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Cummings v. Stephens Respondent's Brief 2 Dckt. 40793

IN THE SUPREME COURT OF THE STATE OF IDAHO

STEVEN B. CUMMINGS, Plaintiff/Appellant/Cross-Respondent v. ROGER L. STEPHENS, Defendant/Respondent, and NORTHERN TITLE COMPANY OF IDAHO, INC., Defendant/Respondent/Cross-Appellant	**Docket No. 40793-2013** **RESPONSE BRIEF OF ROGER L. STEPHENS** Appeal from Bear Lake County Case No. CV-09-183

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

Honorable David C. Nye, District Judge, presiding

Randall C. Budge and Brent L. Whiting
Residing at 201 E. Center St., P.O. Box 1391, Pocatello, Idaho, 83204
for Respondent Roger L. Stephens

Brad Bearnson and Aaron Bergman
Residing at Logan, Utah
for Respondent/Cross-Appellant Northern Title Company of Idaho

Nathan M. Olson
Residing at Idaho Falls, Idaho
for Appellant/Cross-Respondent Steven B. Cummings

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STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff-Appellant Steven B. Cummings ("Cummings" or "Appellant") brought this action against Roger L. Stephens ("Stephens"), seeking to find him personally liable for his conduct related to Cummings' purchase of real property from the Roger L. and Barbara L. Stephens Family Trust ("Stephens Family Trust" or "the Trust"). Cummings named Stephens as a defendant, but did not make any reference to Stephens' representative capacity as a co-trustee of the Stephens Family Trust, nor did he name the Trust or the other co-trustee, Barbara Stephens, as parties in the action. (R. Vol. 4, p. 574-595.)

The original warranty deed erroneously included eighty-three (83) acres of land located on the east side of Highway 30 in Bear Lake County, Idaho, which the Stephens Family Trust never intended to sell. Stephens discovered and complained about the error to Defendant-Cross Appellant Northern Title Company of Idaho, Inc. ("Northern Title"), the title company that had closed the sale of the property and issued title insurance. Northern Title modified the legal description to exclude the property east of Highway 30 from the transfer, then re-recorded the original deed as a correction deed with the modified legal description.

In his Second Amended Complaint, Cummings asserted claims against Stephens for breach of warranty, conversion and slander of title, all of which rely solely upon allegations that Stephens had altered the deed or recorded a new deed after the initial transfer. (Id. at pp. 585-87.) Cummings did not allege any claims for specific performance or to quiet title, yet he

requested in his prayer for relief that Stephens be estopped from conveying the property to any other party and that the court deem the entire property conveyed to Cummings.[1] (Id.)

At the close of Cummings' case-in-chief at trial, the district court dismissed all claims against Stephens because there was no evidence that Stephens altered or recorded the correction deed or did anything wrong, and because Cummings had abandoned any claim to recover the actual property at trial. The district court also recognized that Cummings had not named the Trust or the co-trustee as parties in the action, and that Stephens was sued only in his individual capacity, and thus the court could not enter an order affecting title to the property.

On appeal, Cummings asks this Court to conclude that he is the rightful owner of the eighty-three (83) acres on the east side of the highway. Stephens respectfully submits that the district court's dismissal of Cummings' claims should be affirmed.

B. Course of Proceedings Below

Stephens is generally satisfied with the Appellant's description of the course of proceedings, with the following additions:

Cummings moved for summary judgment on August 6, 2010, and Stephens filed a cross-motion for summary judgment on September 22, 2010. The district court initially granted Stephens' motion for summary judgment on January 4, 2011. (R. Vol. 1, p. 106-132.)

Cummings filed a motion to reconsider on January 18, 2011, in which Cummings represented that he "will provide evidence to the Court challenging the credibility of both Evan

[1] During argument at trial on Stephens' motion to dismiss, Cummings' counsel argued that estoppel and recovery of the property are potential remedies for the breach of warranty claim, (Tr. Vol. 1, pp. 733:16-24), but he has not cited any authority in support of such assertion.

Skinner and Dorothy Julian, who are the only agents of the Defendant that Cummings had any interaction with prior to purchasing the property." In support of the motion to reconsider, Cummings submitted an affidavit of counsel, to which was attached an "affidavit" of Curtis Baum, one of the owners of Three Bar Ranch. (R. Vol. 2, p. 191.)[2] Three Bar Ranch originally contracted to purchase the property from the Stephens Family Trust, but assigned its contract rights to Cummings. The district court concluded that Baum's affidavit raised sufficient issues of fact that would preclude summary judgment. The court expressed, however, that Baum's presence at trial would be necessary, otherwise there would insufficient evidence to find in Cummings' favor:

> THE COURT: . . . . So I'm going to grant the motion to reconsider. I'm going to put this back on the court trial calender (sic). It's still a court trial. I just hope we're not spinning wheels here. And I hope Dr. Baum can come in.
>
> Because without him, I think you're going to lose unless there's some other way to get that evidence in.
> * * *
> . . . . I'm just saying that the thing that's tipping my mind today is Dr. Baum's affidavit.
>
> MR. OLSEN: Got it. Okay.
>
> THE COURT: And without that coming in with proper foundation, you're going to have a tough time meeting what you need to meet here, the burden of proof here.

(Tr. Vol. 2, pp. 965:22-966:2, 966:11-17.) In the court's Minute Entry and Order filed after the hearing, the district court further explained: "The Court informed counsel that the affidavit of Dr.

