11-18-2013

Cummings v. Stephens Cross Appellant's Brief Dckt. 40793

IN THE SUPREME COURT OF THE STATE OF IDAHO

STEVEN B. CUMMINGS Plaintiff/Appellant/Cross-Respondent, vs. ROGER L. STEPHENS, Defendant/Respondent/Cross-Respondent, And NORTHERN TITLE COMPANY OF IDAHO, INC. Defendant/Respondent/Cross-Appellant,	)	Docket No. 40793-2013 **CROSS APPELLANT'S BRIEF** Appeal from Bear Lake County, Case No. CV-2009-000183

Cross Appeal from the Sixth Judicial District Court
Of the State of Idaho, in and for the County of Bear Lake

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STATEMENT OF THE CASE

Nature of the Case & Proceedings

Plaintiff/Appellant Steven Cummings' ("Cummings") seeks to hold a title company, Defendant/Respondent/Cross-Appellant, Northern Title Company of Idaho, Inc. ("Northern Title"), liable for a deed description. The subject property is located in Bear Lake County, Idaho. The seller was the Roger L. and Barbara L. Stephens Family Trust, and the buyer was Cummings. The realtors were Dorothy Julian and Evan Skinner, neither of which are parties to this action. Pursuant to I.C. § 41-2702, Northern Title is the agent of Stewart Title Guaranty Company, a Texas corporation from whom Cummings obtained title insurance.

Cummings' Complaint was filed on July 29, 2009. See *R.*, Vol. 1, pp. 1-8. Over two years later, Cummings filed his *First Amended Complaint*, and shortly thereafter filed his *Second Amended Complaint*. See *R.*, Vol. 3, pp. 445-520; *Id.* at pp. 574-649. Cummings brought nine (9) causes of action against Northern Title, including (1) Breach of Warranty, (2) Conversion, (3) Slander of Title, (4) Breach of Contract, (5) Per Se Violations of the Idaho Escrow Act, (6) Breach of Duty of Good Faith and Fair Dealing, (7) Negligence or Gross Negligence, (8) Breach of Insurance Policy Agreement, and (9) Infliction of Emotional Distress. *Id.* at Vol. 4, pp. 574-649.

The case went to trial, and after Cummings rested his case, the district court granted Northern Title's request to dismiss Counts I and II for Breach of Warranty and Conversion. See *R.*, Vol. 8, p. 1589. After trial was completed, the district court dismissed five (5) more of Cummings' claims against Northern Title. *Id.* at Vol. 8, p. 1635. In the end, the district court

could not find any damages against Northern Title, except for one claim based on Northern Title's negligence in drafting the deed description. *Id.* at Vol. 8, p. 1629. Notwithstanding, based on Cummings' one successful claim, the district court deemed Cummings the prevailing party, and ordered Northern Title to pay all of Cummings' attorney's fees. See *R.*, Vol. 9, pp. 1805-1806; *Id.* at Vol. 9, 1809-1812.

Concise Statement of Facts

On July 5, 2007, Three Bar Ranches, Inc. ("Three Bar") entered into a Real Estate Purchase and Sale Agreement (the "REPC") with the Roger L. and Barbara L. Stephens Family Trust ("Stephens Trust"). See Trial Ex. 29.[1] The REPC did not contain a legal description. See *Tr.*, Vol. 1, 515:9-12 (first deed description appeared with Northern Title's title commitment, "received from the [Preston, Idaho] title officer on July 26th, 2007").

On July 22, 2007, Cummings called a listed realtor, Dorothy Julian ('Julian"), to inquire about the property; he was eventually forwarded to another realtor, Evan Skinner ("Skinner"). See *R.*, Vol. 8, p. 1593, ¶¶ 10-12. By July 26, 2007, Cummings decided to purchase the REPC from Three Bar. *Id.* at Vol. 8, p. 1595, ¶ 24. That same day, Cummings contacted Julian by telephone, and she faxed him the REPC. *Tr.*, Vol. 1, 61:4-10 and 62:10-13; see also Trial Ex. 29. After receiving the REPC, Cummings called the realtors back, and "demanded" a legal description, referred to in the REPC as "Addendum One." *Tr.*, Vol. 1, 63:1-16.

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1 See also "Counter Offer # One" attached thereto, naming "Seller" as "Stephens Family Trust," and amending sales price to from $900,000 to $800,000.

As a result, on July 26, 2007, Northern Title produced the first title commitment "under pressure." See *Tr.*, Vol. 1, 390:10-12. Prior to July 26, 2007, Northern Title did not have a title commitment ready. *Id.* 515:9-12. The title commitment was "the first commitment for title insurance . . . received from the title officer on July 26th, 2007." *Id.* at 519:10-13. Specifically, on July 16, 2007, Skinner verbally requested Northern Title for a commitment, stating "I would like to open title on a ranch, the Stephens Ranch, for the buyer to be determined." *Id.* at 516:9-11. As a result, Northern Title created order number NTBL-1183. *Id.* at 376:18-377:3; see also Trial Ex. 110. That same day, Northern Title also created its "PR instructions." *Id.* at 374:8-19. Per Northern Title, "the title officer would compile [the PR instructions] to hand to a processor to start the processing of the commitment." *Id.* The processor and title officer would then "put together a draft of a commitment." *Id.* at 375:3-8.

Northern Title provided Skinner with the title commitment, and Skinner then faxed it to Cummings who by that time was in Utah. *Tr.*, Vol. 1, 815:5-12; see also Trial Ex. 35. With that title commitment, Skinner also faxed to Cummings a new, unsigned Real Estate Purchase and Sale Agreement ("Skinner's REPC"), attaching thereto a copy of Northern Title's title commitment. *Id.* at 815:5-12; see also Trial Ex. 35; see also *R.*, Vol. 8, p. 1594, ¶ 16. The deed description contained in Skinner's REPC was identical to the deed description contained in Northern Title's title commitment. See Vol. 8, p. 1594, ¶ 17.

Back in Utah, Cummings did his own "rough" plot using Northern Title's title commitment. See *Tr.*, p. 280, L. 9-12. According to Cummings, his reliance was based on Northern Title's duties as a title insurer:

> When it goes to a title company, that's where it gets verified. Everything gets taken care of. Through all my years of real estate, I have never done it on my own. I do that on my own personal to get a comfort level with my due diligence, but I most certainly do not take that upon myself. That is a title company's function. Otherwise, why would we even have title insurance companies . . . [that is] [w]hat I have always relied on a title insurance company for.

Tr., Vol. 1, 277:15-278:2 (emphasis added). Based on his analysis of Northern Title's deed description, Cummings "believed" that the sale included property on both the west and the east sides of Highway 30. See *R.*, Vol. 8, p. 1594, ¶ 21. Notwithstanding, Cummings did not obtain an appraisal; Cummings did not obtain a survey; and Cummings did not verify the total acreage. *Id.* at 187:17-188:12; see also *id.* at 214:24-215:4. Prior to closing, Cummings also never spoke to Three Bar, or either of the Stephens Trustees. See *Id.* at 187:17-188:12. Nor did he ever discuss the deed description with Northern Title. *Id.* at 281:7-14; see also *id.* at 298: 22-299:14 (post-closing to address quitclaim deed to family trust).

Contrary to Cummings' alleged belief, everyone else knew that the sale only included property west of Highway 30. The district court expressly held that "[t]he Stephens had no intention to sell their property located on the east side of the highway." *R.*, Vol. 8, p. 1592, ¶ 2. Northern Title understood the same. *Id.* at Vol. 8, p. 1593, ¶ 8. Both the realtors, Julian and Skinner, understood the same. See *Tr.*, Vol. 1, 817:3-818:11; see also *Julian Published Depo.*, 20:13-20, 21:14-17, 36:15-22, 38:16-24, and 40:1-41:3.

On or about July 31, 2007, Northern Title learned that its title commitment erroneously included property east of the Highway. See *R.*, Vol. 8, p. 1595, ¶ 26; see also *Tr.*, p. 519, L. 12 – p. 520, L. 2. Therefore, Northern Title called the realtors, informed them of the error, and faxed

down an amended title commitment. See *Tr.*, Vol. 1, 520:17-521:9. The deed description contained in this second title commitment was utilized at closing. See *R.*, Vol. 8, p. 1595, ¶ 28. However, Cummings testified that he never received from the realtors the updated title commitment, and he failed to read the deed description at closing. See *Tr.*, Vol. 1, 94:5-6 (only aware of first title commitment); see also *id.* at 220:25-221:10 (Cummings does not dispute second title commitment deed description used at closing); see also *id.* at 88:4-19 (Cummings did "cursory review" of closing documents).

