing, Personal Stake**

It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing. Standing determines whether an injury is adequate to invoke the protection of a judicial decision. Standing is a threshold determination by the court before reaching the merits of the case. The inquiry focuses on the party seeking relief and not on the issues the party wishes to have adjudicated. The Idaho Supreme Court has historically looked to the United

States Supreme Court for guidance on issues of standing. The origin of Idaho's standing rule is a self-imposed constraint adopted from federal practice, as there is no case or controversy clause or an analogous provision in the Idaho Constitution as there is in the United States Constitution.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN7 **Standing, Burdens of Proof**

To establish standing a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. To satisfy the first element—an injury in fact—one must allege or demonstrate an injury that is concrete and particularized and actual or imminent, not conjectural or hypothetical. The common phrase "allege or demonstrate" used by the Idaho Supreme Court is an incomplete statement of the requirements for standing. The standing phrase allege or demonstrate actually requires a showing of a distinct palpable injury and fairly traceable causal connection between the claimed injury and the challenged conduct. Palpable injury has been defined by the Court as an injury that is easily perceptible, manifest, or readily visible.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Constitutional Law > The Judiciary > Case or Controversy > Standing

HN8 **Justiciability, Standing**

The bar for standing can vary with the circumstances of each individual case. It is admittedly imprecise and difficult to apply. However, the court has remained steadfast to the premise that standing can never be assumed based on a merely hypothetical injury. Thus, bare allegations are insufficient. Furthermore, a citizen and taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction. A petitioner must establish a peculiar or personal injury that is different than that suffered by any other member of the public.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Evidence > Weight & Sufficiency

Constitutional Law > The Judiciary > Case or Controversy > Standing

HN9 **Justiciability, Standing**

Mere disagreement with a law is not sufficient to establish standing.

Civil Procedure > Remedies > Writs > Common Law Writs

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN10 **Writs, Common Law Writs**

Where petitioners have not met the traditional standing requirements, the Idaho Supreme Court may exercise jurisdiction to review a petition for extraordinary relief where the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Constitutional Law > The Judiciary > Case or Controversy > Standing

HN11 **Justiciability, Standing**

To qualify for relaxed standing, one still must show: (1) the matter concerns a significant and distinct constitutional violation, and (2) no party could otherwise

have standing to bring a claim.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN12[] **Standing, Burdens of Proof**

To establish standing a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. To satisfy the requirement of an injury in fact, one must allege or demonstrate an injury that is concrete and particularized and actual or imminent, not conjectural or hypothetical. Standing requires a showing of a distinct palpable injury and fairly traceable causal connection between the claimed injury and the challenged conduct.

Civil Procedure > ... > Writs > Common Law Writs > Prohibition

HN13[] **Common Law Writs, Prohibition**

A writ is an extraordinary remedy that cannot be granted where an adequate remedy in the ordinary course of law already exists. One seeking a writ of prohibition must show two contingencies are met: (1) the tribunal, corporation, board or person is proceeding without or in excess of the jurisdiction of such tribunal, corporation, board, or person, and (2) that there is not a plain, speedy, and adequate remedy in the ordinary course of law.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

Governments > Courts > Authority to Adjudicate

HN14[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Even if there is another remedy in the ordinary course of law in the trial courts, the Idaho Supreme Court has recently stated that its willingness to act upon its original jurisdiction includes cases requiring a determination of the constitutionality of recent legislation where there is urgency of the alleged constitutional violation and the urgent need for an immediate determination.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN15[] **Common Law Writs, Mandamus**

The Idaho Supreme Court may exercise jurisdiction to review a petition for extraordinary relief where the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature. Under this relaxed requirement, the Court has determined that one need not show a special injury to himself or his property in order to petition for mandamus. Specifically, the Court held that if (1) the matter concerns a significant and distinct constitutional violation, and (2) no party could otherwise have standing to bring a claim, it is willing to relax ordinary standing requirements.

Governments > Legislation > Enactment

HN16[] **Legislation, Enactment**

A citizen and taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Governments > Legislation > Interpretation

HN17[] **Case or Controversy, Constitutionality of Legislation**

It is emphatically the province and duty of the judicial department to say what the law is. Passing on the constitutionality of statutory enactments, even enactments with political overtones, is a fundamental responsibility of the judiciary, and has been so since Marbury v. Madison. Interpretation of constitutional or statutory provisions is a familiar judicial exercise.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN18 **Case or Controversy, Constitutionality of Legislation**

Applying well-settled legal principles to an unsettled question of law is a judicial function almost as old as our republic.

Constitutional Law > State Constitutional Operation

Constitutional Law > Bill of Rights > Fundamental Rights > Unenumerated Rights

HN19 **Constitutional Law, State Constitutional Operation**

Under the Idaho Constitution, all political power is inherent in the people. Idaho Const. art. I, § 2. Moreover, it is a fundamental principle that the people, in adopting the Idaho Constitution, instituted the government to do their will.

Constitutional Law > State Constitutional Operation

Governments > State & Territorial
Governments > Legislatures

HN20 **Constitutional Law, State Constitutional Operation**

Idaho Const. art. III, § 1 establishes the legislative powers for the state of Idaho, including the power of direct legislation by the people.

Constitutional Law > State Constitutional Operation

Governments > State & Territorial
Governments > Elections

Governments > Legislation > Initiative & Referendum

HN21 **Constitutional Law, State Constitutional Operation**

The Idaho Supreme Court has consistently recognized that a right is fundamental under the Idaho Constitution if it is expressed as a positive right, or if it is implicit in Idaho's concept of ordered liberty. Like voting, the Idaho Constitution plainly expresses the initiative and referendum power as a positive right: The people reserve to themselves the power. Idaho Const. art. III, § 1. This alone requires the Idaho Supreme Court to interpret the people's initiative and referendum rights as fundamental rights.

Constitutional Law > State Constitutional Operation

Governments > Legislation > Interpretation

HN22 **Constitutional Law, State Constitutional Operation**

In interpreting the Idaho Constitution, the rules of statutory construction apply. The general rules of statutory construction apply to constitutional provisions as well as statutes. These rules of construction are well understood: The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the court need not consider rules of statutory construction. An ambiguous statutory or constitutional provision is one where reasonable construction of the language can result in more than one meaning. In that instance, the court must engage in statutory construction in order to determine and give effect to the legislative intent.

Constitutional Law > State Constitutional Operation

Governments > State & Territorial
Governments > Legislatures

HN23 **Constitutional Law, State Constitutional Operation**

Idaho Const. art. III, § 1 establishes and defines the people's power to legislate directly, stating the people reserve to themselves the power. But it also provides that the exercise of this power is to be carried out under such conditions and in such manner as may be provided by acts of the legislature.

Constitutional Law > State Constitutional Operation

Governments > Legislation > Initiative & Referendum

Governments > State & Territorial
Governments > Legislatures

HN24 **Constitutional Law, State Constitutional Operation**

A close reading of Idaho Const. art. III, § 1 convinces the Idaho Supreme Court that it establishes the people's fundamental right to legislate directly, as opposed to a power that is subservient to the will of the legislature. The conditions and manner provisions do not grant the legislature carte blanche in limiting that right. The referendum and initiative powers are described within the section of the constitution that establishes legislative power. Along with the power granted to the legislature, the initiative and referendum rights are "reserved" to the people. To ascertain the ordinary meaning of an undefined term in a statute or constitution, the court has often turned to dictionary definitions of the term. "Reserve" is defined as to hold in reserve or keep back. The people kept back for themselves a portion of the total legislative power they granted to the House of Representatives and the Senate. There is a straightforward reservation of a portion of the total legislative power to the people in the Idaho Constitution.

Constitutional Law > State Constitutional Operation

Governments > Legislation > Initiative & Referendum

HN25 **Constitutional Law, State Constitutional Operation**

A referendum is a constitutional mechanism allowing the people to repeal a law already passed by the legislature. By its very nature, it cannot be independent of the legislature because it is a response to legislative action.

Constitutional Law > State Constitutional Operation

Governments > Legislation > Initiative & Referendum

Governments > Legislation > Interpretation

Governments > State & Territorial
Governments > Legislatures

HN26 **Constitutional Law, State Constitutional Operation**

The language in Idaho Const. art. III, § 1 describing the people's initiative right is not limited to its subject matter. The paragraph on initiatives begins: The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. What is reserved is expressly the power to propose laws and to enact laws—verbs closely associated with the act of legislating and not just choosing the subjects of legislation. The Idaho Supreme Court sees no need to strain for an interpretation when the plain language of the Idaho Constitution is clear: the people have the power to propose and enact laws on any subject. This power is both equivalent to that of the legislature and one which the people possess independent of the legislature.

Governments > Legislation > Initiative & Referendum

Governments > State & Territorial
Governments > Legislatures

HN27 **Legislation, Initiative & Referendum**

The legislature's conditions and manner authority in Idaho Const. art. III, § 1 plainly relate to the process of direct legislation. Thus, while the legislature may determine how the people's right to legislate is initiated, it has not been given the power to effectively prevent the people from exercising this right by placing onerous conditions on the manner of its use.

Constitutional Law > State Constitutional Operation

Governments > State & Territorial

Governments > Elections

Governments > State & Territorial
Governments > Legislatures

HN28 **Constitutional Law, State Constitutional Operation**

The right to vote is a fundamental right because the Idaho Constitution expressly guarantees the right to suffrage. While it is true that Idaho Const. art. VI, § 4 provides for the legislature's ability to prescribe qualifications, limitations, and conditions for the right of suffrage, this does not mean the Idaho legislature could, notwithstanding the Twenty-Sixth Amendment, constitutionally limit the franchise by raising the voting age from 18 to 35.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN29 **Fundamental Freedoms, Freedom of Speech**

The legislature is permitted to place conditions on certain aspects of free speech. The ability of the legislature to make laws related to a fundamental right arises from the reality that, in an ordered society, few rights are absolute. However, the legislature's duty to give effect to the people's rights is not a free pass to override constitutional constraints and legislate a right into non-existence, even if the legislature believes doing so is in the people's best interest.

Constitutional Law > Bill of Rights > Fundamental Rights

Constitutional Law > State Constitutional Operation

HN30 **Bill of Rights, Fundamental Rights**

Because the people of Idaho expressly reserved to themselves the powers to (1) approve or reject at the polls any act or measure passed by the legislature, and (2) propose laws and enact the same independent of the legislature, when they amended the Idaho Constitution in 1912, the Idaho Supreme Court concludes these powers are fundamental rights. Accordingly, while the legislature has authority to define the processes by which these rights are exercised, any legislation that effectively prevents the people from exercising these rights will be subject to strict scrutiny.

Constitutional Law > Bill of Rights > Fundamental Rights

Constitutional Law > Substantive Due Process > Scope

HN31 **Bill of Rights, Fundamental Rights**

A law infringing on a fundamental right is subject to strict scrutiny: If a fundamental right is at issue, the appropriate standard of review to be applied to a law infringing on that right is strict scrutiny. Under the strict scrutiny standard of review, a law which infringes on a fundamental right will be upheld only where the State can demonstrate the law is necessary to promote a compelling state interest. Like the right to vote, the people's right to legislate is expressed as a positive right in the Idaho Constitution and is, therefore, fundamental.

Constitutional Law > Bill of Rights > Fundamental Rights

Constitutional Law > Substantive Due Process > Scope

HN32 **Bill of Rights, Fundamental Rights**

Strict scrutiny is a well-established standard where fundamental rights are concerned. The standard for strict scrutiny is clear: Strict scrutiny should be applied to legislation dealing with fundamental rights or suspect classifications. Strict scrutiny requires that the government action be necessary to serve a compelling state interest, and that it is narrowly tailored to achieve that interest. Under the strict scrutiny standard of review, a law which infringes on a fundamental right will be upheld only where the State can demonstrate the law is necessary to promote a compelling state interest. Thus, strict scrutiny is the measuring stick that must be applied to the statutes in question.

Constitutional Law > State Constitutional Operation

Governments > Legislation > Initiative & Referendum

HN33 **Constitutional Law, State Constitutional Operation**

The United States Supreme Court has recognized that state constitutional provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Assembly

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN34 **Fundamental Freedoms, Freedom of Assembly**

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. Protecting the constitutional rights of both the majority and the minority is not only a vital role of the judicial branch, it is also one that judicial officers throughout Idaho are accustomed to performing on a daily basis.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Governments > Legislation > Interpretation

HN35 **Case or Controversy, Constitutionality of Legislation**

The judiciary's role in adjudicating the constitutionality of legislative acts was recognized prior to final adoption of the United States Constitution: If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

Governments > Courts > Authority to Adjudicate

HN36 **Courts, Authority to Adjudicate**

Just as the courts have the constitutional authority to exercise judicial review over the enactments of the legislature, it logically follows that the judiciary has a concomitant power to review direct legislation enacted by the people. Such review not only provides a sturdy bulwark for protecting the rights of both the majority and the minority, but it also is the proper and peculiar province of the courts.

Constitutional Law > State Constitutional Operation

Governments > Legislation > Initiative & Referendum

HN37 **Constitutional Law, State Constitutional Operation**

The inherent purpose of Idaho Const. art. III, § 1's initiative and referendum power is to give the majority of the people an opportunity to have a voice in passing legislation.

Constitutional Law > State Constitutional Operation

Governments > Local Governments > Elections

Governments > Legislation > Initiative & Referendum

Governments > State & Territorial Governments > Elections

HN38 **Constitutional Law, State Constitutional Operation**

The Idaho Constitution's reservation of legislative power to the state's qualified voters—allowing them to pass or repeal legislation independent of the legislature—must also come with a fair opportunity to qualify an initiative or referendum for the ballot to exercise this power, or the power is merely illusory.

Constitutional Law > State Constitutional Operation

Governments > State & Territorial
Governments > Elections

Governments > Legislation > Initiative & Referendum

HN39 **Constitutional Law, State Constitutional Operation**

The people of Idaho have reserved to themselves an additional constitutional mechanism for affecting statewide policy and correcting legislative enactments they do not support—the initiative and referendum process. This power is meaningless unless it is accessible. Just as the Idaho Constitution protects the people's right to either reelect their legislators or elect new ones at the polls, it also protects the right to approve or reject a proposed initiative or referendum at the polls. It is not the proper role for any branch of the government to effectively nullify a constitutional mechanism reserved by the people to effect policy.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Governments > State & Territorial
Governments > Elections

Governments > Legislation > Initiative & Referendum

HN40 **Case or Controversy, Constitutionality of Legislation**

Idaho Code Ann. § 34-1805(2) violates Idaho Const. art. III, § 1 because both tests under strict scrutiny have failed: (1) it was not shown that there is a compelling state interest in demonstrating support from every legislative district before voter initiated legislation or referenda are allowed to appear on the ballot, and (2) it has not been demonstrated that requiring signatures from all 35 legislative districts is a narrowly tailored way of achieving the goal of protecting the interests of rural or regional voters.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > Interpretation

HN41 **Case or Controversy, Constitutionality of Legislation**

When a statute by express language repeals a former statute and attempts to provide a substitute therefor, which substitute is found to be unconstitutional, the repeal of the former statute is of no effect, unless it clearly appears that the legislature intended the repeal to be effective even though the substitute statute were found invalid.

Civil Procedure > ... > Writs > Common Law Writs > Prohibition

Governments > State & Territorial
Governments > Elections

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Governments > Legislation > Initiative & Referendum

HN42 **Common Law Writs, Prohibition**

The Idaho Supreme Court has declared SB 1110 unconstitutional and granted a petition for a writ of prohibition barring its taking effect. Accordingly, Idaho Code Ann. § 34-1805 is restored to its previous state, whereby an initiative or referendum petition filed with the Secretary of State must include signatures from six percent of qualified electors at the time of the last general election in 18 legislative districts, provided the total number of signatures is equal to or greater than six percent of the registered voters in the state at the time of the last general election.

Governments > Legislation > Effect & Operation > Operability

HN43[] **Effect & Operation, Operability**

The Legislature has the power to declare that its legislation is an emergency, which allows the legislation to have immediate effect.

Governments > Legislation > Effect & Operation > Prospective Operation

HN44[] **Effect & Operation, Prospective Operation**

Generally, legislation does not go into effect sooner than 60 days after it is passed, except in case of an emergency. However, it is also true that legislation may contain a different effective date.

Governments > Legislation > Initiative & Referendum

Governments > Legislation > Effect & Operation > Prospective Operation

HN45[] **Legislation, Initiative & Referendum**

Idaho Const. art. III, § 22 states that no act shall take effect until 60 days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law. Thus, the same standard, which allows the legislature considerable discretion in setting the effective date of legislation when an emergency is properly declared, should apply to legislation adopted by the people via the initiative process. The effective date crosses over into the substantive right reserved to the people.

Constitutional Law > State Constitutional Operation

HN46[] **Constitutional Law, State Constitutional Operation**

Idaho Const. art. III, § 1 provides that the people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. Notably, independent of the legislature applies to both the power to propose laws and the power to enact laws. This necessarily includes the power to set the effective date, by which the laws are actually enacted.

Constitutional Law > State Constitutional Operation

Governments > Legislation > Initiative & Referendum

HN47[] **Constitutional Law, State Constitutional Operation**

The power to legislate is derived from the same source. The Idaho Supreme Court reaffirms its prior holdings that initiative-created legislation stands on equal footing with laws enacted by the legislature. This necessarily includes permitting the drafters of initiatives to set effective dates, subject to the requirements in Idaho Const. art. III, § 22. To read Idaho Const. art. III, § 1 otherwise would disregard that the people may enact legislation independent of the legislature. Therefore, the amendments to Idaho Code Ann. § 34-1813(2)(a) are an unconstitutional infringement on the peoples' right to legislate independent of the legislature.

Governments > Legislation > Initiative & Referendum

Governments > State & Territorial Governments > Legislatures

HN48[] **Legislation, Initiative & Referendum**

In Luker v. Curtis, 64 Idaho 703, 136 P.2d 978 (1943), the Idaho Supreme Court made two misstatements in its description of the legislative power in Idaho, which the Court now disavows. First, the Court wrote that the government was divided into three departments, the first and foremost of which is the legislative power vested in the Senate and House of Representatives. The Court has since consistently emphasized that the three departments—the legislative, the executive, and the judiciary—are co-equal. Second, the Court described the 1912 constitutional amendment that reserved the initiative and referendum powers to the people as an afterthought and, thus, implied it was less important than other constitutional provisions. The Court recognizes that many of the people's most important rights have come about by constitutional amendment, beginning with the Bill of Rights (Amendments I through

X, inclusive), including the Thirteenth Amendment (abolishment of slavery) and the Twentieth Amendment (the recognition of women's suffrage). The Court disclaims any language that implies a right created by constitutional amendment is of lesser importance.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Catalyst Theory

HN49[] **Basis of Recovery, Catalyst Theory**

Three factors are to be considered under the private attorney general doctrine: (1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision.

Governments > State & Territorial Governments > Elections

Governments > Legislation > Initiative & Referendum

HN50[] **State & Territorial Governments, Elections**

Idaho Code Ann. § 34-1805(2) violates Idaho Const. art. III, § 1 because the initiative and referendum powers are fundamental rights, reserved to the people of Idaho, to which strict scrutiny applies. A compelling state interest for limiting that right was not presented. Additionally, even if there were a compelling state interest, the Legislature's solution is not a narrowly tailored one. Therefore, the Idaho Supreme Court bars SB 1110 from taking effect. The Court restores the previous version of Idaho Code Ann. § 34-1805, which requires signatures from six percent of the qualified electors at the time of the last general election in each of at least 18 legislative districts, as well as signatures equal to or greater than six percent of the qualified electors in the state at the time of the last general election.

Constitutional Law > State Constitutional Operation

Governments > Legislation > Initiative & Referendum

HN51[] **Constitutional Law, State Constitutional Operation**

Idaho Code Ann. § 34-1813(2)(a) allows the legislature to set the effective date for initiatives as July 1 of the year following passage, violates Idaho Const. art. III, § 1 because it infringes on the people's reserved power to enact legislation independent of the legislature.

Counsel: Ferguson Durham, PLLC, Boise, for Petitioners. Deborah A. Ferguson argued.

Lawrence G. Wasden, Idaho Attorney General, Boise, for Respondent Lawerence Denney. Megan Larrondo argued.

Holland & Hart, LLP, Boise, for Intervenors-Respondents Scott Bedke, Chuck Winder and Sixty-Sixth Idaho Legislature. William G. Myers, III, argued.

Michael Stephen Gilmore, Boise, Petitioner, Pro se, argued.

Lawrence G. Wasden, Idaho Attorney General, Boise, for Respondent Lawerence Denney. Megan Larrondo argued.

Holland & Hart, LLP, Boise, for Intervenors-Respondents Scott Bedke, Chuck Winder and Sixty-Sixth Idaho Legislature. William G. Myers, III, argued.

Judges: MOELLER, Justice. Chief Justice BEVAN and Justice BURDICK CONCUR. STEGNER, J., specially concurring. BRODY, J., concurring in part and dissenting in part.

Opinion by: MOELLER

Opinion

[166]** **[*412]** MOELLER, Justice.

This case concerns the people's referendum and initiative rights, enshrined in *Article III, Section 1 of the Idaho Constitution*, which reads, in part:

> The people reserve **[***2]** to themselves the power to approve or reject at the polls any act or measure passed by the legislature.
> . . .
> The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature.
> . . .

These same provisions also contain language directing

the Idaho Legislature to enact laws establishing the "conditions" and "manner" by which these rights will be exercised. *Id.* Today we are asked to determine whether recent limitations imposed by the Idaho legislature unconstitutionally infringe upon these rights.

I. INTRODUCTION

Two petitions have come before us seeking to invoke the Idaho Supreme Court's original jurisdiction in order to declare two statutes unconstitutional and to issue extraordinary writs—a writ of mandamus and a writ of prohibition. First, Michael Stephen Gilmore ("Gilmore") seeks a declaration that *Idaho Code section 34-1805(2)*, as amended by SB 1110, violates the people's constitutional initiative and referendum rights. SB 1110 requires that, for an initiative or referendum to appear on the ballot, organizers must obtain a threshold number of signatures from "each of the thirty-five (35) legislative districts" in the state. Gilmore argues this violates **[***3]** the *equal protection clause of the Idaho Constitution* and unconstitutionally divides the people's legislative power. Gilmore also petitions the Idaho Supreme Court for a writ of mandamus ordering the Idaho Secretary of State "not to implement" the statute as amended.

Gilmore's petition is opposed by the Idaho Secretary of State ("the SOS"), who is represented by the Attorney General, as well as the Intervenor-Respondents Scott Bedke, as Speaker of the House of Representatives of the State of Idaho; Chuck Winder, as President Pro Tempore of the Idaho State Senate; and the Sixty-Sixth Idaho Legislature (collectively "the Legislature"),[1] which retained independent counsel. Both the SOS and the Legislature argue that the changes enacted by SB 1110 are a lawful exercise of the legislature's constitutionally-delegated power to prescribe the conditions and manner under which initiatives and referenda may be carried out by the people. The SOS also asserts that Gilmore lacks standing, a writ of mandamus is an improper remedy, original jurisdiction is not warranted, and this case presents a nonjusticiable political question that the Idaho Supreme Court should not address.

Second, this case consolidates a subsequent petition filed by Reclaim Idaho **[***4]** ("Reclaim") and the Committee to Protect and Preserve the Idaho Constitution, Inc. ("the Committee"), which seeks a declaration that the new signature threshold mandated by SB 1110, requiring signatures from every legislative district, is unconstitutional. They also challenge the constitutionality of another statute, *Idaho Code section 34-1813(2)(a)*, which was amended in 2020 and states that an initiative may not become effective earlier than July 1 of the year following the vote in which it was passed. Reclaim and the Committee contend both amended statutes nullify the people's fundamental constitutional right to legislate directly. They seek a writ of prohibition to prevent the Secretary of State from enforcing these statutory provisions.

Reclaim and the Committee's petition is also opposed by the SOS, as Respondent, and the Legislature, as Intervenors. The SOS and the Legislature again argue that the **[**167]** **[*413]** challenged provisions fall within the legislature's authority granted in *Article III, Section 1 of the Idaho Constitution.* The SOS adds that a writ of prohibition is an inappropriate remedy and this Court lacks original jurisdiction to hear the petition. The Legislature further contends that the substance of the legislature's conditions on the people's initiative **[***5]** and referendum powers is a nonjusticiable political question.

II. BACKGROUND

A. Factual Background

In 2021, the Idaho Legislature passed SB 1110, which amended *Idaho Code section 34-1805(2)*, the statute that sets forth the process by which the people exercise their initiative and referendum rights. Governor Brad Little signed SB 1110 into law, but expressed reservations concerning the constitutionality of the legislation. Under the previous law, petition organizers needed to gather signatures from 6% of the total registered voters in the state at the time of the last general election, including 6% of registered voters from each of 18 legislative districts. SB 1110 increased the legislative district requirement to 35 districts—meaning petition organizers must now obtain signatures from 6% of registered voters at the time of the last general election in *every* legislative district in the state. *See I.C. § 34-1805(2)*. Because the bill contained an emergency clause, it became effective immediately.

[1] To avoid confusion, we have capitalized the word "Legislature" in this opinion when referring to the 2021 Idaho Legislature as a party in this case. When generally discussing the role and function of the legislature as a legislative body, it will not be capitalized.

A year earlier, in 2020, Governor Little signed into law a bill amending the second statute at issue in this case, *Idaho Code section 34-1813(2)(a)*. That statute now prevents any initiative approved by voters from taking effect before July 1 of the year following voter approval **[***6]** of the ballot initiative, effectively allowing the legislature six months from when it convenes in January to repeal any voter-passed legislation before it goes into effect. *See* *Idaho Const., art. III, § 8*. The Legislature insists that the amendments to both statutes are within its constitutional authority.

This is a dispute many years in the making. In 1912, the people of Idaho amended the state constitution to "reserve to themselves" initiative and referendum powers. The amendment added a second and third paragraph to *Article III, Section 1 of the Idaho Constitution*, which defines the legislative power of the state. As amended, this section reads:

> The legislative power of the state shall be vested in a senate and house of representatives. The enacting clause of every bill shall be as follows: "Be it enacted by the Legislature of the State of Idaho."
>
> The people reserve to themselves the power to approve or reject at the polls any act or measure passed by the legislature. This power is known as the referendum, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their **[***7]** approval or rejection.
>
> The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection.

