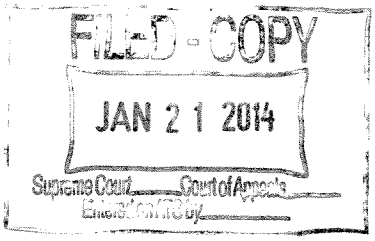
1-21-2014

Cummings v. Stephens Appellant's Reply 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.	Bear Lake Co. Case No. CV-2009-000183 Idaho Supreme Court Docket 40793-2013



APPELLANT REPLY/CROSS-RESPONDENT'S BRIEF

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

Honorable David C. Nye, District Judge, Presiding

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I. The Respondents Failed to Challenge the Appellant's Core Arguments and Issues Presented on Appeal.

The 39 page brief provided by Respondent (Stephens) and 100 pages of briefs (not including covers) provided by Respondent Cross-Appellant (Northern Title) largely leave un-refuted the primary arguments and issues raised by the Appellant (Cummings), including the following:

1) As it pertains to Stephens – that the August 3, 2007, Warranty Deed unambiguously conveyed to Cummings all of the Stephens Ranch and that Stephens failed to present any evidence under the rare basis and strict evidentiary burden of unilateral or mutual mistake to justify a modification of the deed. Further, the trial court should have simply upheld the August 3, 2007, Warranty Deed and declared invalid the November 8, 2008, Warranty Deed modified and recorded by Northern Title without authorization from Cummings or original signatures from Stephens effectively clouding title to 83 acres of property conveyed to Cummings in the August 3, 2007, Warranty Deed. Moreover, without providing any written conclusions of fact or law as explicitly required under the rule, and in disregard of the merger doctrine and statute of frauds, the trial court erred in holding that "Stephens had no intention to sell the property east of the highway" contrary to the unambiguous intent not only set forth in the August 3, 2007, Warranty Deed, signed by Stephens, but virtually every other fully signed agreement, including the Real Estate Purchase and Sale Agreement (REPC), the Title Commitment (as incorporated

into Section 11 of the signed General Escrow Instructions), and even the signed Listing Agreement. Tr. Ex. 105, 35, 1. Moreover, the trial court had no actual testimony from Stephens suggesting what his intent was aside from the aforementioned documents signed by Stephens and admitted into the record. Finally, the trial court's determination of Stephens "intent" to mean something other than the writings is contrary to Idaho authority reinforced in *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 614,167 P.3d 748, 751 (2006) restricting the intent of the parties to the "words of the contract without regard to what the parties to the contract thought it meant or what they actually intended for it to mean."

2) As it pertains to Northern Title – that, in violation of the explicit instructions of the Escrow Agreement and its statutory duties, Northern Title's gross negligence and/or willful misconduct in altering and recording the November 8, 2007, Warranty Deed improperly reconveying 83 acres back to Stephens had the direct consequence of depriving Cummings the value and income from that property, including some $28,991.07 in CRP payments as *stipulated by the parties at trial* would have been paid to Cummings as the owner of the property generating the income. Tr. 716: 4-17. Moreover, as a Title & Escrow Agent governed under Idaho's insurance laws, Northern Title had a "special" or fiduciary relationship to Cummings, the violation of which, as is the case for other types of entities subject to the insurance code in Idaho, should subject Northern Title to a "bad faith" tort. Further, Northern Title failed in their fiduciary duties under law by failing to obtain and/or follow written instructions before altering and recording a deed, by not obtaining "original signatures" in recording a document, and further

by completely abandoning its crucial duty to maintain neutrality in the transaction. As reinforced by extensive testimony from a seasoned and highly qualified expert in Escrow Services, Northern Title not only acted well outside of its strict and narrow duties set forth under law and its contract, it also took sides, collaborated with, and even indemnified one party in the transaction, Stephens – even after it became aware that it had "nothing in writing" from Cummings to suggest that the intent of the parties in the transaction was anything other than what was contained in the REPC and the August 3, 2007, Warranty Deed. The trial court erred by not considering this bad faith tort claim and its resulting damages to Cummings, including severe financial and emotional distress. Finally, the trial court should have considered punitive damages for Northern Title's "gross negligence and/or willful misconduct" alone, in addition to the ongoing bad faith and intentional misconduct that occurred even after Northern Title wrongfully altered and recorded the November 8, 2007, Deed.

Again, all of the above as presented and meticulously supported by citations in the record by Cummings' appellant brief has been largely untouched by the Respondents. On that basis alone, this Court should grant Cummings his appeal, including his attorney fees on appeal.