In providing the second title commitment, with its amended deed description, Northern Title was relying upon the Realtors, with whom Cummings admits he solely dealt:

> Q: All right. During the period of the transaction, did you have any direct contact with Mr. Stephens, the Seller?
>
> A: No.
>
> Q: Did you have any direct contact with any of the principals for Three Bar Ranches?
>
> A: No.
>
> Q: So all your negotiations with them were though – was it Evan Skinner?
>
> A: Yes.

Tr., Vol. 1, 98:21-99:5; see also *id.* at 187:17-188:2; see also *id.* at 210:2-12. Similarly in obtaining the legal description, Cummings testified:

> Q: The legal description is one of the documents – one of the three or four documents you were asking for?
>
> A: That's correct.

Q: And you continued to follow up with the realtors in that regard?

A: That's correct.

Q: But at this point in time you had not correspondence with Northern Title?

A: At this juncture?

Q: Yes.

A: I do not believe so.

Tr., Vol. 1, 311:9-20. Cummings also used the realtors in determining acreage. *Id.* at 214:20-21. Further, Cummings received the title commitment from the realtors, not Northern Title. *Id.* at 187:21-23.

The realtors had specifically instructed Northern Title that the sale included only that property west of Highway 30:

> But we sent it [the first title commitment] out, and a few days later, after the weekend, Dorothy Julian came into my office, and she walked right in, and she knocked on my desktop, and she said -- dropped it on the desktop, and she said, "Does this description except out the east side of the highway?" And I looked at it, and I told her, "I will call the title officer." And she was standing there, I called the title officer. She went over it. Barbara [the title officer] said, "No, It's missing. I need to get that put in. I'll put it in and get it sent back out." So she sent back out an updated title commitment.

Tr., Vol. 1, 518:13-25; see also *R.*, Vol. 8, p. 1593, ¶¶ 8-9. Through these instructions, "Northern Title had the understanding all along that the sale was to include only that property on the west side of Highway 30." *R.*, Vol. 8, pp. 1611-1612.

However, the deed description used at the August 3, 2007 closing still erroneously included the Lui's property, as well as 83 acres of the Stephens Family Trust east of the Highway. See *R.*, Vol. 8, p. 1595, ¶ 27; see also See *Tr.*, Vol. 1, 543:10-14. On November 8, 2007, Roger Stephens, Trustee of the Stephens Family Trust, informed Northern Title of the inadvertent error. *Id.* at 1596, ¶ 34. Prior to this time, Northern Title had been trying for months to get in touch with Cummings regarding his request to quitclaim the property into his own family trust. See *Tr.*, Vol. 1, 530:16-25. Notwithstanding, Northern Title strove again to get in touch with Cummings prior to filing a correction deed. *Id.* at 537:8-13; see also *id.* at 538:14-23 (tried several times, left message for Cummings, did not hear back for three months); see also *R.*, Vol. 8, p. 1596, ¶ 37 (Northern Title tried to let Cummings know "that Northern Title was changing the legal description . . . but was only able to leave a voicemail").

Under the Escrow General Provisions, Cummings was required to "cooperate and adjust clerical errors, and or further documentation which may be deemed necessary to comply with any Real Estate Purchase Contract governing this transaction or it's [sic] intent." See *Escrow General Provisions*, Trial Ex. 111, ¶ 20. Cummings, however, must have known his alleged "belief" regarding the eastern property was an outlier. In addition to getting voicemails from Northern Title, Cummings admits "I received a message from Stephens that changes were made to the Warranty Deed." *Tr.*, Vol. 1, 322:9-11; see also *Cummings' Affidavit*, Trial Ex. 49, ¶ 6. Specifically, by letter Roger Stephens told Cummings "I had to go to Northern Title and found that they had made a mistake on the land description . . . ." *Tr.*, Vol. 1, 342:12-16; see also

Stephen's Nov. 27, 2007 Ltr., Trial Ex. 21. However, Cummings did not respond to Stephens. Nor did Cummings seek out the realtors. Nor did Cummings respond to Northern Title.

Rather, Cummings located someone he had never spoken with: Curtis Baum of Three Bar. See *Tr.*, 187:2-13; see also *id.* at 187:17-188:12. Cummings sought out Baum to allegedly "get clarity on what the agreement between the buyer and the seller was." *Id.* at 324:3-7. Two months after meeting with Baum, Cummings by letter finally responded to Northern Title, but made no mention of the corrected warranty deed. *Id.* at 531:21-24; see also Trial Ex. 41. Later on March 27, 2008, Cummings by letter again communicated, but demanded only his policy, and made no mention of the corrected warranty deed. See Trial Ex. 43.

Cummings conduct was beyond coy. He testifies "I clearly knew" about the changed legal description. See *Tr.*, Vol. 1, 326:22-327:5. He also testifies that if given the chance, he would claim recovery for all of the property included in Northern Title's erroneous title commitment, even that property never owned by the Stephens Family Trust. *Id.* at 542:7-20 (deed description relied upon by Cummings included Romrell and Lui properties); see also *id.* at 275:21-276:10 (Cummings did not notice Romrell and Lui properties in deed description); *id.* at 277:2-10 (Cummings expects title insurance to cover Romrell and Lui properties).

For over four years, Cummings has endeavored to obtain damages for a correction deed; a correction deed filed and expressly authorized by Northern Title's escrow instructions. Notwithstanding, because Cummings' had relied upon Northern Title's title commitment, the district court awarded damages against Northern Title in violation of the *Anderson* rule.

ISSUES PRESENTED ON APPEAL

1. Whether the district court's finding of negligence and damages against Northern Title should be reversed, where Northern Title's deed description was provided to further title insurance, and Cummings reliance thereon was in violation of the *Anderson* rule.

Standard of Review: "Whether a duty exists is a question of law, over which this Court exercises free review." *Gagnon v. Western Bldg. Maintenance, Inc.*, 155 Idaho 112, 306 P.3d 197, 200 (2013).

2. Whether the district court's award of damages should be reversed, where (1) the district court's ability to calculate damages was limited to the entire assignment purchase price; where (2) Cummings' negligence was far greater than Northern Title's, and where (3) Cummings failed to mitigate.

Standard of Review: This "Court reviews a district court's determination of damages pursuant to a clearly erroneous standard." *Stephen v. Sallaz & Gatewood, Chtd.*, 150 Idaho 521, 529, 248 P.3d 1256, 1264 (2011) (citations omitted). An amount of damages will be affirmed only when supported by "substantial and competent" evidence. See *Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 457, 283 P.3d 757, 774 (2012); see also *Weatherhead v. Griffin*, 123 Idaho 697, 706, 851 P.2d 993, 1002 (Ct. App. 1992). Similarly, the finding of contributory negligence and/or mitigation is a question of fact, requiring substantial and competent evidence. See *Collins v. Collins*, 130 Idaho 705, 710, 946 P.2d 1345, 1350 (Ct. App. 1997); see also See *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 261, 846 P.2d 904, 912 (1993).

3. Whether the district court's finding of gross negligence and willful misconduct against Northern Title should be reversed, where the Escrow General Provisions authorized Northern Title to record a correction deed that comported with the realtors' instructions.

Standard of Review: "When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law." *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 723, 291 P.3d 399, 406 (2012). This Court exercises "free review" over questions of law. *Gagnon*, 155 Idaho 112, 306 P.3d at 200.

4. Whether the district court's award of attorney fees and costs should be reversed, where Northern Title prevailed in whole or in part at trial.

Standard of Review: The determination of a prevailing party is "committed to the discretion of the district court and we review the determination on an abuse of discretion standard." *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 718-719, 117 P.3d 130, 132-133 (2005). Similarly, the apportionment of any fees is reviewed under the abuse of discretion standard. See *Nguyen v. Bui*, 146 Idaho 187, 192, 1941 P.3d 1107, 1112 (2008).

ATTORNEY FEES AND COSTS ON APPEAL

Pursuant to Rule 35(g) of the Idaho Appellate Rules, Cross-Appellant Northern Title hereby incorporates by reference the *Response Brief of Northern Title Company of Idaho, Inc.*, specifically those arguments set forth supporting an award of attorney fees and costs on appeal. Should Cross-Appellant Northern Title prevail on appeal, fees and costs are proper pursuant to I.C. § 12-120(3), or pursuant to the Escrow General Provisions.

ARGUMENT

I. CUMMINGS' RELIANCE ON NORTHERN TITLE'S TITLE COMMITMENT, FORMING HIS ALLEGED "BELIEF," VIOLATES THE ANDERSON RULE AND THE EXPRESS TERMS OF THE PARTIES' AGREEMENTS.