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[2] Interestingly, the affiant resides in Russia but his "affidavit" was notarized in Idaho Falls, Idaho.

Baum is not admissible at trial. Plaintiff's counsel stated they would find Dr. Baum and have him testify at trial." (Augmented Record, Minute Entry and Order, dated March 17, 2011, p. 2.)

At trial, Baum was not called as a witness. The district court granted Stephens motion to dismiss pursuant to IRCP 41(b) after Cummings closed his case-in-chief. (Tr. Vol. 1, pp. 735-737.) Later, after trial, in its decision awarding attorney fees to Stephens, the district court discussed its prior decision to grant Cummings' motion to reconsider, and Cummings' failure to produce Baum as a witness at trial:

> Stephens prevailed on summary judgment only to be brought back into the case on Cummings' motion to reconsider based upon Cummings' representation of newly discovered facts to be presented by a lay witness. The Court made it very clear that the only reason it granted the motion to reconsider was because of the purported testimony of the new witness. At trial, the lay witness did not testify. The facts presented in the plaintiff's case-in chief did not materially change from the facts presented at the time of summary judgment. The Court granted Stephens a Rule 41(b) dismissal at the close of plaintiff's presentation of evidence.

(R. Vol. 9, pp. 1803-04.)

C. Concise Statement of Facts

The Stephens Family Trust owned real property located in Bear Lake County, Idaho, located on both the east and west sides of Highway 30. (R. Vol. 8, p. 1592, Findings #1 and 2, and p. 1596, Finding #33.) Stephens and his wife, Barbara, as trustees of the Stephens Family Trust, listed only the property on the west side of the highway for sale. (Id.) The trial 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, Finding #2.) Northern Title understood that only the

property west of the highway was for sale, (id. at p. 1593, Finding #8), as did the real estate agents, Dorothy Julian and Evan Skinner. (Tr. p. 817:3 – 818:11; *see also* Julian Published Depo., pp. 20:13-20, 21:14-17, 36:15-22, 38:16-24, and 40:19 – 41:3.)

Cummings was traveling through Bear Lake County on July 22, 2007, and noticed the "for sale" sign at the property, and contacted the listing agent's office. (R. Vol. 8, p. 1593, Findings #10-11.) The property was already under contract to Three Bar Ranches, so Cummings contacted Three Bar Ranches through the real estate agents and offered to purchase the contract for $50,000. (R. Vol. 8, p. 1594, Findings #14-15.) Cummings received a copy of the Real Estate Purchase Contract ("Contract") on July 26, 2007. (R. Vol. 8, p. 1594, Finding #16; Exhibit 8.) Three Bar Ranches executed an assignment of the Contract to Cummings on July 30, 2007. (Exhibit 14.)

Northern Title prepared a legal description for the property, which incorrectly included the property located on both sides of the highway, and even included land that was not owned by either the Stephens Family Trust or Stephens individually. (R. Vol. 8, p. 1594, Finding #17; *See* Exhibit 10.) The error was discovered by Northern Title, and a new legal description was drafted containing language intended to exclude all property east of the highway. However, the new description inserted the exclusionary language in the wrong place and thereby also failed to exclude the property on the east side of the highway. (R. Vol. 8, p. 1595, Findings #25-27; *See* Exhibit 11.)

On August 3, 2007, Roger L. and Barbara Stephens, as trustees of the Stephens Family Trust, executed a warranty deed to Cummings, to which was attached the second incorrect legal

description. (Id. at Findings #28 and 31; Exhibit 17.) On or about November 8, 2007, Stephens learned from the county tax assessor when he went to pay his property taxes that the Trust was no longer the owner of record of the property east of the highway. Stephens immediately contacted Northern Title and requested that the error be corrected. (Id. at Finding #34.) Northern Title prepared a new legal description excluding all land east of the highway, attached it to the original warranty deed executed on August 3, 2007, and re-recorded it as a correction deed. The corrected deed transferred only the Trust property west of the highway to Cummings. (Id. at Findings #35-36.)

Cummings brought suit against Stephens, individually, and Northern Title. He asserted four claims against Stephens in his Second Amended Complaint, alleging Breach of Warranty, Conversion, Slander of Title, and Infliction of Emotional Distress. (R. Vol. 4, p. 575-77, Counts I, II, III and IX.) At trial, Cummings expressly withdrew his claim for Infliction of Emotional Distress against Stephens, (Tr. Vol. 1, p. 722:2-5.) and the district court granted Stephens motion to dismiss under IRCP 41(b) at the close of Cummings' case-in-chief. (Tr. Vol. 1, pp. 735-737.) In making its decision on the motion to dismiss, the district court found that Stephens never intended to sell the property east of the highway; that the real estate agents and title company understood Stephens' intent; that errors in drafting the deed language mistakenly included the land east of the highway; that there was no evidence that Stephens had altered the deed, but that he at most consented to the changes in order to comply with his original intent; and that Cummings abandoned his claim to the actual real property in his trial testimony. (Tr. Vol. 1, pp. 736:17 – 737:25.)

Later, the district court entered written findings, which confirm that Stephens only brought the error in the legal description to Northern Title's attention and that Northern Title acted to record the correction deed. (R. Vol. 8, p. 1596, Findings #32-36.) The written findings demonstrate that all of the actions allegedly giving rise to Cummings' claims against Stephens were actually done by Northern Title.

ISSUES PRESENTED ON APPEAL

1. Whether Cummings' failure to bring suit against the Stephens Family Trust or its trustees precludes any right to recover the disputed property.

