11-18-2013

Cummings v. Stephens Respondent's Brief 1 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 **RESPONSE BRIEF OF NORTHERN TITLE COMPANY OF IDAHO, INC.** Appeal from Bear Lake County, Case No. CV-2009-000183

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

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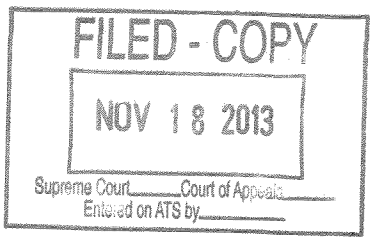

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STATEMENT OF THE CASE

Nature of the Case & Proceedings

The nature of this case is more fully set forth in Northern Title Company of Idaho, Inc.'s ("Northern Title") *Cross-Appellant Brief.* However, for purposes of this brief, Northern Title sets forth the following proceedings regarding the disclosure of expert witnesses, and Cummings' request for punitive damages.

1. Disclosure of Expert Witnesses

Under the district court's *Order Setting Jury Trial*, Cummings' expert report was due March 13, 2012. See *R.*, Vol. 6, p. 1091, ¶ 5. Northern Title's expert report was due April 17, 2012. *Id.* Rebuttal reports were due May 22, 2012. *Id.* Expert disclosures were required irrespective of formal discovery requests. *Id.*[1] On March 13, 2012, Cummings disclosed Gregory Kelley as an expert appraiser, but did not disclose any of the documents Kelley would rely upon, or his actual opinions. See *R.*, Vol. 4, 716 (*Pl's. Supp. Disc. of Witnesses*). On June 14, 2012, one day prior to Kelley's deposition, Cummings at 4:35 p.m. finally produced, in draft form without exhibits, Kelley's report. See *R.*, Supp. Vol. 1, 57 (*NT's Resp. Mem. to Pl's. Mot. for Sanctions and Motion to Exclude Def's. Expert*). However, it was not until the next day, upon Northern Title's arrival to Kelley's deposition, that Cummings produced Kelley's final report with exhibits attached. *Id.*

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1 *Id.* ("in responses to discovery and/or as required herein").

Near the end of Kelly's deposition, Northern Title introduced a report by a potential rebuttal appraisal expert, Craig Warren. See *R.*, Supp. Vol. 1, 58-59 (*NT's Resp. Mem. to Pl's. Mot. for Sanctions and Motion to Exclude Def's. Expert*).[2] As it would turn out, Warren's report proved useless, where Kelley had appraised the eastern property as of 2007, while Warren had appraised the eastern property as of 2012. See *NT's Mem. in Supp. of Mot. to Reconsider*, Supp. Vol. 2, 251-252.

Despite his own late expert disclosures, Cummings adamantly objected, moving to exclude Warren. See *R.*, Supp. Vol. 1, 44 (*Cummings' Mem. to Exclude NT's Expert Witness*). Therefore, within twelve (12) calendar days, Northern Title responded by moving to exclude Cummings' appraiser, Kelley. See R., Vol. 6, 1060-1062 (*NT's Mot. in Limine to Exclude*). On July 6, 2012, the district court granted Cummings' request and excluded Northern Title's expert. See *R.*, Vol. 6, 1233-1236. On July 17, 2012, the district court granted Northern Title's request, and excluded Cummings' expert. See *Tr.*, Vol. 2 1131:19-1133:3; see also *id.* at 1133:19-25. Trying to undo his actions, Cummings moved the district court to reconsider, which on July 30, 2012, was denied. See *R.*, Vol. 8, 1448-1450 (*Pl's. Mot. to Reconsider*); see also Tr., Vol. 2, 1211:19-1212:4.

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2 Explaining (1) introduction of Warren report was due to Kelly's newly learned deposition testimony that he had actually conferred with and relied on documents provided by Warren to formulate his own report and (2) questions posed to Kelly regarding Warren's report did not at this time ask Kelly to opine on any of Warren's opinions.

2. Cummings' Request for Punitive Damages

Twenty-eight (28) days before trial, Cummings filed his *Motion for Leave to Amend Complaint* for punitive damages. See *R.*, Vol. 6, 1191-1193. After considering the evidence and the parties' arguments, the district court declined Cummings' request, but stated "I'm going to deny the motion for leave to amend complaint without prejudice . . . if at trial there's additional evidence that comes up . . . and you want to renew your motion, you can do that." *Tr.*, Vol. 2, 1200:13-17.

After Cummings rested his case-in-chief, Northern Title motioned for dismissal, first stressing that Cummings had not proven punitive damages. See *Tr.*, Vol. 1, 738:6-9. To this the district court answered, "[t]here is no punitive damages . . . I didn't grant the motion to allow them in." *Tr.*, Vol. 1, 738:10-11. Cummings made no objections. *Id.* Additionally, Cummings' never raised the issue of punitive damages in his Post Trial Brief, or in his Reply Post Trial Brief. See *R.*, Vol. 8, 1507-1532, 1571-1585. Nor did Cummings ever seek, as he could have, to re-motion the district court for punitive damages.

Concise Statement of Facts.

A concise statement of the facts is more fully set forth in Northern Title's *Cross-Appellant Brief.* However, for purposes of this brief, some additional facts are provided as to Cummings' alleged "lost opportunity" damages, and his claim to Conservation Reserve Program (CRP) payments.

Cummings alleges he incurred three lost opportunities, including (1) development of "view lots" on the east side, (2) development of an RV Park, and (3) that he could have gotten a

"better deal" had he purchased the Jensen Ranch. See *Tr.*, Vol. 1, 141:19-142:6. As to the "view lots," Cummings had not made a business plan, did not know what profits could be obtained, and provided no evidence as to the actual value of the lost "view lots." See *Tr.*, Vol. 1, 339:8-17; see also *R.*, Vol. 8, p. 1627. As to the RV Park, Cummings has never owned an RV Park, has never fully operated an RV Park, and has never developed an RV Park; he has no business plan, no engineering plan, has not sought zoning changes, and has not done any financial analysis concerning costs or income for the proposed RV Park. See *Tr.*, Vol. 1 254:21-256:12. As to the Jensen Ranch, Cummings visited the Jensen Ranch one time, driving past with a realtor. See *Tr.*, Vol. 1, 20:14-16; see also *R.*, Vol. 8, 1628-1629.

Lastly as to CRP damages, Cummings never received an assignment of the CRP contract, and still at trial had never seen the CRP contract. See Tr., Vol. 1, 190:8-13, 137:3-9. Additionally, the Real Estate Purchase Contract, purchased by Cummings from Three Bar, makes no mention of CRP income. See *Tr.*, Vol. 1, 816:24-817:19; see also *id.* at 794:8-13. In fact, the CRP payments were assigned to the Phelps, who for all times relevant have leased the eastern property. See Tr., Vol. 1, 777:19-24; see also *Phelps' Lease*, Trial Ex. 64, ¶ 4 ("[l]essee shall be entitled to receive the CRP . . . contract payments").

ISSUES PRESENTED ON APPEAL

1. Whether the district court's findings and conclusions in deciding not to grant Cummings lost opportunity damages is supported by substantial and competent evidence, sufficient to overcome the "clearly erroneous" standard.

Standard of Review: The district court found that plaintiff produced insufficient evidence to support a finding of lost opportunity damages. *R.*, Vol. 8 , p. 1634 (Conclusion # 32-34). 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).

2. Whether the district court properly denied CRP damages, and whether alternative means in the record support the district court's decision.

Standard of Review: The district court held that "Cummings is not entitled to recover any property, value, or interest for the Stephens' property located on the east side of the highway." *R.*, Vol. 8 , p. 1634 (Conclusion # 31). Findings of negligence and causation should be affirmed on appeal unless the verdict is "not supported by substantial competent evidence or is against the clear weight of the evidence." *Cramer v. Slater*, 146 Idaho 868, 879, 204 P.3d 508, 519 (2009).