"It has long been the rule in Idaho that only abstractors of title may be found negligent." *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 115 Idaho 56, 60, 764 P.2d 423, 427 (1988). This "Court has never deviated from this rule." *Id* (emphasis added). Additionally, the court "by construction cannot create a liability not assumed . . . nor make a new contract for the parties . . . nor add words to the contract of insurance to either create or avoid liability." *Anderson v. Title Ins. Co.*, 103 Idaho 875, 878-879, 655 P.2d 82, 85-86 (1982) (quoting with approval *Thomas v. Farm Bureau Mutual Insurance Co. of Idaho, Inc.*, 82 Idaho 314, 318, 353 P.2d 776, 778 (1960)) (emphasis added).

Here, the district court's imposition of negligence liability on Northern Title violated the *Anderson* rule:[2]

> Cummings used the legal description in the July 26, 2007 fax from Skinner to do a cursory review of the Stephens property and used this legal description as part of his basis in believing that he was entering into a transaction that included the entire Stephens Ranch, both property in the east and west sides of the highway.
> . . .

2 The district court was informed regarding the impropriety of Cummings' reliance on Northern Title's deed description. See R., Vol. 4, pp. 744-746 (*NT's Second Motion in Limine*); *Id.* at Vol. 5, pp. 767-769 (*Memo. in Supp. of NT's Second Motion in Limine*); see *id.* at Vol. 2, pp. 311-314 (*Minute Order & Entry*, district court fails to rule on Northern Title's *Second Motion in Limine*).

> Cummings was willing to pay an additional $50,000 and purchase an assignment from the Baums in order to purchase what he believed was the entire Stephens ranch situated on both sides of the highway. This belief came based upon the negligent preparation of the legal description by Northern Title that identified land on the east side of the highway. The only harm that the Court can conclude is outside the realm of speculation is that Cummings has been proximately harmed by this negligence in the amount of $50,000.

R., Vol. 8, p. 1594 (par. 21), and p. 1629.

A. *Cummings' reliance on Northern Title's deed description violates the Anderson rule, where Northern Title created and provided the title commitment to further title insurance.*

"It has long been the rule in Idaho that only abstractors of title may be found negligent." *Brown's Tie & Lumber Co.*, 115 Idaho at 60, 764 P.2d at 427. "To fall outside the rule . . . it must be shown that the act complained of was a direct result of duties voluntarily assumed by the insurer in addition to the mere contract to insure title." *Id.* at 115 Idaho at 59, 764 P.2d at 426 (emphasis added).

In *Anderson v. Title Insurance Company*, Anderson worked with the insurer's agent "Fremont" to purchase a title policy from "Title Insurance Company." See *Anderson*, 103 Idaho at 876, 655 P.2d at 83. Prior to the issuance of the policy, Fremont gave Anderson a preliminary title report upon which he relied. *Id.* After the sale, Idaho Fish and Game asserted its right to a portion of the land that Fremont neglected to exclude from its title report. Anderson argued that a "purchaser is relying on the title insurer in the same manner in which he would rely on an abstractor of title and therefore the insurer has the same obligation as an abstractor and is liable

in tort for errors or omissions." *Id.* The *Anderson* Court rejected this argument, refusing to impose the liabilities of an abstractor. See *Anderson*, 103 Idaho at 879, 655 P.2d at 86.

Six years later in *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, the Court reaffirmed *Anderson*.[3] There, the insurer's agent ("Local") twice misrepresented the status of the property. Specifically, the seller had defaulted, after which the buyer moved to foreclose. See *Brown's Tie & Lumber Co.*, 115 Idaho at 57, 764 P.2d at 424. As a condition to cure, the seller agreed to remove all encumbrances. *Id.* The buyer sought an updated encumbrance report from Local, and Local negligently reported there were no encumbrances. *Id.* One month later, the seller defaulted again, and the buyer again moved to foreclose. *Id.* Local provided a written commitment, again negligently reporting no encumbrances. *Id.* On appeal, the Court rejected the seller's reliance on the title commitment, holding that to fall outside *Anderson*, reliance must be "a direct result of duties voluntarily assumed by the insurer in addition to the mere contract to insure title." *Brown's Tie & Lumber Company*, 115 Idaho at 59, 764 P.2d at 426.

Northern Title's deed description, upon which Cummings relied, was to facilitate title insurance. On July 16, 2007, Skinner told Northern Title "I would like to open title on a ranch, the Stephens Ranch, for the buyer to be determined." *Tr.*, Vol. 1, 516:9-11. As a result of Skinner's verbal order, Northern Title created order number NTBL-1183. *Id.* 376:18-377:3; see also Trial Ex. 110. That same day, Northern Title created its "PR instructions." *Id.* at 374:8-19. Thornock explains, "the title officer would compile [the PR instructions] to hand to a processor

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3 The Court further held that Idaho Code section 41-2708(1) "does not create a duty in tort upon the part of the title insurers to conduct a reasonable search and inspection of title." *Id.* at 115 Idaho at 60, 764 P.2d at 427 (a question previously left open in *Anderson*)

to start the processing of the commitment." *Id.* The processor and tile officer would then "put together a draft of a commitment." *Id.* at 375:3-8.

Six (6) days after Skinner's verbal order, Cummings saw the property for sale, and contacted Julian. See *R.*, Vol. 8, p. 1593, ¶ 10. On July 26, 2007, Cummings contacted Julian by telephone, and she faxed him the REPC. See *Tr.*, Vol. 1, 61:4-10; see also *id.* at 62:10-13; see also Trial Ex. 29. After receiving that REPC, Cummings called the Realtors back and "demanded" a legal description, or an "Addendum One." *Id.* at 63:1-16. Prior to July 26, 2007, Northern Title did not have a title commitment with deed description ready. *Id.* at 515:9-12; see also *id.* at 519:10-13. That same day however, July 26, 2007, Northern Title was able to produce its first title commitment, "under pressure." *Id.* at 390:10-12. Northern Title provided Skinner with the title commitment, and Skinner then faxed it to Cummings. Id. at 815:5-12[4]; see also Trial Ex. 35.

Cummings testified that this fax, Exhibit 35, contained the only deed description he ever saw. See *Tr.*, Vol. 1, 94:3-9. Exhibit 35 contains an unsigned REPC, i.e. Skinner's REPC, and Northern Title's title commitment. See Trial Ex. 35. Skinner admits filled out this REPC, and Cummings then initialed such, including the new "Addendum One." See *Tr.*, Vol. 1, 64:5-24 (confirming Ex. 35 was faxed to Cummings on July 26, 2007); see also *id.* at 65:16-66:9. There is no dispute that Addendum One contains the exact same legal description as Northern Title's title commitment. *Tr.*, Vol. 1, 66:21-67:6. However, no testimony was ever introduced that

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4 Testifying specifically regarding the title commitment contained within Exhibit 35.

Northern Title added "Addendum One" to Skinner's REPC. Skinner admitted the "Addendum One" written in the REPC was his handwriting, and Thornock testified that Northern Title doesn't put "Addendum One" on its deed descriptions. See *Tr.*, Vol. 1, 806:23-25; see also *id.* at 819:6-13; see also *id.* at 391:6-9. Indeed, looking closely at this "Addendum One," such is a literal *copy* of Northern Title's title commitment deed description, being the only page in Skinner's REPC that also contains Northern Title's facsimile identifiers, "2088470881." See *Tr.*, Vol. 1, 397:10-14. It is patently clear that Northern Title's deed description was copied and placed in Skinner's REPC with a handwritten "Addendum One" by Skinner, not Northern Title. See Ex. 35.

Receiving the fax back in Utah, Cummings relied on that legal description, and therefrom, allegedly believed that the sale included property east of Highway 30. See Tr., Vol. 1, 238:21-239:22. Based on this, the district court held Northern Title liable, holding that Cummings' "belief came based upon the negligent preparation of the legal description by Northern Title . . . [and] Cummings has been proximately harmed by this negligence . . . ." *R.*, Vol. 8, 1629.

Therefore, the question is whether that deed description "was a direct result of duties voluntarily assumed by the insurer in addition to the mere contract to insure title." *Brown's Tie & Lumber Company*, 115 Idaho at 59, 764 P.2d at 426 (emphasis added). Clearly it was not. By July 26, 2007, Northern Title and Cummings had never even met, and Cummings obtained the legal description solely through the Realtors. See *Tr.*, Vol. 1, 311:9-20. Second, Northern Title expressly testified that the deed description was to facilitate title insurance, stating "the first

commitment for title insurance . . . [was] received from the title officer on July 26th, 2007." *Id.* at p. 519, L. 10-13 (emphasis added). Third, the very testimony relied upon by the district court[5] in holding Northern Title liable contrary to the *Anderson* rule[6] makes clear that the legal description was solely to facilitate title commitment:

> Q: And then when you get the contract, do you then send it to the title department?
>
> A: Yes. We can send it to the title department. We can give them the information. They'll update the commitment.
>
> . . .
>
> Q: Okay. Somebody there at the company opens the order, and then they're supposed to send the real estate purchase – the full real estate purchase agreement to the title department; right?
>
> A: Yes.
>
> Q: And that would – I'm assuming would assume – wouldn't that include the legal description that the parties agreed upon?
>
> A: If it was provided.
>
> . . .
>
> Q: Okay. So when did you get it?
>
> A: We didn't get it. It was generated by us when we produced the title commitment on July 26th under pressure.
>
> . . .
>
> Q: Now, this Addendum 1 was in your records; correct?
>
> A: It would be in my records as part of the commitment.