2. Whether Cummings abandoned any claim to recover any real property; and if not, whether he waived any objection to the district court's conclusion that the claim to recover real property was abandoned.

3. Whether the district court's findings and conclusions adequately supported its decision to dismiss the claims against Stephens; and if not, whether those reasons are obvious from the record.

4. Whether the district court correctly granted Stephens attorney fees as the prevailing party where the claims relate to a commercial transaction and the underlying contract provides for an award of attorney fees to the prevailing party.

ATTORNEY FEES ON APPEAL

Stephens requests that this Court award his reasonable attorney fees and costs on appeal pursuant to Idaho Code §§ 12-120(3) and 12-121, Idaho Appellate Rules 40 and 41, and pursuant to the Contract underlying Cummings' claims. Pursuant to section 12-120(3), the prevailing

party is entitled to attorney fees in an action "relating to . . . any commercial transaction." This litigation arose out of a commercial transaction for the sale of a ranch to Cummings, which he intended for commercial use, and thus falls within the meaning of a commercial transaction. (R. Vol. 4, p. 575-77, Second Amended Complaint ¶¶ 11 and 16.) If Stephens is the prevailing party on appeal, he is entitled to recover additional reasonable attorney fees incurred on appeal.

In normal circumstances, attorney's fees will be awarded under section 12-121when the court is left with the abiding belief that the appeal was brought, pursued, or defended frivolously, unreasonably or without foundation. *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979); *Johnson v. McPhee*, 147 Idaho 455, 210 P.3d 563 (Ct. App. 2009). In this appeal, the primary relief sought as against Stephens by Cummings is a recovery of the real property, which Cummings claims should have been transferred to him pursuant to the Contract with the Stephens Family Trust. As will be further addressed below, however, Cummings had abandoned his claim to the actual property at trial, which precludes him from seeking its recovery on appeal. Furthermore, Cummings failed to bring suit against the Trust or the trustees who actually hold title to the disputed property. His arguments on appeal that seek to obtain title to the property from Stephens—who has no ownership interest in the property—are therefore frivolous and without any basis in fact or law. Therefore, Stephens should be awarded his attorney fees on appeal pursuant to Idaho Code § 12-121.

Additionally, Cummings' claims relate to the Contract entered between himself and the Stephens Family Trust. Section 27 of the Contract specifically provides for an award of attorney fees to the prevailing party if "either party initiates or defends any . . . legal action . . . which are

in any way connected with [the Contract] . . . , including such costs and fees on appeal." (Exhibit 8.) Because this action was initiated by Cummings, a party to the Contract, and his claims on appeal are connected to the Contract, Stephens should be entitled to an award of attorney fees on appeal as the prevailing party.

ARGUMENT

I. STANDARD OF REVIEW

This Court has long held that in a non-jury trial, the trial court is permitted to weigh the evidence and resolve conflicts in the evidence in deciding a motion for dismissal under IRCP 41(b):

> [W]hen a defendant moves for an involuntary dismissal at the close of the plaintiff's presentation in a non-jury case, the court sits as a trier of fact and is not required to construe all evidence and inferences to be drawn therefrom in the light most favorable to the plaintiff. Thus, in rendering a judgment pursuant to the defendants' motion for dismissal under I. R.C.P. 41(b), the trial court is not as limited in its evaluation of the plaintiff's case as it would be in a motion for directed verdict. The court is not to make any special inferences in the plaintiff's favor nor concern itself with whether plaintiff has made out a prima facie case. Instead, it is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies.

Keenan v. Brooks, 100 Idaho 823, 825, 606 P.2d 473, 475 (1980); *Clear Springs Foods v. Clear Lakes Trout Co.(in Re SRBA Case No. 39576)*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002).

On appeal, the district court's findings of fact made pursuant to an IRCP 41(b) dismissal will be upheld so long as they are not "clearly erroneous." *Dep't of Health & Welfare ex rel. Osborn v. Altman*, 122 Idaho 1004, 1009, 842 P.2d 683, 688 (1992). A finding of fact is not

"clearly erroneous" if it is supported by substantial, competent evidence. *Id.* The appellate courts exercise free review of the district court's conclusions of law. *Coward v. Hadley*, 150 Idaho 282, 246 P.3d 391 (2010).

A district court is required by IRCP 52(a) to make findings of fact and conclusions of law when dismissing a plaintiff's case pursuant to IRCP 41(b), "[h]owever, failure to state reasons is not fatal if those reasons are obvious from the record itself." *Rudy-Mai Farms v. Peterson*, 109 Idaho 116, 705 P.2d 1071 (Ct. App. 1985) (internal quotation marks omitted).

When the trial court reaches the correct result by an erroneous theory, Idaho appellate courts will affirm the result on the correct theory. *Nampa & Meridian Irr. Dist. v. Mussell*, 139 Idaho 28, 33, 72 P.3d 868, 873 (2003).

II. CUMMINGS FAILED TO BRING SUIT AGAINST THE OWNER OF THE PROPERTY

On appeal, Cummings asks this Court to reverse the district court's dismissal of the claims he brought against Roger Stephens, and to conclude that he is the rightful owner of the eighty-three (83) acres located on the east side of the highway pursuant to the original Warranty Deed. The record is abundantly clear, however, that the owner and grantor of the subject property was not Stephens in his individual capacity; it was the Stephens Family Trust acting through him and his wife, Barbara Stephens, as co-trustees. (Exhibits 17 and 22; *see also* Exhibits 10, 18 and 19; and Tr. Vol. 1, pp. 728:15-729:10.)[3] Stephens does not hold any

[3] During argument on the motion to dismiss, the Court recognized that the Stephens Family Trust was the owner of record and the grantor in the warranty deed. The Court expressed doubt that it could award the property to Cummings because neither the trust nor Barbara

ownership interest in the subject property in his individual capacity, and Cummings presented no evidence of any such interests. Therefore, Stephens could not effectuate a transfer of the property in his individual capacity, whether voluntarily or by judicial compulsion.