3. Whether the trial court properly utilized its discretion in denying Cummings' amended complaint for punitive damages, and/or whether Cummings' waived the issue when he failed to object or re-motion the district court to reconsider punitive damages.

Standard of Review: Denial for punitive damages is reviewed under the abuse of discretion standard. See *Polk v. Larrabee*, 135 Idaho 303, 315, 17 P.3d 247, 259 (2000).

4. Whether the district court rightly concluded, under the circumstances of this case, that a tort of bad faith does not exist against Northern Title as escrow.

Standard of Review: The district court held that the tort of bad faith does not exist against Northern Title as escrow. See *R.*, Vol. 8, p. 1633 (Conclusion # 16). Applying a new tort of "bad faith" against escrows would impose new duties, and "[w]hether 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). The district court's findings should not be overturned as long as there is substantial and competent evidence to support its decision. See *Hummer v. Evans*, 129 Idaho 274, 279, 923 P.2d 981, 986 (1996).

5. Whether the district court acted within the proper bounds of its discretion when it excluded Cummings' appraisal expert for being untimely disclosed.

Standard of Review: "[T]he imposition of discovery sanctions under Rule 37(b) is committed to the discretion of the district court, and the ruling will not be overturned on appeal absent an abuse of discretion." *Noble v. Ada County Elections Board*, 135 Idaho 495, 499, 20 P.3d 679, 683 (2001) (citation omitted).

ATTORNEY FEES & COSTS ON APPEAL

Attorney fees are awarded to the prevailing party on appeal if authorized by statute, contract or court rule. See *Capps v. FIA Card Services, N.A.*, 149 Idaho 797, 744, 240 P.3d 583, 590 (2010) (citations omitted). Idaho Code section 12-120(3) "mandates an award of attorney fees to the prevailing party on appeal as well as at trial." *Chavez v. Barrus*, 146 Idaho 212, 225, 192 P.3d 1036, 1049 (2008).

Here, Cummings admits the dispute falls under the purview of Idaho Code section 12-120(3). See *Appellant's Brief*, 47. That statute is applicable at trial, and on appeal. See *Chavez*, 146 Idaho at 225, 192 P.3d at 1049. Therefore should Northern Title prevail on appeal, the Court should award Northern Title its attorney fees.

As an alternative basis, Cummings agreed that "[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 in *Cross-Appellant's Brief*, the district court erred in finding Northern Title grossly liable under the Escrow General Provisions. Further, even though the district court found Northern Title had breached the Escrow General Provisions, there was no damage incurred, and therefore the entire action "failed." 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 (district court holding Cummings failed to prove damages in connection with escrow agreement). Therefore, the Court should award Northern Title its attorney fees on appeal.

Should Northern Title prevail on appeal, the Court pursuant to statute and/or contract should award Northern Title its fees. Further if the prevailing party, Northern Title should be awarded its costs. See I.A.R. 40(a).

ARGUMENT

I. THE RECORD SUBSTANTIATES CUMMINGS' FAILURE TO PROVE LOST OPPORTUNITY DAMAGES, THE INAPPROPRIATENESS OF PUNITIVE DAMAGES, AND HIS WAIVER THEREOF.

A. Cummings' lost opportunity damages were based on nothing more than bare intent.

Under *Hummer v. Evans*, "[w]here a claim is asserted for the recovery of future benefits, the burden of proof is upon the plaintiff to prove with reasonable certainty the amount of the loss caused by the conduct of the defendant." 129 Idaho 274, 280, 923 P.2d 981, 987 (1996) (quoting *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977)). Therefore, "[t]his court has explicitly stated that damages for loss of earnings or profits must be shown with reasonable certainty and that compensatory awards based upon speculation or conjecture will not be allowed." *Rindlisbaker v. Wilson*, 95 Idaho 752, 761, 519 P.2d 421, 430 (1974) (citing *Jolley v. Puregro Co.*, 94 Idaho 702, 496 P.2d 939 (1972)).

The district court held that Cummings had failed to prove lost opportunity damages. See *R.*, Vol. 8, pp. 1627-1629. Specifically, he alleged three (3) lost opportunities. First, use of the east side to develop "view lots," second, the development of an RV Park, and third that he could have purchased the Jensen Ranch for a "better deal." See *Tr.*, Vol. 1, 141:19-142:6.

As to the RV Park, Cummings provided no evidence of damages. Cummings had never owned an RV Park, had never fully operated or developed an RV Park, had no business plan, no engineering plan, had not sought zoning changes, and had not done any financial analysis concerning cost or income. See *Tr.*, Vol. 1, 254:21-256:12. When asked "would it be accurate to

say that this is largely just all in your head," Cummings responded, "yeah, it's a new concept . . . [a] new idea." *Tr.*, Vol. 1, 256:13-20. Similarly, as to the "view lots," the district court correctly concluded "Cummings has provided no evidence on the value of the lost opportunity of the view lots." *R.*, Vol. 8, p. 1627.

As to the Jensen Ranch, Cummings visited the ranch one time, and could not provide any credible basis for the value of that ranch. See *Tr.*, Vol. 1, 20:14-16; see also see also *R.*, Vol. 8, 1628-1629. Despite his lack of knowledge, Cummings baldly asserted he could have gotten a "better deal." See *Cummings' Post Trial Brief*, *R.*, Vol. 8, p. 1529. Indeed, Cummings never placed an offer on the Jensen Ranch, and presented no evidence regarding zoning laws, costs of development, marketing, sales, time to market, etc. See *R.*, Vol. 8, 1628-1629.

Cummings' claim for lost opportunity damages is analogous to *Rindlisbaker v. Wilson*. There, a farmhand was paralyzed in a work-related accident, and based on a future plan to create a cattle ranch, alleged lost opportunity damages. *Rindlisbaker*, 95 Idaho at 761, 519 P.2d at 430. Regarding that future plan, Rindlisbaker had "not entered into any lease arrangement for the winter rangeland and had taken no action to convert hay ground into pasture ground." *Id.* The Court held "the evidence . . . shows little more than a bare intent . . . [which is] too speculative to be admissible as proof of lost future earnings." *Id.* (citing McCormack on Damages, p. 309, s 87 (1935); 45 A.L.R. 345, 381, 419; Mathew Bender, Personal Injury, s 304(4)(c)(e); *Jolley*, 94 Idaho 702, 496 P.2d 939).

Just as in *Rindlisbaker*, Cummings lost opportunity damages were just an "idea." He admits the view lots were simply "a new idea," he could not provide evidence of income or

costs for the RV Park, and his pursuit of the Jensen Ranch was limited to a one-time drive while simultaneously seeking to buy the Stephens Trust property. See *Tr.*, Vol. 1, 20:14-16.

Further, Cummings' claims are against Northern Title, with whom he has contracts. Lost profits are "generally not recoverable in contract unless there is something in that contract that suggests that they were within the contemplation of the parties and are proved with reasonable certainty." See *Brown's Tie & Lumber Company*, 115 Idaho 56, 61, 764 P.2d 423, 428 (1988) (citing *Nelson v. World Wide Lease, Inc.*, 110 Idaho 369, 378, 716 P.2d 513, 522 (Ct. App. 1986)). Thus in *Brown's Tie & Lumber Company*, the insured could not recover lost profits for a defect in title where the parties did not contractually "contemplate . . . damages, including lost profits." See *Brown's Tie & Lumber Company*, 115 Idaho at 61, 764 P.2d at 428. Similarly here, Northern Title never contractually bound itself against Cummings' speculative lost profits.[3]

The Court should affirm Cummings' failure to prove lost opportunity damages. Cummings' alleged damages were mere conjecture, and Northern Title never accepted liability for such damages.

B. The district court properly declined Cummings' emotional distress damages where he voluntarily dismissed his sole emotional distress claim.