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5 See R., Vol. 8, p. 1622, fn. 119 (district Court citing trial testimony of "387:24-391:16").

6 See *R.*, Vol. 8, p. 1593, ¶ 6 (finding "Northern Title was responsible for preparing the legal description that the parties would use in the real estate transaction").

. . .

Q: Who prepared this document? Do you know?

A: The title officer.

Q: You're saying that the title officer prepared this Exhibit A?

A: She prepared Exhibit A.

Q: Okay. And so that says Addendum 1 on it?

A: She didn't write Addendum 1 on. Our commitments come with Exhibit A.

Q: You're saying this is part of a commitment?

A: This was part of the commitment. The first one that we produced for Three Bar Ranches.

Tr., Vol. 1, 387:24-391:16 (emphasis added).

Perhaps the trial court found the above testimony convincing, because it regards finding an "Addendum 1" in "my [Thornock's] file." *Tr.*, Vol. 1, 387:23; see also Ex. 105. But of course it would be in Thornock's file, where she was the managing escrow officer. See *Tr.*, Vol. 1, 370:9-11. Being an escrow, however, does not make Northern Title an abstractor. For instance in *Brown's Tie & Lumber Company*, the insurer's agent was not held liable as an abstractor, even though it was acting in the joint capacities of an insurer's agent, deed trustee, and "closing agent." 115 Idaho at 59, 764 P.2d at 426. Similarly here, the fact Northern Title was the escrow, and that the parties elected to use Northern Title's legal description, does not transmute Northern Title into their abstractor.

While Northern Title sent the realtors a deed description, which the parties opted to use at closing, the record clearly shows that Northern Title made that deed description to facilitate title insurance. As such, Cummings' reliance thereon was misplaced, and the district court's order imposing negligence liability and damages upon Northern Title should be reversed.

B. The district court's imposition of liability against Northern Title runs contrary to the terms of the title commitment and the escrow agreement.

The duties of an insurer's agent, and those of an escrow, are governed by contract. A title company is not impliedly an abstractor of title. See *Brown's Tie & Lumber Co.*, 115 Idaho at 60, 764 P.2d at 427 (holding I.C. § 41-2708(1) does not create a duty on title insurers to conduct a reasonable search and inspection of title"). Rather per *Anderson*, "[p]olicies of insurance, as other contracts, are to be construed in their ordinary meaning and where the language employed is clear and unambiguous, there is no occasion to construe a policy other than the meaning as determined from the plain wording therein." *Anderson*, 103 Idaho at 878-879, 655 P.2d at 85-86. Similarly as a closing agent, the "[d]uties of an escrow holder are those set out in the escrow agreement." *Foreman v. Todd*, 83 Idaho 482, 486, 364 P.2d 365, 367 (1961) (holding escrow agent not liable for defects in title).

The district court's findings are directly contrary to the terms of Northern Title's title commitment and escrow agreement. While the district court held "Northern Title was responsible for preparing the legal description that the parties would use in the real estate

transaction,"[7] the title commitment and escrow agreement both made clear that Northern Title was not their abstractor:

> This Commitment is a contract to issue one or more title insurance policies and is not an abstract of title or a report of the condition of title.

Trial Ex. 35; see also Trial Ex. 10, bates-stamped 0009, ¶ 4 (emphasis added). Similarly, Northern Title's escrow agreement states:

> The undersigned Buyer and Seller affirm that the legal description appearing in the commitment is satisfactory.
> . . .
> The undersigned buyers and sellers hereby acknowledge that they have [chosen not to] have a survey completed . . . affirm that the legal description on the title documents of even date herewith is satisfactory, and the undersigned herein agree to hold ***NORTHERN TITLE COMPANY OF IDAHO*** and the undersigned Real Estate Company harmless as to any dispute resulting from not having a survey done at the time of the transaction.

Trial Ex. 111, ¶¶ 11, 14 (emphasis in original; brackets added).

Per the reasoning in *Anderson*, a district court "cannot create a liability not assumed . . . nor make a new contract for the parties . . . nor add words to the contract of insurance to either create or avoid liability." *Anderson*, 103 Idaho at 878-879, 655 P.2d at 85-86 (quoting with approval *Thomas*, 82 Idaho at 318, 353 P.2d at 778) (emphasis added). Further as explained by the *Boel v. Stewart Title Company* Court, the "intent of the parties should, if possible, be ascertained from the language of the documents." *Boel*, 137 Idaho 9, 13, 43 P.3d 768, 779 (2002) (citation omitted). Here as evidenced by the contractual documents, Northern Title clearly did not intend to be an abstractor, and that intent was ascertainable from the plain language of the

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7 *R.*, Vol. 8, 1593, ¶ 6.

documents. Under well-established law, contracts "are to be construed in their ordinary meaning and where the language employed is clear and unambiguous, there is no occasion to construe a policy other than the meaning as determined from the plain wording therein." *Anderson*, 103 Idaho at 878-879, 655 P.2d at 85-86.

In order to find Northern Title liable as an abstractor, the district court ignored the clear and unambiguous terms of Northern Title's title commitment and escrow agreement. Therefore, the district court's finding of liability against Northern Title was error, and should be reversed.

II. THE EVIDENCE PRODUCED BY CUMMINGS LEFT THE DISTRICT COURT WITH ONLY ONE NUMBER, LEADING TO AN ILLOGICAL COMPUTATION OF DAMAGES.

A. Even though Cummings left the district court struggling to find any damages, such does not justify the district court's speculative use of the assignment to value the eastern property.

"The plaintiff, of course, has the burden to prove all elements of [his] negligence claim, including damages." *Hei v. Holzer*, 145 Idaho 563, 567, 181 P.3d 489, 494 (2008); see also *Glacier Gen. Assur. Co. v. Hisaw*, 103 Idaho 605, 608, 651 P.2d 539, 542 (1982) (judgment cannot be entered absent damages); see also *Twin Falls Cnty. v. Knievel*, 98 Idaho 321, 323, 563 P.2d 45, 47 (1977). Therefore, a plaintiff must prove his amount of damages by a preponderance of the evidence. See *Harmston v. Agro-West, Inc.*, 111 Idaho 814, 821, 727 P.2d 1242, 1249 (1986) (must prove each element by a preponderance). Further, the amount of damages must be beyond "conjecture or speculation." *Mabe v. State ex. rel. Rich*, 86 Idaho 254, 262, 385 P.2d 401, 406 (1963) (plaintiff fails to prove damages in condemnation proceeding); see also *Harris, Inc. v. Foxhollow Const. & Trucking, Inc.*, 151 Idaho 761, 770 264 P.3d 400, 409 (2011)

("amount and causation must be proven with reasonable certainty"); see also *Mosell Equities, LLC, v. Berryhill & Co., Inc.*, 154 Idaho 269, 241, 297 P.3d 232 (2013) ("court cannot grant a judgment as to one element of a claim for relief").

Here, the district court could compute damages in only one way, which ultimately was based on complete speculation:

> The only thing that the Court can say with certainty is that the Stephens were willing to sell the property on the west side of the highway for $800,000. Cummings was willing to pay an additional $50,000 and purchase an assignment from the Baums in order to purchase what he believed was the entire Stephens ranch situated on both sides of the highway. This belief came based upon the negligent preparation of the legal description by Northern Title that identified land on the east side of the highway. The only harm that the Court can conclude is outside the realm of speculation is that Cummings has been proximately harmed by this negligence in an amount of $50,000.

R., Vol. 8, 1629 (emphasis added). Thus, the district court erroneously reasoned that the value of the eastern side, Cummings' alleged loss, was $50,000.00. The record does not support the district court's conclusion. The written assignment makes no partition of the property:

> Assignment of the Purchase and Sale Agreement from Roger Stevens to Three Bar Ranches, L.L.C. to Steven Cummings. Purchase and sales agreement Dated 7-2-07 Id # ES070207B. All terms and purchase price to remain the same except Steven Cummings to pay $850,000.00 with $50,000.00 going to Three Bar Ranches and the balance to pay off to Roger Stephens. All included items + excluded items to remain the same. All money paid to be cash at closing. Closing by 8-3-07.