Idaho Const. art. III, § 1. The Idaho Constitution reserves to the people the power to legislate directly, while authorizing the legislature to prescribe the "conditions" and "manner" by which the people can do so. *Id.*

In 1915, the legislature passed enabling legislation for the exercise of those powers setting several onerous—if not impossible—conditions for a ballot proposition to qualify for the ballot. For one, the proposed legislation would have required all signatures to be witnessed by a judge or state official. Further, the threshold signature requirement to qualify for the ballot would have been high: 15% of voters in the last gubernatorial election in each of Idaho's counties for initiatives, and 10% in each of Idaho's counties for referenda.[2] **[**168]** **[*414]** Then-Governor Moses Alexander **[***8]** vetoed the bill, writing that it would have been "fatal" to the people's nascent initiative and referendum rights. In response, the legislature set a course of deliberate inaction, failing to pass any enabling legislation and allowing the people's initiative and referendum power to remain dormant for another 18 years.

In 1933, the legislature finally acted, passing a law which allowed an initiative or referendum to qualify for the statewide ballot if proponents obtained signatures from 10% of the statewide votes cast in the prior gubernatorial election. That law, which included no geographic distribution requirement for signatures, remained in effect for 64 years—from 1933 until 1997. During that time, 24 initiatives and three referenda qualified for the ballot.[3] In 1984, the legislature again attempted to make the process more onerous, by passing a bill that increased the signature requirement from 10% of the votes cast in the last gubernatorial election to 20%. Then-Governor John Evans vetoed the bill, observing that it would give Idaho "the dubious distinction" of enacting the most restrictive conditions on the initiative power in the nation. As Governor Alexander had before, Governor **[***9]** Evans wrote that the legislature's requirements would make the people's direct legislative power a "dead letter."

Then, in 1997, citing unspecified abuses in the people's use of their direct legislative power—and on the heels of a successful 1994 voter initiative that created term limits[4] —the legislature succeeded in changing the initiative and referendum procedure. The new law required signatures from 6% of *registered* voters, as opposed to persons *qualified* to vote. And, for the first

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[2] As of the end of 1915, Idaho had 37 counties. Extrapolated from public data provided by the State of Idaho at http://www.idaho.gov/aboutidaho/county/index.html .

[3] Because there are no accurate records from this time period reflecting the number of unsuccessful attempts to qualify an initiative or referendum for the ballot, we cannot accurately determine the percentage that successfully made the ballot.

[4] The term limits initiative passed in 36 of Idaho's 44 counties, with a 59% majority vote.

time, those signatures were subject to a geographic distribution requirement: the 6% total signatures gathered from registered voters statewide had to include signatures from 22 of Idaho's 44 counties, equal to 6% of the qualified electors in each county at the time of the last general election. This geographic distribution requirement was later challenged in federal court, and subsequently struck down by the United States Court of Appeals for the Ninth Circuit. *Idaho Coal. United for Bears v. Cenarrusa, 342 F.3d 1073 (9th Cir. 2003)*. The Ninth Circuit concluded that, because Idaho counties have vastly disparate populations, the 22-county requirement violated equal protection and the "one person, one vote" principle by granting more power to those signing petitions in less **[***10]** populous counties. *Id. at 1078-79*. *See generally* *Gray v. Sanders, 372 U.S. 368, 381, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963)* ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the *Fifteenth*, *Seventeenth*, and *Nineteenth Amendments* can mean only one thing—one person, one vote."). Thus, the requirement that petition organizers obtain signatures from 6% of registered voters statewide went forward without any geographic distribution requirement. Under this law, which existed unchanged from 1998 to 2013, only four initiatives and four referenda qualified for the ballot out of 63 circulated voter petitions.

Despite the fact that few voter-initiated propositions were making it to the ballot, the legislature again added a more restrictive signature threshold in 2013. This came on the heels of three successful referenda in 2012 that repealed the so-called "Luna Laws"—education legislation that, among other things, limited teachers' ability to negotiate contracts and tied teacher pay to standardized test scores. The Ninth Circuit, in dicta to *Idaho Coal. United for Bears*, had suggested that a geographic distribution requirement based on legislative districts, which are roughly equal in population, would not violate the United States Constitution's *equal protection clause*. *342 F.3d at 1078*; *U.S. Const. amend. XIV*. In 2013, **[***11]** the legislature passed just such a geographic distribution **[**169]** **[*415]** requirement, mandating that petition organizers gather signatures from 6% of registered voters at the time of the last general election in each of at least 18 of Idaho's 35 legislative districts, provided that the total number of signatures gathered was equal to or greater than 6% of registered voters statewide at the time of the last general election. The new 18 legislative district requirement remained in place from 2013 until the passage of SB 1110 in 2021. Over the last eight years, 14 voter petitions have been circulated; of those, only two initiatives and no referenda qualified for the statewide ballot.

The two initiatives which qualified under the 18 legislative district requirement both appeared on the ballot in 2018. The first attempt to sponsor an initiative was mounted by Reclaim Idaho, a grassroots, mostly volunteer organization, which sought to expand Medicaid coverage in Idaho ("Medicaid Expansion"). Reclaim exceeded the signature requirement, obtaining signatures from 6% of qualified electors in 21 of Idaho's 35 legislative districts. The second initiative sought to authorize "historic" horse racing in Idaho ("Horse **[***12]** Racing"). Horse Racing relied on paid signature gatherers. This petition also exceeded the signature requirement, obtaining signatures from 6% of the qualified electors in 22 of Idaho's 35 legislative districts. At the polls in November, Medicaid Expansion passed with 60.6% of the statewide vote; Horse Racing failed, garnering only 46.6% statewide support.

In 2019, in the immediate aftermath of Medicaid Expansion passing, the legislature again attempted to make qualifying initiatives and referenda more difficult, proposing legislation that would have required signatures from 10% of registered voters statewide at the time of the last general election, including at least 10% of registered voters in 32 of Idaho's 35 legislative districts. *See* H.B. 296 (Idaho 2019); S.B. 1159a (Idaho 2019). Further, the bills would have required all signatures to be gathered in just 180 days, rather than the 18 months previously allowed. However, Governor Little, like Governors Alexander and Evans before him, vetoed the bill, expressing concern about its constitutionality.

The following year, in 2020, the legislature amended one of the two statutes at issue here, *Idaho Code section 34-1813(2)(a)*. The amendment now prevents initiatives **[***13]** from setting an effective date "earlier than July 1 of the year following the vote on the ballot initiative." *ID LEGIS 336 (2020), 2020 Idaho Laws Ch. 336 (H.B. 548)*. Pursuant to *Article III, Section 8 of the Idaho Constitution*, the legislature convenes annually on the second Monday in January. This means the legislature would have six months to repeal or amend any voter-passed law before it took effect.

Most recently, in 2021, the legislature passed SB 1110, which amended the other statute at issue, *Idaho Code section 34-1805(2)*, by requiring that, to qualify an initiative or referendum for the ballot, organizers must

now obtain signatures from 6% of registered voters in "each of the thirty-five (35) legislative districts" in the state, almost doubling the prior geographic distribution requirement. The Legislature correctly notes that the amendment did not change the overall number of signatures needed to qualify for the ballot because both versions of the law still require signatures equal to or greater than 6% of registered voters statewide.

Currently, Reclaim Idaho is working to qualify two initiatives for the 2022 ballot. The first is the "Quality Education Act," which proposes increasing funding for K-12 education in Idaho. On June 16, the Secretary of **[***14]** State approved the Quality Education Act petition for signature gathering. The second is the "Initiative Rights Act," which would eliminate the geographic distribution requirement for initiatives mandated by SB 1110. In declarations submitted to this Court, Reclaim avers that the new signature requirement for qualifying initiatives for the statewide ballot poses an undue burden on an organization made up of volunteers, even if an initiative has broad statewide support.

The Committee has also filed a referendum with the Secretary of State seeking to repeal SB 1110, which it is attempting to qualify for the 2022 ballot. They will have 60 days to **[**170]** **[*416]** collect those signatures once the legislature adjourns *sine die*.[5]

B. Procedural Background

On April 26, 2021, Gilmore, a qualified elector from Ada County, filed a verified petition with this Court for issuance of a writ of mandamus to prevent the SOS from implementing *Idaho Code section 34-1805(2)*'s geographic requirement that signatures obtained for qualifying an initiative or referendum for the ballot must include 6% of registered voters in each of Idaho's 35 legislative districts. The SOS opposed Gilmore's petition. The Legislature sought and was granted permission to intervene, **[***15]** so that it could also oppose the petition.

On May 7, 2021, Reclaim and the Committee filed a verified petition with this Court, naming the SOS as respondent. They seek a declaration that the geographic distribution requirement in *Idaho Code section 34-1805(2)* violates *Article III, Section 1 of the Idaho Constitution*, as does *Idaho Code section 34-1813(2)(a)*. They also seek a peremptory writ of prohibition from this Court prohibiting the SOS or any state official from enforcing these provisions. The SOS opposed Reclaim and the Committee's petition. Again, the Legislature was granted permission to intervene, so that it could also oppose this petition. On June 3, 2021, this Court ordered that the two cases be consolidated for the purposes of oral argument and the issuance of this Court's opinion.

On June 2, 2021, the SOS filed a motion to strike certain paragraphs from eight declarations submitted by Reclaim and the Committee. On June 14, 2021, the SOS and the Legislature filed a joint motion to strike two additional declarations submitted by Reclaim and the Committee. On June 21, 2021, we entered an order granting the SOS's motion to strike, in part, as to three of the declarations. We reserved ruling on the objections to the remaining declarations until after oral argument and permitted the **[***16]** SOS to file additional responsive declarations. We afforded Reclaim and the Committee, as well as the SOS, additional time during oral argument to address the outstanding motions.

III. THE MOTIONS TO STRIKE

Initially, we will address the SOS's and the Legislature's remaining motions to strike. Pursuant to this Court's Order of June 21, 2021, we granted the SOS's motion to strike, in part, by striking portions of the declarations of Linda Larson (paragraph 7), Karen Lansing (paragraph 10), and Jessica Mahuron (paragraphs 8 and 9). We reserved ruling on the SOS's motion to strike portions of the declarations of Ben Ysursa, Luke Mayville, Dr. Gary Moncrief, David Daley, and Robin Nettinga. We also reserved ruling on the SOS's and the Legislature's joint motion to strike the declaration of Joe Champion and the supplemental declaration of Dr. Gary Moncrief.

HN1[↑] *Idaho Rule of Evidence 602* requires that witnesses have personal knowledge of the evidence of the matter to which they testify. *Idaho Rule of Evidence 701* sets forth the standard for opinion testimony from lay witnesses:

> If a witness is not testifying as an expert, testimony in the form of an opinion or inference is limited to one that is:

[5] The Idaho Senate adjourned its 2021 legislative session in May; however, the Idaho House of Representatives refused to do so, opting instead to recess to a date no later than December 31, 2021. Thus, the 60-day window for gathering the required signatures for the referendum has not yet commenced.

> (a) rationally based on the witness's perception;
>
> **[***17]** (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of *Rule 702*.

For expert witness testimony, *Idaho Rule of Evidence 702* governs:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand **[**171]** **[*417]** the evidence or to determine a fact in issue.

The SOS's motion to strike concerned testimony in the Ysursa, Mayville, Moncrief, Daley, and Nettinga declarations that the SOS claims is speculative as to how the 35 legislative district requirement will affect future signature drives. The SOS asserts these statements are impermissible under *Idaho Rule of Evidence 602*, *701*, and *702*. We disagree. These declarants, based on their considerable personal knowledge and experience with the initiative and referendum processes in Idaho, provided both facts and opinion that comply with the requirements of *Idaho Rules of Evidence 602*, *701*, and *702*. In sum, the respective expertise of the declarants in these topics permits them to offer such opinions, and we conclude that they were not **[***18]** unduly speculative. In some instances, the SOS's objections appear to go more to the weight of the testimony, but not to its admissibility. This Court is competent to determine the weight we should afford those opinions.

HN2[⬆] We recently emphasized that, while "[t]he test for determining whether a witness is qualified as an expert is 'not rigid[,]' . . . . [p]ractical experience or special knowledge must be shown to bring a witness within the category of an expert." *Phillips v. E. Idaho Health Servs., Inc., 166 Idaho 731, 755, 463 P.3d 365, 389 (2020)*. Mayville and Moncrief adequately demonstrated their qualifications, experience, and expertise to give expert opinions. Their declarations provided the type of opinions commonly and properly admitted under *Idaho Rule of Evidence 702*. Contrary to the SOS's assertions, the declarations were not speculative because each addressed opinions upon which an expert in the field can properly opine. Likewise, the remaining declarants provided factual information based on their experience, observations, and personal knowledge.

The SOS also objected to the declarations of Ysursa, Mayville, Moncrief, Daley, and Nettinga, arguing they stated impermissible conclusions of law that were otherwise irrelevant and should be stricken. Moreover, the SOS argues these declarations **[***19]** stated the incorrect constitutional test for this Court to apply in this case. To the extent that any of the declarations contained statements which could arguably be read as legal conclusions, this Court has disregarded such statements as a matter of course. Concerning the balance of the declarations, we find them relevant inasmuch as they contain evidence that has a tendency to make a fact of consequence more or less probable. *See I.R.E. 401*. Accordingly, we deny the balance of the SOS's motion to strike.

The SOS and the Legislature filed a joint motion to strike the declaration of Joe Champion and the supplemental declaration of Dr. Gary Moncrief. The SOS and the Legislature asserted that the declarations were submitted too late for any reply, were unfair to the SOS and the Legislature, and Champion's declaration was too speculative. ***HN3***[⬆] Typically, a motion to file a supplemental declaration is granted with a showing of good cause. This case, which is being heard as an original action without the benefit of a trial record, presents constitutional issues of significant importance. It is essential that the Court have access to all the relevant facts necessary to reach an appropriate decision. Moreover, **[***20]** the SOS successfully moved this Court to allow a supplemental declaration from its declarant, Dr. John R. Stevens. Therefore, we find there was good cause to admit Reclaim and the Committee's supplemental declarations. There was no unfair prejudice inasmuch as the SOS was allowed to submit its own supplemental declarations. Again, as with the aforementioned declarations, Champion's declaration was the type of opinion commonly and properly admitted under *Idaho Rule of Evidence 702*. It was not speculative because the declaration addressed opinions upon which an expert in the field can properly opine. Any objections to his methodologies go to the weight, not the admissibility, of his testimony. Therefore, the SOS and the Legislature's outstanding motion to strike the declaration of Champion and the supplemental declaration of Moncrief is also denied.

IV. STANDING AND JUSTICIABILITY ISSUES

A. The legal basis for exercising our original jurisdiction

Before proceeding to the merits, we must determine whether the Petitioners have **[**172]** **[*418]** properly invoked this Court's original jurisdiction. HN4[] We summarized the legal basis for exercising original jurisdiction in a recent case involving the legislature:

> Article V, Section 9 of the Idaho Constitution vests this Court with original **[***21]** jurisdiction to issue writs of mandamus and prohibition, as well as 'all writs necessary or proper to the complete exercise of its appellate jurisdiction.' This original jurisdiction is limited only by the separation of powers provisions contained in Article II, Section 1 of the Idaho Constitution and this Court's own rules. Mead v. Arnell, 117 Idaho 660, 663, 791 P.2d 410, 413 (1990). 'Any person may apply to the Supreme Court for the issuance of any extraordinary writ or other proceeding over which the Supreme Court has original jurisdiction.' I.A.R. 5(a). The procedural guidelines over special writs are outlined in Idaho Appellate Rule 5. Once this Court asserts its original jurisdiction, 'it may issue writs of mandamus and/or prohibition.' Mead, 117 Idaho at 663-64, 791 P.2d at 413-14.

Ybarra v. Legislature by Bedke, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020); *see also* Regan v. Denney, 165 Idaho 15, 19, 437 P.3d 15, 19 (2019). Our case law demonstrates that we have accepted original jurisdiction in matters where "the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature, . . ." Sweeney v. Otter, 119 Idaho 135, 138, 804 P.2d 308, 311 (1990). *See also* Idaho Watersheds Project v. State Bd. of Land Commissioners, 133 Idaho 55, 57, 982 P.2d 358, 360 (1999).

B. Standards for determining justiciability and standing

HN5[] A party must present a justiciable controversy in order to invoke the original jurisdiction of this Court and seek declaratory relief. We have been clear: "A prerequisite to a declaratory judgment action is an actual or justiciable controversy. Justiciability is generally divided into subcategories—advisory **[***22]** opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions." Miles v. Idaho Power Co., 116 Idaho 635, 639, 778 P.2d 757, 761 (1989). "'Concepts of justiciability, including standing, identify appropriate or suitable occasions for adjudication by a court.'" Coeur d'Alene Tribe v. Denney, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015) (quoting State v. Philip Morris, Inc., 158 Idaho 874, 881, 354 P.3d 187, 194 (2015)). As we noted in *Phillip Morris*, this Court has previously explained that a justiciable controversy should be

> distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

158 Idaho at 881, 354 P.3d at 194 (quoting Davidson v. Wright, 143 Idaho 616, 620, 151 P.3d 812, 816 (2006)).

HN6[] Additionally, "[i]t is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing." Young v. City of Ketchum, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). Standing determines whether an injury is adequate to invoke the protection of a judicial decision. Coeur d'Alene Tribe, 161 Idaho at 513, 387 P.3d at 766. Standing is a threshold determination by this Court before reaching the merits of the case. Philip Morris, 158 Idaho at 881, 354 P.3d at 194. "The inquiry **[***23]** 'focuses on the party seeking relief and not on the issues the party wishes to have adjudicated.'" *Id.* (quoting Young, 137 Idaho at 104, 44 P.3d at 1159). This Court has historically looked to the United States Supreme Court for guidance on issues of standing. *Id.* "'[T]he origin of Idaho's standing [rule] is a self-imposed constraint adopted from federal practice, as there is no 'case or controversy' clause or an analogous provision in the Idaho Constitution as there is in the United States Constitution.'" Regan, 165 Idaho at 21, 437 P.3d at 21 (quoting Coeur d'Alene Tribe, 161 Idaho at 513, 387 P.3d at 766) (citing U.S. Const. art. III, § 2, cl. 1).[6]

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[6] We recognize the criticism the Court has received in the past, including that contained in the concurring opinion, for allegedly departing from common law standing principles, dating back to

[173]** **[*419]** HN7[] "[T]o establish standing 'a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a like[lihood] that the injury will be redressed by a favorable decision.'" *Philip Morris, 158 Idaho at 881, 354 P.3d at 194* (quoting *Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157-58, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014)*. To satisfy the first element—an injury in fact—one must "allege or demonstrate" an injury that is "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Susan B. Anthony, 573 U.S. at 157-58*). The common phrase "allege or demonstrate" used by this Court "is an incomplete statement of the requirements for standing." *Id.* This Court clarified in *Young* that the standing phrase "allege or demonstrate" **[***24]** actually "requires a showing of a '*distinct palpable injury*' and 'fairly traceable causal connection between the claimed injury and the challenged conduct.'" *Young, 137 Idaho at 104, 44 P.3d at 1159* (emphasis added) (quoting *Miles, 116 Idaho at 639, 778 P.2d at 761*). "Palpable injury" has been defined by this Court as "an injury that is easily perceptible, manifest, or readily visible." *Philip Morris, 158 Idaho at 881, 354 P.3d at 194*.

HN8[] The bar for standing can vary with the circumstances of each individual case. *Id. at 882, 354 P.3d at 195*. It is admittedly "imprecise and difficult to apply." *Young, 137 Idaho at 104, 44 P.3d at 1159*. However, we have remained steadfast to the premise that "standing can never be assumed based on a merely hypothetical injury." *Philip Morris, 158 Idaho at 882, 354 P.3d at 195* (citing *Young, 137 Idaho at 104, 44 P.3d at 1159*). Thus, bare allegations are insufficient. *Id.* Furthermore, "'a citizen and taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction.'"[7] *Noh v. Cenarrusa, 137 Idaho 798, 800, 53 P.3d 1217, 1219 (2002)* (quoting *Miles, 116 Idaho at 641, 778 P.2d at 763*). A petitioner must "'establish a peculiar or personal injury that is different than that suffered by any other member of the public.'" *Id.* (quoting *Selkirk-Priest Basin Ass'n v. State, 128 Idaho 831, 834, 919 P.2d 1032, 1035 (1996)*).

[174]** **[*420]** **C. Gilmore's petition fails to raise a justiciable claim**.

1. Gilmore does not meet the requirements for standing.

The SOS asserts that Gilmore lacks standing for this Court to hear his petition. The SOS argues Gilmore's alleged injury **[***25]** is generalized in that SB 1110 affects Gilmore in an identical fashion to all other Idahoans. We agree with the SOS's assessment and conclude that Gilmore lacks standing because he has failed to present a "'peculiar or personal injury that is different than that suffered by any other member of the public.'" *Noh, 137 Idaho at 800, 53 P.3d at 1219*

Idaho's early statehood, by adopting federal standing principles in *Bear Lake Education Ass'n v. Bd. of Trustees of Bear Lake Sch. Dist. No. 33, 116 Idaho 443, 448, 776 P.2d 452, 457 (1989)*. *See* Michael S. Gilmore, *Standing Law in Idaho: A Constitutional Wrong Turn*, *31 IDAHO L. REV. 509 (1995)*; *Zeyen v. Pocatello/Chubbuck Sch. Dist. No. 25, 165 Idaho 690, 705-08, 451 P.3d 25, 40-43 (2019)* (Stegner, J., dissenting). However, notwithstanding his noted law review article on this topic, Gilmore does not argue for this Court to reassess its standing principles and revert to common law standing principles. In fact, Gilmore cites the federal standing principles adopted by this Court—injury in fact, causal connection, and redressability—and argues their applicability to his case. Therefore, the concept of judicial restraint would suggest that this Court not address an issue that was not raised: "'[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.'" *State v. Chambers, 166 Idaho 837, 847, 465 P.3d 1076, 1086 (2020)* (Brody, J., concurring) (quoting *Carducci v. Regan, 714 F.2d 171, 177, 230 U.S. App. D.C. 80 (D.C. Cir. 1983)*). Therefore, notwithstanding the persuasive arguments of the concurring opinion, this case simply does not present a compelling reason for "leaving behind thirty years of jurisprudence on standing."

[7] This Court has recognized the U.S. Supreme Court's narrow exception regarding taxpayer standing. "'Taxpayers have been held qualified to maintain an action to test the validity of a statute or ordinance which increases the tax burden. Generally cases so holding involve an alleged illegal expenditure of public money.'" *Koch v. Canyon Cnty., 145 Idaho 158, 161, 177 P.3d 372, 375 (2008)* (quoting *Greer v. Lewiston Golf & Country Club, Inc., 81 Idaho 393, 397, 342 P.2d 719, 722 (1959)*). "[T]his Court has never questioned the standing of a taxpayer to challenge expenditures that allegedly violate *Article VIII, § 3*." *Id. at 162, 177 P.3d at 376*. Neither Gilmore nor Reclaim Idaho has cited *Koch* as authority this Court should apply—and probably for good reason. These petitions do not involve governmental expenditures, allegations that any expenditures violate *Article VIII, § 3*, or argument that the parties have standing through the taxpayer exception challenging expenditure of public money.

(quoting *Selkirk-Priest, 128 Idaho at 834, 919 P.2d at 1035*).

In *Young*, plaintiffs filed a complaint against the City of Ketchum for declaratory relief and a writ of prohibition regarding the City's involvement in a professional services contract and a related lease. *Young, 137 Idaho at 103, 44 P.3d at 1158*. The City entered into a contract with the Sun Valley-Ketchum Chamber of Commerce ("Chamber"), which provided that the Chamber would provide tourist information to the public and marketing services to promote the area. *Id.* In consideration of the services provided, the City was required to pay the Chamber money, which was raised via the local option nonproperty tax.[8] *Id.* A group of plaintiffs, consisting of concerned citizens who resided in and paid property taxes to the City, unsuccessfully challenged the contract in district court. *Id.* On appeal to this Court, we held that the plaintiffs lacked standing.

Plaintiffs alleged they suffered a distinct and palpable injury **[***26]** as concerned citizens and property owners living in the city. *Id. at 105, 44 P.3d at 1160*. The plaintiffs complained:

> (1) the option tax expenditures attract visitors and second homeowners to the area, which in turn has driven up the value of land and increased the amount they pay in property taxes; (2) the option tax is not actually paid by local businesses, but are paid by both residents and visitors; and (3) the City raised cash to make payments to the Chamber by reducing option tax expenditures for basic government functions . . . .

Id. This Court rejected the plaintiffs' assertions, reasoning that their alleged injury is more akin to an indirect effect that all citizens and taxpayers in the City share. We noted that none of the plaintiffs were business owners. *Id.* Therefore, the Court held, "Plaintiffs have made no allegations that such an injury is any different or distinct from any other citizen or property owner in the Ketchum area. This is insufficient to confer standing." *Id.*

Gilmore points to this Court's opinion in *Van Valkenburgh v. Citizens for Term Limits, 135 Idaho 121, 15 P.3d 1129 (2000)*, in support of his assertion that he meets the standing requirements. In *Van Valkenburgh*, petitioners sought a writ of prohibition and a declaratory judgment to prevent the Secretary of **[***27]** State from carrying out any action regarding a new ballot initiative—"The Congressional Term Limits Pledge Act of 1998" ("Term Limits Act"). *Id. at 123, 15 P.3d at 1131*. The Term Limits Act required the Secretary of State to place information on ballots for voters on whether a particular Congressional candidate had taken or broken a term limits pledge. Petitioners alleged that the law violated their right to vote because it "greatly diminishes the likelihood the candidate of their choice will prevail in the election." *Id. at 123-25, 15 P.3d at 1131-33*. The State, defending the Term Limits Act, argued the petitioners' injury is no different from the injury suffered by any other Idaho citizen. *Id.* However, the Court rejected the State's argument and agreed with the petitioners, reasoning:

> We believe the Petitioners have met the requirement of demonstrating a distinct injury because they have alleged *I.C. § 34-907B* adversely impacts only those registered voters who oppose the term limits pledge, or who support candidates who oppose the term limits pledge. Those who support the specific term limits pledge contained in the law are not injured by the use of the ballot legend, and it in fact benefits those who support the term limits pledge **[**175]** **[*421]** by increasing the likelihood **[***28]** their candidate will be elected.