Intentional infliction of emotional distress requires (1) conduct that is intentional and reckless, (2) conduct that is extreme and outrageous, (3) a causal connection between the conduct and the emotional distress, and (4) emotional distress that is severe. See *Bollinger v. Fall River Rural Elec. Co-op.*, Inc., 152 Idaho 632, 272 P.3d 1263, 1274 (2012). Additionally, when

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3 Further, his suit was never even brought against the actual title insurer, Stewart Guaranty. See *R.*, Vol. 8, 1612-1615.

physical manifestations are classified as medical conditions, expert testimony is required. See *Cook v. Skyline Corporation*, 135 Idaho 26, 34-35, 13 P.3d 857, 865-866 (2000).

In his *Second Amended Complaint,* Cummings alleged Northern Title's conduct was "intentional, reckless, malicious, or wanton," and "outrageous, extreme, atrocious and beyond all possible bounds of decency." *R.*, Vol. 4, 20-21 (par. 97-98). Finding a lack of evidence, Cummings stipulated to its dismissal:

> OLSEN: Thank you, your Honor. Let me start out with the intentional infliction of emotional distress. And I think I already mentioned in our Monday hearing that if there were any claims that were plaintiff's weakest, that probably was it. But we at least wanted to see how the evidence came out in trial. So I think frankly speaking we would be hard pressed to find evidence in the trial where there's been intentional infliction of emotional distress. So we will -- we'll go ahead and not object to dismissing that particular claim.

Tr., Vol. 1, 721:21-722:5.[4] Indeed, Cummings was not hospitalized. *Id.* at 250:16-19. He was not taking any medications. *Id.* at 251:5-6. And though Cummings alleged the litigation exacerbated his "immunity dysfunction," he provided no expert testimony. *Id.* at 125:5-12; see also *Cook*, 135 Idaho at 34-35, 13 P.3d at 865-866 (distress manifested in a medical condition requires expert testimony).

The only "emotional" damages referenced to in Appellant's Brief are that he had to "file a lawsuit and subsequently endure the anguish and suffering now entering its sixth year since the

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4 Despite Cummings' voluntary dismissal on the record, he again in his Post Trial Brief referenced to intentional infliction of emotional distress as his only claim for emotional damages, and argued for their application. See *R.*, Vol. 8, pp. 1510, 1529-1530.

purchase was closed." *Appellant's Brief*, 37. However, an "actor is never liable . . . where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." *Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 446-447, 235 P.3d 387, 396-397 (2010). (citations omitted).

The Court should affirm the district court's denial of Cumming's emotional distress claim, where Cummings failed to introduce evidence separate from litigation supporting such an award, and stipulated, on the record, to its dismissal.

C. Irrespective of any right to the eastern property, Cummings failed to prove a contractual right to CRP payments.

The Conservation Reserve Program ("CRP") is governed by the USDA Farm Service Agency, where income obtained through that program is governed by contract. See 16 U.S.C. 3831(a).[5] The Montana Supreme Court explains, "CRP contracts provide payments to land holders who set land aside for conservation purposes and requires that the land holders not grow crops or permit grazing on those lands." *Weter v. Archambault*, 313 Mont. 284, 287, 61 P.3d 771, 773 (2002). Under well-established Idaho law, a contract "must be definite and certain in its terms and requirements . . . [because a] court cannot enforce a contract unless it can determine what it is." *Lawrence v. Jones*, 124 Idaho 748, 751, 864 P.2d 194, 197 (Ct. App. 1993).

Here, Cummings has failed to prove a right to the CRP payments. At trial, the parties stipulated that "the CRP payment is $38.31 per acre, that there's 83 acres, that it works out to be

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5 Section 3831(a) of the Federal Security Act states: "the Secretary shall formulate and carry out a conservation reserve program under which land is enrolled through the use of contracts to assist owner and operators of land specified . . . ." 16 U.S.C. 3831(a) (emphasis added).

$3,221.23 a year for CRP payments, and that would have been paid each and every year since the transaction[.]" *Tr.*, Vol. 1, 716:6-9. Assuming, however, that Cummings is entitled to the eastern property, he never proved his right to the contractual payments. Cummings admits he never received an assignment of the CRP contract, nor had ever even seen the CRP contract. *Tr.*, Vol. 1, 190:8-13, 137:3-9 (never saw contract prior to closing); see also *id.* at 288:7-16 (never confirmed whether CRP payments transfer to him upon ownership). Additionally, the Real Estate Purchase Contract, assigned by Three Bar, makes no mention of CRP payments. *Tr.*, Vol. 1, 816:24-817:19; see also *id.* at 794:8-13. Rather, the contractual documents in the record state that all CRP funds were assigned to the Phelps, who at all times relevant have leased the CRP property. *Id.* at 777:19-24; see also *Phelps' Lease*, Ex. 64, ¶ 4 ("[l]essee shall be entitled to receive the CRP . . . contract payments"). Therefore, Cummings cannot claim right to the CRP payments. *Lawrence*, 124 Idaho at 751, 864 P.2d at 197 ("court cannot enforce a contract unless it can determine what it is").

CRP funds are a contractual right. Irrespective of any right to the eastern property, Cummings failed to prove his contractual right to the CRP payments. In fact, the record shows that those payments have been and are assigned to the Phelps.

D. The Court should affirm the district court's denial of Cummings' motion to amend for punitive damages; the district court reasonably considered the evidence, and substantial evidence at trial supports its decision.

Punitive damages are not favored, and should be awarded "only in the most unusual and compelling circumstances." *Seiniger Law Office, P.A. v. North Pacific Ins. Co.*, 145 Idaho 241, 249, 178 P.3d 606, 614 (2008). At the very least, a plaintiff must prove by clear and convincing

evidence that a defendant's conduct was oppressive, fraudulent, malicious, or outrageous. See I.C. § 6-1604(1). Therefore, a plaintiff bears the burden of proving a bad act and a bad state of mind. See *Seiniger Law Office, P.A.*, 145 Idaho at 250, 178 P.3d at 615.

Even before asking for punitive damages, a party must motion to amend its pleadings, and prove that there is a reasonable likelihood of proving punitive damages at trial. See I.C. § 6-1604(1). A denial is upheld as long as the district court realized it had discretion to allow or prevent the issue from going to the jury, acted consistent with legal standards, and reached its decision by an exercise of reason. *Polk v. Larrabee*, 135 Idaho 303, 315, 17 P.3d 247, 259 (2000); see also *Miller v. Callear*, 140 Idaho 213, 218, 91 P.3d 1117, 1122 (2004) ("[w]e do not presume error on appeal; the party alleging error has the burden of showing it in the record").

The district court did not abuse its discretion. Twenty-eight (28) days before trial, Cummings filed his *Motion for Leave to Amend Complaint.* See *R.*, Vol. 6, 1191-1193. At the July 17, 2012 hearing, Cummings sought to add punitive damages for two reasons: (1) Northern Title "changing the warranty deeds without first checking with Mr. Cummings," and (2) because Northern Title chose to "side with – go with one side," i.e. Stephens. See *Tr.*, Vol. 2, 1101:16-17, 1102:14-15. Northern Title rebutted as follows:

> BERGMAN: The issue that really bothers me about these punitive damages is where's the harmful state of mind? If you look to Lori Thornock's affidavit, she states, "In the course of the transaction, Northern Title's contact was limited to the realtors Dorothy Julian and Evan Skinner . . . [which indicated the Stephens only intended] to sell property west of Highway 30. This was [Thornock's] understanding from the very beginning."

Tr., Vol. 2, 1109:6-15. The district court in response carefully considered the facts presented up to that point:

> COURT: I understand that. But it can be determined by circumstantial evidence and by inferences. I'm not saying I'm ruling that way. I'm just saying there is that potential out there; that a jury could determine that the title company knew what they were doing when they changed the loan documents, and they knew they were doing it without Cummings' knowledge. That could be a problem for your clients, if they go that way.
>
> BERGMAN: And I agree with you if maybe that testimony came out in trial, but that testimony hasn't come out now.
>
> COURT: I understand.