The Idaho Rules of Civil Procedure ("IRCP") require that a complaint designate as a defendant "any party against whom the [complaint] is filed," and forbids entry of judgment against a party that was not served with process. IRCP 3(a). Rule 3(b) requires that any action against a person in some representative capacity, such as a trustee, "**shall** indicate the nature of the representative capacity for which the person is made a party to the action." IRCP 3(b) (emphasis added); *Collier Carbon & Chem. Corp. v. Castle Butte, Inc.*, 109 Idaho 708, 710-711, 710 P.2d 618, 620-21 (Ct. App. 1985).

The trustees of a trust are the proper parties in an action that seeks to affect legal title to trust property. As a general rule, "[t]he trustee is the legal owner of trust property, and as such the trustee is the proper party for actions affecting title to trust property. Thus, a trustee is a necessary party to any suit or proceeding involving a disposition of trust property or funds, . . ." 76 Am Jur 2d Trusts § 611 (footnote omitted). *See also, e.g., Ruestman v. Ruestman*, 111 S.W.3d 464, 476 (Mo. Ct. App. S.D. 2003) (same); *Lewis v. Hanson*, 128 A. 2d 819, 835 (Del. 1957) (same); *Bank of N.Y. v. Bell*, 63 A.3d 1026, 1031 (Conn. Ct. App. 2013) (same); *Coverdell v. Mid-South Farm Equipment Ass'n*, 335 F.2d 9, 12-13 (6th Cir. 1964) (same regarding Ohio law); *Starcrest Trust v. Berry*, 926 S.W.2d 343, 355 (Tex. App.1996) (same re

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Stephens were parties to the action, and that the most it could possibly award was Roger Stephens' interests in the property. (Tr. Vol. 1, pp. 728:15-729:10.)

Texas law). Recently, in the context of a deed of trust, this Court held that because legal title to property passed to the trustee, the trustee must be joined in the action in order to affect legal title. *See Parkwest Homes, LLC v. Barnson*, ___ Idaho ___, 302 P.3d 18, 24-25 (2013) ("[A] lienor seeking to enforce a mechanic's lien against property encumbered by a deed of trust must name the trustee of the deed of trust . . . to give effect to the mechanic's lien against subsequent holders of legal title."). The property interests of the trustee(s) for an intervivos trust, as in this case, is materially indistinguishable from those of a trustee under a deed of trust, as in *Parkwest*. In both instances, the property is being held in trust for the beneficiaries. Therefore, the trustees of the Stephens Family Trust are the proper parties in an action seeking to alter title to the real property being held in trust.

Neither the original complaint, nor the first or second amended complaint in this case make any reference to the Stephens Family Trust or to Stephens' capacity as a trustee, nor is any other defendant alleged to be a trustee (R. Vol. 4, pp. 574-95.) The Warranty Deed and other documents clearly reflect that the Stephens Family Trust is the property owner and seller. (Exhibits 10, 11, 17, 19 and 20.) Cummings' failure to name the Trust or trustees as a party is fatally defective to any claim to recover real property. In *Collier Carbon*, suit was brought against the defendants only in their capacity as trustees, but they had not been named as parties in their individual capacity. The personal judgment entered against them as individuals was declared void by the Court of Appeals, holding that the trial court never obtained jurisdiction over the defendant trustees in their individual capacities. *Collier Carbon*, 109 Idaho at 710-711, 710 P.2d at 620-21. The present case is no different, only in the inverse. Even though Stephens

was named individually, he was not named or indicated as the trustee. Therefore, the district court correctly concluded that it never obtained jurisdiction over the Stephens Family Trust or over Stephens in his capacity as the trustee. (R. Vol. 8, p. 1635, Conclusion #38.) Lacking such jurisdiction, the district court could not enter any judgment against the Trust, and thus could not grant ownership of the Trust's property to Cummings. ICRP 3. (Id.)

Furthermore, even if Roger Stephens were somehow deemed to be joined in his representative capacity, Cummings could not have secured the change in title to the Trust's real property without joining both trustees. Cummings wholly failed to name Barbara Stephens as a defendant in *any* capacity, despite the fact that she had executed both the Contract and the warranty deed as a trustee. The district court concluded that such failure to sue the proper parties was fatal to his ability to rescind the corrected warranty deed. (R. Vol. 8, p. 1629-30.) In *Walter E. Wilhite Revocable Living Trust v. Northwest Yearly Meeting Pension Fund*, 128 Idaho 539, 546, 916 P.2d 1264, 1271 (1996), this Court held that a co-trustee could not transfer property of the trust without the consent of the other co-trustee:

> Other jurisdictions have recognized the principle that co-trustees must not act independently of one another. See, e.g., *Colburn v. Grant*, 181 U.S. 601, 606, 45 L. Ed. 1021, 21 S. Ct. 737 (1901) (recognizing the principle that "co-trustees may not act independently of one another, nor ignore each other in the management of the trust"); *Union Bank & Trust Co. of Helena v. Penwell*, 99 Mont. 255, 42 P.2d 457, 462 (Mont. 1935) (stating "it is clear that both under our statutes and the general rule under the common law the act of one only of the trustees is not sufficient"); *Cooper v. Federal Nat. Bank of Shawnee*, 175 Okla. 610, 53 P.2d 678, 682 (Okla. 1936) (holding that "co-trustees cannot act independent of one another, and the disagreement between the trustees in this case renders the act of each a nullity"). The

> principle that two trustees must exercise trust powers unanimously can also be inferred from I.C. § 68-109(a) which provides that "any power vested in 3 or more trustees may be exercised by a majority...."