Id. Accordingly, this Court found the petitioners alleged an injury not suffered by all citizens and taxpayers alike, thus they had standing. *Id.*

Gilmore's reliance on *Van Valkenburgh* is misplaced. Gilmore argues he is akin to the petitioners in *Van Valkenburgh* because: (1) he has established an injury in fact—SB 1110 diminishes the chance that hypothetical, future initiatives and referenda Gilmore might support will ever make it to the ballot; and (2) his injury is not an injury suffered by all citizens of Idaho—SB 1110 only negatively impacts those who are opposed to it.

First, it is certainly true that SB 1110 may diminish the chance an initiative or referendum Gilmore supports makes it to the ballot in the future; however, Gilmore's claimed injury is based on pure conjecture. Gilmore suggests that all Idahoans do not share his injury because SB 1110 only makes it harder for Idahoans like Gilmore, who may support a hypothetical future initiative or referendum, to qualify it for the ballot; whereas, it causes no injury to those who would oppose a hypothetical future initiative or referendum. Gilmore's analogy is too speculative and generalized.

[8] This was essentially a municipal sales tax.

Gilmore **[***29]** has not identified any initiative or referendum he *currently* supports, which SB 1110 makes more difficult to qualify for the ballot. Gilmore merely alleges that it will be harder for initiatives and referenda he *might* support in the future to reach the ballot because of SB 1110. Simply put, while Gilmore has shown that he is personally vexed by the passage of SB 1110, he has not effectively demonstrated that he currently has a dog in this fight. The Court's analysis might be different had Gilmore demonstrated his participation in a pending initiative or referendum drive in Idaho. Here, however, Gilmore can only claim that there might be some hypothetical initiative or referenda in the future that he desires to support, which SB 1110 may prevent from qualifying for the ballot.

Second, Gilmore further claims that he has standing because he is in a class of injured Idahoans that is unique: those who generally favor initiatives and referenda. Gilmore asserts that SB 1110 does not injure those opposed to "citizen legislation" because it aligns with their core values—it only injures those who favor it. Gilmore's distinction is creative, but if this Court were to adopt his view, it would essentially **[***30]** grant standing to almost every citizen that opposes any newly passed law. It is hardly a stretch to assume that almost every bill passed by the legislature has an opponent somewhere who feels personally aggrieved, yet standing requires more than mere disappointment. In comparison, the Term Limits Act in *Van Valkenburgh* did not affect all citizens in Idaho equally. It made it more difficult for specific candidates and their supporters who oppose term limits pledges to be successful in the next election. This is an actual and discernible injury.

For example, if the legislature enacted a new law that capped Idaho's speed limit to a maximum of 55 miles per hour statewide, some may be opposed to the law and some may favor it. However, would citizens in the former group have standing to challenge the law in court based solely on their personal disagreement with the legislature's action? Likely no, because standing is rooted in the injury suffered by the party challenging the law, not whether the party is merely opposed to the law on principle. To have standing, an opponent of the new speed limit would at least have to demonstrate a "distinct and palpable" injury related to the speed limit **[***31]** change, such as an Uber driver or a commercial trucking firm whose livelihoods were adversely affected by the change, in order to make an arguable case for standing.[9] *See* *Miles, 116 Idaho at 639, 778 P.2d at 761*.

Here, Gilmore's proposed distinction is too similar to the hypothetical above. Just because Gilmore favors citizen legislation and SB 1110 impedes citizen legislation, Gilmore argues he has standing. This is not a proper basis for standing. ***HN9***[↑] Mere disagreement with a law is not sufficient to establish standing. Gilmore fails to meet the test set forth by this Court in *Phillip Morris* by pointing to a **[**176]** **[*422]** "distinct and palpable injury" that he has suffered and is unique to him, and one "that is easily perceptible, manifest, or readily visible." *Philip Morris, 158 Idaho at 881, 354 P.3d at 194*. Aside from his argument that SB 1110 makes it generally more difficult for all initiatives and referenda to qualify for the ballot, Gilmore cannot point to an injury personal to him that is "concrete and particularized." *Id.* (quoting *Driehaus, 573 U.S. at 157-58*). Therefore, we conclude that Gilmore lacks standing.

2. Gilmore's petition does not meet the requirements for relaxed standing.

Over the last few decades this Court has relaxed traditional standing requirements in order to hear cases involving alleged **[***32]** constitutional violations that would otherwise go unaddressed because no one could satisfy traditional standing requirements. *See, e.g., Coeur d'Alene Tribe, 161 Idaho 508, 387 P.3d 761*; *Regan, 165 Idaho 15, 437 P.3d 15*. ***HN10***[↑] Where petitioners have not met the traditional standing requirements, we have nevertheless held that we may "'exercise jurisdiction to review a petition for extraordinary relief where the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature.'" *Coeur d'Alene Tribe, 161 Idaho at 513, 387 P.3d at 766* (quoting *Idaho Watersheds Project, 133 Idaho at 57, 982 P.2d at 360*).

HN11[↑] To qualify for relaxed standing, one still must show: (1) the matter concerns a significant and distinct constitutional violation, *and* (2) no party could otherwise have standing to bring a claim. *Id.* Here, Gilmore essentially raises the same issues as Reclaim and the Committee. However, inasmuch as we hold below that Reclaim and the Committee have demonstrated they have standing, Gilmore's argument for us to exercise relaxed standing is undermined because he can no

[9] This is not to say that there may not be other significant impediments to bringing such a case.

longer meet the second prong of our relaxed standing test—that *no other party* could have standing to bring a claim. Therefore, because Reclaim and the Committee have shown that they are parties with proper standing before this Court, Gilmore does not meet the relaxed standing requirements **[***33]** for this Court to hear his petition.

D. Reclaim and the Committee have raised justiciable claims and have demonstrated that this Court should exercise original jurisdiction over their petition.

The SOS contends that Reclaim and the Committee lack standing because their alleged injuries are speculative, arguing it is unclear whether Reclaim and the Committee will have problems qualifying their future initiatives of referenda for the ballot under SB 1110. Furthermore, both the SOS and the Legislature contend that the issues raised in Reclaim and the Committee's petition lack the urgency necessary to trigger original jurisdiction. The SOS asserts that Reclaim and the Committee should ask a district court for a preliminary injunction or a temporary restraining order because this case involves inherently factual questions and, therefore, there should be discovery, depositions, testimony, and cross-examination. Moreover, they argue that Reclaim and the Committee have plenty of time to collect signatures for a referendum because the time to collect signatures has not begun because the House has not yet adjourned *sine die*. Finally, the Legislature asserts that Reclaim and the Committee raise **[***34]** a purely political question that this Court should not entertain.

1. Reclaim and the Committee satisfy the requirements of standing.

HN12[↑] As noted above, "to establish standing 'a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a like[lihood] that the injury will be redressed by a favorable decision.'" *Philip Morris, 158 Idaho at 881, 354 P.3d at 194* (quoting *Susan B. Anthony, 573 U.S. at 157-58*). The SOS only challenges the first element of standing—an injury in fact. To satisfy the requirement of an injury in fact, one must "allege or demonstrate" an injury that is "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Susan B. Anthony, 573 U.S. at 157-58*). Standing "requires a showing of a 'distinct palpable injury' and 'fairly traceable causal connection **[**177]** **[*423]** between the claimed injury and the challenged conduct.'" *Young, 137 Idaho at 104, 44 P.3d at 1159* (quoting *Miles, 116 Idaho at 639, 778 P.2d at 761*).

Here, we find Reclaim and the Committee have met the burden of demonstrating injury in fact. Reclaim has demonstrated that it is currently sponsoring two initiatives for the ballot in 2022. Likewise, the Committee has a proposed referendum approved by the SOS awaiting the Idaho House of Representatives adjournment *sine die*. Because SB 1110 increases **[***35]** the burden on both petitioners to qualify their proposed initiatives and referendum for the ballot, it results in a distinct and palpable injury in fact. While it is yet to be seen whether SB 1110 will preclude either from qualifying their matters for the 2022 ballot, the fact that the legislature has placed a significantly greater burden for getting their petitions certified for the ballot is clear. Petitioners would now have to obtain 6% of the registered voter's signatures in all thirty-five legislative districts, instead of the previous requirement of eighteen. Thus, Reclaim and the Committee have shown a particularized injury; one that is "fairly traceable" to SB 1110. Therefore, they have met their burden to establish standing before this Court.

2. The urgent and important circumstances of this case justify the Court exercising its original jurisdiction to consider whether to issue a writ of prohibition.

HN13[↑] A writ is an extraordinary remedy that cannot be granted where an adequate remedy in the ordinary course of law already exists. *Leavitt v. Craven, 154 Idaho 661, 665, 302 P.3d 1, 5 (2012)*; *Wasden ex rel. State v. Idaho State Bd. of Land Comm'rs, 150 Idaho 547, 551-52, 249 P.3d 346, 350-51 (2010)*. One seeking a writ of prohibition must show two contingencies are met: "[(1)] 'the tribunal, corporation, board or person is proceeding without or **[***36]** in excess of the jurisdiction of such tribunal, corporation, board, or person, and [(2)] that there is not a plain, speedy, and adequate remedy in the ordinary course of law.'" *Wasden, 150 Idaho at 551-52, 249 P.3d at 350-51* (quoting *Henry v. Ysursa, 148 Idaho 913, 915, 231 P.3d 1010, 1012 (2008)*).

The SOS asserts that a writ of prohibition is inappropriate because Secretary of State Denney is not exceeding his powers in any way since he did not enact

the statutory provisions. However, we have issued a writ of prohibition against the Idaho Secretary of State under similar circumstances in the past to prevent him from acting pursuant to an unconstitutional statute. *See* Van Valkenburgh, 135 Idaho at 124, 15 P.3d at 1132 (noting review was urgent due to a deadline imposed on the Secretary of State and issuing a writ of prohibition prohibiting the Secretary of State from carrying out term limits pledge directions from I.C. § 34-907B on the ballot). *See generally* Sweeney v. Otter, 119 Idaho at 138, 804 P.2d at 311 (accepting jurisdiction because "the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature" and deciding whether the Lieutenant Governor could break a tie in Senate leadership elections); Keenan v. Price, 68 Idaho 423, 429, 195 P.2d 662, 664 (1948) (accepting jurisdiction because of the "importance of the question[] presented" and the "urgent necessity for immediate determination").

HN14[] Even if there is another remedy **[***37]** in the ordinary course of law in the trial courts, this Court has recently stated, "[o]ur willingness to act upon our original jurisdiction includes cases requiring a determination of the constitutionality of recent legislation where there is 'urgency of the alleged constitutional violation and the urgent need for an immediate determination.'" Ybarra, 166 Idaho at 906, 466 P.3d at 425 (quoting Regan, 165 Idaho at 21, 437 P.3d at 21). For example, in *Coeur d'Alene Tribe*, the Senate and the House of Representatives passed SB 1011, which repealed a law that allowed wagering on "historical" horse races. 161 Idaho at 511, 387 P.3d at 764. About a week later, then Governor C.L. "Butch" Otter vetoed the bill. *Id.* Senate officials filed letters that stated because the Governor's veto came after the five-day constitutional deadline, SB 1011 became law before the veto took effect. Id. at 512, 387 P.3d at 765. The Senate nevertheless called a vote to override the veto, but did not receive enough votes. *Id.* The President of the Senate sustained the Governor's veto and **[**178]** **[*424]** declared that SB 1011 failed to become law. *Id.* The Tribe requested the Secretary of State to certify it as law, which the Secretary of State refused. *Id.* The Tribe then petitioned this Court for a writ of mandamus ordering the Secretary of State to certify SB 1011 **[***38]** as law. *Id.*

This Court initially concluded that the petitioner failed to "provid[e] facts to show actual or imminent losses of profit or rights greater than the average citizen, the [petitioner] has not demonstrated a 'distinct and palpable' injury sufficient to confer standing." Id. at 513, 387 P.3d at 766 (quoting Troutner v. Kempthorne, 142 Idaho 389, 391, 128 P.3d 926, 928 (2006)). HN15[] Yet, this Court noted that it may nonetheless "'exercise jurisdiction to review a petition for extraordinary relief where the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature.'" *Id.* (quoting Idaho Watersheds Project, 133 Idaho at 57, 982 P.2d at 360). Under this relaxed requirement, this Court determined that one need not show a special injury to himself or his property in order to petition for mandamus. Id at 514, 387 P.3d at 767. Specifically, the Court held that if (1) the matter concerns a significant and distinct constitutional violation, and (2) no party could otherwise have standing to bring a claim, it is willing to relax ordinary standing requirements. *Id.* Examining the petitioner's claim under this standard, this Court held that the case concerned a significant and distinct constitutional violation (if the petitioner's allegations were taken as true), and no other party would have standing to bring the petition, or **[***39]** the willingness to do so. *Id.* Therefore, this Court applied relaxed traditional standing requirements and heard the petitioner's writ. Id at 514-15, 387 P.3d at 767-68.

Likewise, in *Regan*, the petitioner asserted that Idaho Code section 56-267, a statute enacted directly by the people through the same initiative power at issue here, had violated Idaho's Constitution by delegating future lawmaking authority regarding Medicaid expansion to the federal government. 165 Idaho at 17, 437 P.3d at 17. HN16[] This Court noted that "'a citizen and taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction.'" Id. at 21, 437 P.3d at 21 (quoting Noh, 137 Idaho at 800, 53 P.3d at 1219). The petitioner conceded that he could not satisfy the traditional standing requirements. *Id.* Yet, this Court, relying on *Coeur d'Alene Tribe*, relaxed the traditional requirements because of the urgent nature of the alleged constitutional violation. *Id.* (noting the 90-day requirement in the new law for the Department to submit the necessary plan amendments created an urgent need to hear the case immediately). *But see* Regan 165 Idaho at 29-33, 437 P.3d at 29-33 (Brody, J., concurring in part and dissenting in part) (Moeller, J., concurring in part and dissenting in part). Here, if we take the allegations in Reclaim and the Committee's **[***40]** petition as true, "there is 'urgency of the alleged constitutional violation and the urgent need for an immediate determination.'" Ybarra, 166 Idaho at 906, 466 P.3d at 425 (quoting Regan, 165 Idaho at 21, 437 P.3d at 21). This case presents an issue of a vital and urgent constitutional nature. Both Reclaim and the Committee are attempting to qualify initiatives and a

referendum for the 2022 ballot. The legislature's actions amounted to a one-two punch for groups like Reclaim and the Committee—it passed a law that made the initiative and referendum process more difficult for proponents of future ballot propositions, while simultaneously making it more difficult for those opposed to the new law to pass a referendum to repeal that very law.

The SOS argues that because there is no urgency for this Court to address the petition, the matter should begin at the district court level. However, SB 1110 contains its own emergency clause that enacted it as soon as the Governor signed it. *See* Idaho Const. art. III, § 22; I.C. § 67-510. By its wording, this began the short, 60-day period for a referendum to circulate in all 35 legislative districts to obtain the 6% of registered voters' signatures necessary for the referendum to appear on the ballot. *See* Regan, 165 Idaho at 21, 437 P.3d at 21 (exercising original jurisdiction, in part, because of the **[***41]** urgent nature of the alleged constitutional violation and the short timeline in the new law for the Department to submit the necessary plan amendments). By comparison, previous referenda **[**179]** **[*425]** had eighteen months to garner 6% of the registered voters' signatures in the then-required 18 legislative districts. Because it is unknown when the Idaho House of Representatives will adjourn *sine die*, there is great uncertainty as to when that 60-day period will begin. This will clearly hamper the organizational efforts of groups like the Committee who have a referendum already filed with the SOS. Accordingly, we conclude that Reclaim and the Committee have properly invoked our original jurisdiction to decide this matter.

3. Reclaim and the Committee's petition does not present a purely political question.

The Legislature contends that Reclaim and the Committee's petition presents a nonjusticiable political question that this Court should not entertain because it "would be substituting its judgment for that of another coordinate branch of government, when the matter was one properly entrusted to that other branch." Miles, 116 Idaho at 639, 778 P.2d at 761.

This is an argument we have addressed before, and one that the United States Supreme **[***42]** Court resolved long ago. HN17[↑] We have previously recognized that "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'" Nye v. Katsilometes, 165 Idaho 455, 463, 447 P.3d 903, 911 (2019) (quoting Marbury v. Madison, 5 U.S. 137, 177, 2 L. Ed. 60 (1803)). "Passing on the constitutionality of statutory enactments, even enactments with political overtones, is a fundamental responsibility of the judiciary, and has been so since *Marbury v. Madison*." Miles, 116 Idaho at 640, 778 P.2d at 762. Interpretation of constitutional or statutory provisions is a "familiar judicial exercise." Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 196, 132 S. Ct. 1421, 182 L. Ed. 2d 423 (2012).

The assertion that this case is nonjusticiable because it poses a political question "is akin to the political question abstention doctrine of the federal court system which is outlined in Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). However, as presented here, the issue is more correctly viewed under the doctrine of separation of powers, which is embraced in art. 2 § 1 of the Idaho Constitution." Miles, 116 Idaho at 639, 778 P.2d at 761. We have turned to and relied upon the considerations in Baker when addressing such questions in the past. *Id.*; *see also Idaho State AFL-CIO v. Leroy, 110 Idaho 691, 718 P.2d 1129 (1986)*. "[J]udicial action must be governed by standard, by rule, and must be principled, rational, and based upon reasoned distinctions found in the Constitution or laws." Rucho v. Common Cause, 139 S. Ct. 2484, 2507, 204 L. Ed. 2d 931 (2019) (italics omitted, internal quotation marks and citation omitted). One indication that a case raises a political question is the **[***43]** lack of "judicially discoverable and manageable standards" available to the Court to resolve the question. *Leroy, 110 Idaho at 695, 718 P.2d at 1133*. Another would be a case where this Court is asked to take sides on a purely ideological matter, as opposed to a legitimate legal or constitutional question. *See, e.g.,* Regan, 165 Idaho at 32-33, 437 P.3d at 32-33, (Moeller, J., concurring in part and dissenting in part) ("[Petitioner's] arguments are largely ideological and dogmatic in nature—not legal—and demonstrate that the intent behind the petition is to have this Court redefine the proper role of federalism in Idaho. In sum, this Court is not really being asked to address an urgent constitutional issue created by the passage of [Medicaid expansion]; rather, Regan is asking this Court to take sides in an ideological debate concerning political philosophy."). While there is admittedly a political component to almost any controversial subject the legislature addresses, the issue presented here is not purely political—it is predominantly a legal and constitutional question that this Court may and properly should answer.

The Legislature relies on the U.S. Supreme Court's

recent opinion in *Rucho*, which concerned the issue of partisan gerrymandering. The Court held that **[***44]** it presented a nonjusticiable political issue under the federal constitution. *139 S. Ct. at 2493-2508*. The Court noted that gerrymandering is a hyper-political process: "Partisan gerrymandering claims rest on an instinct that groups **[**180]** **[*426]** with a certain level of political support should enjoy a commensurate level of political power and influence." *Id. at 2499*. Essentially, the Court reasoned that such cases "ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end." *Id.* (emphasis in original). The Court struggled with a "legal standard[] discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable and politically neutral." *Id. at 2500*. Therefore, it declined to hear the issue, holding, "we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority." *Id. at 2508*.

This Court has addressed similar initiative and referendum issues before. *See, e.g., Dredge Mining Control-Yes!, Inc. v. Cenarrusa, 92 Idaho 480, 445 P.2d 655 (1968)*; *Gibbons v. Cenarrusa, 140 Idaho 316, 92 P.3d 1063 (2002)* (finding the legislature could immediately repeal a voter-passed **[***45]** initiative by declaring an emergency); *Luker v. Curtis, 64 Idaho 703, 136 P.2d 978 (1943)* (holding that the legislature can repeal an initiative passed by the people). In *Dredge Mining*, this Court reviewed a statutory requirement that required signatories of an initiative to be a legal voter, among other requirements. *Id. at 481, 445 P.2d at 656*. In its analysis, this Court held that, "[t]he statutory scheme set up by the legislature, although restrictive and perhaps cumbersome, is reasonable and workable." *Id. at 484, 445 P.2d at 659*. Whether this Court continues to follow the "reasonable and workable" standard laid out by *Dredge Mining* will be discussed below, but for purposes of this discussion, it is clear this Court has been able to address such issues before.

Rucho is distinguishable because this case concerns the constitutionality of specific statutes enacted by the legislature, rather than the inherently political exercise of dispersing political power, such as in the case of gerrymandering. Judicial review of these statutes does not raise a purely political question. ***HN18***[↑] "[A]pplying well-settled legal principles to an unsettled question of law . . . is a judicial function almost as old as our republic." *Nye, 165 Idaho at 463, 447 P.3d at 911*. The Legislature correctly notes that this Court is asked to determine "at what **[***46]** point does permissible conditioning of initiatives and referenda to ensure statewide support become unconstitutional?" However, this question does not require us to engage in any sort of political calculus. Rather, it requires this Court to focus on the statute enacted and determine whether it is constitutional as amended. While there are undoubtedly political undertones to this case, this Court need not address such concerns in exercising its fundamental responsibility to (1) "say what the law is" and (2) resolve the overarching constitutional issues raised by Reclaim and the Committee concerning the statutes in question. *Marbury, 5 U.S. at 177*; *Miles, 116 Idaho at 640, 778 P.2d at 762*.

V. CONSTITUTIONAL ISSUES

HN19[↑] We begin our constitutional analysis by recognizing that under the Idaho Constitution, "*All* political power is inherent in the people." *Idaho Const. art. I, § 2* (emphasis added). Moreover, it is a fundamental principle that the people, in adopting the Idaho Constitution, instituted the government to do their will. *See id.* Here, the legislature has passed a law (*I.C. § 34-1805(2)*) making it undeniably more difficult for the people to qualify an initiative or referendum for a statewide vote and another (*I.C. § 34-1813(2)(a)*) effectively granting the legislature time to repeal any initiative passed **[***47]** by a majority of the state's voters before it ever takes effect. The question before this Court is whether the legislature has acted within its delegated power to prescribe the "conditions" and "manner" for the people's exercise of direct legislative power, or whether it has exceeded its power. Thus, the Idaho Supreme Court is called upon to act in its role as the final arbiter of the meaning of the Idaho Constitution, to give effect to that meaning, and to protect against encroachments on the people's constitutionally enshrined power. For the reasons set forth below, we conclude that the Legislature has acted beyond its constitutional authority and **[**181]** **[*427]** violated the people's fundamental right to legislate directly.

A. The initiative and referendum powers reserved in the Idaho Constitution are fundamental rights.

HN20[↑] As previously noted, Article III, Section I of the Idaho Constitution establishes the legislative powers for the state of Idaho, including the power of direct

legislation by the people:

> The legislative power of the state shall be vested in a senate and house of representatives. The enacting clause of every bill shall be as follows: "Be it enacted by the Legislature of the State of Idaho."
>
> *The people reserve to themselves the* ***[***48]*** *power to approve or reject* at the polls any act or measure passed by the legislature. This power is known as the referendum, and legal voters may, *under such conditions and in such manner as may be provided by acts of the legislature*, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection.
>
> *The people reserve to themselves the power to propose laws, and enact the same* at the polls *independent of the legislature*. This power is known as the initiative, and legal voters may, *under such conditions and in such manner as may be provided by acts of the legislature*, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection.

Idaho Const. art. III, § 1 (emphasis added).

HN21[↑] This Court has consistently recognized that "a right is fundamental under the Idaho Constitution if it is expressed as a positive right, or if it is implicit in Idaho's concept of ordered liberty." Van Valkenburgh, 135 Idaho at 126, 15 P.3d at 1134 (citing Idaho Sch. For Equal Educ. Opportunity, 123 Idaho 573, 581-82, 850 P.2d 724, 732-33 (1993); Simpson v. Cenarrusa, 130 Idaho 609, 615, 944 P.2d 1372, 1378 (1997)). *Van Valkenburgh* dealt with the right to vote and held that voting was a fundamental right "because the Idaho Constitution expressly guarantees the right **[***49]** of suffrage." *Id.* We have not previously applied this test to the people's direct legislative power. However, like voting, the Idaho Constitution plainly expresses the initiative and referendum power as a positive right—*"The people reserve to themselves the power . . . ."* Idaho Const. art. III, § 1. This alone requires us to interpret the people's initiative and referendum rights as fundamental rights.

The SOS and the Legislature ask us to read the initiative and referendum provisions of the Idaho Constitution as merely defining a power that is subject to total control by the legislature. We do not agree.

HN22[↑] In interpreting the Idaho Constitution, the rules of statutory construction apply. Rudeen v. Cenarrusa, 136 Idaho 560, 567, 38 P.3d 598, 605 (2001) ("The general rules of statutory construction apply to constitutional provisions as well as statutes."). These rules of construction are well understood:

> The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, **[***50]** usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

In Re Doe, 168 Idaho 511, , 484 P.3d 195, 200 (2021) (internal quotations omitted). An ambiguous statutory or constitutional provision is one where reasonable construction of the language can result in more than one meaning. *Id.* In that instance, this Court must engage in statutory construction in order to determine and give effect to the legislative intent. *Id.*

Analyzing the nature of the initiative/referendum power requires us to reconcile a tension in the language of the constitutional **[**182]** **[*428]** provision. HN23[↑] Article III, Section 1 establishes and defines the people's power to legislate directly, stating, *"The people reserve to themselves the power . . . ."* But it also provides that the exercise of this power is to be carried out *"under such conditions and in such manner as may be provided by acts of the legislature . . . ." Id.* The SOS and the Legislature aver that the conditions and manner phrasing controls, **[***51]** thereby establishing the ultimate authority of the legislature to place boundaries around initiatives and referenda. Reclaim and the Committee argue that the people's right predominates. They insist the conditions and manner language only entrusts the legislature with providing a process through which the people can exercise their reserved right—not suppressing it.