Baum Assignment, Trial Exhibit 14. Similarly, Cummings' own testimony refutes a piecemeal valuation:

> Q. Mr. Cummings, would you put a separate value to the east side?

A. Would I?

COURT: Not would he? Did he.

Q: Did you. Did you put a separate value to the east side?

A: I looked at it as a whole. It was what it was . . . .

Q: So when you say "$850,000," you're referring to the value to the property as a whole.

A: That's correct.

Tr., Vol. 1, 133:14-134:15 (emphasis added).

Indeed, that $50,000 assignment gained Cummings 270 acres on the west, which are not at dispute. See *Tr.*, Vol. 1, 793:1-4. Thus, while Cummings may argue that he never would have purchased the assignment absent the eastern property, causation is but one element. See *McDevitt v. Sportsman's Warehouse, Inc.*, 151 Idaho 280, 283, 255 P.3d 1166, 1169 (2011) (must be causal connection between conduct and injuries). Cummings' also bore the burden of proving his damages beyond mere speculation and conjecture. See *Mabe*, 86 Idaho at 262, 385 P.2d at 406; see also *Harris, Inc.*, 151 Idaho at 770, 264 P.3d at 409.

Rather than accept Cummings' failure to prove damages, the district court's sole method of valuation was to engage in an illogical calculation. Cummings failed to prove his damages, and the Court should order Cummings' claims dismissed.

B. Cummings' disregard for his duties constitutes contributory negligence; furthermore, the district court failed to consider mitigation.

A plaintiff's action is barred when his negligence is at least as great as the defendant's. See I.C. §6-801; see also *R.*, Vol. 4, p. 696 (affirmative defense of contributory negligence).

Separate and apart from contributory negligence, the "doctrine of avoidable consequences, or the duty to mitigate, is an affirmative defense that provides for a reduction in damages where a defendant proves that it would have been reasonable for the plaintiff to take steps to avoid the full extent of the damages caused by the defendant's actionable conduct." *McCormick Int'l. USA, Inc. v. Shore*, 152 Idaho 920, 924, 277 P.3d 367, 371 (2012) (citing *Davis v. First Interstate Bank of Idaho, N.A.*, 115 Idaho 169, 170, 765 P.2d 680, 681 (1988)); see also *Third Party Defendant's Answer*, Vol. 4, 696 (affirmative defense of failure to mitigate). As explained in *Casey v. Nampa*:

> Contributory negligence acts concurrently with that of the defendant. They are synchronous in their operation. The carelessness or indifference of the plaintiff in the matter of lessening damages [mitigation] is successive and subsequent to the carelessness of the defendant. They do not take effect at the same time. The defendant's negligence has spent its force and is past . . . [t]he two are not to be confounded, although in some instances the result - that is, the obliteration of damages - may be almost identical.

Casey v. Nampa and Meridian Irrigation Dist., 85 Idaho 299, 306, 379 P.2d 409, 413 (1963) (quoting and citing *Dippold v. Cathlamet Timber Co.*, 111 Or. 199, 225 P. 202 (1924); 81 A.L.R. 282; 15 Am.Jur. Damages § 27; 25 C.J.S. Damages § 32; 65 C.J.S. Negligence § 135).

i. Based on the allocation of duties and Cummings' own negligence, the district court should have found Cummings contributorily negligent.

Cummings' "belief" regarding the eastern side was attributable to his conduct, not Northern Title's. As discussed *supra*, Northern Title produced its commitment to further title insurance, and was not Cummings' abstractor. See *Anderson*, 103 Idaho 875, 878-879, 655 P.2d

82, 85-86 (1982) ("Court by construction cannot create a liability not assumed by the insurer"); see also *Brown's Tie & Lumber Co.*, 115 Idaho 56, 764 P.2d 423 (1988); see also Trial Ex. 35; see also Trial Ex. 10, bates-stamped 0009, ¶ 4 ([t]his commitment is a contract . . . and is not an abstract of title"); see also *Escrow General Provisions*, Trial Ex. 111, ¶¶ 11, 14 (affirms legal description, indemnifies Northern Title for lack of survey).

Additionally, Cummings' alleged belief was a self-created outlier. The district court found "[t]he Stephens had no intention to sell their property located on the east side of the highway." *R.*, Vol. 8, p. 1592, ¶ 2. Similarly, the realtors had no intention of selling the eastern property. *Id.* at p. 1593, ¶ 9. Finally, Northern Title understood the same. *Id.* at p. 1593, ¶ 8. In concluding that the eastern property was for sale, Cummings never spoke with Three Bar or either of the Stephens Trustees. See *Tr.*, Vol. 1, 87:17-188:12. He never went to Northern Title. *Id.* at 281:7-14; see also *id.* at 298:22-299:14 (only went to Northern Title regarding desire to quitclaim property into his family trust). Rather, all that Cummings did was a "rough" plot of Northern Title's deed description, which even he admits, "I wouldn't rely on." *Tr.*, Vol. 1, 280: 9-12. Cummings did not obtain an appraisal; Cummings did not obtain a survey; and Cummings did not verify the total acreage. *Id.* at 187:17-188:12; see also *id.* at 214:24-215:4. Therefore, while Northern Title's legal description may have been a catalyst for Cummings' erroneous belief, that belief was clearly driven by Cummings' own negligence.

Cummings' furthered his own negligent belief at closing. Cummings admits that the only legal description he ever saw was that in Exhibit 35, containing Northern Title's first erroneous title commitment. See *Tr.*, Vol. 1, 94:3-9. However, Northern Title had issued a second title

commitment. See *R.*, Vol. 9, p. 1595 ¶¶ 26-27. While the legal description from this second title commitment was utilized and provided to Cummings at closing, he admits he did not review the closing documents. See *Tr.*, Vol. 1, 94:5-6 (only aware of first title commitment); see also *id.* at 220:25-221:10 (Cummings does not dispute second title commitment deed description used at closing); see also *id.* at 88:4-19 (Cummings only did "cursory review" of closing documents). Further, Cummings admits that if he had seen this second legal description, which was included in the closing documents, such would have been a "major red flag." *Id.* at 226:12-14. In other words, Cummings' erroneous belief came as the result of his own, self-imposed negligence, not Northern Title.

The district court's award of damages was barred by Cummings' contributory negligence. Cummings' alleged belief, wrought through his own negligence, was not Northern Title's fault.

ii. Rather than acknowledge his mistake, Cummings avoided the parties, and even when the opportunity arose, refused to mitigate his damages.[8]

The duty to mitigate "provides that a plaintiff who is injured by actionable conduct of the defendant, is ordinarily denied recovery for damages which could have been avoided by reasonable acts." *Davis v. First Interstate Bank of Idaho, N.A.*, 115 Idaho 169, 170, 765 P.2d 680, 681 (1988). The doctrine seeks to "discourage even persons against whom wrongs have

8 While the trial court failed to address mitigation of damages in its *Findings of Fact and Conclusions of Law*, the issue of mitigation, with arguments in support, were provided in Northern Title's Post Trial Brief, and pled as an affirmative defense. See *R.*, Vol. 8, pp. 1566-1567; see also *R.*, Vol. 4, p. 696 (Affirmative Def. No. 8).

been committed from passively suffering economic loss which could be averted by reasonable efforts . . . ." *Indus. Leasing Corp. v. Thomason*, 96 Idaho 574, 577, 532 P.2d 916, 919 (1974).

First, Cummings avoided the consequences of his negligent belief. By November of 2007, Cummings admits "I received a message from Stephens that changes were made to the Warranty Deed." *Tr.*, Vol. 1, 322:9-11; see also *Cummings' Affidavit*, Trial Ex. 49, ¶ 6. Similarly in November of 2007, Cummings received a letter from Roger Stephens, stating "I had to go to Northern Title and found that they had made a mistake on the land description . . . ." *Id.* at 342:12-16; see also *Stephen's Nov. 27, 2007 Ltr.*, Trial Ex. 21. The district court also found that prior to recording the corrected warranty deed, Northern Title left Cummings a voicemail. See *R.*, Vol. 8, p. 1596, ¶ 37.