Tr., Vol. 2, 1110:13-25. Finally, the district court expressed its decision, which clearly indicates an act of discretion and reason:

> COURT: I've been thinking about this punitive damage issue, and this is how I'm going to deal with it for the time being: I'm going to deny the motion for leave to amend complaint without prejudice. Meaning, Mr. Olsen, if at trial there's additional evidence that comes up that I'm not aware of and you want to renew your motion, you can do that.

Tr., Vol. 2, 1200:13-17. By way of analogy, in *Polk v. Larrabee*, the district court stated as follows:

> I've considered all of the allegations with regard to punitive damages and as I've previously said . . . the standard for this court is that there must be substantial evidence to justify submitting this case to the jury. In my opinion there is not sufficient evidence on the issue of punitive damages upon which a jury could render a verdict that would award punitive damages.

Polk, 135 Idaho at 315, 17 P.3d at 259. From this statement above, the trial court had evidenced the discretionary nature of its power, acted consistent within legal standards, and "as indicated by its comments, it reached its decision by an exercise of reason." *Id.* Similarly here, the district court below perceived its discretion, denying Cummings' motion "without prejudice," and clearly felt that at that time, there was insufficient evidence to prove punitive damages by a reasonable likelihood.

Three more points deserve attention. First, a party may not obtain punitive damages unless there is "the invasion of a legally protected right." *Payne v. Wallace*, 136 Idaho 303, 308, 32 P.3d 695, 700 (Ct. App. 2001). Here, Cummings does not have the right to exclude Northern Title from "siding" with Stephens in its defense. *Cf. Appellant Brief*, 40-41. For instance, there is no bad faith when a party challenges the validity of a fairly debatable claim. See *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 96, 730 P.2d 1014 (1986). Similarly, an "actor is never liable . . . where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." *Mortensen*, 149 Idaho at 446-447, 235 P.3d at 396-397.

Second, the substantial evidence at trial does not support an award of punitive damages. See e.g. *Payne v. Wallace*, 136 Idaho 303, 308, 32 P.3d 695, 700 (Ct. App. 2001) (court examines whether record contains substantial evidence to support punitive damages award). The district court's specific findings, all supported by the record, weigh strongly against the finding of punitive damages. First, the district court opened its decision by stating "while the Title

Company did 'mess up,' the wrongs committed are not nearly to the extreme level claimed by the Plaintiff." See *R.*, Vol. 8, p. 1588 (emphasis added).

> During November 2007, Thornock tried to contact Cummings to let him know that Northern Title was changing the legal description on the warranty deed but was only able to leave a voicemail on his answering machine.[6]
>
> . . .
>
> Northern Title's actions, in rerecording the November 8 warranty deed, were made in good faith and on the reasonable belief that the property on the east side of Highway 30 was not to be included in the transaction.[7]
>
> . . .
>
> Northern Title did not rerecord the deed for the purpose of harming or injuring Cummings. Thornock testified that a portion of Northern Title's purpose in rerecording the deed was to protect Cummings from potential lawsuits that might be brought against him over the mistaken conveyance of the property on the east of Highway 30.[8]
>
> . . .
>
> However, Northern Title had the understanding all along that the sale was to include only that property on the west side of Highway 30. Northern Title therefore contested Cumming's claims in good faith.[9]
>
> . . .
>
> Northern Title's information was that Cummings only received property on the west side of Highway 30.[10]

R., Vol. 8, pp. 1596, 1599-1600, 1611-1612, 1616. Therefore, the district court's specific findings, supported by substantial and competent evidence, show that Northern Title did not act

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6 See also *Tr.*, Vol. 1, 537:8-13, 538:11; see also *Tr.*, Vol. 1, 468:16-18.

7 See also *Tr.*, Vol. 1, 426:9-22; see also *id.* at Vol. 1, 817:3- 818:11; see also *Julian Published Depo.*, 20:13-20, 21:14-17, 36:15-22, 38:16-24, and 40:19-41:3.

8 See also *Tr.*, Vol. 1, 468:6-18.

9 See also Tr., Vol. 1, 426:15-22.

10 See also Tr., Vol. 1, 518:13-25.

oppressively, fraudulently, maliciously, or outrageously; and certainly not with the bad mind that warrants the types of damages recoverable only in the "most unusual and compelling circumstances." *Seiniger Law Office, P.A.*, 145 Idaho at 249, 178 P.3d at 614; see also See I.C. § 6-1604(1).

Finally, Cummings waived the issue of punitive damages. When denying Cummings' request for punitive damages, the district court clearly stated "I'm going to deny the motion for leave to amend complaint without prejudice . . . if at trial there's additional evidence that comes up . . . and you want to renew your motion, you can do that." *Tr.*, Vol. 2, 1200:13-17 (emphasis added). After Cummings rested his case-in-chief, Northern Title motioned for dismissal under Rule 41(b), first stressing that Cummings had not proven punitive damages. See *Tr.*, Vol. 1, 738:6-9. The district court answered, "[t]here is no punitive damages . . . I didn't grant the motion to allow them in." Trial TT., 738:10-11. Cummings made no objections. *Id.* Neither did Cummings' address punitive damages in his Post Trial Brief or Reply Post Trial Brief. See *R.*, Vol. 8, 1507-1532, 1571-1585. Further, Cummings never re-motioned the district court for punitive damages. Therefore, Cummings waived his punitive damages for appeal. See *State v. Lewis*, 126 Idaho 77, 79-81, 878 P.2d 776, 778-80 (1994); see also *State v. Drennon*, 126 Idaho 346, 349, 883 P.2d 704, 707 (Ct. App. 1994); see also *State v. Reynolds*, 120 Idaho 445, 448, 816 P.2d 1002, 1005 (Ct. App. 1991); see also *Mackowiak v. Harris*, 146 Idaho 864, 866, 204 P.3d 504, 506 (2009) ("party's failure to object to action by the trial court precludes a party from challenging that action on appeal"); see also *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982) ("litigant may not remain silent . . . and later urge his objections . . . for the first

time on appeal"); see also *Kirkman v. Stoker*, 134 Idaho 541, 544, 6 P.3d 397, 400 (2000) (even if district court is mistaken, when a party fails to object, party fails to preserve issue for appeal).

The district court considered the parties' evidence, acted using reason, and denied Cummings' punitive damages as authorized under I.C. § 6-1604(1). Therefore, there was no abuse of discretion. Notwithstanding, Cummings waived the issue. He remained silent when the district court's decision was raised at trial, remained silent in his Post-Trial Briefs, and despite the opportunity "without prejudice," never motioned the district court to reconsider.

II. THE COURT SHOULD NOT ENTERTAIN A NOVEL BAD FAITH CLAIM AGAINST AN ESCROW, ESPECIALLY WHERE NORTHERN TITLE ACTED IN GOOD FAITH.

A. Where Cummings has failed to prove that the district court's findings were clearly erroneous, he seeks an improper advisory opinion.

"Idaho appellate courts have often declined to address the merits of an issue where the practical effect of the appellate opinion is merely conclusory." *State v. Long*, 153 Idaho 168, 170, 280 P.3d 195, 197 (Ct. App. 2012). Specifically, "rulings on those issues [that] would have no practical effect . . . constitute an impermissible advisory opinion." *Id.* (citing *State v. Monzanares*, 152 Idaho 410, 419, 272 P.3d 382, 391 (2012)); see also *Taylor v. AIA Services Corp.*, 151 Idaho 552, 569 261 P.3d 829, 846 (2011) ("Court not empowered to issue purely advisory opinions").

Additionally, once a finding of fact has been made, such will not be set aside unless "clearly erroneous." Idaho R. Civ. P. 52(a); see also *WanderWal v. Albar*, Inc., 154 Idaho 816, 303 P.3d 175, 180 (2013) (failed to defend against breach of real estate contract when failed to

prove error on the record); see also *Miller*, 140 Idaho at 218, 91 P.3d at 1122 ("[w]e do not presume error on appeal; the party alleging error has the burden of showing it in the record"). "An appellant must support assignments of error with citations to the parts of the transcript or record relied upon." *Id.* (citing I.A.R. 35(a)(6)). However, a district court's finding will not be overturned if there is substantial and competent evidence to uphold the finding. See *Hummer*, 129 Idaho at 279, 923 P.2d at 986 (citations omitted).