HN24[↑] A close reading of Article III, Section 1 convinces us that it establishes the people's fundamental right to legislate directly, as opposed to a

power that is subservient to the will of the legislature. The conditions and manner provisions do not grant the legislature *carte blanche* in limiting that right. First, the referendum and initiative powers are described within the section of the constitution that establishes legislative power. Along with the power granted to the legislature, the initiative and referendum rights are "*reserved*" to the people. "To ascertain the ordinary meaning of an undefined term in a statute [or constitution], we have often turned to dictionary definitions of the term." *Marek v. Hecla, Ltd., 161 Idaho 211, 216, 384 P.3d 975, 980 (2016)*. *Merriam-Webster* defines "reserve" as to "hold in reserve" or "keep back." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *Reserve* (10th Ed. 1993). As applied **[***52]** here, the people kept back for themselves a portion of the total legislative power they granted to the House of Representatives and the Senate. The SOS and Legislature's perspective—that the legislature has the authority to limit the people's initiative and referendum rights, even to the point of near extinction—is simply not supported by the straightforward reservation of a portion of the total legislative power to the people in the Idaho Constitution.

Second, we must give full effect to the phrase "*independent of the legislature*," which appears in the paragraph on initiatives. The first sentence of the initiatives paragraph reads, "The people reserve to themselves the power to propose laws, and enact the same at the polls *independent of the legislature*." *Idaho Const. art. III, § 1* (emphasis added). The SOS urges us to read this phrase as describing only the people's freedom to determine the *subject matter* of initiative-based laws. According to the SOS, if the power itself were intended to be independent of the legislature, then it would have also appeared in the paragraph on referenda, which is otherwise the linguistic parallel of the initiatives paragraph. Therefore, the SOS argues, it must mean the opposite: **[***53]** that everything *except* the subject matter of initiatives is dependent on the legislature.

However, there are two significant flaws with this reasoning. First, and most basically, ***HN25***[⬆] ***HN26***[⬆] a referendum is a constitutional mechanism allowing the people to repeal a law already passed by the legislature. By its very nature, it cannot be "independent of the legislature" because it is a response to legislative action. This is a simple enough explanation as to why the phrase "independent of the legislature" does not appear in the referenda paragraph, and a far more self-evident explanation than the one offered by the SOS, which would require us to bend the meaning of the entire initiative and referendum power around an inference about an omission. Second, the language describing the people's initiative right is not limited to its subject matter. The paragraph on initiatives begins: "The people reserve to themselves the power *to propose laws, and enact the same* at the polls independent of the legislature." What is reserved is expressly the power *to propose* laws and *to enact* laws—verbs closely associated with the act of legislating and not just choosing the subjects of legislation. The SOS would have **[***54]** us read into the provision a phrase that is not there— "subject matter"—and ignore what is otherwise plainly stated. We see no need to strain for an interpretation when the plain language of the Idaho Constitution is clear: the people have the power to propose and enact laws on any subject. This power is both equivalent to that of the legislature and one which the people possess "independent of the legislature."

[183]** **[*429]** The conditions and manner language, on the other hand, does not provide authority to the legislature beyond defining the *process* by which initiatives and referenda are qualified for the ballot. For example, in the initiatives paragraph, the language appears as follows:

> This power is known as the initiative, and legal voters may, *under such conditions and in such manner as may be provided by acts of the legislature*, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection.

Idaho Const. art. III, § 1 (emphasis added). The conditions and manner language for initiatives comes between the words "may" and "initiate," thus qualifying that verb phrase—i.e., legal voters *may initiate* any desired legislation, but that process **[***55]** of *initiation* is subject to legislated conditions and manner. The interpretation is identical for the paragraph related to referenda. There, the conditions and manner language comes between "may" and "demand," thus qualifying that the legislature may place conditions on and determine the manner by which voters *may demand* a referendum. Both "initiate" and "demand" relate to the procedures by which an initiative or referendum, respectively, may be pursued. ***HN27***[⬆] The legislature's conditions and manner authority plainly relate to the *process* of direct legislation. Thus, while the legislature may determine *how* the people's right to legislate is initiated, it has not been given the power to effectively prevent the people from exercising this right

by placing onerous conditions on the manner of its use.

The SOS and the Legislature maintain that the initiative and referendum power cannot be a fundamental right if the right is not "self-executing," but instead relies on the legislature to enact the processes which give the right effect. For support, they point to the history of the initiative and referendum powers—that after the constitutional amendment enshrining these powers was passed in 1912, **[***56]** the legislature did not pass enabling legislation for more than twenty years,[10] thwarting the constitutional amendment passed by the people. This is flawed and troubling logic. Simply because the legislature failed to act does not mean they were justified in doing so, nor does it signal that the drafters of the amendment intended to give the people an impotent and illusory power.

More persuasively, we look to the number of other important rights which, like the initiative and referendum powers, are considered fundamental even though the legislature has the authority to set conditions or procedures related to the right. For example, ***HN28***[↑] the right to vote is a fundamental right because the Idaho Constitution expressly guarantees the right to suffrage. *Van Valkenburgh, 135 Idaho at 126, 15 P.3d at 1134* (citing *Idaho Const. art. I, § 19*) ("No power, civil or military shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage."). While it is true that *Article VI, Section 4 of the Idaho Constitution* provides for the legislature's ability to "prescribe qualifications, limitations, and conditions for the right of suffrage . . . ," this does not mean the Idaho legislature could, notwithstanding the *Twenty-sixth Amendment*, constitutionally limit the franchise by raising the voting age from 18 to 35. ***HN29***[↑] Similarly, **[***57]** the legislature is permitted to place conditions on certain aspects of free speech. *See, e.g., State v. Sanchez, 165 Idaho 563, 569, 448 P.3d 991, 997 (2019)* (holding that statutes criminalizing threats against public servants is within the "wide range of conduct" that the state has the "power to prohibit"). The ability of the legislature to make laws related to a fundamental right arises from the reality that, in an ordered society, few rights are absolute. However, the legislature's duty to give effect to the people's rights is not a free pass to override constitutional constraints and legislate a right into nonexistence, even if the legislature believes doing so is in the people's best interest.

Therefore, ***HN30***[↑] because the people of Idaho expressly "reserve[d] to themselves the power[s]" **[**184]** **[*430]** to (1) "approve or reject at the polls any act or measure passed by the legislature," and (2) "propose laws and enact the same ... independent of the legislature," when they amended the Idaho Constitution in 1912, we conclude these powers are fundamental rights. Accordingly, while the legislature has authority to define the processes by which these rights are exercised, any legislation that effectively prevents the people from exercising these rights will be subject **[***58]** to strict scrutiny, as explained below.

B. Because Idaho's initiative and referendum powers are fundamental rights, any effort to limit those rights is subject to strict scrutiny.

The proper constitutional standard to be applied when reviewing legislation that impacts the people's initiative and referendum rights is a matter of first impression. ***HN31***[↑] In *Van Valkenburgh*, we held without qualification that a law infringing on a fundamental right is subject to strict scrutiny:

> [I]f a fundamental right is at issue, the appropriate standard of review to be applied to a law infringing on that right is strict scrutiny. Under the strict scrutiny standard of review, a law which infringes on a fundamental right will be upheld only where the State can demonstrate the law is necessary to promote a compelling state interest.

135 Idaho at 126, 15 P.3d at 1134 (internal citations omitted). We have already concluded that, like the right to vote, the people's right to legislate is expressed as a positive right in the Idaho Constitution and is, therefore, fundamental. *See id.* Because our fundamental rights jurisprudence is unequivocal that such rights are subject to strict scrutiny, that is the standard we must apply here.

The SOS and the Legislature **[***59]** ask us to apply a lower standard of scrutiny based on reasoning from *Dredge Mining*, where we held that the legislature has the authority to require a process to verify and certify that signatures come from registered voters because those requirements fall within the conditions and manner language of *Article III, Section 1 of the Idaho Constitution*. *92 Idaho at 483, 445 P.2d at 658*. In so ruling, we acknowledged that the procedures for the initiative and referendum power are not self-executing,

[10] While the 1915 legislature passed enabling legislation, Governor Alexander vetoed the law because the severe requirements would have been "fatal" to the initiative and referendum power.

and we described the legislature's signature verification and certification requirements as being, among other things, "reasonable and workable":

> The statutory scheme set up by the legislature, although restrictive and perhaps cumbersome, is *reasonable and workable*. Changes designed to make it less restrictive and burdensome in its operation are for the legislature to enact. The trial court did not err in its conclusion of law that the provisions of the law enacted by the legislature pertaining to the initiative procedures are reasonable.

Id. at 484, 445 P.2d at 659 (emphasis added; internal citations omitted). The SOS and the Legislature now claim that *Dredge Mining* established a "reasonable and workable" standard for analyzing legislative acts which affect the direct legislation process.[11]

[185]** **[*431]** We disagree that *Dredge Mining* established the applicable legal standard for scrutinizing legislative acts for a simple reason: we did not apply a fundamental rights analysis in *Dredge Mining*. The focus of our analysis was on giving effect to language in *Article VI, Section 2 of the Idaho Constitution* to conclude that a "legal voter" is one who is registered to vote. *Id. at 482-83, 445 P.2d at 657-58*. Next, we affirmed the language of the trial court that the legislature's procedures for verifying that signatures came from registered voters were "not unreasonable" and were "workable." *Id. at 483, 445 P.2d at 658*. We were simply not called upon to engage in the same type of constitutional analysis in *Dredge Mining* that we must engage in here—*i.e.*, first determining the nature of the right at stake and then arriving at **[***61]** an appropriate level of scrutiny. Rather, *Dredge Mining* focused on cases dealing with the State's police power, a governmental power not invoked by any party in this case.[12] The case before us is different because the initiative and referendum powers retained by the people are expressed in the Idaho Constitution as fundamental rights.

HN32[⬆] Additionally, we note that strict scrutiny is a well-established standard where fundamental rights are concerned. It is a standard which exists within a significant body of case law from both the Idaho Supreme Court and the United States Supreme Court to guide us in its application. The "reasonable and workable" standard preferred by the dissent has not been applied as a standard of constitutional review

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[11] The SOS and the Legislature would have us read *Dredge Mining* ***[***60]*** as providing a standard akin to the rational basis standard. However, if *Dredge Mining's* "reasonable and workable" language were to be read as a legal standard, it is closer to the "undue burden" standard employed recently by the Utah Supreme Court. *See* *Count My Vote, Inc. v. Cox, 2019 UT 60, 452 P.3d 1109, 1118 (Utah 2019)*; *Utah Safe to Learn-Safe To Worship Coal., Inc. v. State, 2004 UT 32, 94 P.3d 217, 226 (Utah 2004)*. The Utah Supreme Court has recognized that state's initiative and referendum powers are fundamental rights. However, that court also observed, "This right, though fundamental under our state constitution, is not unfettered, but comes with a built-in limitation." *Id. at 226*. To that end, the court employed a flexible standard:

> [A] court should assess whether a legislative "enactment is reasonable, whether it has a legitimate legislative purpose, and whether the enactment reasonably tends to further that legislative purpose." And in "evaluating the reasonableness of the challenged enactment and its relation to the legislative purpose," we have said that "courts should weigh the extent to which the right of initiative is burdened against the importance of the legislative purpose."

Count My Vote, 452 P.3d at 1118 (internal citations omitted). The Utah Supreme Court described the "undue burden" standard as being similar to its "minimal scrutiny" standard but "more exacting." *Id. at 1118*. However, this standard has yet proved to be workable inasmuch as that court acknowledged that it had not yet determined the "manner and means" by which a party could establish the "nature and extent" of the burden on the initiative right, nor how this was to be weighed against the legislative purpose. *Id. at 1118-19*.

[12] In *Dredge Mining*, this Court further concluded that when a statute is "reasonable and workable," it is the purview of the legislature to make additional changes that will "make it less restrictive and burdensome in its operation ..." *Dredge Mining, 92 Idaho at 484, 445 P.2d at 659*. Notably, the cases cited in support of this assertion all deal with the state's police power—a power to act with broad authority to ensure the public health, safety, and welfare of its citizens. *See* *Messerli v. Monarch Memory Gardens, Inc., 88 Idaho 88, 96, 397 P.2d 34, 39 (1964)* (regarding the constitutionality of a statute protecting against fraud in contracts for funerary services and body disposal); *Johnston v. Boise City, 87 Idaho 44, 52, 390 P.2d 291, 295 (1964)* (regarding eminent domain and compensation); *Berry v. Koehler*, 84 Idaho 170, 176, 369 P.2d 1010, 1013 (1961) (regarding a statute defining the practice of dentistry). The need for the state's police power has not been invoked here by the SOS or the Legislature. Even if it had, it would not be possible to conclude that the Legislature's actions have made the initiative and referenda process "less restrictive and burdensome in its operation."

since *Dredge* in 1968 and we would be breaking new legal ground if we suddenly applied it now. In fact, it is far from clear how such a standard would be applied. On the other hand, the standard for strict scrutiny is clear: "Strict scrutiny should be applied to legislation dealing with fundamental rights or suspect classifications. Strict scrutiny requires that the government action be necessary to serve a compelling state interest, and **[***62]** that it is narrowly tailored to achieve that interest." *Bradbury v. Idaho Jud. Council, 136 Idaho 63, 69, 28 P.3d 1006, 1012 (2001)* (internal citations omitted). *See also Van Valkenburgh 135 Idaho at 126, 15 P.3d at 1134* ("Under the strict scrutiny standard of review, a law which infringes on a fundamental right will be upheld only where the State can demonstrate the law is necessary to promote a compelling state interest."). Thus, strict scrutiny is the measuring stick that must be applied to the statutes in question.

C. *Idaho Code section 34-1805(2)*, which requires a threshold amount of signatures from all 35 legislative districts, is unconstitutional.

1. Requiring signatures from all 35 legislative districts does not promote a compelling state interest.

The SOS avers that *Idaho Code section 34-1805(2)* survives strict scrutiny because "the state has an 'important regulatory interest' in ensuring an initiative petition has a modicum of statewide support before it is placed on the ballot." According to the SOS, the amended statute (1) protects the state by ensuring the ballot is not inundated with localized legislation and (2) increases voter involvement and voter inclusivity across the entire state. The stated purpose of SB1110 is: "to increase voter involvement and inclusivity **[**186]** **[*432]** in the voter initiative/referendum process." Thus, given the fundamental right at stake, **[***63]** we must determine whether SB 1110's stated purpose identifies a compelling state interest.

To begin, we look to the history of how the legislature has previously exercised its conditions and manner authority. Since we have described this history in detail above, we will briefly summarize it here. In 1912, following the amendments to *Article III, Section 1 of the Idaho Constitution*, the legislature had the duty to pass enabling legislation for the people's newly enshrined initiative and referendum rights. The legislature eventually passed an enabling act in 1915, but it was so restrictive that then Governor Alexander vetoed it. Thus, the legislature's failure to provide reasonable procedures meant that the people's rights to propose initiatives and referenda lay dormant for more than twenty years. Finally, in 1933, the legislature set the signature requirements simply at 10% of the statewide votes cast in the prior gubernatorial election. This remained the requirement for 64 years, and during this time only 24 initiatives and three referenda qualified for the ballot. In 1984, the legislature attempted to double the number of signatures needed to qualify initiatives and referenda for the ballot to 20%. However, then Governor Evans, **[***64]** just as Governor Alexander had before him, vetoed the legislation because it appeared bent on rendering the initiative and referendum power a "dead letter."

From 1994 to 2012, the people twice succeeded in passing or repealing significant legislation at the polls—the 1994 initiative creating term limits, and the 2012 repeal of education legislation known as the "Luna Laws." Both times the legislature responded by placing new, more difficult requirements on the process for qualifying voter-based petitions. In 1997, the legislature created a 22-county geographic distribution requirement for signatures, which was subsequently struck down by the Ninth Circuit for violating equal protection principles. *Idaho Coal. United for Bears, 342 F.3d at 1079*. Over the next fifteen years (1998-2013), when the signature requirement was simply 6% of registered voters statewide, only four initiatives and four referenda qualified for the ballot out of 63 voter petitions circulated. In 2013, following the repeal of the "Luna Laws," the legislature again adopted a geographic distribution requirement, this time based on legislative districts of roughly equal population size, which the Ninth Circuit had suggested would not violate the *Equal Protection Clause*. *See id. at 1078* ("Idaho could **[***65]** achieve the same end through a geographic distribution requirement that does not violate equal protection, for example, by basing any such requirement on existing state legislative districts."). This legislation mandated that the signatures of the requisite 6% of registered voters statewide include 6% of registered voters as of the last general election in at least 18 of Idaho's 35 legislative districts.

Over the next eight years, until the passage of SB 1110 in 2021, only 14 voter petitions were circulated. Of those, just two initiatives and no referenda qualified for the statewide ballot. In 2018, despite years of opposition by the legislature, voters passed one of those initiatives:

legislation which expanded access to Medicaid. Medicaid Expansion passed with widespread support, garnering over 60% of the vote statewide, including majority votes in 35 out of Idaho's 44 counties. The following year, the legislature passed stricter requirements for obtaining signatures, which were later vetoed by Governor Little. And again, in 2021, the legislature passed an even stricter geographic requirement, SB 1110, which Governor Little signed despite noting concerns about its constitutionality. **[***66]**

We approach the present legislation from this historical context—one which shows an unmistakable pattern by the legislature of constricting the people's initiative and referendum powers after they successfully use it. At oral argument, the Legislature repeatedly asserted that this was necessary to prevent the minority from being "trammeled by the majority." We acknowledge, as James Madison argued in the Federalist Papers, one advantage of a republican form of government over a direct democracy is that it may provide greater protection to minority interests. *See* THE FEDERALIST NO. 10 (James Madison). ***HN33***[↑] Nonetheless, the United States Supreme Court has recognized that **[**187]** **[*433]** state constitutional "[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James v. Valtierra, 402 U.S. 137, 141, 91 S. Ct. 1331, 28 L. Ed. 2d 678 (1971)*. Here, the SOS and the Legislature have offered no supporting evidence of a compelling need to further restrict the people's initiative and referendum power in order to protect minority interests. In short, they have failed to demonstrate how minority rights have been "trammeled" by the initiative process in Idaho. It is difficult to find, as the SOS and the Legislature suggest, that there is a **[***67]** realistic threat that the interests of any group of Idaho citizens are currently at risk due to the initiative process previously in effect when (1) so few initiatives or referenda have even qualified for the ballot in the last 109 years, and (2) the legislature still possesses the authority to repeal initiatives once passed, as they have done before. In fact, no actual or perceived threat to minority interests necessitating SB 1110's signature requirement has been identified by the legislature. The most recent examples—the referenda overturning the "Luna Laws" in 2012 and the Medicaid Expansion initiative in 2018—actually may have been examples of the majority of Idaho voters acting in a democratic fashion to *protect* minority interests (educators and the poor) when the Idaho Legislature would not.

In the end, should the protection of minority rights have been the aim of the legislature in enacting further restrictions on the initiative and referendum process, we recognize that there already exists a mechanism in place to perform this function, as former United States Supreme Court Justice Robert Jackson adroitly explained:

> ***HN34***[↑] The very purpose of a *Bill of Rights* was to withdraw certain subjects from **[***68]** the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied *by the courts*. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; *they depend on the outcome of no elections*.

VW. a. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (emphasis added). Protecting the constitutional rights of both the majority and the minority is not only a vital role of the judicial branch, it is also one that judicial officers throughout Idaho are accustomed to performing on a daily basis. ***HN35***[↑] Indeed, the judiciary's role in adjudicating the constitutionality of legislative acts was recognized prior to final adoption of the United States Constitution:

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. *It is not otherwise to be supposed, that the Constitution could intend to* ***[***69]*** *enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority*. ... A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

THE FEDERALIST NO. 78, at 492 (Alexander Hamilton) (B. Wright ed. 1961) (emphasis added). ***HN36***[↑]

Importantly, just as the courts have the constitutional authority to exercise judicial review over the enactments of the legislature, it logically follows that the judiciary has a concomitant power to review direct legislation enacted by the people. *See, e.g.,* Regan, 165 Idaho at 22, 437 P.3d at 22. Such review not only provides a sturdy bulwark for protecting the rights of both the majority and the minority,[13] but it also, as Hamilton **[**188]** **[*434]** concluded, is the "proper and peculiar province of the courts." THE FEDERALIST NO. 78, at 492.

Additionally, the SOS and the Legislature insist that the 35 legislative district requirement is justified because it assures that voter-initiated legislation that qualifies for the ballot has a "modicum of statewide support." To prove this, they point to the same two initiatives that qualified for the ballot in 2018. Both initiatives—Medicaid Expansion and Horse Racing—were required to present signatures from 6% of qualified electors statewide, including 6% of qualified electors as of the last general election in at least each of 18 legislative districts. *See* I.C. § 34-1805 (2013). The SOS points out that both initiatives qualified for the ballot without first demonstrating support in all areas of the state. ("Historical Horse Racing did not obtain a qualifying number of signatures in any legislative district in Northern Idaho, while Medicaid Expansion did not obtain sufficient signatures in legislative districts in the midsection of the state."). Thus, the SOS claims, Idaho Code section 34-1805(2)'s requirement that petitioners obtain a qualifying number of signatures in each of Idaho's 35 legislative districts "provides a system of checks and balances for direct legislation, which creates a check on the will of the **[***71]** majority."

We see little evidentiary or logical support for the position that the state has a compelling interest in ensuring that initiatives and referenda demonstrate a threshold level of support in *every* legislative district before qualifying for the ballot. For example, there is simply no logical reason why a ballot proposition supported by 6 percent of the voters in 34 out of 35 legislative districts has not clearly established that it has statewide support. More importantly, the suggestion that the proponents of a ballot proposition must demonstrate "a modicum of statewide support" just to qualify for the ballot is simply inapposite to **HN37**[↑] the inherent purpose of Article III, Section 1's initiative and referendum power, which is to give the majority of the people an opportunity to have a voice in passing legislation. It must be remembered that SB 1110 only addresses qualifying for the ballot; once qualified, a proposition still requires a majority vote to pass. **HN38**[↑] The Idaho Constitution's reservation of legislative power to the state's qualified voters—allowing them to pass or repeal legislation "independent of the legislature"—must also come with a fair opportunity to qualify an initiative or referendum **[***72]** for the ballot to exercise this power, or the power is merely illusory. The SOS and the Legislature have failed to demonstrate an interest compelling enough to justify the placing of such an onerous procedural hurdle on the proponents of an initiative or referendum before the majority ever gets to weigh-in on the issue.

The same is true of the rationale that SB 1110 was necessary to address concerns that the ballot might become "cluttered" with initiatives representing special interests. While we are mindful that California has had to contend with cluttered ballots,[14] Idaho's experience over the same period of time has been very different. We note first that, in the 109 years since the initiative and referendum power was created—88 years since the legislature passed enabling legislation—only 30 initiatives and seven referenda have ever made it onto the ballot. Only 28 initiatives and seven referenda qualified for the ballot in the 80 years (1933-2013)[15] when there was no geographic distribution requirement at all for gathering signatures. However, even if more initiatives and referenda qualified for the ballot in Idaho, the SOS and the Legislature would still have failed to establish that **[***73]** special interest "clutter" is a sufficient reason to limit fundamental rights.

[189]** **[*435]** In sum, the legislature has crafted a

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[13] For an assessment of how the courts have acted as check on the initiative and referendum processes to protect minority rights when needed, *see* David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum* ***[***70]*** *Process*, 66 U. Colo. L.Rev. 13, 40-42 (1995).

[14] According to data from the California Secretary of State's webpage, 392 initiatives have qualified for the ballot in California since 1912. *See* https://www.sos.ca.gov/elections/ballot-measures/resources-and-historical-information/history-california-initiatives .

[15] This includes the period in which the Ninth Circuit struck down Idaho's 22-county signature requirement for qualifying initiatives and referenda for the ballot. Technically, the 22-county geographic distribution requirement was in effect from 1997 to 2001, but no direct legislation made it to the ballot in those years.

dramatic check on the ballot qualification process without showing a compelling need for such a check. Importantly, a thorough check is already built into the process: that every qualifying initiative or referenda is subject to a statewide, majority vote in which every qualified elector has an equal say. Thus, we conclude that the SOS and the Legislature have failed to demonstrate a compelling state interest justifying the restrictions in SB 1110.

2. The requirement for signatures from all 35 legislative districts is not narrowly tailored.

Even if we were to accept, *arguendo*, the SOS and the Legislature's argument that there is a compelling state interest in demonstrating a "modicum of statewide support," we still cannot conclude that requiring signatures from 6% of registered voters in every one of the state's 35 legislative districts is narrowly tailored to achieve that goal. The statement of purpose to SB 1110 explains that it will accomplish its goals "by ensuring signatures are gathered from each of the 35 legislative districts, so every part of Idaho is included **[***74]** in the process." However, instead of crafting a narrow solution to address this concern, SB 1110 resolves it by placing an absolute veto power into the hands of any one legislative district in the state.

The SOS and the Legislature's argument is based on the unsupported assumption that a failure to gather enough signatures to qualify an initiative for the ballot in any one legislative district means that voters in the district do not support the initiative, or that there is not "a modicum of statewide support" for the initiative. There is little evidence to support such an inference. Medicaid Expansion is a salient example. In that case, organizers *qualified* the petition for the ballot without relying on signatures from districts in the middle of the state because the campaign was not required to do so. Yet, voters still passed the initiative by winning a majority of the vote in 35 of Idaho's 44 counties, amassing over 60% of the statewide vote. Moreover, even though many of the qualifying signatures were gathered where the state's population is more concentrated, the majority of the counties where the initiative passed were rural. Of course, Medicaid Expansion is only a single example. **[***75]** Yet, due to the relatively few initiatives that have passed in Idaho in recent years—only one has passed since 2002—the SOS and the Legislature have been unable to provide us with contrary evidence.

Instead of historic examples, the Legislature invokes the *possibility* of an extreme future scenario: If the 18-legislative-district requirement for signatures remains in effect, organizers *could* qualify an initiative or referendum by gathering signatures from only four populous counties—Ada, Canyon, Kootenai, and Bonneville—which alone currently encompass 18 legislative districts. Yet, such a scenario has never occurred. In the most recent initiative campaigns, both Medicaid Expansion and Horse Racing proponents ran extremely efficient and organized campaigns, with Medicaid Expansion relying on regional networks of volunteers, and Horse Racing deploying paid signature gatherers. To qualify for the ballot, Medicaid Expansion gathered signatures from 6% of registered voters in 26 counties; Horse Racing did the same in approximately 20 counties. Although these are only two limited, but recent, examples, in neither of these well-run campaigns did the petition organizers qualify their initiatives **[***76]** for the ballot by obtaining signatures from only four counties.