However, Cummings did not respond to Stephens. Nor did Cummings seek out the Realtors, nor Northern Title. Rather, Cummings located someone he had never spoken with, Curtis Baum of Three Bar. See *Tr.*, 187:2-13 (having never met the Baums prior thereto, Cummings sought out and took "Mr. Buam" to lunch); see also *id.* at 187:17-188:12 (Cummings did not go to Stephens). Allegedly, Cummings sought Baum to "get clarity on what the agreement between the buyer and the seller was." *Id.* at 324:3-7. Months later on February 29, 2008, Cummings finally responded to Northern Title, but made no mention of the corrected warranty deed. *Id.* at 531:21-24; see also Trial Ex. 41. Then on March 27, 2008, Cummings

again sent letter to Northern Title, and while he admits by this time he "clearly knew" about the changed warranty deed, said nothing of it. See *Tr.*, Vol. 1, 326:22-327:5; See also Trial Ex. 43.[9]

Cummings' knew his negligence had led to his outlier belief, and so he went "dark" in hopes of figuring a version of the transaction that would work best for him. However, Cummings' conduct was directly contrary to the Escrow General Provisions, wherein he agreed to "cooperate and adjust clerical errors, and or further documentation which may be deemed necessary to comply with any Real Estate Purchase Contract governing this transaction or it's [sic] intent." See *Escrow General Provisions*, Trial Ex. 111, ¶ 20. Rather than comply with these provisions, Cummings strove to get more than he should. [10]

Thus under these circumstances, it is strange that the district court did not address the issue of mitigation. Assuming, *arguendo*, that Cummings proved the value of the eastern side, and that the district court did not violate the *Anderson* rule, Cummings did nothing to alleviate his alleged damages. First, Cummings never investigated the real estate market to look for replacement property. See *Tr.*, Vol. 1, 259:14-19. Second, un-refuted testimony, admitted without objection, shows Cummings had the ability to mitigate all his alleged property damages:

> A. When -- after Mr. Cummings had purchased the property and I heard that there were some problems, I told him -- or I wrote him. But I did let him know that there were people that were interested in buying that for the same price that he did if he wanted to get out.

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9 Letter wherein Cummings demands his title policy.

10 Disturbingly, when Cummings admitted that his own inspection of the deed description failed to identify the Romwell and Lui properties (neither of which belonged to the Stephens Trust) Cummings claimed Northern Title should pay him for that too. See Tr., Vol. 1, 542:7-20; *id.* at 275:22-276:10; see also *id.* at 277:2-10.

Q. And did you hear a response from him in that regard?

A. No. He just -- no, he didn't respond.

Q. Okay. And is that, in fact, the case, you believe you had buyers that would be willing to pay him the same amount he paid for the property?

A. After he bought it, there were people that were coming in with their advertising that, yes, indicated they would have been interested for it at that price.

Q. Okay. Did Mr. Cummings ever approach you with any interest to sell?

A. No.

Tr., Vol. 1, 799:16-800:8 (testimony by realtor Skinner) (emphasis added). Therefore, Cummings' conduct violated the law of mitigation, where a plaintiff may not passively suffer reasonably avoidable economic loss. *Indus. Leasing Corp.*, 96 Idaho at 577, 532 P.2d at 919. Though Cummings could have taken steps to avoid his alleged damages, he did nothing.

The district court erred when it failed to address mitigation. Cummings isolated himself, refused to cooperate, and shirked the opportunity to re-sell the property at the same price. The Court should dismiss Cummings' award of damages.

III. CONTRARY TO THE DISTRICT COURT'S FINDING OF GROSS NEGLIGENCE AND WILLFUL MISCONDUCT, NORTHERN TITLE WAS EXPRESSLY AUTHORIZED TO FILE A CORRECTED WARRANTY DEED.

An escrow is responsible for those "duties and powers limited to the terms of the escrow agreement." *Foreman v. Todd*, 83 Idaho 482, 485, 364 P.2d 365, 366 (1961) (quoting *Nickell v.*

Reser, 143 Kan. 831, 57 P.2d 101, 103 (1936)). As such, an escrow may "be looked upon as a special agent of both parties, with powers limited only to those stipulated in the escrow agreement . . . [who] acts by virtue of his own powers, and not as the agent of anybody." *Foreman*, 83 Idaho at 486, 364 P.2d at 367 (quoting 19 Am.Jur., Escrow, § 13, p. 430). As such, the escrow is "the trustee of an express trust with duties to perform for each of the parties, which duties neither can forbid without the consent of the other." *Id.*

To hold Northern Title liable, the district court disregarded the unambiguous terms of the Escrow General Provisions. The first deed was filed on August 3, 2007, which erroneously failed to properly place the "exception" language on top, excluding all eastern property. See *R.*, Vol. 8, p. 1596, ¶¶ 32-33.[11] In November of 2007, Mr. Stephens informed Northern Title of the error. *Id.* at ¶ 34. Prior to filing the corrective deed, Northern Title strove to get in touch with Cummings, but was only able to leave a voicemail. *Id.* at ¶ 37; see also *Tr.*, Vol. 1, 537:8-13 and 538:14-23 (tried several times, and even after leaving message for Cummings regarding incorrect deed, still did not hear back for three months). Unable to reach Cummings,[12] Northern Title filed the corrective warranty deed. *Id.* at ¶ 35; see also Trial Ex. 22.

The district court was incensed with Northern Title, holding Northern Title's failure "to get Cummings' authorization prior to altering the legal description and recording a warranty

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11 Notably, the Court failed to recognize that the legal description used at closing still erroneously contained property that did not belong to the Stephen Family Trust, namely the Lui property. See *Tr.*, Vol. 1, 543:10-14.

12 Prior to recording the corrected deed, Northern Title had been trying to get a hold of Cummings to facilitate the placement of the property into his family trust, but received no response. See *Tr.*, Vol. 1, 530:16-25.

deed containing a legal description that was altered from the title commitment legal description that the parties had agreed upon constitutes gross negligence . . . [t]here was not the slightest degree of care shown when Northern Title recorded the warranty deed." *R.*, Vol. 8, p. 1605. The crux of the district court's holding was based, quite simply, on the erroneous fact that Northern Title failed to act under Cummings' "authorization." *Id.* at Vol. 8, p. 1604-1605.

In reality, Cummings' authorization did not matter. What mattered was the joint authorization of the parties. An escrow is "a special agent of both parties . . . [who] acts by virtue of his own powers, and not as the agent of anybody." *Foreman*, 83 Idaho at 486, 364 P.2d at 367 (quoting 19 Am.Jur., Escrow, § 13, p. 430). As Lenore Katri explained, the *Escrow General Provisions* are the joint instructions of the parties. See *Tr.*, Vol. 1, 662:9-663:9. Similarly, the *Foreman* Court held that the "[d]uties of an escrow holder are those set out in the escrow agreement." *Foreman*, 83 Idaho at 486, 364 P.2d at 367.

Here, the district court's finding was contrary to Northern Title's authority. Northern Title was expressly authorized to receive instructions from the realtors through whom Cummings had dealt, and to record documents that comport with those instructions:

> The parties authorize Escrow Agent to close the transaction, record documents, disburse funds, and otherwise act in accordance with the written Settlement Statement and any written or oral directions or agreements given to Escrow agent by the parties or their representatives. The parties agree that Escrow Agent is entitled to act on the direction of the realtor, attorney or other person who has dealt with Escrow Agent on behalf of them in this transaction. If any party wishes to limit the authority of those who have dealt on their behalf with Escrow Agent, any such limitation must be contained in writing.

Trial Ex. 111, ¶ 2 (emphasis added).

First, Cummings used the realtors to deal with Northern Title. Prior to closing, Cummings never met with Stephens or Three Bar Ranches. According to Cummings, he worked exclusively through Skinner:

> Q: All right. During the period of the transaction, did you have any direct contact with Mr. Stephens, the Seller?
>
> A: No.
>
> Q: Did you have any direct contact with any of the principals for Three Bar Ranches?
>
> A: No.
>
> Q: So all your negotiations with them were though – was it Evan Skinner?
>
> A: Yes.

Tr., Vol. 1, 98:21-99:5; see also *id.* at 187:17-188:2; see also *id.* at 210:2-12. Additionally, Cummings used the realtors when it came to obtaining the legal description:

> Q: The legal description is one of the documents – one of the three or four documents you were asking for?
>
> A: That's correct.
>
> Q: And you continued to follow up with the realtors in that regard?
>
> A: That's correct.
>
> Q: But at this point in time you had not correspondence with Northern Title?
>
> A: At this juncture?
>
> Q: Yes.
>
> A: I do not believe so.

Tr., Vol. 1, 311:9-20. Similarly, Cummings testified he relied on the realtors for determining acreage. *Id.* at p. 214, L. 20-21. Further, Cummings testified that he received the title commitment from the realtors, not Northern Title. *Id.* at p. 187, L. 21-23.