As discussed below, the arguments contained in both Stephens' and Cummings' briefs, for the most part, do not directly address the trial courts conclusions of law and findings of fact, but rather raise issues for the first time on appeal or attempt to retry this case, while also ignoring or incorrectly citing parts of the record that do not support their arguments.

II. The Facts in the Record, Stephens' Own Admissions in the Pleadings, and Prior Holdings by the Trial Court Fail to Support His Claim that the Owner of the Property Was Not Involved in the Lawsuit.

Stephens raises for the first time on appeal a claim that the owner of the property allegedly the "Stephens Family Trust" was not named in the lawsuit, and is therefore "precluded" from "obtaining any relief with regard to a transfer of the trust's real property." (Stephens Response Brief pp. 10-14.) In making such an argument, Stephens suggests that this Court disregard the following facts in the record, admissions in the pleadings and previous findings of the trial court:

1. Stephens admitted both in his initial answer and the answer to Cummings' 2nd Amended Complaint (adding Northern Title as a defendant) that the court had both in personam and subject matter jurisdiction. R. Vol. 1, pp. 1-2, 10, R .Vol. 4, p. 575. R. Vol 6, pp. 1215-18.

2. Stephens further admitted that he was the "grantor" and signer of the August 3, 2007, Warranty Deed. (Cite to complaint) R. Vol 4, pp. 578 ¶ 23, 653 ¶ 23, R. Vol 6, p. 1218.

3. The signed and executed Warranty Deed was attached and incorporated into Cummings' notice pleading Complaint and 2nd Amended Complaint. R. Vol 1, pp. 6-7, R. Vol. 4, pp. 626-629. Further, Stephens admits that "Stephens executed (the attached) warranty deed in favor of Cummings which deed transferred Stephens Ranch to Cummings." R. Vol. 6, p. 1218. Moreover, the 2nd Amended Complaint attaches and incorporates numerous documents signed by Stephens. R. Vol. 4, pp. 597-647.

4. Stephens initially filed a Third Party Complaint against Northern Title again alleging that the Court had jurisdiction and further requesting relief as it pertained to the real estate transaction entered into between Stephens and Cummings. R. Vol. 1. 9-16.

5. The trial court exercised jurisdiction over the property and Stephens when in its initial decision on summary judgment it ordered Stephens to "submit a reformed deed to the Court along with the judgment." R. Vol. 1, p. 131.

6. Notwithstanding comments made *sua sponte* by the court at trial from the bench with regard to whether the naming of the trust, the court nevertheless continued to exercise its jurisdiction over the matter by finding that: "Stephens (as seller) had no intention to sell the property east of the highway; that Stephens never authorized the sale of the property east of the highway" and further "that there (may be) evidence that (Stephens) may have consented to the changes in order for those – for the deeds to comply with (Stephens') original intent." Tr. pp. 736: 17–25, 737:1–21.

7. Even after trial, Stephens has continued to assert that the court has jurisdiction over the seller, by seeking his attorney fees both from the trial court and this Court under the REPC and further claiming that Stephens and Cummings were engaged in a "commercial transaction."

This Court has dealt with a similar situation. In *Rasmuson v. Walker Bank & Trust Co.*, 102 Idaho 95, 625 P.2d 1098 (1981), the defendant argued that the trial court lacked jurisdiction to award attorneys fees against him as the trustee because the court was not in the "principal place of registration" of the trust which therefore meant that the court lacked jurisdiction under

IC § 15-7-103. *Id.* at 102 Idaho 98, 625 P.2d 1101. The *Rasmuson* Court rejected this argument, pointing out that:

> In the case at bar, plaintiff's complaint alleged jurisdiction pursuant to I.C. § 5-514. Defendant's answer admitted in personam jurisdiction. Neither party presented evidence regarding the place of trust registration. Trustee Walker **consented to in personam jurisdiction aware that the complaint dealt with several issues regarding administration of the trust.**

Id. (emphasis added)

The Court further relied upon IRCP § 15(b), which states:

> **When issues not raised by a pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings**. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; **but failure so to amend does not affect the result of the trial of these issues.**

Id. (emphasis added)