However, again assuming, *arguendo*, that the Legislature's scenario was realized—an initiative qualified for the statewide ballot by garnering signatures from only Ada, Canyon, Kootenai, and Bonneville counties—it would still not mean that the initiative did not represent a diverse array of statewide interests. Although Ada and Canyon County are adjacent to one another in the southwest region of the state, Canyon County is decidedly more rural and politically distinguishable from Ada County. There, the population centers of Nampa and Caldwell serve largely rural interests. Even Ada County, which is home to Idaho's most populous city, Boise, with approximately 228,000 people as of the **[**190]** **[*436]** last census,[16] includes large tracts of rural land and more than 1,300 farms comprising more than 112,000 acres in 2017.[17] Importantly, notwithstanding the population of Boise, the SOS and the Legislature have failed to show that the political interests of Ada County as a whole are consistent with those of Boise. Similarly, Bonneville County, outside of Idaho Falls and Ammon, is indisputably a large rural county. The Legislature casts

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[16] According to current U.S. Census data, the City of Boise has a population of 228,965. https://data.census.gov/cedsci/profile?g=1600000US1608830 .

[17] *See* U.S. Dep't. of Agric., 2017 Census of Agriculture, Idaho State and County Data (April 2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_2_County_Level/Idaho/ idv1.pdf .

Idaho Code section 34-1805(2) as necessary **[***77]** to ensure that a diversity of interest, such as urban and rural voters, can weigh-in on a proposed initiative. However, even based on just these four counties, the reality is that counties with large "urban" centers in Idaho also contain significant amounts of agricultural land and have diverse and unique political makeups. Thus, the interests of the voters in these four counties are more grayscale than black or white.

The Legislature also claims it must protect against one region of the state dominating the rest with its local agenda. Yet, the four counties in their example could not be more geographically, culturally, and economically diverse. Kootenai County is in the state's panhandle, about 400 miles north from Boise and borders the State of Washington, while Bonneville County is about 300 miles east of Boise on the state's southeastern border with Wyoming. Ada County and Canyon County are both near Idaho's southwestern border with Oregon. If an organizer somehow qualified a ballot proposition by obtaining signatures from legislative districts in only these four counties, the signatures would have to come from voters in three far-flung corners of the state, representing varied **[***78]** regional interests, including both urban and rural interests, and spanning two time zones. This would certainly suggest a "modicum of statewide support" for the proposition. Moreover, we reiterate that the initiative and referendum processes come with a protection against local provincialism already built in: the requirement that direct legislation must be passed by a majority vote at the polls in November.

Interestingly, the SOS also argues that the new 35-legislative-district requirement is not impossible to satisfy because, due to the way legislative districts overlay counties, sponsors of initiative and referenda would only need to gather signatures "in about a third of Idaho's 44 counties (14 of 44)" and that "[s]carcely populated counties need not be visited." Of course, this only emphasizes the SOS and the Legislature's logical dilemma: on the one hand, they argue interests across the state must be represented; on the other hand, they argue that SB 1110 would require signatures from only 14 counties in the state. At best, it looks as though the Legislature has devised a requirement that nearly doubles the previous threshold—from 18 to 35 legislative districts—while also claiming **[***79]** that it would not affect anyone very much.

Rather than evenly distributing power across the state, the Legislature has achieved just the opposite. By requiring a threshold of support from every legislative district in the state, the Legislature has essentially given every legislative district veto power over qualifying initiatives and referenda for the ballot. While this might theoretically assure that voters with minority interests will have a voice, it will achieve this end at a terrible cost. For example, a lone urban district in Boise could thwart an agricultural initiative with strong statewide support. Likewise, a paid special interest lobby could derail a popular initiative it dislikes by focusing its opposition efforts on a single legislative district with which it shares common interests. Indeed, the consequences of this would be felt across the political spectrum as the respective strengths of a majority or minority group ebbs and flows over time. In sum, rather than protecting the interests of minority voters, in reality the Legislature has given minority voters an effective veto over the will of the majority of voters.

[191]** **[*437]** If the Legislature's actual goal is to prevent any initiative **[***80]** or referendum from qualifying for the ballot, then this is probably an effective tactic. However, this is inconsistent with the constitutional requirement of a "narrowly drawn" solution. Rudeen, 136 Idaho at 570, 38 P.3d at 608. If the goal were to assure that all voters across the state have a voice, the Legislature has done this in a way that is devoid of *any* tailoring at all. Ultimately, the effect of SB 1110 is to prevent a perceived, yet *unsubstantiated* fear of the "tyranny of the majority," by replacing it with an *actual* "tyranny of the minority." This would result in a scheme that squarely conflicts with the democratic ideals that form the bedrock of the constitutional republic created by the Idaho Constitution,[18] and seriously undermines the people's initiative and referendum powers enshrined therein.

The SOS and the Legislature have argued that if statewide voters do not agree with the Legislature's policies, and cannot garner sufficient signatures to qualify an initiative or referendum for the ballot, the proper recourse is to elect different legislators. While it is true that the biennial election cycle affords the people one way to exercise their voting power to influence

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[18] *See* U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, . . ."); Idaho Admission Bill, 26 Stat. L. 215, ch. 656 (July 3, 1890) ("[The Idaho] Constitution is republican in form, and is in conformity with the Constitution of the United States."); Reynolds v. Sims, 377 U.S. 533, 566, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) (Acknowledging the "democratic ideals of equality and majority rule.").

legislation, this is hardly a panacea **[***81]** when it comes to statewide issues—the people in one portion of the state have no ability to vote out a powerful legislator from another. More importantly, this argument ignores the fact that ***HN39***[⬆] the people of Idaho have reserved to themselves an additional constitutional mechanism for affecting statewide policy and correcting legislative enactments they do not support—the initiative and referendum process. This power is meaningless unless it is accessible. Just as the Idaho Constitution protects the people's right to either reelect their legislators or elect new ones at the polls, it also protects the right to approve or reject a proposed initiative or referendum at the polls. It is not the proper role for any branch of the government to effectively nullify a constitutional mechanism reserved by the people to effect policy.

In sum, ***HN40***[⬆] *Idaho Code section 34-1805(2)* violates *Article III, Section 1 of the Idaho Constitution* because the SOS and the Legislature have failed both tests under strict scrutiny: (1) they have not shown that there is a compelling state interest in demonstrating support from *every* legislative district before voter initiated legislation or referenda are allowed to appear on the ballot, and (2) they have failed to demonstrate that requiring **[***82]** signatures from all 35 legislative districts is a narrowly tailored way of achieving the goal of protecting the interests of rural or regional voters.

3. The previous version of Idaho Code section 34-1805 is restored.

Reclaim and the Committee ask this Court to strike the entire geographic requirement from *Idaho Code section 34-1805*. However, *section 34-1805(2)*'s 35-district requirement replaced a previous version of the statute with an 18-district requirement, and Reclaim and the Committee have not directly challenged the constitutionality of that previous legislation. Because there is no emergency cited that would warrant the Court exercising its original jurisdiction to deal with a statute which has been in effect for at least eight years, we deny Reclaim and the Committee's request to hold *Idaho Code section 34-1805* unconstitutional as it existed prior to the 2021 amendments. Thus, the proper remedy is to restore the previous version of the statute with its 18-district requirement.

The Idaho Supreme Court, in *American Independent Party in Idaho, Inc. v. Cenarrusa, 92 Idaho 356, 442 P.2d 766 (1968)*, considered the constitutionality of a statute that increased the signature requirement for qualifying new political parties. In holding that the amended statute was unconstitutional because it would make organizing a new political party "a practical impossibility," this **[***83]** **[**192]** **[*438]** Court held that the previous version of the statute "remain[ed] in full force and effect":

> ***HN41***[⬆] When a statute by express language repeals a former statute and attempts to provide a substitute therefor, which substitute is found to be unconstitutional, the repeal of the former statute is of no effect, unless it clearly appears that the legislature intended the repeal to be effective even though the substitute statute were found invalid.

Id. at 359, 442 P.2d at 769 (internal citations omitted).

For the reasons outlined herein, ***HN42***[⬆] we have declared SB 1110 unconstitutional and granted Reclaim and the Committee's petition for a writ of prohibition barring its taking effect. Accordingly, *Idaho Code section 34-1805* is restored to its previous state, whereby an initiative or referendum petition filed with the Secretary of State must include signatures from 6% of qualified electors at the time of the last general election in 18 legislative districts, provided the total number of signatures is equal to or greater than 6% of the registered voters in the state at the time of the last general election.

In so ruling, we clarify that we have not decided the question of whether *section 34-1805*, with its 18 legislative district requirement, is also unconstitutional. Accordingly, **[***84]** we deny this claim for relief without prejudice.

D. *Idaho Code section 34-1813(2)(a)*, which requires all voter-approved initiatives to take effect no sooner than July 1 of the following year, is also unconstitutional.

In 2020, the legislature amended *Idaho Code section 34-1813* to include a provision that no initiative may take effect until July 1 of the year following the election in which it was approved:

> A statewide initiative may contain an effective date, if passed, that shall be no earlier than July 1 of the year following the vote on the ballot initiative. If no effective date is specified in the petition, the effective date of a statewide initiative that has been approved by the electorate shall be July 1 of the

following year.

Idaho Code § 34-1813(2)(a). Similar to the 2021 amendments to section 34-1805(2), Reclaim and the Committee argue that this provision is unconstitutional. We agree.

Reclaim and the Committee claim that the constitutional right reserved to the people to legislate directly by initiative in Article III, Section 1 of the Idaho Constitution is expressly "independent of the legislature," which means the legislature has no authority to set the effective date for initiative based legislation. For support, they cite previous case law in which this Court reasoned that, once passed, initiative laws stand on "equal **[***85]** footing" with laws passed by the legislature. *See* Westerberg, 114 Idaho at 404, 757 P.2d at 667 (citing Luker, 64 Idaho at 706, 136 P.2d at 979).

HN43[↑] The Legislature has the power to declare that its legislation is an emergency, which allows the legislation to have immediate effect. *See Idaho State AFL-CIO v. Leroy, 110 Idaho 691, 698, 718 P.2d 1129, 1136 (1986)*. To this end, Reclaim and the Committee aver that the people have a commensurate right to place an effective date into the legislation the people pass. Accordingly, they argue that, because Idaho Code section 34-1813(2)(a) intrudes upon that right, it violates the people's independent legislative power under Article III, Section 1 of the Idaho Constitution. Critically, they contend that, "[t]he only conceivable purpose [the Legislature] could have in imposing a blanket requirement of a July 1 or later effective date—some eight months after passage—is to give itself the opportunity to repeal a successful initiative in the session before July 1." Thus, they ask this Court to issue a writ prohibiting state officials from enforcing the effective date language in Idaho Code section 34-1813(2)(a).

[*439] In response, the SOS states that the effective date of legislation is a procedural matter and, therefore, within the purview of the legislature's conditions and manner authority under Article III, Section 1. Again, the SOS argues that "independent of the legislature" language of the Constitution only allows the people to determine the **[***86]** subject matter of the legislation but does not create independence **[**193]** in the legislative process. Further, the SOS argues there are practical considerations in "setting a consistent default effective date for all initiatives . . . ." To some extent, these echo the very concerns described by Reclaim and the Committee: that the Legislature does not wish to have legislation take immediate effect so they can repeal it in the next legislative session. The SOS notes that most legislation in Idaho does not include an effective date, and that July 1 is the default date, unless another effective date is included. **HN44**[↑] Generally, legislation does not go into effect sooner than 60 days after it is passed, except in case of an emergency. However, it is also true that legislation *may* contain a different effective date.

HN45[↑] Article III, Section 22, of the Idaho Constitution states: "No act shall take effect until sixty days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law." Thus, the same standard, which allows the legislature considerable discretion in setting the effective date of legislation when an emergency is properly declared, **[***87]** should apply to legislation adopted by the people via the initiative process. Although the SOS argues that the effective date is merely procedural, we conclude that it crosses over into the substantive right reserved to the people. **HN46**[↑] Article III, Section 1 provides that the people reserve to themselves the "power to *propose* laws, and *enact* the same at the polls *independent of the legislature*." Notably, "independent of the legislature" applies to both the power to propose laws and the power to *enact* laws. This necessarily includes the power to set the effective date, by which the laws are actually enacted.

In *Luker*, we held that initiative-based legislation was subject to amendment and repeal by the legislature because, after the law is passed, the constitutional amendment that created the initiative right placed initiative legislation "on an equal footing" with other legislative acts. 64 Idaho at 706, 136 P.2d at 979. **HN47**[↑] In other words, "[t]he power to legislate is . . . derived from the same source." *Id.* As noted previously, we reaffirm our prior holdings that initiative-created legislation stands on equal footing with laws enacted by the legislature.[19] We conclude that this necessarily

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[19] **HN48**[↑] In *Luker*, this Court made two misstatements in its description of the legislative power in Idaho, which we now disavow. First, we wrote that the government was divided into three departments, "the first and foremost of which is the legislative power" vested in the Senate and House of Representatives. *Id.* (citing Idaho Const. art. III, § 1). We have since consistently emphasized that the three departments—the legislative, the executive, and the judiciary—are co-equal. Second, we described the 1912 constitutional amendment that reserved the initiative and referendum powers to the people as

includes permitting the drafters of initiatives to set effective **[***88]** dates, subject to the requirements in *Article III, Section 22, of the Idaho Constitution.* To read *Article III, Section 1* otherwise would disregard that the people may enact legislation "independent of the legislature." Therefore, we conclude that the amendments to *Idaho Code section 34-1813(2)(a)* are an unconstitutional infringement on the peoples' right to legislate independent of the legislature.

VI. ATTORNEY FEES UNDER THE PRIVATE ATTORNEY GENERAL DOCTRINE

Reclaim and the Committee request an award of attorney fees under the private attorney general doctrine. ***HN49***[⬆] Three factors are to be considered under this doctrine:

> (1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision.

[194]** **[*440]** *Ada Cnty. v. Red Steer Drive-Ins of Nevada, Inc., 101 Idaho 94, 100, 609 P.2d 161, 167 (1980)* (citing *Serrano v. Priest, 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P.2d 1303, 1314 (Cal. 1977)*). In *Smith v. Idaho Comm'n on Redistricting, 136 Idaho 542, 546, 38 P.3d 121, 125 (2001)*, we held that the private attorney general doctrine was applicable, even without a factual record, where petitioners "pursued the vindication of [a] right vigorously and the pursuit of such benefited a large number of Idahoans."

Reclaim and the Committee likewise assert that theirs is exactly the kind of case for which the doctrine was created: one pursued to protect the public and uphold **[***89]** the Idaho Constitution. Further, they note that no one from the public sector was able to effectively challenge the statute. Because the Attorney General's Office was charged with advising and representing the state officials who created the legislation at issue, and they ultimately represented the SOS in this action, there was no public entity available to protect the people's rights that Reclaim and the Committee defended. Thus, private enforcement was their only alternative. Additionally, the Legislature intervened to defend the contested legislation, using taxpayer funds to do so. Finally, Reclaim and the Committee's efforts in vindicating the people's constitutional right to pass and repeal legislation potentially benefits every citizen of Idaho.

Therefore, under the circumstances unique to this case, we conclude that attorney fees are warranted under the private attorney general doctrine. The contested legislation constituted a grave infringement on the people's constitutional rights, making this matter vital to the public interest to people across Idaho. Accordingly, this Court grants attorney fees for Reclaim and the Committee, to be apportioned equally between the SOS and the **[***90]** Legislature, inasmuch as both were active in opposing the petition.

VII. CONCLUSION

For the reasons set forth herein, we dismiss Gilmore's petition because he lacks standing. However, Reclaim and the Committee have established standing for this Court to hear their petition, and we conclude that this Court should hear the petition as it presents possible constitutional violations, which have an urgent need for immediate determination. Because the challenged legislation does not raise a purely political question, it falls within this Court's fundamental responsibility to act in its original jurisdiction and pass on its constitutionality.

Regarding the merits of Reclaim and the Committee's petition, we grant the petition in part by declaring that ***HN50***[⬆] *section 34-1805(2)* violates *Article III, Section 1 of the Idaho Constitution* because the initiative and referendum powers are fundamental rights, reserved to the people of Idaho, to which strict scrutiny applies. We conclude that the SOS and the Legislature have failed to present a compelling state interest for limiting that right. Additionally, even if there were a compelling state interest, the Legislature's solution is not a narrowly tailored one. Therefore, we also grant the petition for a writ of prohibition **[***91]** barring SB 1110 from taking effect. However, we deny without prejudice the request to further strike the geographic distribution requirement in the previous statute. Instead, we restore the previous version of *section 34-1805*, which requires signatures from 6% of the qualified electors at the time of the last general election in each of at least 18 legislative

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an "*afterthought*" and, thus, implied it was less important than other constitutional provisions. *Id.* (emphasis added). We recognize that many of the people's most important rights have come about by constitutional amendment, beginning with the *Bill of Rights (Amendments I through X*, inclusive), including the *Thirteenth Amendment* (abolishment of slavery) and the *Twentieth Amendment* (the recognition of women's suffrage). We disclaim any language that implies a right created by constitutional amendment is of lesser importance.

districts, as well as signatures equal to or greater than 6% of the qualified electors in the state at the time of the last general election.

HN51[↑] We further declare that section 34-1813(2)(a), which allows the legislature to set the effective date for initiatives as July 1 of the year following passage, violates Article III, Section 1 of the Idaho Constitution because it infringes on the people's reserved power to enact legislation independent of the legislature. Accordingly, we grant Reclaim and the Committee's petition for a writ of prohibition preventing the Secretary of State from enforcing this provision.

As the prevailing parties, Reclaim and the Committee are awarded their reasonable attorney fees under the private attorney general doctrine. Likewise, they are further entitled **[**195]** **[*441]** to recover their costs as a matter of course.

Chief Justice BEVAN and Justice BURDICK CONCUR.

Concur by: STEGNER; BRODY (In Part)

Concur

STEGNER, J., specially **[***92]** concurring.

I concur with the ultimate holding and reasoning of the majority in its resolution of the claims of Reclaim and the Committee. I agree with my colleagues that Idaho Code sections 34-1805(2) (2021) and 34-1813(2)(a) (2020) constitute unconstitutional attempts by the Legislature to limit the people's ability to enact and repeal legislation "independent of the legislature." Idaho Const. art. III, § 1. However, I write to explain my disagreement with my colleagues' analysis regarding Gilmore's standing, or rather, lack of standing. I feel no need to dissent because the determination that Gilmore lacks standing "does not affect the outcome of the instant appeal." Glengary-Gamlin Protective Ass'n v. Bird, 106 Idaho 84, 87, 675 P.2d 344, 347 (Ct. App. 1983). The question of Gilmore's standing is therefore unimportant to the ultimate resolution of these cases as the claims of Reclaim and the Committee are coterminous with Gilmore's.

This concurrence begins with an analysis of our state constitution. The Idaho Constitution guarantees that "[c]ourts of justice shall be open to *every person*, and a speedy remedy afforded for *every injury of person, property or character*, and right and justice shall be administered without sale, denial, delay, or prejudice." Idaho Const. art. I, § 18 (italics added). Considering this guarantee—and the noticeable absence of a "case or **[***93]** controversy" requirement in the Idaho Constitution—use of the federal standing framework in Idaho is not only legally unsound, but constitutionally incorrect.

This Court is not bound by the "case" or "controversy" language contained in the United States Constitution.[1] The "case or controversy" language presents a jurisdictional requirement applicable only to federal courts; federal courts are courts of limited jurisdiction, and can only hear cases they have been granted jurisdiction to hear. Gunn v. Minton, 568 U.S. 251, 256, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013); *see also* U.S. Const. art III, § 2. In dramatic contrast, state courts are courts of *general* jurisdiction. *See, e.g.*McCormick v. Smith, 23 Idaho 487, 489, 130 P. 999, 1001 (1913) ("Unless the jurisdiction conferred by the Constitution and laws of the United States upon the federal courts is made exclusive of the state courts, *state courts retain jurisdiction of all actions wherein they are competent to take jurisdiction under their own laws*.") (italics added); *see also* Idaho Const. art. V, § 20 ("The district court shall have original jurisdiction *in all cases*, both at law and in equity, and such appellate jurisdiction as may be conferred by law.") (Italics added.) In other words, the starting premise in state court is inclusion and a presumption of jurisdiction, as opposed to exclusion and the opposite **[***94]** presumption.

Moreover, federal standing jurisprudence is rooted in a federal constitutional provision which has no equivalent in the Idaho Constitution. *See, e.g.*Lujan v. Defs. of

[1] This Court observed in *Bear Lake Educational Association, by and through* Belnap v. Board of Trustees of Bear Lake School District No. 33, 116 Idaho 443, 448, 776 P.2d 452, 457 (1989), that "some elements of standing in the federal system are colored by the constitutional requirements of a 'case' or 'controversy[.]'" However, it appears that subsequently, the federal standing framework was wholly adopted without any such qualifying language. *See, e.g.*Miles v. Idaho Power Co., 116 Idaho 635, 641, 778 P.2d 757, 763 (1989) (referring to "the case or controversy requirement of standing"). Twenty-five years later, in *Coeur d'Alene Tribe v. Denney*, the Court acknowledged that the Idaho Constitution contains no analogous provision requiring a "case or controversy[.]" but described adoption of the federal standard as a "self-imposed constraint adopted from federal practice[.]" 161 Idaho 508, 513, 387 P.3d 761, 766 (2015). No additional explanation has ever been provided.

Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) ("Though some of [the federal standing] elements express merely prudential considerations that are part of judicial self-government, the core component of [federal] standing is an essential and unchanging part of the case-or-controversy requirement of Article III."); *compare U.S. Const. art III, § 2*, *with* IDAHO CONST. art. V (generally). In the words of the United **[**196]** **[*442]** States Supreme Court: "[T]he constraints of Article III [of the federal constitution] do not apply to state courts, and accordingly *the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability* even when they address issues of federal law[.]" *ASARCO Inc. v. Kadish, 490 U.S. 605, 617, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989)* (italics added).

Notwithstanding this fact, the Idaho appellate courts began employing the federal standing framework in the 1980s without explanation. *See, e.g.Glengary-Gamlin Protective Ass'n, Inc., 106 Idaho at 87, 675 P.2d at 347*. Significantly, "none of the cases [utilizing the federal standing framework] have ever tried to reconcile or explain the 'case or controversy' requirement in the federal constitution **[***95]** to any provision in the Idaho Constitution, Idaho statute, or Idaho common law." *Zeyen v. Pocatello/Chubbuck Sch. Dist. No. 25, 165 Idaho 690, 706, 451 P.3d 25, 41 (2019)* (Stegner, J., dissenting).

This Court remains in the small minority of states that do not meaningfully distinguish between sources of state and federal standing. Most states acknowledge the distinction "between the structure of the state and federal courts, and avoid adopting federal doctrine without regard to their own precedent or circumstances." Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 349, 398 (2016). Results vary widely in those states that have grappled with the issue. Some states retain very loose standing frameworks that are heavily context-dependent.[2] Other states' frameworks have more shape, but emphasize the state's liberal approach to standing.[3] Still other states reduce standing to the existence of a "real" or "actual controversy,"[4] or rely on the existence and source of the legal cause of action to determine whether a plaintiff has standing.[5] Other states consider the federal standing framework to be persuasive and adopt it in part or wholesale as a matter of judicial policy, prudence, or restraint, or as a result of another state constitutional mandate.[6]

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[2] *Roop v. City of Belfast, 2007 ME 32, 915 A.2d 966 (Me. 2007)* ("Unlike the language of *article III, section 2 of the United States Constitution*, the Maine Constitution contains no 'case or controversy' requirement. Therefore, '[o]ur standing jurisprudence is prudential, rather than constitutional.' The basic premise underlying the doctrine of standing is to 'limit access to the courts to those best suited to assert a particular claim.' There is no set formula for determining standing.") (citations omitted); *Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n, Inc., 2011 WI 36, 333 Wis. 2d 402, 797 N.W. 2d 789, 799 (Wis. 2011)* (identifying "three aspects of standing[:] the personal interest, the adverse effect, and judicial policy").

[3] *See*, *e.g.*, *State v. Quitman Cnty., 807 So.2d 401, 405 (Miss. 2001)*; *Jenkins v. Swan, 675 P.2d 1145, 1149 (Utah 1983)*; *Crescent Park Tenants Ass'n v. Realty Equities Corp. of New York, 58 N.J. 98, 275 A.2d 433, 437-38 (N.J. 1971)*.

[4] *See* ***Dep't of Revenue v. Kuhnlein, 646 So.2d 717, 720-21 (Fla. 1994)*** (requiring a "real controversy"); *Goldston v. State, 361 N.C. 26, 637 S.E.2d 876, 882 (N.C. 2006)* (requiring an "actual controversy").

[5] *Grosset v. Wenaas, 42 Cal. 4th 1100, 72 Cal. Rptr. 3d 129, 175 P.3d 1184 (Cal. 2008)* (referring to the statutory cause of action in determining whether a plaintiff has a cause of action); *Lansing Schools Educ. Ass'n v. Lansing Bd. of Educ., 487 Mich. 349, 792 N.W.2d 686, 696 (Mich. 2010)*; *Stockmeier v. Nevada Dep't of Corrs. Psychological Review Panel, 122 Nev. 385, 135 P.3d 220, 225 (Nev. 2006)*, abrogated on other grounds by *Buzz Stew, LLC v. City of North Las Vegas, 124 Nev. 224, 181 P.3d 670 (Nev. 2008)* (examining whether statute giving rise to suit at bar provided standing to sue); *Kellas v. Dep't of Corrs., 341 Ore. 471, 145 P.3d 139, 142 (Or. 2006)* ("The source of law that determines that question is the statute that confers standing in the particular proceeding that the party has initiated, 'because standing is not a matter of common law but is, instead, conferred by the legislature.'") (quoting *Local No. 290 v. Dep't of Environ. Quality, 323 Ore. 559, 919 P.2d 1168 (Or. 1996)*).