Second, Northern Title had received unequivocal instructions from the realtors. After Cummings was already involved,[13] Julian came to Northern Title and demanded to know whether the deed description excluded all eastern property:

> So at the end of the month, you always have a lot of closings. But we sent it [the first title commitment] out, and a few days later, after the weekend, Dorothy Julian came into my office, and she walked right in, and she knocked on my desktop, and she said -- dropped it on the desktop, and she said, "Does this description except out the east side of the highway?" And I looked at it, and I told her, "I will call the title officer." And she was standing there, I called the title officer. She went over it. Barbara [the title officer] said, "No, It's missing. I need to get that put in. I'll put it in and get it sent back out." So she sent back out an updated title commitment.

Tr., Vol. 1, 518:13-25. Indeed, the district court held that it was "quite clear" to Northern Title that the sale included only that property west of the Highway. *R.*, Vol. 8, p. 1593, ¶¶ 8-9; see also *Tr.*, Vol. 1, 817:3-818:11 (sale only included west); see also *Julian Published Depo.*, p. 20: 13-20, 21:14-17, 36:15-22, 38:16-24, and 40:19-41:3 (sale only included west).

Thus in a transaction that took less than a week, where Cummings relied on the realtors to deal with Northern Title, Northern Title was obligated to rely on its realtor's instructions and "record documents" in accordance with those instructions. See *Escrow General Provisions*, Trial

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13 See *Tr.*, Vol. 1, 519:3-4 and 519:12-22; see also *id.* at 520:21-521:9 (first title commitment sent July 26, 2007; correction detected a "couple of days" after); see also *id.* at 94:5-6 (receipt of first title commitment by Cummings on July 26, 2007).

Ex. 111, ¶ 2. This authority was something neither Cummings, nor the Stephens Trust, could forbid. See *Foreman*, 83 Idaho at 486, 364 P.2d at 367 (escrow has duties to perform for each of the parties, which duties neither can forbid without the consent of the other").

Third, once Northern Title learned of the clerical error, Northern Title had authority to correct the deed. The *Escrow General Provisions* expressly contemplated corrective authority:

> The undersigned hereby further agree, if required by closing agent, to cooperate and adjust clerical errors, and or further documentation which may be deemed necessary to comply with any Real Estate Purchase Contract governing this transaction and its intent.

Escrow General Provisions, Trial Ex. 111, ¶ 20 (emphasis added). As the *Foreman* Court held, Northern Title "is not concerned with nor responsible for defects in the title to the property." *Foreman*, 83 Idaho at 486, 364 P.2d at 367. Rather as was the case here, Northern Title was concerned with following its instructions:

> Q: Is it your job to figure out what the intent of the contract is?
>
> A: No, but I can rely on my realtors' instructions.

Tr., Vol. 1, 468:16-18 (Thornock on behalf of Northern Title).

Finally to make the correction, Cummings's signature was immaterial. As the Idaho Court of Appeals explains, "[t]he doctrine of relation back permits a party to a conveyance of real property to correct an erroneous legal description in the original deed by filing a subsequent or *correction* deed; the correction then becomes effective as of the date of the original deed." *Sartain v. Fidelity Financial Services, Inc.*, 116 Idaho 269, 272, 775 P.2d 161, 164 (Idaho App. 1989). (emphasis in original). Northern Title shared this understanding. See *Tr.*, Vol. 1, 471:16-

20. Northern Title knew that the deed description failed to comport with the realtors' instructions. Additionally, the Escrow General Provisions had given Northern Title corrective authority. *Escrow General Provisions*, Trial Ex. 111, ¶ 20. Further, Northern Title had obtained a grantors' permission when Stephens' reported the error. Therefore, Northern Title was fully authorized to record a correction deed that comported with its joint instructions.

The district court's holding of *gross* negligence against Northern Title is contrary to the express terms of the *Escrow General Provisions*. Northern Title acted in good faith and in accordance with the written joint *Escrow General Provisions*. Where Northern Title was merely striving to fulfill its joint instructions,[14] Cummings "must look to [his] grantors, not to the depository nor its officer, for title." *Foreman*, 83 Idaho at 486, 364 P.2d at 367.

IV. THE DISTRICT COURT IMPROPERLY IGNORED NORTHERN TITLE'S SUCCESSFUL DEFENSE, AND NORTHERN TITLE SHOULD BE DEEMED A PREVAILING PARTY.

Under the law of the prevailing party, "courts must not ignore the value of a successful defense." *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005). Therefore, "the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis." *Id.* Three principal factors guide a district court when determining "which party, if any, prevailed: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues."

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14 See *Tr.*, Vol. 1, 468:16-18 (Northern Title testifying not its job to figure out the intent of the transaction, and that it could rely on the realtors' instructions).

Nguyen v. Bui, 146 Idaho 187, 192, 1941 P.3d 1107, 1112 (2008) (citing *Daisy Mfg. Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259, 261–62, 999 P.2d 914, 916–17 (Ct. App. 2000); *Chadderdon v. King*, 104 Idaho 406, 411, 659 P.2d 160, 165 (Ct. App. 1983)).

Further, a district court "may not use the award or denial of attorney fees to vindicate his sense of justice beyond the judgment rendered on the underlying dispute between the parties." *Eighteen Mile Ranch, LLC*, 141 Idaho at720, 117 P.3d at 134 (quoting *Evans v. Sawtooth Partners*, 111 Idaho 381, 387, 723 P.2d 925, 931 (Ct. App. 1986)).

The district court's award to Cummings of all his attorney fees, based on one successful claim, was improper. In his *Second Amended Complaint*, Cummings brought nine (9) causes of action against Northern Title, including (1) Breach of Warranty, (2) Conversion, (3) Slander of Title, (4) Breach of Contract,[15] (5) Per Se Violations of the Idaho Escrow Act, (6) Breach of Duty of Good Faith and Fair Dealing,[16] (7) Negligence or Gross Negligence,[17] (8) Breach of Insurance Policy Agreement, and (9) Infliction of Emotional Distress. See *R.*, Vol. 4, pp. 574-649. After Cummings rested his case, the district court granted Northern Title's request to dismiss Counts I and II for Breach of Warranty and Conversion. See *R.*, Vol. 8, p. 1589.[18] That is a successful defense.

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15 Cummings' breach of contract claim against Northern Title as Escrow Agent for rerecording the deed, ¶¶ 64-67.

16 Cummings' bad faith tort claim against Northern Title, ¶¶ 73-81.

17 Cummings' tort claim against Northern Title for rerecording the deed, ¶¶ 82-86.

18 The district court also entered its Minute Entry & Order on this matter, which Cummings has not included on appeal; notwithstanding, Cummings does not raise or contest the district court's

After trial, the court dismissed five (5) more of Cummings' counts against Northern Title. See *R.*, at Vol. 8, p. 1635.[19] Through Northern Title's testimony, Cummings' claim for Slander of Title lacked malice. *Id.*at Vol. 8, pp. 1599-1600. Through Northern Title's affirmative defense, Cummings' Negligence Per Se claim was barred by the express terms of the *Escrow General Provisions*. *Id.* at Vol. 8, pp. 1607-1608; see also *R.*, Vol. 4, 678.[20] Cummings' Breach of Duty of Good Faith and Fair Dealing claim was dismissed where Northern Title successfully argued that a tort of bad faith does not exist against an Escrow, and proved at trial that Northern Title had disputed Cummings' claims in good faith. See *R.*, Vol. 8, p. 1608-1616. Cummings' Breach of Insurance Policy claim was also dismissed based on Northern Title's eleventh (11th) and twentieth (20th) affirmative defenses, for lack of privity and failure to join indispensable parties. *Id.* at Vol. 8, pp. 1612-1615, 1624; see *R.*, Vol. 4, p. 696-697.[21] In the end, the district court could only find damages against Northern Title for one claim, based on negligence in drafting the title commitment deed description. See *R.*, Vol. 8, p. 1629.[22] That is a successful defense.

Rule 41(b) dismissals in favor of Northern Title.

19 Dismissing claims of Slander of Title, Negligence Per Se, Breach of Duty of Good Faith and Fair Dealing, Breach of Insurance Policy Agreement, and Infliction of Emotional Distress.

20 Northern Title's Fifth Affirmative Defense.

21 Northern Title's Eleventh and Twentieth Affirmative Defenses.

22 Which, as discussed *supra*, was entirely speculative and violated the *Anderson* rule.

Indeed Cummings failed to prove the gravamen of his case. Cummings argued as follows:

> [T]he written agreement for escrow services . . . was integral to Cummings' claim, or constituting the 'gravamen' of the lawsuit. The Court held that Northern Title breached that contract . . . [and by] prevailing on these claims, Cummings is allowed a reasonable attorney fee.