Id. Cummings' failure to name co-trustee Barbara Stephens as a party in this action thus precludes him from obtaining any relief with regard to a transfer of the trust's real property.

Ultimately, Cummings did not bring suit against the owner of the property he seeks to obtain through this appeal. His failure to do so is fatal to his claim to the real property.

III. CUMMINGS ABANDONED HIS CLAIM TO THE REAL PROPERTY

At trial, Cummings abandoned any claim to recover the eighty-three (83) acres on the east side of Highway 30; yet on appeal, he asks this Court to conclude that he is the owner of that property. Cummings' Second Amended Complaint alleged claims against Stephens only for breach of warranty, conversion and slander of title. He did not allege any claims for specific performance or to quiet title. (R. Vol. 4, pp. 574-95.) As explained by his attorney during trial, Cummings was relying on his claim for breach of warranty as the basis for recovering the property. (Tr. Vol. 1, p. 733:16 – 734:20.)

At trial, Cummings initially testified that he was seeking the benefit of his bargain. (Tr. Vol. 1, p. 138:7-12.) Cummings' counsel later acknowledged that this same testimony regarding the benefit of his bargain could be construed two ways, as either asking for damages to compensate for the lost property or as asking for the property back. (Tr. Vol. 1, p. 735:1-10.) On cross-examination, Cummings clarified that he was only seeking damages under the title insurance policy, not a judgment granting him title to the subject property:

Q: In your deposition when we discussed damage with you, your comment was you only want the land. Is that still your testimony?

A: Not at this point.

Q: What is your testimony? **What is your claim? 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, p. 335:7-14) (emphases added).

At the conclusion of Plaintiff's case-in-chief, Stephens sought dismissal, which the district court analyzed under IRCP 41(b). During argument on the motion, the district court inquired of Cummings' counsel regarding the court's understanding that Cummings had abandoned his claim to the property during his trial testimony. Counsel confirmed that the district court correctly recalled Cummings' testimony, and admitted that the testimony could reasonably be interpreted to mean that Cummings only wanted to recover monetary damages. The exchange was as follows:

MR. BUDGE: . . . I think from the testimony of Mr. Cummings himself yesterday, **he said, "I don't want the property back." He no longer wants it. He only wants damages**. That's all I have, your Honor. Thank you.

THE COURT: Well, let me ask you, Mr. Olsen, as far as that issue, which cause of action seeks the recovery of the real property if your client's still going for that? **I thought he gave it up on the stand, too**.

MR. OLSEN: **And that's possible**. But it is a remedy, you know – I think it's one of the remedies under breach of warranty, if I'm not mistaken.

I think, actually, "the remedy for breach of warranty is that the defendant be estopped by deed from conveying that portion of the property wrongfully removed from the possession to any other party."

* * *

THE COURT: . . . **[B]ut my notes showed that when he was on the stand, Mr. Cummings said, "I don't want that east side anymore. I want monetary damages.**" And I think he was speaking specifically of the $850,000 under the policy.

MR. OLSEN: **Yeah, I think he said that.** And then I also offered some testimony of "What do you want," you know, the benefit of your bargain. I guess you could look at benefit of the bargain as either being – you know, reducing the amount he would have had to pay without the 83, or you could construe it as, you know, "Just give me the property back."

Yeah, but I would say, you know, based on Mr. Cummings' testimony probably leaning more towards, you know, "Just pay me some damages, and let's move on." I think that might have been his exact words, actually.

THE COURT: **I think so, too.**

(Tr. Vol. 1, pp. 733:12-734:1 and 734:21-735:11) (emphases added). If both the district court and Cummings' own attorney were incorrect in their understanding of Cummings' intentions in relation to the property, Cummings easily could have leaned over and informed his attorney that he did not want to abandon his claim to the property.

Shortly after that exchange, the district court made its ruling, relying in part upon its confirmed understanding that Cummings had abandoned his claim to the actual property:

> If there is liability here, that liability lies either with Northern Title or the real estate agents. I do not see where it lies with Mr. Stephens. And I understand that creates a problem when it comes to remedies as far as the actual real property itself, but Mr. Cummings abandoned that remedy on the stand. And I think we're looking simply here now at monetary damages and how much they are.

(Tr. Vol. 1, p. 737:7-13.) Cummings did not object or seek to correct the district court's understanding when it was first addressed on the motion to dismiss, nor at any other time during or after the trial. After trial, the district court issued written findings and conclusions, in which the court specifically found that Cummings had abandoned his claim to the property and was seeking only money damages. (R. Vol. 8, p. 1627.)