[6] *Sierra Club v. Dep't of Transp., 115 Haw. 299, 167 P.3d 292, 312 (Haw. 2007)* (acknowledging borrowed justiciability requirements from federal framework "based on this court's prudential rules of judicial self-governance"); *Pence v. State, 652 N.E.2d 486, 488 (Ind. 1995)*; *ACLU of New Mexico v. City of Albuquerque, 2008- NMSC 045, 144 N.M. 471, 188 P.3d 1222, 1226-27 (N.M. 2008)* ("'While we recognize that standing in our state courts does not have the constitutional dimensions that are present in federal court, New Mexico's standing jurisprudence indicates that our state courts have long been guided by the traditional federal standing analysis."); *Hous. Auth. of Cnty. of Chester v. Pennsylvania State Civ. Serv. Comm'n, 556 Pa. 621, 730 A.2d 935, 941 (Pa. 1999)* (acknowledging distinction between federal and state

Wherever **[**197]** **[*443]** these states ultimately **[***96]** arrived on standing, however, the core reasoning is the same: the state constitution does not contain the same limitations as the U.S. Constitution, and the state is free to set its own standing requirements.

Our neighbors in Oregon and Utah have both expressly rejected the federal framework for standing because there is no state constitutional equivalent of the "case or controversy" requirement,[7] with the Oregon Supreme Court writing:

> [W]e cannot import federal law regarding justiciability into our analysis of the Oregon Constitution and rely on it to fabricate constitutional barriers to litigation with no support in either the text or history of Oregon's charter of government.
>
> As former Justice Linde of this court has explained:
>
> > "In sum, rejecting premature or advisory litigation is good policy, but rigid tests of 'justiciability' breed evasions and legal fictions. It is prudent to keep judicial intervention within statutory or established equitable and common law remedies. It is not prudent to link a decision declining adjudication to non-textual, self-created constitutional barriers, and thereby to foreclose lawmakers from facilitating impartial, reasoned resolutions **[***97]** of legal disputes that affect people's public, rather than self-seeking, interests. Requirements that rest only on statutory interpretations can be altered to meet desired ends, but change becomes harder once interpretations are elevated into supposedly essential doctrines of 'justiciability.'"

Kellas v. Dep't of Corrs., 341 Ore. 471, 145 P.3d 139, 143 (Or. 2006) (quoting Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Différence*! *46 WM. & MARY L. REV. 1273, 1287-88 (2005)*).

Blind adoption of the federal framework is not only legally unsound, but more importantly, it is a fundamental rejection of Idaho's unique judicial power and constitutional guarantee. I again urge my colleagues to address this issue. I recognize that leaving behind thirty years of jurisprudence on standing is a significant departure from our recent jurisprudence. However, the trek back to the true course—the *Idaho* constitution—will be shorter if begun now. It is never too late to correct a mistake. Only then can Idaho's courts truly satisfy the mandate of our state constitution: "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, **[***98]** delay, or prejudice." *Idaho Const. art. I, § 18*. Notwithstanding my disagreement with this Court's analysis regarding Gilmore's standing, I concur.

Dissent by: BRODY (In Part)

Dissent

BRODY, J., concurring in part and dissenting in part.

I concur with the Court's conclusion that SB 1110 is unconstitutional. I dissent from subsections III.B and III.C of the opinion where the Court adopts and applies strict scrutiny to invalidate the law. I would hold that SB 1110 is unconstitutional because it is not "reasonable and workable" under the standard articulated by the Court in *Dredge Mining Control-Yes!, Inc. v. Cenarrusa, 92 Idaho 480, 484, 445 P.2d 655, 659 (1968)*. I otherwise concur and join the other portions of the Court's opinion.

Standards of review matter. Strict scrutiny is the most exacting standard of constitutional review. It takes the usual presumption—that legislation is constitutional unless those **[**198]** **[*444]** opposing it can prove otherwise, *see* *Olsen v. J.A. Freeman Co., 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990)*and turns it on its head. Strict scrutiny presumes legislation is

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standing frameworks, but only examining statutory source of standing when federal framework not met); *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty., 301 S.W.3d 196, 202-03 (Tenn. 2009)*.

[7] *See* *Jenkins, 675 P.2d at 1149* ("[N]o similar requirement exists in the Utah Constitution. We previously have held that 'this Court may grant standing where matters of great public interest and societal impact are concerned.' However, the requirement that the plaintiff have a personal stake in the outcome of a legal dispute is rooted in the historical and constitutional role of the judiciary in Utah."); *see also* *Couey v. Atkins, 357 Ore. 460, 355 P.3d 866, 885 (Or. 2015)* ("Neither of the judicial-power provisions was patterned after the judicial-power provisions of the federal constitution, which expressly limited the exercise of judicial power by federal courts to specifically enumerated categories of 'cases' and 'controversies.' To the contrary, the constitution vested '*[a]ll judicial power*' in the courts, without limitation or qualification.") (italics in original).

*un*constitutional unless the government can prove otherwise by establishing it is necessary to further a compelling interest. *Van Valkenburgh v. Citizens for Term Limits, 135 Idaho 121, 126, 15 P.3d 1129, 1134 (2000)*.

In this case, the Court holds that strict scrutiny must apply because the referendum and initiative rights are fundamental:

> "We have already concluded that, just like the right to vote, the **[***99]** people's right to legislate is expressed as a positive right in the Idaho Constitution and is, therefore, fundamental. Our fundamental rights analysis is unequivocal that such rights are subject to strict scrutiny, and that is the standard we must apply here."

Must? We *must* apply strict scrutiny when the Idaho Constitution expressly grants the legislature the authority to regulate the conditions and manner in which the people exercise their initiative and referendum rights? In other words, we *must* presume the legislature has acted unconstitutionally, absent proof to the contrary, when it does what the constitution says it may do? This cannot be so.

I understand our Court has typically applied strict scrutiny in cases impacting fundamental rights. I disagree, however, with following that tradition here. The Court needs only look as far as the decision in *Van Valkenburgh v. Citizens for Term Limits, 135 Idaho 121, 15 P.3d 1129 (2000)*the case it cites for the proposition that strict scrutiny applies—to see that a reflexive application of the standard is unwarranted. Specifically, in finding strict scrutiny applied, the Court distinguished the circumstances of *Van Valkenburgh* from those of *Burdick v. Takushi, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992)*, a decision that limns the fallacies in the Court's application of strict **[***100]** scrutiny here.

In *Burdick*, a registered voter from Hawaii wanted to vote for a write-in candidate in the primary and general elections. *504 U.S. at 430*. He was informed by state officials that there was no provision for write-in voting so he sued the state, arguing that the prohibition violated the *First* and *Fourteenth Amendments of the United States Constitution*. *Id.* The voter argued that strict scrutiny should be applied to the case because the prohibition involved the fundamental right to vote. *Id. at 432*.The United States Supreme Court soundly rejected his argument, holding that strict scrutiny would impermissibly tie the state's hands to regulate as expressly permitted by the Constitution:

> *Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold*.
>
> It is beyond cavil that "voting is of the most fundamental significance under our constitutional structure." It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. *The Constitution provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives,"* *Art. I, § 4, cl. 1*, and the Court **[***101]** therefore has recognized that States retain the power to regulate their own elections. Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."
>
> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are **[**199]** **[*445]** operated equitably and efficiently*. Accordingly, the mere fact that a State's system "creates barriers ... tending to limit the field of candidates from **[***102]** which voters might choose ... does not of itself compel close scrutiny."

504 U.S. at 432-34 (citations omitted) (emphasis added). After rejecting the petitioner's strict scrutiny argument, the *Burdick* Court went on to apply a more flexible balancing test articulated by the Court in *Anderson v. Celebrezze, 460 U.S. 780, 782, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983)*. *Burdick, 504 U.S. at 433-34*. Ultimately, it upheld Hawaii's prohibition on write-in voting. *Id. at 441*.

To be clear, I do not advocate for the application of what

is now known as the *Anderson-Burdick* flexible balancing test that federal courts apply in federal voting cases. My point in raising *Burdick* is two-fold. First, *Burdick* illustrates that the application of strict scrutiny in a case involving fundamental rights is not always a given. And, second, the express provision in the United States Constitution which grants states the authority to set the time, place, and manner of voting for senators and representatives, necessitated a more deferential standard of review than strict scrutiny. The same logic applies here. *Article III, section 1 of the Idaho Constitution* grants the legislature the authority to set the conditions and manner for the exercise of referendum and initiative rights; good sense and the constitutional text necessitate a standard that lets it do so.

Over half a century ago, our Court articulated **[***103]** the standard that I would apply to this case in *Dredge Mining Control-Yes!, Inc. v. Cenarrusa, 92 Idaho 480, 484, 445 P.2d 655, 659 (1968)*. The Court's decision today does not convince me that we should jettison that precedent. It is true that the *Dredge Mining* court did not address strict scrutiny as a standard of review. In fact, the modern doctrine of strict scrutiny did not actually emerge until the late 1960s, about the time when *Dredge Mining* was decided. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, *54 UCLA L. Rev. 1267, 1284-85 (2007)*. That does not mean, however, that *Dredge Mining* has no precedential value as the Court seems to conclude.

The Court contends that *Dredge Mining* did not establish the standard of review applicable here because, instead of conducting a fundamental rights analysis, the Court was focused on an issue of statutory interpretation—whether the term "legal voter" in the version of *Idaho Code section 34-1805* then in effect was synonymous with the term "qualified elector" in *Article VI, section 2 of the Idaho Constitution.* *See Dredge Mining at 482-83, 445 P.2d at 657-58*. To be sure, the *Dredge Mining* Court spent a lot of ink discussing this statutory interpretation issue. But it also squarely addressed what can only be read as a constitutional challenge to the signature verification requirements enacted by the legislature in connection with initiatives. Here was the assignment of error and **[***104]** the Court's summary of the arguments made by the proponent of the initiative:

> In its conclusions of law VI, the trial court stated:
>
> > 'The Legislature is charged with the duty of establishing a procedure whereby the people can place initiative matters on the ballot. The legislative procedures outlined in Chapter 18 of Title 34, Idaho Code, are not unreasonable and must be complied with. While they may be cumbersome they are nevertheless workable and if any changes are required therein, they should be promulgated by the Legislature and not by the Court.'
>
> *Appellant has assigned this conclusion as error and contends that the trial court should have concluded that the certification of signatures by the clerks of the various district courts was a practical impossibility under the Idaho voter registration laws*. The Idaho initiative law is nearly identical to that enacted by the Oregon legislature. Appellant contends that the requirement for certification of signatures by clerks of the courts in Oregon is workable under its election and registration laws, but that the same procedure is unworkable in Idaho because of differences in statutory **[**200]** **[*446]** enactments concerning the registration of voters.

92 Idaho at 483, 445 P.2d at 658 (emphasis **[***105]** added).

Right on the heels of this discussion, the Court recognized the people's constitutional right to initiative set forth in *Article 3, section 1* and the legislature's authority to regulate that right:

> *Idaho Const. Art. 3, § 1* reserves to the people the right to propose legislation by initiative, but only 'under such conditions and in such manner as may be provided by acts of the legislature * * *.' This court has specifically held in *Johnson v. Diefendorf, 56 Idaho 620, 57 P.2d 1068 (1936)*, that the right of referendum (also provided in *Idaho Const. Art. 3, § 1*) is not self-executing, but rather its exercise is dependent upon the statutory scheme enacted by the legislature. The legislature has established such a scheme by enactment of I.C. Title 34, Chapter 18.

Id. Then, after a discussion of how the signature verification process actually worked at the time, the Court upheld the signature verification requirements because they were "reasonable and workable":

> *The statutory scheme set up by the legislature, although restrictive and perhaps cumbersome, is reasonable and workable*. Changes designed to make it less restrictive and burdensome in its operation are for the legislature to enact. The trial court did not err in its conclusion of law that the provisions of the law enacted by the legislature

> pertaining **[***106]** to the initiative procedures are reasonable.

Dredge Mining Control-Yes!, Inc., 92 Idaho at 484, 445 P.2d at 659.

The bottom line is that the *Dredge Mining* Court squarely confronted the tension that exists between the people's right to an initiative and the legislature's authority to regulate that right. The Court resolved that tension by applying a "reasonable and workable" test and ultimately concluded that the signature verification requirements enacted by the legislature passed constitutional muster. This is the same test I would apply today. SB 1110 is not reasonable and workable. I agree wholeheartedly with the Court's conclusion that SB 1110 gives every legislative district in the state veto power and turns a perceived fear of "tyranny of the majority" into an actual "tyranny of the minority." I would invalidate SB 1110 on that ground.

User Name: Jeremy Bass
Date and Time: Friday, October 25, 2024 3:20:00 PM PDT
Job Number: 237024862

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1. *Spencer v. Jameson*
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Spencer v. Jameson

Supreme Court of Idaho

June 16, 2009, Filed

Docket No. 34517, 2009 Opinion No. 85

Reporter
147 Idaho 497 *; 211 P.3d 106 **; 2009 Ida. LEXIS 96 ***

LAWRENCE SPENCER, Plaintiff-Appellant, v. DEE JAMESON, an individual, DAVIDSON TRUST CO., Custodian for IRA/SEP Account No. 68-0811-30, and JAMES A. RAEON, Successor Trustee, Defendants-Respondents.

Subsequent History: Released for Publication July 8, 2009.

Prior History: [*1]** Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Lansing D. Haynes, District Judge.

Disposition: District court order granting summary judgment, reversed.

Core Terms

trust deed, bid, mobile home, credit bid, attorney's fees, sales, real property, district court, summary judgment, purchaser, proceeds, Parcel, excess of the amount, amount owing, secured note, time of sale, foreclosure, holder, recorded, non-judicial, argues, prevailing party, price bid, surplus, foreclosure sale, conveyed, expended, grantor, secured obligation, affixed

Case Summary

Procedural Posture

Plaintiff borrower filed suit against defendant lenders in the District Court of the First Judicial District, State of Idaho, Kootenai County, claiming irregularities in two non-judicial foreclosure sales and seeking to set them aside or recover a monetary surplus under *Idaho Code Ann. § 45-1507*. The district court granted summary judgment for the lenders. The borrower appealed.

Overview

The borrower executed promissory notes in favor of the lender, secured by two deeds of trust. The borrower later defaulted. The trustee sold the deeds at non-judicial foreclosure sales. The borrower argued that a mobile home was personal property rather than real property and should not have been transferred to the trustee. He also argued that the lender submitted bids in excess of the amounts owed on the notes and that he was entitled to the surplus proceeds. The court held that the mobile home was affixed to the land at the time of sale and, therefore, was real property under *Idaho Code Ann. § 55-101* and properly transferred to the trustee under *Idaho Code Ann. §§ 45-1502(3)* and *45-1503*. Because the lender bid in excess of the amount of credit available to it under one of the deeds of trust, it did not pay the price owing before the trustee executed the Trustee's Deed as required by *Idaho Code Ann. § 45-1506(9)*; however, it was unnecessary to set aside the sale. The court found that there were proceeds from the sales that went beyond the expenses of the sales and the trust deed obligations, and the trial court was required to distribute the excess under *Idaho Code Ann. § 45-1507*.

Outcome

The court reversed the district court's award of summary judgment for the lender and remanded for a determination of the amount of sale proceeds to be distributed along with who was entitled to such proceeds under *Idaho Code Ann. § 45-1507*. The court awarded the borrower court costs, but not attorney fees, on appeal.

LexisNexis® Headnotes

Judgment > Appellate Review > Standards of Review

HN1 **Appellate Review, Standards of Review**

When reviewing an order for summary judgment, an appellate court applies the same standard of review as was used by the trial court in ruling on the motion for summary judgment.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN2 **Entitlement as Matter of Law, Appropriateness**

Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Idaho R. Civ. P. 56(c). If there is no genuine issue of material fact, only a question of law remains, over which an appellate court exercises free review.

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN3 **Appellate Review, Standards of Review**

An appellate court reviewing a grant of summary judgment liberally construes all disputed facts in favor of the nonmoving party, and all reasonable inferences drawn from the record will be drawn in favor of the nonmoving party. If reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented, then summary judgment is improper.

Real Property Law > Mobilehomes & Mobilehome Parks > General Overview

HN4 **Real Property Law, Mobilehomes & Mobilehome Parks**

Upon manufacture, a mobile home is a movable chattel and characterized as personal property. Once a mobile home is affixed to land it is converted to real property. Idaho Code Ann. § 55-101. Accordingly, a mobile home may be considered either real property or personal property under Idaho law.

Real Property Law > Financing > Mortgages & Other Security Instruments > Definitions & Interpretation

HN5 **Mortgages & Other Security Instruments, Definitions & Interpretation**

A deed of trust, by definition, is limited to the conveyance of real property. Idaho Code Ann. § 45-1502(3).

Real Property Law > General Overview

HN6 **Real Property Law**

The Idaho Legislature has defined "real property" under Title 55, Chapter 1, which governs property and ownership, as follows: 1. Lands, possessory rights to land, ditch and water rights, and mining claims, both load and placer. 2. That which is affixed to land. 3. That which is appurtenant to land. Idaho Code Ann. § 55-101.

Real Property Law > Fixtures & Improvements > Fixture Characteristics

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN7 **Fixtures & Improvements, Fixture Characteristics**

A deed of trust is limited to the conveyance of real property. Idaho Code Ann. § 45-1502(3). Accordingly, that which is land, affixed to the land, or appurtenant to the land, and falls within the parameters of the real property described in the deed, is conveyed under the deed of trust. Idaho Code Ann. § 45-1502(5) provides additional limitations on what real property can be

transferred to the trustee for purposes of non-judicial foreclosure.

Real Property Law > Fixtures & Improvements > Fixture Characteristics

HN8[] Fixtures & Improvements, Fixture Characteristics

When faced with the issue of fixture, courts apply three general tests: (1) Actual or constructive annexation to the realty; (2) Appropriation to the use of that part of the realty to which it is connected; and (3) Intention of the party so annexing to make the article a permanent accession to the realty.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN9[] Foreclosures, Private Power of Sale Foreclosure

A trust deed must be foreclosed in the manner set forth in *Idaho Code Ann. § 45-1506*, which requires in part that the purchaser at the sale shall forthwith pay the price bid and upon receipt of payment the trustee shall execute and deliver the trustee's deed to such purchaser. *Idaho Code Ann. § 45-1506(9)*.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN10[] Foreclosures, Private Power of Sale Foreclosure

A credit bid in a foreclosure sale made by the lender holding the note is the equivalent of a cash sale and, therefore, satisfies the statutory requirements for purchasing real property at a trustee's sale under *Idaho Code Ann. § 45-1506(9)*. However, there is a limitation on credit bids: the holder of a deed of trust note credit must bid in all or part of the amount owing pursuant to the note at the time of sale.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN11[] Foreclosures, Private Power of Sale Foreclosure

Property may only be transferred to the trustee for purposes of non-judicial foreclosure pursuant to *Idaho Code Ann. § 45-1503(1)* to secure an obligation under the trust deed.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN12[] Foreclosures, Private Power of Sale Foreclosure

See *Idaho Code Ann. § 45-1508*.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN13[] Foreclosures, Private Power of Sale Foreclosure

Reading subsections *(9)* and *(10) of Idaho Code* Ann. *§ 45-1506* in their entirety, it is more reasonable to infer that the legislature did not intend for a non-judicial foreclosure sale to be set aside once the trustee accepts the credit bid as payment in full.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN14[] Foreclosures, Private Power of Sale Foreclosure

See *Idaho Code Ann. § 45-1506(9)*.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN15[] Foreclosures, Private Power of Sale

Foreclosure

See *Idaho Code Ann. § 45-1506(10)*.

Real Property
Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN16[] **Foreclosures, Private Power of Sale Foreclosure**

Although *Idaho Code Ann. § 45-1506(9)* requires that the purchaser at a non-judicial foreclosure sale forthwith pay the price bid, the sale is final once the trustee accepts the bid as payment in full unless there are issues surrounding the notice of the sale.

Real Property
Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN17[] **Foreclosures, Private Power of Sale Foreclosure**

Where the holder of a deed of trust note is the bidder, crediting the bid against the note is the equivalent of a cash sale.

Real Property Law > ... > Liens > Nonmortgage Liens > Equitable Liens

Real Property Law > ... > Liens > Nonmortgage Liens > Lien Priorities

HN18[] **Nonmortgage Liens, Equitable Liens**

See *Idaho Code Ann. § 45-105*.

Real Property
Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN19[] **Foreclosures, Private Power of Sale Foreclosure**

Idaho Code Ann. § 45-1508 does not require that the grantor to a deed of trust demonstrate harm resulting from an irregularity in a foreclosure sale in order to have the sale set aside. The district court cannot impose this additional requirement under the statute, thereby increasing the plaintiff's burden, just because it does not agree with the result.

Real Property
Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN20[] **Foreclosures, Private Power of Sale Foreclosure**

Idaho Code Ann. § 45-1506(9) does not authorize a trustee to execute a trustee's deed until the buyer pays the entire price bid. Accepting an excessive credit bid has a chilling effect on the trustee's ability to obtain the maximum amount of recovery for the debtor's property.

Real Property
Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN21[] **Foreclosures, Private Power of Sale Foreclosure**

Idaho Code Ann. § 45-1507 requires that a trustee apply the proceeds from a foreclosure sale as follows: (1) To the expenses of the sale, including a reasonable charge by the trustee and a reasonable attorney's fee. (2) To the obligation secured by the trust deed. (3) To any persons having recorded liens subsequent to the interest of the trustee in the trust deed as their interests may appear. (4) The surplus, if any, to the grantor of the trust deed or to his successor in interest entitled to such surplus.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN22[] **Reviewability of Lower Court Decisions, Preservation for Review**

An appellate court will not consider arguments raised for the first time on appeal.

Civil Procedure > Preliminary Considerations > Equity > Adequate Remedy at

Law

Real Property
Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN23 **Equity, Adequate Remedy at Law**

Idaho Code Ann. § 45-1502 et seq. provides a comprehensive regulatory scheme for non-judicial foreclosure of deeds of trust, which includes the exclusive remedies for a given statutory violation. Where a statute provides an adequate remedy of law, equitable remedies generally are not available. Equitable principles cannot supersede the positive enactments of the legislature.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN24 **Basis of Recovery, Bad Faith Awards**

Idaho Code Ann. § 12-120(3) allows recovery of attorney fees by the prevailing party in any commercial transaction. Idaho Code Ann. § 12-121 allows recovery of attorney fees by the prevailing party only if the court determines that the appeal was brought or defended frivolously, unreasonably, or without foundation. Thus, both statutes require that the party requesting attorney fees be a prevailing party.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

HN25 **Basis of Recovery, Bad Faith Awards**

Idaho Code Ann. § 12-123(2)(b) sets forth a specific procedure for attorney fees, requiring a motion by a party and notice and a hearing in the trial court.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

HN26 **Basis of Recovery, Bad Faith Awards**

Idaho Code Ann. § 12-123 limits an award of attorney fees to twenty-one days after the entry of judgment in a civil action.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

HN27 **Basis of Recovery, Bad Faith Awards**

See Idaho Code Ann. § 12-123(2)(a).

Civil Procedure > Appeals > Costs & Attorney Fees

HN28 **Appeals, Costs & Attorney Fees**

Idaho Code Ann. § 12-123(2)(a) makes no provision for attorney fees on appeal.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN29 **Basis of Recovery, Statutory Awards**

Idaho Code Ann. § 12-121 allows an award of reasonable attorney's fees to the prevailing party.

Civil Procedure > Appeals > Costs & Attorney Fees

HN30 **Appeals, Costs & Attorney Fees**

Reasonable attorney fees are available to the prevailing party on appeal under Idaho Code Ann. § 12-121 only if the Court determines that the appeal was brought or defended frivolously, unreasonably, or without foundation.

Counsel: Ian Duncan Smith, Coeur d'Alene, argued for appellant.

Chapman Law office, PLLC, Coeur d'Alene, for respondent Jameson. Michael Ryan Chapman argued.

Elsaesser, Jarzabek, Anderson, Marks, Elliott & McHugh, Chtd., Coeur d'Alene, for respondent Davidson Trust. Bruce A. Anderson argued.

Judges: BURDICK, Justice. Chief Justice EISMANN and Justices W. JONES and HORTON, CONCUR. J. JONES, J., specially concurring.

Opinion by: BURDICK

Opinion

[*500] [109]** BURDICK, Justice

I. NATURE OF THE CASE

This case arises out of two non-judicial foreclosure sales for separate but related deeds of trust. Appellant Lawrence Spencer appeals from the district court's order of summary judgment in favor of Respondent Davidson Trust Company, custodian for IRA/SEP account No. 68-0811-30 and James Raeon, successor trustee (Davidson Trust); and Respondent Dee Jameson, the trust beneficiary. We reverse the district court's award of summary judgment and remand for a determination of the amount of sale proceeds to be distributed along with who is entitled to such proceeds under **[***2]** *Idaho Code § 45-1507*.

II. FACTUAL AND PROCEDURAL BACKGROUND

On April 30, 2002, Spencer executed a promissory note for $ 90,000 in favor of Davidson Trust. The note was secured by a Deed of Trust (DOT No. 1) on Spencer's real property Parcels Nos. 1, 2, and 3. Parcel No. 3 also included title to a 1981 Skyline mobile home, VIN # 01910302P. A few months later on November 13, 2002, Spencer entered into a Loan Commitment Agreement (Agreement) with Davidson Trust for a proposed loan in the amount of $ 65,000. The Agreement provided that the loan was to be secured by Parcel No. 3 along with title to a 1977 mobile home, VIN # 73165. [1] The Agreement also provided that $ 42,500 of the $ 65,000 was to be withheld from Spencer and paid to him incrementally upon completion of several tasks and improvements related to the mobile home. On November 14, 2002, Spencer executed a promissory note for $ 65,000 in favor of Davidson Trust for the second loan. The following day on November 15, 2002, Spencer executed a Deed of Trust (DOT No. 2) as security for the second note. DOT No. 2 conveyed Parcel No. 3 by description, but made no reference to the 1977 mobile home, or the Agreement itself.

Between November 2002 and March 2004, Spencer completed six of the seven items set forth in the Agreement. It is undisputed that Spencer failed to complete item (g), which held back $ 5,000 pending the completion of certain improvements entitled "[m]obile remodel costs." These improvements included "windows, carpets, drywall, etc. (to be paid upon completion)." Because Spencer did not complete item (g), he was only distributed $ 60,000 of loan proceeds for the second loan.