Here, the district court dutifully evaluated the facts and determined that Northern Title withstood Cummings' claims in good faith. See *R.*, Vol. 8, pp. 1615-1616. The district court found that Northern Title understood the sale included only that property west of Highway 30,[11] and that Northern Title maintained that understanding all along; thus, "Northern Title's actions, in rerecording the November 8 warranty deed, were made in good faith and on the reasonable belief that the property on the east side of Highway 30 was not to be included in the transaction." See *R.*, Vol. 8, 1596, 1599-1600, 1611-1612, 1616-1617 (emphasis added). Additionally, that Northern Title did not intend to harm Cummings, and even rerecorded the deed "to protect Cummings from potential lawsuits." *Id.*[12] Further that Northern Title strove to contact Cummings to let him know it was going to file the correction deed. *Id.*[13] Finally, that Cummings' claims were fairly debatable. *Id.*

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11 See *Tr.*, Vol. 1, 426:9-22.

12 See also *Tr.*, Vol. 1, 468:6-18.

13 See also *Tr.*, Vol. 1, 536:13-537:13; 538:11.

Cummings does not dispute the above findings. Rather, he makes broad, conclusory statements, without specific citations to the record, which do not convince a reasonable mind that the district court's findings were clearly erroneous. See *Appellant's Brief*, 32-38. Thus, to ask for this Court to determine whether a tort of "bad faith" exists, when the district court expressly found that Northern Title acted in "good faith," seeks an improper advisory opinion.

Based on substantial and competent evidence, Northern Title acted in good faith, and Cummings' claims were fairly debatable. Therefore, where the imposition of a tort of bad faith would make no difference, Cummings improperly seeks a mere advisory opinion.

B. The tort of bad faith only applies to insurance for failure of payment, and is not invoked merely by disputing a claim in good faith.

The tort of bad faith "had its genesis in the peculiar nature of the first-party insurance contract, [and] as explained in *White v. Unigard*, has no application outside the first-party insurance contract." *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 276, 824 P.2d 841, 851 (1991). It "is founded upon the unique relationship of the insurer and the insured, the adhesionary nature of the insurance contract . . . and the unique, 'non-commercial' aspect of the insurance contract." *Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 317, 233 P.3d 1221, 1239 (2010). In contrast, an escrow "is not an agent at all, but rather 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." *Foreman v. Todd*, 83 Idaho 482, 486, 364 P.2d 365, 367 (1961).

Additionally, the tort of bad faith is "not simply bad judgment or negligence." *O'Neil v. Vasseur*, 118 Idaho 257, 262, 796 P.2d 134, 139 (Ct. App. 1990). Rather, it applies only "where the insurer company refuses to honor a direct claim without a lawful basis for such refusal coupled with actual knowledge of the fact." *Id.* The tort is strictly construed to apply to an insurer's knowing and wrongful failure to make payment:

> [P]ursuant to *White*, by definition, there is no claim for bad faith unless it relates to an insurer intentionally and unreasonably failing to pay a claim or compensate the insured . . . [and such] a claim must relate to the failure to pay monies that the insured claims he is owed. If the allegation does not relate to the insurer's unreasonable failure to pay the insured, either explicitly or implicitly, the insured has not stated a claim for bad faith.

Idaho State Ins. Fund v. Van Tine, 132 Idaho 902, 907, 980 P.2d 566, 571 (1999); see also *Selkirk Seed Co. v. State Ins. Fund*, 135 Idaho 649, 22 P.3d 1028 (2000) (refusing to extend bad faith tort to unreasonable adjustment and overpayment); see also *Simper v. Farm Bureau Mut. Ins. Co. of Idaho*, 132, Idaho 471, 974 P.2d 1100 (1999) (refusing to extend bad faith tort to rising of insurance premium); see also *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 101, 730 P.2d 1014, 1021 (1986) (refusing to extend bad faith tort to violations of Unfair Claims Settlement Practices Act).

Here, the crux of Cummings' claim is that Northern Title aligned itself with Stephens during litigation, rather than immediately settle its claims with Cummings. See *Appellant's Brief*, 36 (alleging a "united front"). A similar argument was made in *Foreman v. Todd*. There, the Todds sold their land to the Fishers, and the Fishers assigned their purchase rights to Foreman. *Foreman*, 83 Idaho at 483, 364 P.2d at 365. First National Bank (closing agent) took many hats,

where it drafted the assignment to Foreman, drafted the deed description used at closing, and also acted as escrow. See *Foreman*, 83 Idaho at 485, 364 P.2d at 366. When the deal went south, Foreman alleged that National Bank had colluded with the Todds (the sellers) in failing to provide marketable title, and therefore "was liable with them for defects in the title which the Todds purported to convey." *Id.* The Court disagreed, holding that First National Bank was an agent of no one, and that "Plaintiffs must look to their grantors, not to the depository nor its officer, for title." *Foreman*, 83 Idaho at 486, 364 P.2d at 367.

Similarly here, Cummings as the assignee of the Three Bar Ranches' REPC alleges that Northern Title has colluded with Stephens in refusing to provide the title he wanted. See *Appellant's Brief*, 36. However, just as in *Foreman v. Todd*, Northern Title was not Cummings' agent, and does not become liable with Stephens merely because Northern Title agrees with Stephen's interpretation of the transaction. See *Foreman*, 83 Idaho at 485, 364 P.2d at 366. If Cummings is dissatisfied with title, his recourse, as in *Foreman v. Todd*, is to properly sue the grantors of title, not Northern Title.

The tort of bad faith applies solely to the failure to make payment as an insurer. In contrast here, Northern Title is not Cummings' agent, but rather is obligated to fulfill its instructions, regardless of what Cummings' unilaterally wants. Thus, an escrow relationship is very different from an insurance relationship, and Cummings' concerns regarding title are a matter between him and the Stephens Trust, not Northern Title.

III. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION WHEN IT EXCLUDED CUMMINGS' APPRAISAL EXPERT.

Under the district courts *Order Setting Jury Trial*, Cummings' expert report was due March 13, 2012. See *R.*, Vol. 6, 1091, ¶ 5. Northern Title's expert report was due April 17, 2012. *Id.* Rebuttal reports were due May 22, 2012. *Id.*

A. The district court knew it was acting under discretionary powers, and convincingly reasoned that exclusion was the fair and proper approach.

Once a discovery violation has occurred, "the imposition of discovery sanctions under Rule 37(b) is committed to the discretion of the district court, and the ruling will not be overturned on appeal absent an abuse of discretion." *Noble v. Ada County Elections Board*, 135 Idaho 495, 499, 20 P.3d 679, 683 (2001) (citing *Ashby v. Western Council*, 117 Idaho 684, 686, 791 P.2d 434, 436 (1990)). Further as to discovery sanctions, "we have consistently held that such will not be overturned absent a manifest abuse of that discretion." *S. Idaho Production Credit Assn. v. Astorquia*, 113 Idaho 526, 528, 746 P.2d 985, 987 (1987) (citing *Quick v. Crane*, 111 Idaho 759, 770, 727 P.2d 1187, 1198 (1986)) (emphasis added).

"An appellant bears the burden in establishing an abuse of district court discretion . . . [which requires the appellant to] show that the district court's findings are clearly erroneous and that it did not properly identify and apply the law to the facts found." *S. Idaho Production Credit Assn.*, 113 Idaho at 528, 746 P.2d at 987 (citing *Shelton v. Dia-mond International Corp.*, 108 Idaho 935, 703 P.2d 699 (1985); *Avondale on Hayden, Inc. v. Hall*, 104 Idaho 321, 658 P.2d 992 (Idaho Ct. App. 1983)). "There is no abuse of discretion where [1] the district court perceives the issue in question as discretionary, [2] acts within the outer limits of its discretion and

consistently with the legal standards applicable to the available choices, and [3] reaches its own decision through an exercise of reason." *Noble*, 135 Idaho at 489, 20 P.3d at 683 (citations omitted).