If the district court misunderstood Cummings' intent to abandon his claim to the property, it was incumbent upon him to raise his challenge at that time, not for the first time on appeal. "A litigant may not remain silent as to claimed error during a trial and later urge his objections thereto for the first time on appeal." *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982). "A party's failure to object to action by the trial court precludes a party from challenging that action on appeal." *Mackowiak v. Harris*, 146 Idaho 864, 866, 204 P.3d 504, 506 (2009), *citing Kirkman v. Stoker*, 134 Idaho 541, 544, 6 P.3d 397, 400 (2000).

In *Kirkman*, the case was scheduled for a court trial even though the plaintiff had requested a jury trial in his complaint, but the plaintiff did not raise any objection to the trial setting. A few months later during a conference, the trial court commented that it expected to hold a two- to three-day court trial, to which plaintiff's counsel asked, "What do you mean court, not a jury?" The trial court responded, "It's been set for a court trial for a considerable period of

time." The plaintiff's counsel did not raise any objection, either orally or in writing. When he attempted to raise the issue on appeal, this Court held: "Kirkman, by failing to object to the setting of a court trial, failed to bring the issue before the district court and thus did not properly preserve it for appeal." *Id.* *See also Mackowiak*, 146 Idaho at 866, 204 P.3d at 506 (discussing *Kirkham*).

In this case, the trial court believed that Cummings had abandoned his claim to the actual property, which, *even if incorrect*, is similar to the misunderstanding in *Kirkham* that no jury trial had been requested. Like plaintiff's counsel in *Kirkham*, Cummings' attorney questioned the district court's understanding of Cummings' testimony, but no objection was made to the court's conclusion that Cummings had abandoned his claim to the property. Rather, Cummings allowed the case to proceed through the rest of trial and then raised his objection for the first time on appeal. Therefore, as in *Kirkham*, Cummings did not properly preserve the issue for appeal.

Based on Cummings' abandonment of any property claim and his failure to object to the district court's understanding of his intent to abandon his claim to the property, Cummings cannot now seek to recover the property on appeal.

IV. CUMMINGS FAILED TO PRESENT ANY EVIDENCE TO PROVE HIS ALLEGED CLAIMS AGAINST STEPHENS OR THAT STEPHENS DID ANYTHING WRONG.

A. Cummings Failed to Prove the Alleged Factual Basis for His Claims

Cummings asserted claims against Stephens for breach of warranty, conversion and slander of title. (R. Vol. 4, pp. 586-87.) The sole factual basis for Cummings' claims are

allegations that Stephens improperly altered, revised and recorded the warranty deed, or that he executed another warranty deed. (R. Vol. 4, pp. 586-87, ¶ 50, 55, 56 and 61.)[4]

The district court correctly found there was no evidence that Stephens ever altered either the original or the corrected deed. (Tr. Vol. 1, p. 737:2-6.) The evidence is undisputed that Northern Title, not Stephens, prepared and recorded the corrected warranty deed. In its written findings of fact, the district court correctly found that Stephens had executed the original deed as a co-trustee for the Stephens Family Trust and later only informed Northern Title of the error in the legal description. (R. Vol. 8, p. 1596, ¶¶ 31-34.) The district court found that the changes to the legal description and re-recording of the corrected deed were done by Northern Title, not by Stephens. (Id. at ¶¶ 35-36.) All Stephens did was bring the error in the legal description to the attention of Northern Title and request that the error be corrected. The district court recognized that it could infer from Exhibit 115 "that [Stephens] went to [Northern Title] and said, 'I don't know how you take care of this, but you take care of it. It's your problem.'" (Tr. Vol. 1, p. 726:9-12.) Cummings' counsel agreed that such an inference could be drawn. (Tr. Vol. 1, p. 726:13.) Certainly, Stephens was justified in requesting that an actual mistake be corrected.

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[4] Count I for Breach of Warranty alleges that "Stephens breached his covenants to the Plaintiff in November of 2007 when Stephens altered and recorded a revised warranty deed and disturbed Plaintiffs' possession of Stephens Ranch." (Id. At ¶ 50.) Count II for Conversion alleges that "Stephens and John Does I-X executed another warranty deed on November 8, 2007, which transferred approximately 83 acres away from Plaintiff back to Stephens," and that "Stephens took no less than 83 acres of land from Plaintiff without a right to do so." (Id. at ¶¶ 55 and 56.) Count III for "Slander of Title" alleges that "Stephens and John Does I-X falsely and maliciously recorded a revised warranty deed in November of 2007 that slandered Plaintiff's title to Stephens Ranch." (Id. at ¶ 61.) The only other claim alleged against Stephens, Count IX for Infliction of Emotional Distress, was expressly withdrawn at trial. (Tr. Vol. 1, p. 722:2-5.)

In explaining its decision on the motion to dismiss at trial, the district court recognized the lack of any evidence that Stephens had engaged in any of the allegedly wrongful conduct:

> There's no evidence that Stephens altered the deed either the first or second time. That it was changed, at most, there is evidence that he may have consented to the changes in order for those – for the deeds to comply with his original intent.

(Tr. Vol. 1, p. 737:2-6.) Also, as discussed below, the district court's written findings of fact and conclusions of law are sufficient to support the conclusion that Stephens was not liable, and satisfy the requirements of IRCP 41(b) and 52(a).

Moreover, Stephens could not be personally liable for his actions taken as a trustee on behalf of the Trust because he was not personally at fault. Idaho Code § 15-7-306 provides, in pertinent part:

> (a) Unless otherwise provided in the contract, a trustee is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he fails to reveal his representative capacity and identify the trust estate in the contract.
>
> (b) A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault.
>
> (c) Claims based on contracts entered into by a trustee in his fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration may be asserted against the trust estate *by proceeding against the trustee* ***in his fiduciary capacity***, whether or not the trustee is personally liable therefor.