Spencer later defaulted on his repayment obligations under both Deeds of Trust. On February 24, 2005, the trustee sold the deeds at two separate non-judicial foreclosure sales. It is undisputed that Spencer received proper notice for both sales. The sale of DOT No. 2 was conducted first at 10:00 a.m. Spencer did not attend this sale. Davidson Trust submitted a credit bid of $ 86,507.45, which included the $ 5,000 of loan proceeds withheld under item (g) of the Agreement. This was the highest bid and Davidson Trust was given a Trustee's Deed to **[***4]** Parcel No. 3. The sale of DOT No. 1 was conducted next at 10:30 a.m. Spencer did attend this sale and bid $ 10 for the mobile home. Davidson Trust submitted a credit bid in the amount of $ 204,074.37, which Davidson Trust calculated as being the cumulative amount owing under both deeds of trust. Davidson Trust submitted the highest bid and was given a Trustee's Deed to Parcels Nos. 1, 2, and 3 and title to the 1981 Skyline mobile home.

The Trustee's Deed for DOT No. 2 was recorded first at 11:29 a.m. and the Trustee's Deed for DOT No. 1 was recorded second at 11:30 a.m. The Trustee's Deed for the sale of DOT No. 1 listed the 1981 Skyline mobile home as part of the property sold; the Trustee's Deed for the sale of DOT No. 2 did not include any reference to a mobile home. The trustee subsequently executed an Amended Trustee's Deed on March 23, 2005 for DOT No. 1, which conveyed all three parcels and title to the 1981 Skyline mobile home as being the property secured under both Deeds of Trust.

[110] [*501]** On April 27, 2006, approximately fourteen months after the sales, Spencer filed suit against Jameson and Davidson Trust, claiming irregularities in both non-judicial foreclosure sales. Spencer sought **[***5]** a declaratory judgment to set aside and reschedule the sales. In the alternative, Spencer argued that a monetary surplus was owed to him under *I.C. § 45-1507*.

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[1] During oral **[***3]** argument, Spencer's counsel conceded that the parties intended for the 1981 Skyline mobile home, rather than the 1977 mobile home, to serve as collateral under the Agreement.

On November 3, 2006, Jameson moved for summary judgment, which Davidson Trust joined. The district court granted summary judgment in favor of the respondents. Spencer filed a motion for clarification and reconsideration, which the district court denied. Spencer now appeals from the district court's order of summary judgment.

III. STANDARD OF REVIEW

HN1[] When reviewing an order for summary judgment, this Court applies the same standard of review as was used by the trial court in ruling on the motion for summary judgment. *See* Cristo Viene Pentecostal Church v. Paz, 144 Idaho 304, 307, 160 P.3d 743, 746 (2007). HN2[] Summary judgment is proper if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). "If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review." Cristo, 144 Idaho at 307, 160 P.3d at 746 **[***6]** (quoting Infanger v. City of Salmon, 137 Idaho 45, 47, 44 P.3d 1100, 1102 (2002)).

HN3[] This Court liberally construes all disputed facts in favor of the nonmoving party, and all reasonable inferences drawn from the record will be drawn in favor of the nonmoving party. *Id*. If reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented, then summary judgment is improper. McPheters v. Maile, 138 Idaho 391, 394, 64 P.3d 317, 320 (2003).

IV. ANALYSIS

On appeal, Spencer claims the district court erred in granting summary judgment to the respondents. First, Spencer argues that the character of the 1981 Skyline mobile home is personal property rather than real property and, therefore, the mobile home was improperly transferred to the trustee for purposes of non-judicial foreclosure under I.C. § 45-1501, et seq. [2] In addition, Spencer argues the sales should be set aside pursuant to I.C. § 45-1508 because Davidson Trust submitted bids in excess of the amounts he owed under the notes secured by the trust deeds. Alternatively, Spencer argues that he is entitled to surplus proceeds from the sales under I.C. § 45-1507. Each argument will be discussed **[***7]** in turn.

A. Character of the Mobile Home

Spencer argues that the character of the 1981 Skyline mobile home is personal property rather than real property and, therefore, the mobile home was not subject to foreclosure. Before addressing Spencer's argument, we find it necessary to clarify why this issue is pertinent to the case. HN4[] Upon manufacture, a mobile home is a movable chattel and characterized as personal property. Once a mobile home is affixed to land it is converted to real property. *See* I.C. § 55-101. Accordingly, a mobile home may be considered either real property or personal property under Idaho law. However, HN5[] a deed of trust, by definition, is limited to the conveyance of real property. I.C. § 45-1502(3). Thus, we must determine whether at the time of the sale the 1981 Skyline mobile home was converted to real property and, therefore, was properly transferred to the trustee for purposes of non-judicial foreclosure under I.C. § 45-1503; or whether the mobile remained **[***8]** personal property, in which case the mobile home was not subject to foreclosure under the statute.

HN6[] The Idaho Legislature has defined "real property" under Title 55, Chapter 1, **[**111]** **[*502]** which governs property and ownership, as follows:

> 1. Lands, possessory rights to land, ditch and water rights, and mining claims, both load and placer.
> 2. That which is affixed to land.
> 3. That which is appurtenant to land.

I.C. § 55-101. As set forth above, HN7[] a deed of trust is limited to the conveyance of real property. *See* I.C. § 45-1502(3). Accordingly, that which is land, affixed to the land, or appurtenant to the land, and falls within the parameters of the real property described in the deed, is conveyed under the deed of trust. Idaho Code § 45-1502(5) provides additional limitations on what real property can be transferred to the trustee for purposes of non-judicial foreclosure. In this case, the question is whether the 1981 Skyline mobile home was affixed to the real property described as Parcel No. 3 in DOT No. 1 and DOT No. 2 at the time of the sale. HN8[] When faced with the issue of fixture, we apply three

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[2] Idaho Code § 45-1501 has been repealed; therefore, the statutory provisions governing the non-judicial foreclosure of trust deeds will be referred to as I.C. § 45-1502, et seq. throughout the remainder of this opinion.

general tests: "(1) Actual or constructive annexation to the realty; (2) Appropriation to the use of that **[***9]** part of the realty to which it is connected; [and] (3) Intention of the party so annexing to make the article a permanent accession to the realty." *Prudente v. Nechanicky, 84 Idaho 42, 47, 367 P.2d 568, 570-71 (1961)*.

The evidence demonstrates that the 1981 Skyline mobile home was affixed to the land at the time of sale and, therefore, was converted to real property. *See* *I.C. § 55-101*. As set forth in Ed Jameson's affidavit dated November 3, 2006, Spencer completed items (a) through (f) in the Agreement related to the mobile home, which were: (a) well set-up, with pump, pressure tanks, lines; (b) septic system with inspections, and hookup to home; (c) driveway completion to county standards; (d) power lines and pedestal, with inspections and hookup; (e) mobile title in file; and (f) foundation, decks, and mobile set-up, including attachment and conversion to real property. These tasks and improvements show: (1) the mobile home was actually annexed to the realty, (2) the mobile home was appropriated to the use of that part of the realty to which the home was connected, and (3) it was Spencer's intention to make the mobile home a permanent accession to the realty. *See id*. Most persuasively, **[***10]** item (f) specifically required "attachment and conversion to real property." Because the 1981 Skyline mobile home was affixed to the land at the time of sale, we hold that the mobile home was properly transferred to the trustee for purposes of non-judicial foreclosure under *I.C. § 45-1503*.

B. Credit Bids

Next, Spencer argues that Davidson Trust's bids were in excess of the amounts owing under the notes secured by the trust deeds and, therefore, Davidson Trust did not "forthwith pay the price bid" before the trustee executed and delivered the Trustee's Deeds as required by *I.C. § 45-1506(9)*. Spencer further argues that because Davidson Trust is not a good faith purchaser for value, *I.C. § 45-1508* mandates that the sales be set aside due to Davidson Trust's failure to comply with this statutory provision. Each sale will be discussed separately.

1. The sale for DOT No. 2 is final.

First, Spencer argues Davidson Trust's credit bid for DOT No. 2 was $ 5,000 in excess of the amount Spencer owed under the note secured by the trust deed. Although the original amount of the loan was $ 65,000, only $ 60,000 was actually disbursed to Spencer; Davidson Trust withheld the $ 5,000 because Spencer failed **[***11]** to complete item (g) of the Agreement which called for "[m]obile remodel costs, including windows, carpets, drywall, etc. (to be paid upon completion)." Davidson Trust expended $ 45,000 to complete these improvements after the sale. The district court held the $ 5,000 was properly included in Davidson Trust's credit bid for two reasons. First, the district court determined that pursuant to the terms of DOT No. 2, Davidson Trust was permitted to make the $ 5,000 advances to protect its security interest (the mobile home) and to charge Spencer's account for the expenditure. The district court also determined that Davidson Trust could charge Spencer's account for the $ 5,000 because he agreed to complete the "mobile remodel costs" listed in item (g) of the Agreement, which Spencer failed to do.

[112] [*503]** *HN9*[↑] A trust deed must be foreclosed in the manner set forth in *I.C. § 45-1506*, which requires in part that "[t]he purchaser at the sale shall forthwith pay the price bid and upon receipt of payment the trustee shall execute and deliver the trustee's deed to such purchaser . . . ." *I.C. § 45-1506(9)*. In this case, Davidson Trust submitted a credit bid of $ 86,507.45 for DOT No. 2 and the trustee subsequently **[***12]** executed a Trustee's Deed to Davidson Trust for the sale. This Court recently determined that *HN10*[↑] a credit bid in a foreclosure sale made by the lender holding the note is the equivalent of a cash sale and, therefore, satisfies the statutory requirements for purchasing real property at a trustee's sale under *I.C. § 45-1506(9)*. *Federal Home Mortgage Corp. v. Appel, 143 Idaho 42, 45, 137 P.3d 429, 432 (2006)*. However, the Court imposed a limitation on credit bids, requiring that the holder of a deed of trust note credit bid "in all or part of the amount owing pursuant to the note" at the time of sale. *Id*.

We find that Davidson Trust bid in excess of the amount of credit available to it under DOT No. 2. Only $ 60,000 of the $ 65,000 was actually advanced to Spencer and thus "*owing* pursuant to the note" at the time of the sale. *Id*. (emphasis added). Accordingly, Davidson Trust bid in excess of the amount of credit available to it under the note secured by DOT No. 2 by at least $ 5,000 and, therefore, did not pay the price owing before the trustee executed the Trustee's Deed for DOT No. 2 as required

by I.C. § 45-1506(9). [3]

The respondents argue that the $ 5,000 was properly included in Davidson Trust's bid because DOT No. 2 specifically allows Davidson Trust to make any advances necessary to protect the security interest and to charge Spencer's account for such advances. However, the $ 5,000 was not advanced until after the sale. In Ed Jameson's Affidavit dated March 27, 2007, he states that approximately $ 60,000 was expended in relation to the three parcels of property, and of that $ 60,000, over $ 5,000 was expended to complete item (g) of the Agreement. Jameson stated this expenditure was made "[b]etween February 24, 2005, and April 27, 2006." The sale for DOT No. 2 occurred at 10:00 a.m. on the morning of February 24, 2005. Thus, the $ 5,000 was not expended until *after* the sale of DOT No. 2, and accordingly did not constitute an amount owing under the note at the time of the sale.

The respondents also argue the $ 5,000 was properly included in Davidson Trust's bid because Spencer failed to complete the "mobile remodel costs" as required under item (g) of the Agreement. As set forth above, Davidson Trust did not expend **[***14]** the $ 5,000 it withheld to complete the improvements until after the sale of DOT No. 2. Therefore, the $ 5,000 was not an amount owing at the time of the sale.

Finally, the respondents argue the $ 5,000 should be treated the same as property taxes, which were properly charged to Spencer's account and included in Davison Trust's credit bid. However, the payment of property taxes was an obligation secured by DOT No. 2, whereas the "mobile remodel costs" were not. **HN11**[↑] Property may only be transferred to the trustee for purposes of non-judicial foreclosure pursuant to I.C. § 45-1503(1) to secure an obligation under the trust deed. Although Spencer was obligated to immediately repay sums expended by Davidson Trust under Paragraph A(5) of DOT No. 2, he was not required to repay sums not expended at the time of sale.

Based on our analysis set forth above, we find that Davidson Trust did not pay the price bid before the trustee executed the Trustee's Deed to DOT No.2 as required by I.C. § 45-1506(9). Even though Davidson Trust failed to comply with this provision, however, we find it unnecessary to set aside the sale. Idaho Code § 45-1508, which governs the finality of the sale, states in pertinent **[***15]** part:

> **HN12**[↑] A sale made by a trustee under this act shall foreclose and terminate all interest in the property covered by the trust deed of all persons to whom notice is given under section 45-1506, Idaho Code, and of any **[**113]** **[*504]** other person claiming by, through or under such persons and such persons shall have no right to redeem the property from the purchaser at the trustee's sale . . . . [A]ny failure to comply with the provisions of section 45-1506, Idaho Code, shall not affect the validity of a sale in favor of a purchaser in good faith for value at or after such sale, or any successor in interest thereof."

Upon initial reading of this provision, it would appear we are required to set aside the sale of DOT No. 2 due to Davidson Trust's failure to comply with I.C. § 45-1506(9), unless the Court finds that Davidson Trust is a good faith purchaser for value. Nevertheless, after **HN13**[↑] reading subsections (9) and (10) of I.C. § 45-1506 in their entirety, we find that it is more reasonable to infer that the legislature did not intend for a sale to be set aside once the trustee accepts the credit bid as payment in full. Idaho Code § 45-1506(9) states:

> **HN14**[↑] The purchaser at the sale shall forthwith pay the price **[***16]** bid and upon receipt of payment the trustee shall execute and deliver the trustee's deed to such purchaser, provided that in the event of any refusal to pay purchase money, the officer making such sale shall have the right to resell or reject any subsequent bid as provided by law in the case of sales under execution.

Immediately following this provision, Idaho Code § 45-1506(10) states:

> **HN15**[↑] The trustee's deed shall convey to the purchaser the interest in the property which the grantor had, or had the power to convey, at the time of the execution by him of the trust deed together with any interest the grantor or his successors in interest acquired after the execution of such trust deed.

Thus, **HN16**[↑] although I.C. § 45-1506(9) requires that the purchaser forthwith pay the price bid, the sale is final once the trustee accepts the bid as payment in full unless there are issues surrounding the notice of the sale (which are admittedly not present in this case). This

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[3] Davidson Trust overbid by at least $ 5,000 since the interest and fees **[***13]** calculated for DOT No. 2 were based on $ 65,000 being the principal amount owed.

interpretation promotes the legislature's interest in preserving the finality of title to real property. In addition, our interpretation does not deprive trust deed grantors of a statutory remedy in cases such as this where the trustee wrongfully **[***17]** accepts a credit bid as payment in full. Grantors may still turn to I.C. § 45-1507 which governs the manner which the sale proceeds are to be distributed for relief. Therefore, we hold that the sale for DOT No. 2 was final once the trustee accepted Davidson Trust's bid as payment in full and subsequently executed the Trustee's Deed for DOT No. 2.

Because the sale of DOT No. 2 is final, we need not address whether Davidson Trust is a good faith purchaser for value, as that determination would only be applicable to our analysis if we found reason to set aside the sale.

2. The sale for DOT No. 1 is final.

Spencer also argues the sale for DOT. No. 1 should be set aside because Davidson Trust bid $ 86,507.45 in excess of the amount owing under the note secured by the trust deed. During the trustee's sale for DOT No. 1, Davidson Trust submitted a credit bid in the amount of $ 204,074.37, which included the remaining principal balance under the promissory note secured by DOT No. 1, along with the alleged payoff amount for the second note secured by DOT No. 2 and related fees.

The respondents assert they were compelled to satisfy the amount owing under the note secured by DOT No. 2 for their own **[***18]** protection and, therefore, properly included the payoff amount for DOT No. 2 and related fees in their bid for DOT No. 1. In support of their assertion, the respondents cite to Federal Home Loan Mortgage Corp. v. Appel, 143 Idaho 42, 137 P.3d 429 (2006), and Thompson v. Kirsch, 106 Idaho 177, 677 P.2d 490 (Ct. App. 1984). In *Federal Home Loan*, debtors in a foreclosure sale argued that a credit bid made by the lender for the amount owed on the note satisfied the statutory requirements for "purchase money" or "paying the price" pursuant to I.C. § 45-1506(9). Federal Home Loan, 143 Idaho at 44, 137 P.3d at 431. This Court held "that ***HN17***[⬆] where the holder of the deed of trust note is the bidder, crediting the bid against the note is the equivalent of a cash sale." Id. at 45, 137 P.3d at 432. Thus, Federal Home Loan dealt strictly with whether a credit bid constitutes **[**114]** **[*505]** "paying the price" for a trust deed under the statute.

Thompson, on the other hand, is more relevant to the respondents' argument. In that case, the Thompsons, holders of a second deed of trust, satisfied a first deed of trust to prevent foreclosure of the prior lien. 106 Idaho at 181, 677 P.2d at 494. The district court included **[***19]** the amounts the Thompsons paid to service the debt on the first deed of trust in determining the amount of mortgage indebtedness that was owed under the Thompsons' second deed of trust. *Id*. On appeal, the Kirsches, those indebted under both deeds of trust, argued it was error for the district court to include these amounts. *Id*. The Thompsons, however, contended that I.C. § 45-105 entitled them to reimbursement for any sums they paid in satisfaction of the first deed of trust. *Id*. Idaho Code § 45-105 states: ***HN18***[⬆] "Where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him, as part of the claim for which his own lien exists." The Idaho Court of Appeals held that the second deed of trust was the functional equivalent to a mortgage and that I.C. § 45-105 entitled the Thompsons to include payments they made to prevent foreclosure of the first deed of trust as part of the mortgage indebtedness created by their junior encumbrance. Id. at 181-82, 677 P.2d at 494-95. (citing *Miller v. Stavros, 174 So.2d 48, 49 (Fla. Dist. Ct. App. 1965)* (holding that "amounts paid by the holder of a second mortgage to protect **[***20]** his security are properly included in a decree foreclosing the second mortgage")). Conversely, this case does not involve the holder of a special lien paying off a "prior lien." *See* I.C. § 45-105. DOT No. 1 was the prior lien under the facts of this case, which was sold after DOT No.2. Davidson Trust did not make advances to prevent the foreclosure of DOT No. 1 before it bid on DOT No. 2. Therefore, Davidson Trust was not compelled to satisfy a prior lien for its own protection when it bid on DOT No. 1.

The respondents also argue that the $ 86,507.45 was properly included in its bid for DOT No. 1 because DOT No. 1 contains a future advance clause. DOT No. 1 states that the property conveyed "secure[s] payment of all such further sums as may hereafter be loaned or advanced by the Beneficiary herein to the Grantor herein . . . ." At the time DOT No. 1 was sold, the $ 65,000 loan advance plus interest and fees had already been paid off as the trustee had previously accepted Davidson Trust's bid for $ 86,507.45 for DOT No. 2 as payment in full. As such, only $ 117,566.92 was owing under the note secured by DOT No. 1 at the time of sale. Yet, Davidson Trust bid $ 204,074.37. Davidson Trust **[***21]** did not pay the full price bid before the trustee executed the Trustee's Deed for DOT No. 1 as required by I.C. § 45-1506(9). Still, we find it

unnecessary to set aside the sale. The trustee accepted Davidson Trust's bid for DOT No. 1 as payment in full, which, as set forth above, was the point in time when the sale became final. Again, because the sale for DOT No. 1 is final, we need not address whether Davidson Trust is a good faith purchaser for value.

The district court also held that the sale for DOT No. 1 is final despite the irregularity in Davidson Trust's credit bid, but did so under the reasoning that Spencer had failed to demonstrate harm resulting from the excessive credit bid. ***HN19***[↑] *Idaho Code § 45-1508* does not require that the grantor to a deed of trust demonstrate harm resulting from an irregularity in the foreclosure sale in order to have the sale set aside. The district court cannot impose this additional requirement under the statute, thereby increasing the plaintiff's burden, just because it does not agree with the result. Thus, although we agree with the district court that the sale for DOT No. 1 should not be set aside, we do so under different reasoning.

Although neither **[***22]** party attributes fault to the trustee, we note that ***HN20***[↑] *I.C. § 45-1506(9)* does not authorize a trustee to execute a trustee's deed until the buyer pays the entire price bid. Accepting an excessive credit bid has a chilling effect on the trustee's ability to obtain the maximum amount of recovery for the debtor's property. Here, the trustee executed the Trustee's Deeds for DOT No. 1 and DOT No. 2 before Davidson Trust paid its bids in full. Pursuant to *I.C. § 45-1506(9)*, the trustee should have required **[**115]** **[*506]** that Davidson Trust pay cash for the excess amounts before executing the Trustee's Deeds.

C. Surplus

In the alternative, Spencer argues that he is entitled to surplus proceeds from both sales. ***HN21***[↑] *Idaho Code § 45-1507* requires that the trustee apply the proceeds from the foreclosure sale as follows:

> 1) To the expenses of the sale, including a reasonable charge by the trustee and a reasonable attorney's fee.
> (2) To the obligation secured by the trust deed.
> (3) To any persons having recorded liens subsequent to the interest of the trustee in the trust deed as their interests may appear.
> (4) The surplus, if any, to the grantor of the trust deed or to his successor in interest entitled to such surplus.

I.C. § 45-1507. **[***23]** As set forth above, Davidson Trust bid $ 86,507.95 in excess of the amount owing under the note secured by DOT No. 2, and also bid at least $ 5,000 in excess of the amount owing under the note secured by DOT No. 2. Accordingly, there are proceeds from the sales that go beyond the expenses of the sales and the obligations secured by the trust deeds. *See* *I.C. § 45-1507*.

The respondents argue that even if Davidson Trust submitted excessive bids, Spencer is not entitled to proceeds from the sales. The respondents claim that Michael Thompson, the holder of a recorded lien on Parcel No. 3 subsequent to the interest of Davidson Trust, is entitled to these proceeds under *I.C. § 45-1507(3)* before Spencer is entitled to a surplus under *I.C. § 45-1507(4)*. This argument is based on two subordination agreements signed by Thompson, through which Thompson subordinated his interest in Parcel No. 3 to both Deeds of Trust held by Davidson Trust. Based on these subordination agreements, the respondents argue that Spencer has failed to state a claim upon which relief can be granted. However, neither respondent raised this argument before the district court. In fact, Jameson argued that the subordination **[***24]** agreements supported the district court's award of summary judgment in his response to Spencer's motion for reconsideration. ***HN22***[↑] This Court will not consider arguments raised for the first time on appeal. *Johannsen v. Utterbeck, 146 Idaho 423, 429, 196 P.3d 341, 347 (2008)*.

In addition, the respondents argue that the $ 86,507.45 was properly deducted under *I.C. § 45-1507(3)* since the lien for DOT No. 2 was still a subsequently recorded lien at the time the Trustee's Deed for DOT No. 1 was recorded. The respondents' argument is based on the district court's determination that the Trustee's Deed for DOT No. 1 was recorded at 11:29 a.m. and that the Trustee's Deed for DOT No. 2 was recorded at 11:30 a.m. This argument fails for two reasons. First, the district court erred in determining the order in which the sales were recorded; the sales were actually recorded in reverse order--the Trustee's Deed for DOT No. 2 was recorded first at 11:29 a.m. and the Trustee's Deed for DOT No. 1 was recorded second at 11:30 a.m. More importantly, the order in which the Trustee's Deeds were recorded is irrelevant. The lien on DOT No. 2 was extinguished when the trustee accepted Davidson Trust's bid, not when **[***25]** the Trustee's Deed for DOT No. 2 was executed.

Finally, the respondents argue that it would be

inequitable for this Court to award Spencer a surplus. The respondents argue that because Spencer defaulted under two separate promissory notes, he will obtain a windfall if he prevails. However, equity is not available to the respondents. ***HN23***[⬆] *Idaho Code § 45-1502, et seq*. provides a comprehensive regulatory scheme for non-judicial foreclosure of deeds of trust, which includes the exclusive remedies for a given statutory violation. "Where a statute provides an adequate remedy of law, equitable remedies generally are not available." 27A Am. Jur. 2d Equity § 213 (2008). "It is well understood that equitable principles cannot supersede the positive enactments of the legislature." *Davis v. Idaho Dept. of Heath & Welfare, 130 Idaho 469, 471, 943 P.2d 59, 61 (Ct. App. 1997)*. Because *I.C. § 45-1502, et seq*. applies and dictates the requirements for relief **[**116]** **[*507]** in this case, the Court will not allow equity to interfere.

Based on the analysis set forth above, we hold there are sale proceeds in excess of the amounts secured by the trust deeds. However, part of the property conveyed subject to the trust deeds **[***26]** was Parcel No. 3, upon which Thompson has an existing lien. Therefore, we reverse in part the district court's award of summary judgment in favor of the respondents and remand for a determination of the amount of sale proceeds to be distributed along with a determination of who is entitled to such proceeds under *I.C. § 45-1507*.

D. Attorney Fees

All parties request attorney fees on appeal. First, Jameson requests attorney fees under *I.C. §§ 12-120(3)*, *12-121*, and *12-123*. ***HN24***[⬆] "[*Idaho Code] § 12-120(3)* . . . allows recovery of attorney fees by the prevailing party in any commercial transaction." *Mackay v. Four Rivers Packing Co., 145 Idaho 408, 415, 179 P.3d 1064, 1071 (2008)*. *Idaho Code § 12-121* allows recovery of attorney fees by the prevailing party only if the Court determines that the appeal was brought or defended frivolously, unreasonably, or without foundation. Thus, both statutes require that the party requesting attorney fees be a prevailing party. Here, Jameson is not a prevailing party and, therefore, is not entitled to attorney fees under *I.C. §§ 12-120(3)* or *12-121*.

We also deny Jameson's request for attorney fees on appeal under *I.C. § 12-123*. ***HN25***[⬆] *Idaho Code § 12-123(2)(b)* sets forth **[***27]** a specific procedure for attorney fees, requiring a motion by a party and notice and a hearing in the trial court. *See Roe Family Servs. v. Doe, 139 Idaho 930, 938, 88 P.3d 749, 757 (2004)*. Those were not followed in this case. Furthermore, ***HN26***[⬆] the statute limits an award of attorney fees to twenty-one days after the entry of judgment in a civil action. *Idaho Code § 12-123(2)(a)* states: ***HN27***[⬆] "[A]t any time prior to the commencement of the trial in a civil action or within twenty-one (21) days after the entry of judgment in a civil action, the court may award reasonable attorney's fees to any party to that action adversely affected by frivolous conduct." ***HN28***[⬆] The statute makes no provision for attorney fees on appeal. Therefore, attorney fees are not awardable under *I.C. § 12-123* for the appellate process.