First, the district court properly perceived that its exclusion of Cummings' expert ("Kelley") was an act of discretion. The district court's *Order Setting Jury Trial* expressly provided that "[w]itnesses not disclosed . . . as required herein will be excluded at trial, unless allowed by the Court in the interest of justice." See Vol. 6, 1091, ¶ 5 (emphasis added). Additionally, the district court had excluded Northern Title's expert just days earlier, wherein it stated "[t]he impositions of such sanctions is committed to the discretion of the district court." *R.*, Vol. 6, p. 1234. The district knew it was still exercising its discretion as to Cummings' expert, where it viewed the exclusion of Northern Title's expert as closely linked to its exclusion of Cummings' expert: "[e]ither I keep them both out or I let them both in . . . I don't see any other way to do it." *Tr.*, Vol. 2, 1132:25-11:33:3. Therefore, the (i) district court's discovery order, (ii) its order excluding Northern Title's expert and (iii) its statements during the July 17, 2012 hearing, all suggests that the district court acted knowingly within its discretionary powers. See *Duspiva v. Fillmore*, 154 Idaho 27, 293 P.3d 651 (2013) (where court did not expressly state issue was a matter of discretion, "[t]he transcript is replete with statements from the judge indicating that he perceived that [the admissibility of an expert] was committed to the court's discretion").

Second, the district court acted well within the outer limits of its discretion, consistently with the legal standards and available choices. For instance in *Priest v. Landon*, where the trial

court's order was clear, plaintiff's untimely 'rebuttal' expert was excluded, even though the discovery order "unfairly" precluded plaintiff from producing a rebuttal expert. *Priest*, 135 Idaho 898, 900-901, 26 P.3d 1235, 1237-1238 (Ct. App. 2001). The Court of Appeals held:

> A district court has authority to sanction parties for non-compliance with pretrial orders. Sanctions may include those enumerated in I.R.C.P. 37(b)(2)(B), (C) and (D) for discovery violations. One such authorized sanction is the disallowance of specified evidence.

Priest, 135 Idaho at 900, 26 P.3d at 1237 (citing I.R.C.P. 16(i); *Fish Haven Resort, Inc. v. Arnold*, 121 Idaho 118, 121, 822 P.2d 1015, 1018 (Ct. App. 1991); and I.R.C.P. 37(b)(2)(B)).

Similar to *Priest v. Landon*, the district court's order was clear as to when Cummings' expert report was due. See *R.*, Vol. 6, p. 1091, ¶ 5. Also analogous to *Priest v. Landon*, the Court especially frowned against "stonewalling." *Priest*, 135 Idaho at 901, 26 P.3d at 1238. Now in contrast to *Priest v. Landon*, here the district court's order expressly allowed Northern Title to put on its defense by expert rebuttal testimony, to be disclosed no later than May 22, 2010. See *R.*, Vol. 6, p. 1091, ¶ 5. Cummings as Plaintiff knew this. But rather than supply his expert's opinions, he deliberately waited until after Northern Title's deadline:

> Because we had not received such a request before, Mr. Kelley was anticipating to have that report prepared and submitted at the time of the deposition [June 14, 2012]. Nevertheless . . . I pressed Mr. Kelley to finish his report which we then provided a draft of one day prior to the deposition.

R., Supp. Vol. 1, 11 (par. 6 of Nathan Olsen Aff'd). Therefore, the district court was well within its discretion to exclude Kelley, where Cummings had precluded Northern Title from formulating a rebuttal, and had admitted to violating the clear *Order Setting Jury Trial.*

Finally, the district court's decision to exclude Kelly was a process of reason. First, Cummings' disclosures were patently late. Under the district courts *Order Setting Jury Trial*, Cummings' full expert disclosures were due March 13, 2012. See *R.*, Vol. 6, p. 1091, ¶ 5; see also Idaho R. Civ. P. 26(b)(4)(A)(i). On March 13, 2012, Cummings disclosed his intent to utilize Kelley, but did not include any of Kelly's opinions. See *Witness Disclosure*, R., Vol. 4, p. 716. In fact, Cummings did not produce any of Kelly's opinions until June 14, 2013, at 4:35 p.m., well after the due date and no sooner than the afternoon before Kelley's deposition. See *R.*, Supp. Vol. 1, 57 (*NT's Resp. Mem. to Pl's. Mot. for Sanctions and Motion to Exclude Def's. Expert*). Even then however, the documents produced were a draft, unsigned, without any of the numerous exhibits referenced to in the report. *Id.* It was not until the next day, upon Northern Title's arrival to Kelley's deposition, that Cummings produced the final report, with exhibits. *Id.* The district court was not convinced by Cummings' unbelievable "seasonable supplement" argument:

COURT:	But where is his opinion?
OLSEN:	And that's what I'll get to, that point. I will admit that we didn't provide a written report at that time.
COURT:	Not only a written report, but you didn't even tell them what his opinion was going to be.

Tr., Vol. 2, 1130:7-12; see also *id.* at 1130:18-22.

Essential to the district court's decision to exclude Kelley, Cummings' had successfully requested to exclude Northern Title's expert appraiser, Warren. There was never any question that Cummings bore the burden of proof on the value of the eastern property. See *Hei v. Holzer*,

145 Idaho 563, 567, 181 P.3d 489, 494 (2008) ("plaintiff, of course, has the burden to prove all elements of [his] negligence claim, including damages"). Near the end of Kelley's deposition, Northern Title introduced a report by their potential rebuttal appraiser, Warren. See R., Supp. Vol. 1, pp. 58-59 (*NT's Resp. Mem. to Pl's. Mot. for Sanctions and Motion to Exclude Def's. Expert*).[14]

While Warren's report was made months earlier, Northern Title prior to the deposition did not even know whether Warren's report would prove useful, where Cummings had thus far failed to disclose any of his own experts. *Id.* at 57 (Northern Title "precluded from having its experts form their own opinions"); see also R., Vol. 8, p. 1456.[15] As it turned out, Warren's report was useless. Cummings' expert had appraised the eastern property as of 2007, while Northern Title's had appraised the property as of 2012. See *R.*, Supp. Vol. 2, pp. 251-252.

Even though Cummings' had stonewalled Northern Title from forming a rebuttal, Cummings veraciously objected, and moved to exclude Warren. See *R.*, Supp. Vol. 1, pp. 44, et. seq. Cummings argued such was the "typical" response to Northern Title's late disclosure, and a "proper basis to strike expert testimony." *Id.* at 47. Seeing the hypocrisy in Cummings' request, Northern Title acted quickly, and within twelve (12) calendar days moved to exclude Cummings'

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14 Explaining (1) introduction of Warren report was due to Kelly's newly learned deposition testimony that he had actually conferred with and relied on documents provided by Warren to formulate his own report and (2) questions posed to Kelly regarding Warren's report did not at this time ask Kelly to opine on any of Warren's opinions.

15 "In his Second Amended Complaint, Cummings asks the Court for damages, not quiet title. Therefore, a critical part of Northern Title's case was and always has been its ability to rebut Plaintiff's appraisal evidence of that land."

appraiser Kelley. See R., Vol. 6, pp. 1060-1062 (*NT's Mot. in Limine to Exclude*). On July 6, 2012, the district court granted Cummings' request, and excluded Warren. See *R.*, Vol. 6, pp. 1233-1236. Later at the July 17, 2012 hearing, the district court granted Northern Title's request, and excluded Kelley. See Tr., Vol. 2, p. 11:34:10-13. Realizing what his actions had done, Cummings moved the district court to reconsider, which on July 30, 2012, was denied. See R., Vol. 8, p. 1448-1450; see also *Tr.*, Vol. 2, 1211:19-1212:4 (July 30, 2012 Hrg.).