I.C. § 15-7-306 (emphases added). Lacking any wrongdoing, there is no basis for a judgment against Stephens.

B. Cummings Failed to Prove the Elements of His Causes of Action

1. Breach of Warranty

Cummings' counsel argued that one of the remedies for the breach of warranty claim asserted against Stephens was the right to recover the property. (Tr. Vol. 1, p. 733:16 – 734:17.) "The usual covenants of title are: (1) the covenant to warrant and defend the title; (2) the covenant of seisin; (3) the covenant of good right to convey; (4) the covenant against encumbrances; and (5) the covenant for quiet enjoyment." *20 Am Jur 2d Covenants, Conditions, and Restrictions* § 54.

Cummings alleges that Stephens breached his covenants when he allegedly "altered and recorded a revised warranty deed and disturbed Plaintiff's possession of Stephens Ranch." (R. Vol. 4, p. 586, ¶ 50.) As addressed above, however, the district court concluded that Cummings failed to prove any facts to support his allegations. Because there was no evidence that Stephens had altered the deed or signed any new deed, nor any evidence that he did anything else improper, Cummings failed to prove the alleged basis for any of the relief he sought against Stephens, including a recovery of the property.

2. Conversion

It is well settled that "real property cannot be 'converted' and there is no cause of action for the conversion of real property. Conversion in the legal sense applies only to personal property." *Rowe v. Burrup*, 95 Idaho 747, 750, 518 P.2d 1386, 1389 (1974). Cummings' cause of

action for conversion is pleaded specifically and solely against Stephens for conversion of real property. (R. Vol. 4, pp. 586-87, ¶ 53-58.) Therefore, there was no factual basis upon which Cummings could have prevailed on his claim against Stephens for conversion because real property cannot be "converted."

3. Slander of Title

"Slander of title requires proof of four elements: (1) publication of a slanderous statement; (2) its falsity; (3) malice; and (4) resulting special damages." *Weitz v. Green*, 148 Idaho 851, 862, 230 P.3d 743, 754 (2010). "In a slander of title action, unlike actions for personal slander, plaintiff retains the burden of establishing the falsity of the publication." *Matheson v. Harris*, 98 Idaho 758, 760, 572 P 2d 861, 863 (1977). In its written decision after trial, the district court explained its reasons for concluding that Cummings failed to prove slander of title against Northern Title. One of those reasons was a lack of falsity. The lack of falsity applies equally to the claim as against Stephens. The court wrote:

> The Court is not convinced that Cummings has met his burden of proving that the November 8 rerecorded deed is a false statement. There was considerable disagreement on whether or not the real estate transaction entered into between Cummings and Stephens included property east of Highway 30. The Court does not believe that Cummings has sufficiently met his burden in proving that the transaction did in fact include property east of Highway 30. Since the real estate deal did not include property east of Highway 30, the rerecorded deed that excluded property on the east side of Highway 30 is not a false statement.
>
> Cummings has failed to show that the November 8, re-recorded deed is a false statement, and therefore his claim for slander of title fails.

(R. Vol. 8, p. 1599; *See also*, Id. at 1631, Conclusions # 2-3.)

The district court also concluded that Northern Title was not liable due to a lack of malice. Malice has been generally defined by Idaho courts as a reckless disregard for the truth or falsity of a statement. *Weitz*, 148 Idaho at 862,230 P.3d at, 754. Malice will not be found where a statement "although false, was made in good faith with probable cause for believing it." *Id.* The district court expressly found that Stephens never intended to sell the property east of the highway. (R. Vol. 8, p. 1592, Findings #1 and 2, and p. 1595, Findings #27-28.) A finding that Stephens lacked any malice is consistent, even if he had consented to Northern Title's recording of the correction deed. Lacking both falsity and malice, Cummings' claim for Slander of Title against Stephens was properly dismissed.

C. The District Court's Reasons For Dismissing Cummings' Claims Are Obvious from the Record

The district court did not fail to make adequate findings and conclusions as required by IRCP 41(b) and 52(a), as Cummings asserts. The district court made specific written findings that:

(1) the Stephens Family Trust owned the property and was the grantor on the deeds, but that neither the Trust nor the trustees were named as parties in this case, (R. Vol. 8, p. 1596, Finding #33, and p. 1635, Conclusion #38);

(2) Cummings abandoned his claim to the real property in his testimony at trial, (id. at p. 1627, first full paragraph);

(3) the property east of the highway was not intended to be sold, (id. at p. 1592-93, Findings #1-2, 8-9, p. 1595, Finding #27; p. 1599, #2; and p. 1631, Conclusion #2);

(4) the legal description on the original deed did not conform with the parties' intent, (id. at p. 1595, Findings #25-28; and p. 1631, Conclusion #2); and

(5) Northern Title acted to revise the legal description and record the correction deed, (id. at p. 1596, Findings #31-36); accordingly, Stephens did not revise or record an altered deed.

The district court's comments at trial in granting the motion to dismiss further state the reasons for the dismissal. (Tr. Vol. 1, p. 726:3 – 727:9, p. 728:15 – 729:10, p. 733:10 – 735:11, and p. 735:22 – 737:25.) These findings and conclusions, as well as the others cited throughout this brief, are sufficient to support the district court's dismissal of Cummings' claims against Stephens.