R., Vol. 8, p. 1639-1640. However, to succeed on a claim for breach of contract, Cummings was required to prove damages. For instance in *Harris, Inc. v. Foxhollow Construction & Trucking, Inc.*, the court "found Harris' evidence too speculative to attribute any amount of damages." *Harris*, Inc., 151 Idaho 761, 769, 264 P.3d 400, 408 (2011). Therefore, "Harris' contract action against Johnson fails because Harris failed to prove up its claim for damages." *Harris, Inc.*, 151 Idaho at 770, 264 P.3d at 409. Similarly in *Burns v. County of Boundary*, the Court of Appeals explained that the district court should "consider the presence and absence of awards of affirmative relief and determine which party, on balance, prevailed in the action." *Burns*, 120 Idaho 623, 626, 818 P.2d 327, 330 (Ct. App. 1990) (emphasis). Cummings's failure to prove any damages on the gravamen of his case should have weighed heavily in Northern Title's favor, but the district court refused to acknowledge any of Northern Title's success.

Even more disturbing, the district court appears to have used it discretion in order to punish Northern Title. As explained in *Eighteen Mile Ranch*, a "court may not use the award or denial of attorney fees to vindicate his sense of justice beyond the judgment rendered on the underlying dispute between the parties." 141 Idaho at 720, 117 P.3d at 134 (citation omitted). As set forth in Northern Title's *Memorandum of Fees and Costs*, Brad Bearnson initially represented

Stephens as co-counsel, but discontinued his representation of Stephens after Northern Title became a party. See *R.*, Vol. 9, pp. 1681-1682. During that time period, Mr. Bearnson and Bearnson & Caldwell incurred $35,575.84 in defending Stephens. *Id.* However, even though Stephens was deemed the prevailing party, the district court *refused* to award Bearnson & Caldwell any fees incurred on Stephens' behalf.

The district court specifically asked and was informed that there was no duplication in fees claimed by Stephens counsel, Mr. Budge and Mr. Bearnson. See *Tr.*, Vol. 2, 1314:8-21. However, the district court also knew that Northern Title had agreed to indemnify Stephens, and that Northern Title would be responsible to pay his attorney fees. See Tr., Vol. 1, 725:3-5; see also *id.* at 739:19-22; see also *id.* at 740:8-11. After knowing these facts, the district court summarily held "I'm not going to award Mr. Bearnson's fees." *Tr.*, Vol. 2, 1326:9-10. The district court's award of all fees to Mr. Budge, and denial of all fees to Mr. Bearnson, even though both were legitimately incurred to defend Stephens, was clearly to punish Northern Title.

Notwithstanding, based upon this appeal, Northern Title is clearly the prevailing party. As explained in *Eighteen Mile Ranch*, "while a plaintiff with a large money judgment may be more exalted than a defendant who simply walks out of court no worse for the wear, courts must not ignore the value of a successful defense." *Eighteen Mile Ranch, LLC*, 141 Idaho at 719, 117 P.3d at 133. In that case, one defendant was dismissed on directed verdict, and another "escaped all liability" after defending himself through the entire trial. *Id.* at 141 Idaho at 719-720, 117 P.3d at 133. As such, these parties were "clearly prevailing parties." *Id.*; see also *Willie v. Bd. of Trs.*, 138 Idaho 131, 59 P.3d 302, 307 (2002) (they "are the prevailing party because they have

received all relief sought in their answer"); see also *Sanders v. Lankford*, 134 Idaho 322, 1 P.3d 823, 827 (2000) (court abused its discretion where the defendant obtained "the most favorable outcome that could possibly be achieved by [the] defendant").

The sole relief Cummings sought against Northern Title was damages. See *Feb. 26 Hrg. TT.*, 1340:7-11. In fact at trial, the only relief Cummings sought from any of the parties, was damages:

> Q: In your deposition when we discussed damage with you, your comment was you only wanted the land. Is that still your testimony?
>
> A: Not at this point.
>
> Q: What is your testimony? What are you seeking from the Court?
>
> A: For me, I would collect on the policy and move on with my life.

Tr., Vol. 1, 335:7-14. Cummings did not bring suite to quiet title, or even bring suit against the actual property owner, the Stephens Family Trust. *Id.* at p. 728:15-729:23.[23]

Even though his suit was only for damages, Cummings failed to prove any damages. As explained *supra*, the district court's $50,000 damage award was illogical, where even under the district court's own findings, Cummings paid $50,000 to obtain the entire property, not just the east side. See *R.*, Vol. 8, p. 1594, ¶ 21; see also *Tr.*, Vol. 1, 133:14-134:15 (Cummings valued the property "as a whole"). Additionally, the district court's damage award violates the *Anderson* rule, where Northern Title did not provide its title commitment as an abstractor. *Id.* at

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23 Similarly, Cummings did not bring suit against the expressly stated title insurer, Stewart Guaranty. See *R.*, Vol 8, p. 1629. Cummings' does not appeal his error on this point.

387:24-391:16. Therefore, despite years of litigation and a four-day trial, Cummings failed to prove any damages. Under such circumstances, Northern Title has obtained the most favorable outcome possible, and clearly prevailed. See *Eighteen Mile Ranch, LLC*, 141 Idaho at 719-720, 117 P.3d at 133 (defendant who survived trial with no liability prevailed); see also *Glacier Gen. Assur. Co.*, 103 Idaho at 608, 651 P.2d at 542 (judgment cannot be entered absent damages).

Therefore, based on Northern Title's successful defense, it is the prevailing party and should be awarded its attorney fees and costs. As Cummings admits, this dispute falls under the purview of Idaho Code section 12-120(3). See *Appellant's Brief*, 47. Under that statute, once a prevailing party is determined, Northern Title "shall be allowed a reasonable attorney's fee to be set by the court." I.C. § 12-120(3). Similarly, Rule 54 of the Idaho Rules of Civil Procedure provides costs as a matter of course.

Additionally under the *Escrow General Provisions*, "[i]f an action is brought involving this escrow and/or Escrow Agent, the parties agree to indemnify and hold the Escrow Agent harmless against liabilities, damages, and costs incurred by Escrow Agent (including reasonable attorney's fees and costs) except to the extent that such liabilities, damages and costs were caused by the gross negligence or willful misconduct of Escrow Agent." *Escrow General Provisions*, Trial Ex. 111, ¶ 17. As explained *supra*, Northern Title did not breach the *Escrow General Provisions*, but regardless, that gravamen of Cummings' case failed when he failed to prove damages. See *Harris, Inc.*, 151 Idaho at 770 264 P.3d at 409 (holding plaintiff's contract action failed absent proof of damages); see also *R.*, Vol. 8, pp. 1626-1627 (Cummings failed to

prove damages in connection with escrow agreement). Therefore, under statute, contract and rule, Northern Title should be awarded its trial fees and costs.

Even without this appeal, Northern Title prevailed with a very successful defense. With this appeal if Northern Title prevails, it is clearly the prevailing party. Therefore, the Court should deem Northern Title a prevailing party, accompanied therewith an order for determination of its trial fees and costs.

CONCLUSION

Cummings' reliance upon Northern Title's deed description violated the *Anderson* rule. Northern Title's providing of a title commitment did not transmute its duties to those of an abstractor, even if the parties ultimately elected to use that deed description at closing. Additionally, Cummings was expressly informed under the title commitment and the *Escrow General Provisions* that Northern Title was not his abstractor. Therefore, the Court should reverse the district court's negligence and damages findings against Northern Title.

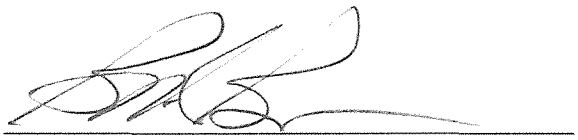
Notwithstanding, the sole amount of damages citable by the district court runs afoul to the law of causation and damages, where the $50,000 was clearly not paid to obtain only the eastern property. Additionally, it was Cummings' mass negligence that created his outlier belief, and he failed to mitigate damages despite available offers. Therefore again, the Court should reverse the district court's award of damages, and order the matter dismissed.

Further, the district court should not have found Northern Title grossly negligent under the *Escrow General Provisions*. Northern Title was expressly authorized to record documents that comported with its realtors' instructions, and to make clerical corrections to ensure the same.

Finally, Northern Title should be awarded its trial attorney fees and costs. The district court improperly disregarded Northern Title's substantial defenses, and should Northern Title prevail on appeal, it will have obtained "the most favorable outcome" possible.

DATED this 15th day of November, 2013.

BEARNSON & CALDWELL, LLC



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of November, 2013, I served a true and correct copy of the above and foregoing **CROSS APPELLANT'S BRIEF**, to the following person(s) by U.S. Mail and Email:

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