First, the district court rightly reasoned against a double standard, warning Cummings "you've got to know that because I held the defendant to a strict standard on their expert, I'm going to do the same thing with you." *Tr.*, Vol. 2, 1124:23-11:24:1. Second, the district court was disenchanted with Cummings sandbag approach:

COURT: Let me ask you this: If I allow this guy to give his expert opinion on the appraisal, and it was disclosed on June 14th, how could they get an expert to respond to what your expert's going to say within their time limits?

OLSEN: Well, they could have, and they didn't. I mean, they might have a point there, but I haven't seen any indication from them –

COURT: It seems to me with Mr. Kelly, if I allow him to testify, I have to allow their expert to testify because he's responding to Mr. Kelly. And if I'm going to exclude their expert, then I exclude your expert. Because he wasn't timely –

OLSEN: Well, I don't think their expert was responding to Mr. Kelley. Their expert was –

COURT: I understand that. But he certainly could. And he couldn't respond to them until he knew what Kelley's testimony was.

OLSEN: I guess, you know, I suppose that's the case. But where they haven't even disclosed a rebuttal witness, they haven't given any indication that they intend to even call a rebuttal expert.

COURT: Well, they're defense, though. They can put on their expert in their case in chief to rebut what your guy said in your case in chief.

OLSEN: Yeah. But if they were going to name the rebuttal witness, they should have done it, you know, under the timeline.

COURT: They did. I just excluded him because he was untimely disclosed. But I'm not so sure he's untimely disclosed for purposes of rebutting your expert. I mean, to me, it seems it's part and parcel of the same thing. Either I keep them both out or I let them both in. I don't see any other way to do it.

Tr., Vol. 2, 1131:19-1133:3; see also *id.* at 1133:19-25 ("[m]y point is that until June of 2012, they didn't know what Mr. Kelly's appraisal was or what it was based on . . . . [s]o if I'm going to let Mr. Kelley testify, I have to give them the opportunity to use their guy to rebut Mr. Kelley").

When given the opportunity to have both experts in, Cummings objected, leading to the district court's exclusion of all untimely disclosed experts:

COURT: So if I'm going to let Mr. Kelley testify, I have to give them the opportunity to use their guy to rebut Mr. Kelley.

OLSEN: Okay. I'm fine with that.[16]

COURT: Even if that means changing his opinion to fit the 2007 deadline -- the numbers. I can't –

OLSEN: Well, here's my concern with that, your Honor, because I haven't seen any disclosures from them since June 14th. Now we're five weeks --

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16 Of course Mr. Olsen was superficially "fine with that," where the two existing reports were completely incongruent; Kelly providing an appraisal as of 2007, and Warren providing an appraisal as of 2012. However, the district court quickly perceived the shallow nature of Mr. Olsen's stipulation, as shown by the district court's immediately next question.

COURT: Well, of course you haven't. I excluded him from testifying. So why would they go get another report? This is going to be my ruling on Kelly and on Northern Title's expert: Neither one of them is going to testify at trial, because their opinions were late disclosed.

Tr., Vol. 2, 1133:23-1134:13. Thus, Cummings was the victim of his own tenacious motion practice. Due to untimely disclosure, he adamantly requested, and obtained, the exclusion of Northern Title's expert. However, the district court aptly reasoned that in fairness, Cummings own expert report, disclosed the exact same late day, should also be excluded.

The district court knew it was acting under discretionary powers, and it had the legal authority to exclude Cummings' expert. The district court aptly reasoned that the fair approach was to let both in, or exclude both, and when Cummings resisted giving Northern Title the ability to rebut, the district court properly excluded both.[17]

B. The district court's exclusion of Kelley is bolstered by Cummings' shallow excuse, the prejudice incurred by Northern Title, and an undesirable continuance.

In deciding to exclude a witness from trial, the court may also (1) consider the explanation of the late disclosure, (2) weigh the importance of the testimony in question, and (3) consider the possibility of a continuance. See *Viehweg v. Thompson*, 103 Idaho 265, 271, 647 P.2d 311, 317 (Ct. App. 1982) (citing 8 C. Wright & A. Miller, Federal Practice and Procedure 327 (1970)); see also *Wiseman v. Schaffer*, 115 Idaho 537, 539, 768 P.2d 800, 802 (Ct. App. 1989).

17 No party on appeal contests the district court's exclusion of Northern Title's expert.

It is unclear whether the district court was required to evaluate the factors in *Viehweg* and *Wiseman*. Both of these cases, cited to in *Appellant's Brief*, regard a court's exclusion for failure to disclose a lay witness' identity. See *Appellant's Brief*, 43-44; see also *Viehweg*, 103 Idaho at 271, 647 P.2d at 317 ("[w]hen the identity of a witness is tardily disclosed , the trial judge should . . ."); see also *Wiseman*, 115 Idaho at 539, 768 P.2d at 802. In contrast here, the witnesses' identities were disclosed, but both were experts; subject to much more expansive disclosure requirements. See I.R.C.P. 26(b)(4)(A)(i); see also R., Vol. 4, p. 716 (*Pl's. Supp. Disc. of Witnesses*). Further, *Viehweg* and *Wiseman* were evaluating a district court's power to exclude under Rule 26(e)(4). In contrast here, the district court was acting under Rule 16(i), holding "[n]either one of them is going to testify at trial, because their opinions were late disclosed." *Tr.*, Vol. 2, 1134:11-13; see also *R.*, Vol. 6, p. 1234 (holding "IRCP 16 is separate and distinct from any discovery demands . . . under IRCP 26 through IRCP 37").

Notwithstanding, the district court did substantively evaluate the *Wiehweg* and *Wiseman* factors. First, Cummings' explanation for the late disclosure was undisputed, admitting by affidavit to a "you did not ask so we did not tell" approach:

> Because we had not received such a request before, Mr. Kelley was anticipating to have that report prepared and submitted at the time of the deposition [June 14, 2012].

See *R.*, Supp. Vol. 1, p. 11, ¶ 6. Cummings' excuse was obviously inadequate, especially where in excluding Northern Title's expert, the district court held just days earlier that "IRCP 16 is separate and distinct from any discovery demands served by the parties under IRCP 26 through IRCP 37." *R.*, Vol. 6, p. 1234. Further, during Cummings' motion to reconsider, the district

court stated "Gentlemen . . . if my orders are going to have any meaning to them, I have to enforce them. Particularly when the parties have moved asking me to enforce them." *Tr.*, Vol. 2, 1211:19-1212:4 (July 30, 2012 Hrg.). Thus, the district court was not satisfied with Cummings' blanket disregard for the scheduling order, especially where he had just asked the district court to enforce the same against Northern Title.

Second, the district court weighed the importance of the evidence. The district court held in excluding Northern Title's expert, just days earlier, "[h]ere, the parties have known from the outset that the value of the property would be relevant on the issue of damages." *R.*, Vol. 6, p. 1235. That issue, as the district court noted, was just as critical for Northern Title:

> COURT: Well, they're defense, though. They can put on their expert in their case in chief to rebut what your guy said in your case in chief.

R., Vol. 2, 1132:16-18. Given the importance of the evidence to both parties, the district court concluded "it's part and parcel of the same thing . . . [e]ither I keep them both out or I let them both in." *Id.* at 1132:25-1133:2. Clearly, the district court had understood and grappled with the importance of such testimony for both parties.

Finally, the district court evaluated the time needed to meet Cummings' late disclosure, and sua sponte, entertained the possibility of a continuance:

> COURT: Tell me what the prejudice is if I allow them both in.
> . . .
> BEARNSON: [O]ur expert, because he was excluded, your Honor, you know, has not prepared a rebuttal in terms of plaintiff's expert. And that would be a problem in this.

COURT: Well, that's the biggest problem I see here is that if I let these experts in, we end up with a continuance [of trial].