Even if the district court had not entered specific findings and conclusions pertaining to the dismissal of the claims against Stephens, those reasons are obvious from the record. When the reasons for the court's decision are obvious from the record, the failure to cite specific reasons is not fatal. *Rudy-Mai Farms v. Peterson*, 109 Idaho 116, 705 P.2d 1071 (Ct. App. 1985).

Furthermore, this Court can affirm the district court on any grounds supported by the record even when the district court committed error. *Nampa & Meridian Irr. Dist. v. Mussell*, 139 Idaho 28, 33, 72 P.3d 868, 873 (2003). The record is sufficient for this Court to affirm the district court on several theories, including the failure to bring suit against the correct party, the

abandonment of any claim to the real property, and the lack of any evidence to prove the allegations against Stephens. Therefore, judgment was properly entered in favor of Stephens.

V. THE AWARD OF ATTORNEY FEES TO STEPHENS WAS PROPER

Cummings argues that the district court's award of fees to Stephens was improper because the court had concluded that Stephens was not a party to the warranty deed or the Contract. There is no requirement in the fee provision of the Contract that the prevailing party in litigation also be one of the parties to the contract. Section 27 of the Contract provides for an award of attorney fees to a prevailing party if either party to the Contract initiates a legal action that is "in any way connected with this Agreement." (Exhibit 8; R. Vol. 4, p. 602.)[5] Under the Contract, Stephens is entitled to attorney fees because (1) Cummings was a party to the Contract through his assignment from Three Bar Ranches; (2) the action was connected in some way to the Contract, a copy of which was included in Exhibit A attached to the complaint; and (3) Stephens was the prevailing party at trial because he obtained a complete dismissal of Cummings claims against him. (*See* Exhibits A and B to the Second Amended Complaint, R. Vol. 4, pp. 598-604 and 624.)

Cummings also ignores the fact that the claims he alleged against Stephens are dependent upon Stephens' status as a party to the Contract and the grantor on the deeds. (R. Vol. 4, p. 576-

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[5] Section 27 of the Contract provides in full:

> If either party initiates or defends any arbitration or legal action or proceedings which are in any way connected with this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and fees on appeal.

95.) "A party may be entitled to attorney's fees under a contract even if it is established that no contract between the parties ever existed." *O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 912 (2008). *See also Konic International Corporation v. Spokane Computer Services, Inc.*, 109 Idaho 527, 708 P.2d 932 (Ct. App. 1985) (concluding that no contract was formed but affirming an award of fees pursuant to the contract); *Intermountain Forest Mgmt. v. Louisiana Pacific Corp.*, 136 Idaho 233, 31 P.3d 921 (2001) (alleging the existence of a relevant contractual relationship is sufficient to trigger application of the fees statute).

Furthermore, Cummings' purchase of the property was clearly a commercial transaction, as he intended it for business use. (R. Vol. 4, p. 575-77, Second Am. Complaint ¶¶ 11 and 16; Vol 8, p. 1627, #2.) Therefore, Stephens was also entitled to fees as the prevailing party under Idaho Code § 12-120(3). *Garner v. Povey*, 151 Idaho 462, 259 P.3d 608 (2011).

Cummings argues that the award of fees to Stephens was improper because Northern Title had agreed to indemnify Stephens, but cites no authority to support this proposition. Northern Title's indemnification of Stephens' attorney fees is immaterial to whether Stephens is entitled to an award of fees as the prevailing party. The indemnification is a contractual obligation between Northern Title and Stephens, and has nothing to do with Cummings as a non-party to that contract. Regardless of whether Northern Title was at fault, Northern Title was not the party who brought Stephens into this action. Cummings chose to bring suit against Stephens despite the lack of any evidence that Stephens acted wrongfully in any way. Even if Northern Title was the party ultimately at fault—to which Stephens does not concede— it should not be required to bear the cost of *Cummings*' decision to pursue unsupported claims against Stephens.

Regardless of whether Northern Title was assigned the award of fees to Stephens, it does not alter the net amount Cummings was entitled to recover under the district court's judgment. He could still recover the damages and fees awarded against Northern Title (but only if he prevails on the cross-appeal), and he will still pay the fees awarded against him to Stephens. The fact that the awards of attorney fees will simply offset because of Stephens assignment to Northern Title does not alter Cummings' net award, it only simplifies execution on the judgments. Therefore, the district court's award of attorney fees to Stephens was proper and should be affirmed.

CONCLUSION

The district court's decision should be affirmed for any of four reasons. First, Cummings' failed to name as a defendant in this case the actual owner of the property in question, the Stephens Family Trust, nor did he name Roger Stephens as a trustee or join the other co-trustee, thus precluding any recovery or remedy against the real property. Second, Cummings testimony at trial abandoned any recovery of the real property and only sought recovery of monetary damages. Third, Cummings failed to object at trial when the district court stated that Cummings had abandoned any claim for recovery of the property. Fourth, there was no evidence presented at trial that Stephens prepared, signed or recorded the correction warranty deed or did anything wrong, as had been alleged in the complaint. Therefore, Stephens respectfully submits that the district court's decision should be affirmed on appeal, with Stephens awarded additional attorney fees on appeal.

DATED this 18th day of November, 2013.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By _____
RANDALL C. BUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of November, 2013, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Nathan M. Olsen Petersen Moss Hall & Olsen 485 "E" Street Idaho Falls, Idaho 83402	[✓] U. S. Mail/Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile (208-524-3391) [✓] Email: nolsen@pmholaw.com
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_____
RANDALL C. BUDGE