Davidson Trust requests attorney fees on appeal under *I.C. § 12-121*. Again, ***HN29***[⬆] *I.C. § 12-121* allows an award of "reasonable attorney's fees to the prevailing party . . . ." *I.C § 12-121*. Davidson Trust is not a prevailing party. Therefore, it is not entitled to attorney fees under *I.C § 12-121*.

Finally, Spencer requests attorney fees pursuant to *I.C. § 12-121*. As set forth above, ***HN30***[⬆] reasonable attorney **[***28]** fees are available to the prevailing party under *I.C. § 12-121* only if the Court determines that the appeal was brought or defended frivolously, unreasonably, or without foundation. *Garcia, 144 Idaho at 546, 164 P.3d at 826*. Although Spencer is the prevailing party on appeal, we find no evidence to suggest that the respondents defended this appeal frivolously, unreasonably, or without foundation. *I.R.C.P. 54(e)(1)*. As such, we deny Spencer's request for attorney fees on appeal.

V. CONCLUSION

For the reasons set forth above, we reverse the district court's order of summary judgment in favor of Davidson Trust and remand with instructions for the district court to determine the amount of sale proceeds to be distributed along with a determination of who is entitled to such proceeds under *I.C. § 45-1507*. We award Spencer court costs, but not attorney fees, on appeal.

Chief Justice EISMANN and Justices W. JONES and HORTON, **CONCUR**.

Concur by: J. JONES

Concur

J. JONES, J., specially concurring.

I concur in the Court's opinion even though it produces a harsh result for the Davidson Trust. Such a result could certainly have been anticipated because the bids submitted by Davidson Trust substantially exceeded the total **[***29]** amount owing on the obligations secured by the two deeds of trust. As noted in the opinion, a credit bid exceeding the trust deed obligation has a chilling **[**117]** **[*508]** effect on the trustee's ability to obtain the maximum amount of recovery for the debtor's property. Allowing a beneficiary to submit a credit bid in excess of the debtor's obligation would give the beneficiary an unwarranted competitive advantage over cash bidders who might be willing to pay more than the debtor's obligation. Such a practice would also deprive the debtor of any excess sale proceeds that might otherwise be available for his or her benefit. A credit bid is designed to allow the beneficiary to bid up to the total owing on the trust deed obligation without having to produce cash in that amount at the trust deed sale, not to allow the beneficiary to avoid a competitive trustee's sale.

In *Federal Home Loan Mortgage Corp. v. Appel, 143 Idaho 42, 45, 137 P.3d 429, 432 (2006)*, we described the purpose of a credit bid as follows:

> There is no reason why the holder of the deed of trust note should not be able to purchase the property at a trustee sale by bidding in all or part of the amount owing pursuant to the note. After all, **[***30]** the holder of the note is the party to be benefitted by the sale. It makes no sense to require the note holder to bring cash to the sale in order to pay himself. His bid, if successful, immediately reduces or eliminates the debtor's obligation. We hold that where the holder of a deed of trust note is the bidder, crediting the bid against the note is the equivalent of a cash sale.

It is clear that the upper limit of a credit bid is the amount owing on the obligation secured by the trust deed. If the beneficiary were permitted to bid in excess of the amount owing on the obligation secured by the trust deed, without having to pay the excess in cash, there would be no need for a competitive auction -- the beneficiary would always be able to outbid a cash purchaser.

A trust deed beneficiary should not submit a bid in excess of the amount owing on the trust deed obligation without expecting to have to pay cash for the excess. Had a third party submitted bids identical to those submitted by the Davidson Trust, the third party would not have been excused from paying the total amount of the two bids. There is no reason to treat Davidson Trust any differently. On the other hand, a trustee should **[***31]** not accept a beneficiary's credit bid exceeding the trust deed obligation. *Idaho Code § 45-1506(9)* requires the purchaser to pay the price bid at the time of sale and provides for delivery of the trustee's deed upon receipt of payment by the trustee. The trustee is provided with options in the event of a refusal by the purchaser to pay the purchase money. Since a credit bid is limited to the amount of the obligation secured by the trust deed, the portion of a bid exceeding that amount must be paid in cash. Where the beneficiary fails to pay the excess amount in cash, he has failed to pay the price bid and the trustee, having failed to receive full payment, delivers the trustee's deed at his potential peril.

It is not entirely clear how these sales went awry. The record contains an affidavit executed by the vice president and trust officer of Davidson Trust, attached to which are two written credit bids that were apparently furnished to the trustee. The affidavit indicates that both bids were to be submitted and that they were to be submitted in the order in which the trustee actually conducted the two sales -- DOT No. 2 being brought up for sale at 10:00 a.m. on February 24, 2005, and **[***32]** DOT No. 1 being brought up at 10:30 a.m. Thus, it appears the trustee conducted the sales as requested by Davidson Trust.

It is unknown why Davidson Trust did not attempt to handle the matter in a single sale by foreclosing DOT No. 2, including the amount owing on the obligation secured by DOT No. 1. Or, it could have foreclosed both trust deeds, seeking only the amount owing pursuant to each. Nor is it known why the trustee did not call attention to the fact that the credit bids exceeded the total available credit. The bids, as presented to and accepted by the trustee, appear destined to produce the unfortunate result actually obtained here.

What this case illustrates is that the beneficiary should be scrupulous in determining the amount owing pursuant to the obligation(s) secured by the deed(s) of trust [4] **[**118]** **[*509]** and, where the beneficiary does

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[4] The written credit bids also contain some overlap. Both bids included the delinquent taxes on parcel No. 3 in the amount of $ 1,783.36, the $ 5,000 amount related to item (g) of the Agreement, and attorney fees and costs in the amount of $ 1,865.40. While it isn't entirely clear, it appears that these

not personally attend the sale, should provide clear-cut instructions to the trustee. The case also illustrates that the trustee should pay attention to the amount owing to the beneficiary on the obligation(s) secured by the trust deed(s) and make sure that any credit bid submitted by the beneficiary does not exceed that amount, unless the beneficiary **[***33]** produces cash to make up the difference.

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duplicate items further inflated Davidson Trust's bid to its current detriment.

User Name: Jeremy Bass
Date and Time: Friday, October 25, 2024 3:16:00 PM PDT
Job Number: 237024656

Document (1)

1. *Taylor v. Just*
   Client/Matter: -None-
   Search Terms:
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
	-None-

Taylor v. Just

Supreme Court of Idaho

November 22, 2002, Filed

Docket No. 28105, 2002 Opinion No. 131

Reporter
138 Idaho 137 *; 59 P.3d 308 **; 2002 Ida. LEXIS 178 ***

JAMES L. TAYLOR, Plaintiff-Respondent-Cross Appellant, v. CHARLES C. JUST, in his capacity as Trustee; FAIRBANKS CAPITAL CORPORATION, a Utah corporation; RONALD DALE RUSH and TERILYN ANN RUSH, husband and wife, Defendants-Appellants-Cross Respondents.

Subsequent History: [*1]** Released for Publication December 16, 2002.

Prior History: Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Sergio A. Gutierrez, District Judge.

Disposition: The judgment of the district court is reversed and remanded.

Core Terms

default, trust deed, district court, cure, foreclosure sale, attorney's fees, terms, void, promissory note, modified, real property, notice, summary judgment, foreclose, execute, grantor, Lender, good faith purchaser, foreclosure, purchaser, deliver, deed, parties

Case Summary

Procedural Posture
The District Court of the Third Judicial District, State of Idaho, Canyon County, granted judgment in favor of appellee trustee under a deed of trust to execute and deliver a trustee's deed to appellant highest bidder at the foreclosure sale. The bidder appealed.

Overview

The district court stated that a breach of contract cause of action would not lie and ordered the trustee to execute and deliver the trustee's deed to the bidder. The bidder argued that the trial court erred. The appellate court found that the agreement cured the default because under the agreement, there were no longer any sums past due. Because at the time of the sale there was no default in the performance of any obligations secured by the deed of trust, the foreclosure sale was void. *Idaho Code § 45-1506(12)* did not purport to limit the right of the grantor and beneficiary to come to their own agreement to cure a default. The foreclosure sale was void for failure to comply with *Idaho Code § 45-1505(2)*. The bidder was not a good faith purchaser for value because he did not acquire title to the real property. Because the foreclosure sale was void, the alleged contract was likewise void. The alleged contract would circumvent the statutory requirement that a deed of trust can be foreclosed only if there is a default in an obligation the performance of which is secured by the deed of trust. The trustee was entitled to an award of a reasonable attorney fee.

Outcome
The judgment was reversed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary

Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN1 **Standards of Review, De Novo Review**

In an appeal from an order of summary judgment, the appellate court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment. All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which the appellate court exercises free review.

Real Property Law > Financing > Foreclosures > General Overview

HN2 **Financing, Foreclosures**

Idaho Code § 45-1505(2) (1997) grants authority to foreclose a deed of trust by nonjudicial sale. It provides, The trustee may foreclose a trust deed by advertisement and sale under this act if there is a default by the grantor owing an obligation the performance of which is secured by the trust deed. The statute requires that the default exist at the time of the sale. It states that the trustee may foreclose a trust deed if there "is" a default by the grantor, not if there "has been" a default by the grantor.

Contracts Law > Contract Interpretation > Intent

Contracts Law > Contract Interpretation > General Overview

HN3 **Contract Interpretation, Intent**

A contract must be construed to give effect to the intention of the parties. In order to ascertain that intent, the contract must be construed as a whole. If a contract's terms are clear and unambiguous, the contract's meaning and legal effect are questions of law, and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words.

Estate, Gift & Trust Law > ... > Private Trusts Characteristics > Trustees > General Overview

Real Property Law > Financing > Foreclosures > General Overview

Estate, Gift & Trust Law > Trusts > General Overview

HN4 **Private Trusts Characteristics, Trustees**

Idaho Code § 45-1506 (1997) provides that the trustee can postpone the sale at the request of the beneficiary.

Real Property Law > Financing > Foreclosures > General Overview

HN5 **Financing, Foreclosures**

Idaho Code § 45-1506(12) gives the grantor the right to cure a default by paying those sums within 115 days after the recording of the notice of default. The statute simply grants a right to cure within 115 days after the recording of the notice of default and specifies how a grantor can exercise that right. It does not purport to limit the right of the grantor and beneficiary to come to their own agreement to cure a default.

Real Property Law > Financing > Foreclosures > General Overview

HN6 **Financing, Foreclosures**

See *Idaho Code § 45-1508* (1997).

Real Property Law > Financing > Foreclosures > General Overview

HN7 **Financing, Foreclosures**

By its terms Idaho Code § 45-1506 only applies to sales challenged because of a failure to comply with the provisions of Idaho Code § 45-1508 (1997).

Contracts Law > Personal Property > Bona Fide Purchasers

Real Property Law > Priorities & Recording > Elements > Bona Fide Purchasers

Real Property Law > Deeds > General Overview

HN8 **Personal Property, Bona Fide Purchasers**

The doctrine of bona fide purchaser is peculiarly available for purposes of defense. This defense can be maintained only in favor of a title, though it may be defective, which a bona fide purchaser has, and it is not available for the purpose of creating a title. Where the title to land passes, though obtained by fraud, and the deed is therefore voidable, one who purchases from the grantee in good faith, and without notice, will be protected, because he had a title which he could and did convey, but when the deed was never in fact delivered, the grantee can convey no title for the protection of which the plea of a bona fide purchaser can be invoked.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

HN9 **Affirmative Defenses, Fraud & Misrepresentation**

A void contract cannot be enforced.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN10 **Attorney Fees & Expenses, Reasonable Fees**

Idaho Code § 12-120(3) provides, In any civil action to recover 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. The statute defines the term "commercial transaction" to mean all transactions except transactions for personal or household purposes. Idaho Code § 12-120(3) (1998).

Counsel: Mark L. Clark, Nampa, for appellants.

White Peterson Morrow Gigray Rossman Nye & Rossman, Nampa, for respondent. Kevin E. Dinius argued.

Judges: EISMANN, Justice. Chief Justice TROUT, and Justices SCHROEDER, WALTERS, and KIDWELL CONCUR.

Opinion by: EISMANN

Opinion

[309]** **[*138]** EISMANN, Justice.

This is an appeal from a judgment ordering the trustee under a deed of trust to execute and deliver a trustee's deed to the highest bidder at the foreclosure sale. Prior to the sale, the grantor and beneficiary had entered into an agreement resolving the default. Therefore, we reverse the judgment of the district court because the sale was void and the trustee cannot be required to execute and deliver a trust deed.

I. FACTS AND PROCEDURAL HISTORY

In April 1998, Ronald and Terilyn Rush executed a deed of trust on their residence to secure payment of a promissory note in the sum of $ 37,000. The defendant Fairbanks Capital Corporation (Fairbanks Capital) later **[**310]** **[*139]** acquired the interest of the beneficiary **[***2]** under that deed of trust. The Rushes failed to make the monthly payments that came due

under the promissory note for the months of November 2000 through February 2001. Fairbanks Capital retained the defendant Charles Just (the Trustee) to foreclose the deed of trust by nonjudicial sale, and he commenced foreclosure proceedings under *Idaho Code § 45-1506*, with the sale scheduled for July 19, 2001. The Trustee retained Pioneer Title Company (Pioneer Title) to conduct the sale.

On July 17, 2001, the Rushes and Fairbanks Capital executed a contract entitled "Forbearance Agreement" (Agreement) which addressed the Rushes' default. The Agreement altered the terms of the promissory note by modifying the payments due. As modified by the Agreement, the Rushes were to pay $ 2,000 on July 17, 2001; $ 575 by the seventeenth days of August, September, and October 2001; and $ 4,984 by November 17, 2001. The Agreement provided that if the Rushes made the payments as modified, Fairbanks Capital would not proceed with the foreclosure. The Rushes timely paid the $ 2,000, and Fairbanks Capital sent the Trustee an e-mail instructing him to stop the foreclosure proceedings. Because **[***3]** of a problem with the Trustee's Internet provider, however, he did not receive the e-mail until July 20, 2001, the day after the sale.

Pioneer Title held the foreclosure sale as scheduled on July 19, 2001. The plaintiff James Taylor (Taylor) was the highest bidder, and on the same day he tendered to Pioneer Title a certified check for the full amount of his bid. On July 20, 2001, the Trustee received the e-mail message from Fairbanks Capital. On July 23, 2001, the Trustee informed Taylor about the Agreement and told him he would not be receiving a trustee's deed. Taylor's check was returned to him.

On August 22, 2001, Taylor commenced this action. In count one of his complaint he requested a declaratory judgment that he is the legal owner of the real property. In count two, he alleged that the Trustee and Fairbanks Capital had breached a contract to convey the real property to him, and he sought either specific performance of that contract or damages for its breach. He alleged that the damages recoverable were $ 47,215, the difference between the price he bid and the fair market value of the real property.

The parties filed cross motions for summary judgment, which were heard on **[***4]** December 14, 2001. The district court ruled that the Agreement did not cure the default, it was simply a promise to cure the default, and that as a result the sale was valid. The district court therefore ruled that the sale was valid and that the Trustee was required to execute and deliver the trustee's deed to Taylor. The court granted summary judgment in favor of Taylor on count one of his complaint. With respect to count two, the district court stated that a breach of contract cause of action would not lie under the facts of this case. It also denied respondents' motion for summary judgment. The district court entered a judgment ordering the Trustee to execute and deliver the trustee's deed to Taylor. The respondents then appealed, and Taylor cross-appealed.

II. ISSUES ON APPEAL

A. Was the foreclosure sale void?

B. Is Taylor a good faith purchaser under *Idaho Code § 45-1508*?

C. Did the district court err in not granting Taylor summary judgment on his claim for breach of contract?

D. Did the district court err in awarding Taylor attorney fees?

E. Is either the Trustee or Taylor entitled to attorney fees on appeal?

III. [***5] ANALYSIS

HN1[⬆] In an appeal from an order of summary judgment, this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment. *Infanger v. City of Salmon, 137 Idaho 45, 44 P.3d 1100 (2002)*. All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving **[**311]** **[*140]** party. *Id.* Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.* If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review. *Id.*

A. Was the Foreclosure Sale Void?

Idaho Code § 45-1505(2) (1997) ***HN2***[⬆] grants authority to foreclose a deed of trust by nonjudicial sale.

It provides, "The trustee may foreclose a trust deed by advertisement and sale under this act if . . . there is a default by the grantor . **[***6]** . . owing an obligation the performance of which is secured by the trust deed." The statute requires that the default exist at the time of the sale. It states that the trustee may foreclose a trust deed if there "is" a default by the grantor, not if there "has been" a default by the grantor. Both parties agree that if the promissory note was not in default on July 19, 2001, the foreclosure sale was void. The issue in this case is whether there was still a default after the Rushes and Fairbanks Capital had entered into the Agreement. The district court held that the Agreement "amounts to a promise to cure a default and . . . it does not cure the default." In so holding, the district court erred.

HN3[⬆] A contract must be construed to give effect to the intention of the parties. *Wing v. Martin, 107 Idaho 267, 688 P.2d 1172 (1984)*. In order to ascertain that intent, the contract must be construed as a whole. *Id.* If a contract's terms are clear and unambiguous, the contract's meaning and legal effect are questions of law, and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words. *Taylor v. Browning, 129 Idaho 483, 927 P.2d 873 (1996)*. **[***7]**

The Agreement expressly modified the payments due under the promissory note. It recited, "Whereas Borrower(s) and Lender are willing to modify the note as set forth below in order to permit Borrower(s) to continue to own and use the property." The parties agreed that the amounts due under the note, including various fees and costs relating to the foreclosure proceedings, totaled $ 6,984.38. They then agreed as follows:

> 2. **Forbearance.** From and after the date of execution of this agreement, during the term hereof, so long as Borrower(s) does not default in any performance required by this Agreement and does not default in any performance required by the Note (except as modified by this Agreement) and Mortgage lender agrees to forbear from scheduling a sheriffs sale, and to forbear from proceeding with the filing of a Foreclosure.
>
> 3. **Duties of Borrower(s).** Borrower(s) shall make the following payments at the following times:
> A) On or before the earlier of July 17, 2001 or the date of execution of this agreement, Borrower(s) shall pay $ 2000.00 to Lender.
>
> B) Thereafter Borrower(s) shall make monthly payments to Lender in the amount of $ 575.00 **[***8]** for the months of August 2001 through and including October 2001 provided that payments shall be received by Lender no later than the 17th day of each of these months. A final balloon payment to reinstate loan is due on or before November 17, 2001 in amount of $ 4984.28.
>
> 4. **Effect of Default.** Should Borrower(s) fail to make any payment required by this Agreement or perform any other act required by this Agreement or should any representation or warranty given by Borrower(s) be untrue or shall be breached, Lender shall have the right to pursue all remedies available to it under the Note, Mortgage and/or Final Judgment. In executing this agreement, Borrower(s) specifically acknowledges that the Notice of Default shall not be rescinded and shall be an instrument of record until withdrawn by Lender.

The Agreement also provided, "Except as specifically modified by this Agreement, all other terms of the Note shall remain unchanged from the original terms and no part of the Mortgage is modified by this Agreement." **[**312]** **[*141]** The Rushes paid the $ 2,000 due upon execution of the Agreement.

The Agreement clearly provided: (1) that the terms of the promissory note were modified **[***9]** so that there were no longer any sums that were past due; (2) that Fairbanks Capital could not proceed with foreclosing the deed of trust unless there was a new default in the Agreement or in the promissory note; and (3) that if there was a future default then Fairbanks Capital could pursue all remedies available to it. Thus, the Agreement by its terms cured the default because under the Agreement, there were no longer any sums past due. Under its terms, it would require a new default by the Rushes for Fairbanks Capital to be able to foreclose the deed of trust.

Idaho Code § 45-1506 (1997) ***HN4***[⬆] provides that the trustee can postpone the sale at the request of the beneficiary. Thus, the beneficiary could agree to postpone the sale to give the grantor additional time to cure the default. That is not what happened here, however. The Agreement did not merely provide that the sale would be postponed. It eliminated the default by altering the terms of the promissory note so that there were no longer any sums past due.

Taylor points to one sentence in the Agreement which he contends shows that the default was not cured. That

sentence states, "In executing this agreement, **[***10]** Borrower(s) specifically acknowledges that the Notice of Default shall not be rescinded and shall be an instrument of record until withdrawn by Lender." This sentence does not provide that the default is not cured. It simply provides that the notice of default will remain filed. Fairbanks Capital may have included this provision in the Agreement under the belief that if there were a future default, Fairbanks Capital could short-circuit the foreclosure process by relying upon the prior notice of default. Whatever the reason behind this provision, its terms do not contradict the fact that upon the execution of the Agreement, there were no longer any sums past due under the promissory note as it had been modified by the Agreement. Thus, because at the time of the sale on July 19, 2001, there was no default in the performance of any obligations secured by the deed of trust, the foreclosure sale was void.

Taylor also argues that the default could not be cured without actual payment of the entire amount then due under the terms of the deed of trust and promissory note, including a reasonable trustee's fee and attorney fees. Taylor relies upon *Idaho Code § 45-1506(12)* **[***11]** in making this argument. ***HN5***[⬆] That code section gives the grantor the right to cure a default by paying those sums within 115 days after the recording of the notice of default. The statute simply grants a right to cure within 115 days after the recording of the notice of default and specifies how a grantor can exercise that right. It does not purport to limit the right of the grantor and beneficiary to come to their own agreement to cure a default.

B. Is Taylor a Good Faith Purchaser Under *Idaho Code § 45-1508*

Taylor argues that he is entitled to a deed to the real property because he is a good faith purchaser under *Idaho Code § 45-1508* (1997), which provides:

> ***HN6***[⬆] A sale made by a trustee under this act shall foreclose and terminate all interest in the property covered by the trust deed of all persons to whom notice is given under *section 45-1506, Idaho Code*, and of any other person claiming by, through or under such persons and such persons shall have no right to redeem the property from the purchaser at the trustee's sale. The failure to give notice to any of such persons by mailing, personal **[***12]** service, posting or publication in accordance with *section 45-1506, Idaho Code*, shall not affect the validity of the sale as to persons so notified nor as to any such persons having actual knowledge of the sale. Furthermore, any failure to comply with the provisions of *section 45-1506, Idaho Code*, shall not affect the validity of a sale in favor of a purchaser in good faith for value at or after such sale, or any successor in interest thereof.

That statute has no application in this case for two reasons.

[313]** **[*142]** First, ***HN7***[⬆] by its terms it only applies to sales challenged because of a failure to comply with the provisions of *Idaho Code § 45-1506*. In this case, the Rushes have not contended that the foreclosure sale was void for failure to comply with *Idaho Code § 45-1506*. They have contended, and we have found, that the foreclosure sale was void for failure to comply with *Idaho Code § 45-1505(2)*, which requires that there be a default in order to sell the real property secured by a deed of trust.

Second, Taylor is not a good faith purchaser for value because **[***13]** he did not acquire title to the real property. The trustee refused to execute and deliver a deed. The doctrine of good faith purchaser for value is available to protect title obtained, not to acquire title. As this Court explained in *Ewald v. Hufton, 31 Idaho 373, 380, 173 P. 247, 247-48 (1918)*:

> ***HN8***[⬆] The doctrine of *bona fide* purchaser is peculiarly available for purposes of defense. (See the discussion in 2 Pomeroy, Equity Jurisdiction, § 735, et seq.) This defense can be maintained only in favor of a title, though it may be defective, which a *bona fide* purchaser has, and it is not available for the purpose of creating a title. This view is well expressed by Mr. Justice Bean in the case of *Allen v. Ayer, 26 Or. 589, 39 Pac. 1*, as follows:
>
> "Where the title to land passes, though obtained by fraud, and the deed is therefore voidable, one who purchases from the grantee in good faith, and without notice, will be protected, because he had a title which he could and did convey, but when the deed was never in fact delivered, the grantee can convey no title for the protection of which the plea of a *bona fide* purchaser can be invoked."

[*14]** Thus, Taylor is not entitled to obtain a deed to the real property based upon his contention that he is a good faith purchaser for value.

C. Did the District Court Err in Not Granting Taylor

Summary Judgment on His Claim for Breach of Contract?

Taylor contends that even if the foreclosure sale is void, the facts in this case gave rise to a contract between him and either Fairbanks Capital or the Trustee, and he is entitled either to enforce that contract either by requiring the Trustee to execute and deliver a deed to the real property or by recovering damages. Because the foreclosure sale is void, the alleged contract is likewise void. The alleged contract would circumvent the statutory requirement, discussed above, that a deed of trust can be foreclosed only if there is a default in an obligation the performance of which is secured by the deed of trust. ***HN9***[⬆] A void contract cannot be enforced. *Quiring v. Quiring, 130 Idaho 560, 944 P.2d 695 (1997)*.

D. Did the District Court Err in Awarding Taylor Attorney Fees?

The district court awarded Taylor attorney fees in the sum of $ 8,842.50 against the Trustee. The district court found that the gravaman **[***15]** of this case involved a commercial transaction, and so the prevailing party was entitled to an award of attorney fees under *Idaho Code § 12-120(3)*. Because we reverse the judgment of the district court, we also reverse the attorney fee award to Taylor.

E. Is Either the Trustee or Taylor Entitled to Attorney Fees on Appeal?

The Trustee and Taylor both seek an award of attorney fees on appeal pursuant to *Idaho Code § 12-120(3)*. ***HN10***[⬆] That statute provides, "In any civil action to recover . . . 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." The statute defines the term "commercial transaction" to mean "all transactions except transactions for personal or household purposes." *IDAHO CODE § 12-120(3)* (1998). Both Taylor and the Trustee agree that Taylor's action against the Trustee was to recover in a commercial transaction. Taylor bid at the foreclosure sale in order to obtain the real property for resale. As the prevailing party on the appeal, the Trustee is entitled **[***16]** to an award of a reasonable attorney fee under *Idaho Code § 12-120(3)*. *Hoffer v. Callister, 137 Idaho 291, 47 P.3d 1261 (2002)*. The Trustee is **[**314]** **[*143]** likewise entitled to an award of a reasonable attorney fee in the district court.

IV. CONCLUSION

We reverse the judgment of the district court and remand this case with instructions to enter a judgment dismissing the complaint with prejudice and to award the Trustee a reasonable attorney fee. We also award costs and attorney fees on appeal to the Trustee.

Chief Justice TROUT, and Justices SCHROEDER, WALTERS, and KIDWELL **CONCUR.**