R., Vol. 2, 1209:5-6; 1210:11-17 (July 30 Hrg.). Thus, the district court knew that if Northern Title were allowed a rebuttal, the trial would have to be continued. However, the district court opted not to continue the trial, where Cummings could have established the value of the property through other means:

COURT: I do think there are ways the plaintiff can meet his burden of proof without an appraiser. And you alluded to that. I think it is possible to do it in this case. I'm just going to let things stand as they currently stand. I'm going to deny the motion to reconsider.

Id. at 1211:19-1212:4.[18]

Notwithstanding the district court's thorough consideration in excluding Kelley, Cummings attempts to twist the *Noble v. Ada* standard, arguing that somehow Cummings' ability to call an expert, as the disobedient party, was more crucial than Northern Title's. See *Appellant's Brief*, 44-45. The standard, set forth in *Noble v. Ada*, is that the court "balance[s] the equities by comparing the culpability of the disobedient party with the resulting prejudice to the innocent party." *Noble v. Ada County Elections Board*, 135 Idaho 495, 499-500, 20 P.3d 679,

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18 Indeed, Cummings' could have asked Stephens regarding the value of the eastern side, but Cummings never asked. See *July 17 Hrg. TT.*, 1068:10-16 (Stephens' deposition specifically noticed up to preserve testimony for trial); see also *id.* at 1064:2-11 (Counsel for Cummings admitting his mistake for not being physically present at Stephens' deposition); see also *id.* at 1070:9-12, 1076:8-15 (Cummings appeared telephonically for deposition, made numerous objections, but asked no questions); see also *id.* at 1093:10-12 (Stephens planning on testifying the next day at trial, if called to testify); see also *Trial TT.*, 716:21-25 (Cummings resting his case without calling Stephens).

683-684 (2001) (quoting *Roe v. Doe*, 129 Idaho 663, 668, 931 P.2d 657, 662 (Ct. App. 1996)).[19] Even though the district court was not required to expressly engage in a *Noble v. Ada* balancing of the equities (see fn. 19, *supra*), it did.

First, the district court evaluated the prejudice to the innocent party, Northern Tile. The district court's order specifically allowed for rebuttal experts. See R., Vol. 6, p. 1091, ¶ 5. And contrary to Cummings' arguments, a defendants' defense is just as critical as a plaintiff's offense. For instance in *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, the Court reasoned as follows:

> In baseball, it is said that a walk is as good as a hit. The latter, of course, is more exciting. In litigation, avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff. The point is, 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 716, 719 117 P.3d 130, 133 (2005); see also *State v. Byington*, 132 Idaho 589, 977 P.2d 203 (1999, J. Shroeder, dissenting) (the "flaw is that if the evidence is that important to the State, it is certainly that important to the defense"). The district court recognized this reality, finding that Northern Title's ability to rebut Cummings' expert was critical and unfairly precluded:

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19 Further, the trial court was not required to make express findings on these equities unless "the sanction deprives a party of the opportunity to go forward on the merits of the claim." (citing *Roe*, 129 Idaho at 667–68, 931 P.2d at 661–62) (also citing *Ashby*, 117 Idaho at 686–87, 791 P.2d at 436–37; *Astorquia*, 113 Idaho at 532, 746 P.2d at 991). The cases of *Roe*, *Ashby* and *Astorquia*, cited to by the *Noble* Court, all regard the striking of pleadings or claims, which is not what the district court did here. Additionally, the district court expressly held that Cummings could have proven his case in other ways. See *Tr.*, Vol. 2, 1211:19-1212:4.

COURT: The way I read his report, that's all he's doing. Your guy is saying the property's worth a certain amount of money. Their guy's saying it's worth a different amount of money. That's rebuttal.

. . .

COURT: I mean, to me, it seems it's part and parcel of the same thing. Either I keep them both out or I let them both in. I don't see any other way to do it.

Tr., Vol. 2, 1133:9-12; see also *id.* at 1131:19-1133:3. Thus, the district court properly considered the prejudice to the innocent party, Northern Title.

Second, the district court considered the culpability of the disobedient party. Cummings had completely failed to provide his appraiser's opinions until compelled by deposition on June 14, 2012:

OLSEN: And that's what I'll get to, that point. I will admit that we didn't provide a written report at that time.

COURT: Not only a written report, but you didn't even tell them what his opinion was going to be.

Tr., Vol. 2, 1130:7-12; see also *id.* at 1130:18-22. Aggravating Cummings' culpability, he had just sought the exclusion of Northern Title's expert, disclosed a day late, the exact same as Cummings' expert disclosure. Such goes directly against the rules of equity, where "he who comes into equity must come with clean hands." *Sword v. Sweet*, 140 Idaho 242, 92 P.3d 492, 501 (2004) (citing *Gilbert v. Nampa School Dist.* No. 131, 104 Idaho 1374, 145, 657 P.2d 1, 9 (1983)). Therefore, the district court aptly warned, "[k]eep in mind . . . because I held the defendant to a strict standard on their expert, I'm going to do the same thing with you." *Tr.*, Vol. 2, 1124:23-11:24:1.

Similarly in *Noble v. Ada*, the Court excluded the plaintiff's untimely expert where (1) it violated an explicit pretrial order and (2) the time for the evidentiary hearing was nigh. See *Noble*, 135 Idaho at 499-500, 20 P.3d at 683-684. Here, Cummings' motion to reconsider was not heard until the day before trial. In this vein, while Cummings cites to *Viehweg v. Thompson* in opposition to the district court's ruling, that Court's reasoning resounds in favor:

> The days are over – if indeed they ever existed – when litigants and their attorneys could dictate the pace of the judicial process . . . [a] district court properly may perceive the private hardships of delay, and the public interest in speedy resolution of civil disputes, without a distress signal from a party whose case is stalled or from other litigants whose cases are waiting their turn.

Viehweg, 103 Idaho at 315, 647 P.2d at 269.

While the district court's decision may not have been an easy one, trial was scheduled, had taken three (3) years to arrive, and it was within the bounds of reason and equity to exclude Cummings' expert. The importance of the testimony was weighed, the possibility of a continuance was entertained, and Cummings' culpability was exacerbated by unclean hands.

CONCLUSION

First, the Court should affirm the district court's denial of lost opportunity damages. The alleged view lots, RV Park, and Jensen Ranch were only an apparition of bare intent, were not supported by a single damage number, no appraisal, no evaluations, no plans, just a "new idea." Similarly, Cummings' claim for emotional distress was unfounded; he waived the same, and on appeal, cites baldly to litigation stress. Further, even if Cummings had a right to the eastern

property, Northern Title never contracted itself CRP income liability, and Cummings failed to prove a contractual right to such payments.

Second, the Court should affirm the denial of punitive damages. The record affirms that the district court knew it was acting under discretionary powers, and that it acted consistently within the law and reason determining that any pretrial evidence did not rise to the level of punitive damages. Further, substantial evidence at trial supported the district court's previous conclusion. Notwithstanding, despite specific instructions from the district court, Cummings failed to object, raise, let alone re-motion the court for punitive damages. Therefore, the district court's denial remains proper.

Third, the tort of bad faith does not apply to escrows. It is unique to the insurance relationship, and applies solely to disputes of non-payment. Neither are parties or at dispute here, and further, the district court expressly found, and the record substantiates, that Northern Title disputed Cummings' claims in good faith. Therefore, Cummings' request for this new cause of action is both improper, and unnecessary.

Fourth, the Court should affirm the district court's exclusion of Kelley. The district court's orders and the transcript evidence the district court's recognition of discretionary power, and Cummings admittedly violated the district court's *Order Setting Jury Trial*. The district court also aptly reasoned the fair approach to admit or exclude both. The district court considered a continuance, decided against it, and did not abuse its discretion in excluding Kelley.

Therefore, the Court should deny Cummings' appeal against Northern Title, and award Northern Title its fees and costs.

DATED this 15th day of November, 2013.

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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 **RESPONSE BRIEF OF NORTHERN TITLE COMPANY OF IDAHO, INC.**, to the following person(s) by U.S. Mail and Email:

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