As in *Rasmuson*, in this case Stephens provided no evidence whatsoever as to the specific nature of the so called "Stephens Family Trust," including whether it was even registered, who were the trustees, or a copy of the actual trust. Rather, Stephens consented to jurisdiction knowing full well that the complaint "dealt with several issues" that would pertain to the administration of matters pertaining to the trust, not the least of which was the August 3, 2007, Warranty Deed, the REPC, Listing Agreement, Escrow Agreement, and all related issues. In essence, from the very outset, although Roger Stephens and Barbara Stephens as Trustee of the Stephens Family Trust were not named in the caption of the Complaint, they were referenced

throughout the Complaint in the various signed documents attached to the Complaint, thus giving the parties ample notice. In every possible respect, issues pertaining to their interests were tried by their and the court's "express" and "implied" intent. It would be an error to now treat the defendant as a different party than the seller of the property, particularly when the record has absolutely no information about the "Stephens Family Trust" to suggest that it was a separate party than the defendant.[1] In fact, the final REPC or "counter-offer" was signed on behalf of "Roger L. Stephens" with no reference to the "Stephens Family Trust." Tr. Ex. 105 This Court should not allow this type of "shell game" to avoid liability.

In the end, the only possible conclusion that this Court can reach as it pertains to jurisdiction is that regardless of how the parties were specifically "named" in the complaint, the sellers (whether it be Roger Stephens, Barbara Stephens and/or the Stephens Family Trust) accepted and assented to jurisdiction of the trial court, and never provided any indication at any time until its November 18, 2013, Response Brief more nearly 4½ years after the Complaint had been filed in July of 2009, that the trial court and Cummings were dealing with anybody else other than the actual sellers of the property he purchased.

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[1] Of further note, the trial court had no evidence as to the exact nature of the "Stephens Family Trust," including whether it was a trust formed and administered pursuant to IC § 68-101, et al., or simply whether it was simply a fiduciary or legal relationship in name only. As a result, there is nothing in the record to suggest that the trust should be treated as a separate entity but rather as part of Stephens. As indicated, Stephens, his attorneys and the trial court certainly did not ever treat the trust separately from Stephens.

III. The Record Clearly Indicates that Cummings did not Abandon his Claim to the Real Property.

The actual testimony provided in the case does not suggest that Cummings abandoned the remedy of recovering the property. Cummings' testimony in his direct examination on this issue was as follows:

> Q. Mr. Cummings, what ultimately do you want in terms of relief?
>
> A. Well at the time I obtained your services to assist me, I wanted what I bargained for. **And I have pretty much been consistent with I want what I bargained for**, that this has gone far beyond.

Tr. 138:7-12 (emphasis added)

Cummings was then asked what *other relief* he believed was entitled to, after which he indicated a number of things, including the CRP income, emotional distress, medical costs, pain and suffering, and lost opportunities. Id. 138:13-25, 139:1-16. Cummings was then asked about the "monetary value" of those damages. Id. 139:4-21. It was at that point that Cummings opined that those types of monetary damages should be covered under the $850,000 title policy, but that he would "leave that for the judge to decide." Id. 139-21-25, 140: 1-9.

The testimony during *Northern Title's* cross-examination of Cummings cited by Stephens in his brief is consistent with his prior testimony, that he now believed he was entitled to more than what he bargained for given Northern Title's conduct:

> 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.

Tr. 335: 7-10 (emphasis added)

Cummings then again proceeds to suggest that he should also be able to "collect on the (title policy)" and "move on with his life." Id. 335: 13-15. The sensible interpretation of this testimony is that since his deposition – prior to adding his claims against Northern Title -- Cummings now believed that he was entitled to *additional* damages than "**only**" the land.

Further, reviewing the entire exchange between the court and Mr. Cummings' attorney near the end of trial, Cummings' attorney was in no way claiming that Cummings had abandoned the property. In fact, Mr. Olsen did point out that recovery of the property was one of the remedies sought forth in Cummings' complaint and additionally was one of the remedies under a breach of warranty. Id. 733: 16-25, 734: 1-17.[2] The court then referred to its notes to suggest that Cummings' testimony was : "I don't want that east side anymore. I want monetary damages" (not accurately reflecting Cummings' actual testimony). Id. 734: 21-25 However, rather than suggesting that Cummings had abandoned the specific relief of clearing his title to the entire Stephens Ranch, including the 83 acres that had been wrongfully taken, Cummings' attorney was actually suggesting that recovery of the property was still an option:

> Mr. Olsen: I guess you could look at (Cummings' testimony that he wanted the) benefit of the bargain as either being – you know, reducing the amount Cummings would have had to pay without (getting back) the 83 (acres), **or you could construe it as, you know, "Just give me the property back."**

Tr. 735: 2-6

[2] The Court should note that Stephens' quotes from this exchange in his brief omits several portions, completely misconstruing Mr. Olsen's comments. The record should speak for itself.

At worst, Olsen opined to the Court that Cummings "might" be "leaning more towards" being paid damages. But there is simply no way that Olsen's comments rise to the level of a judicial admission, which only occurs when there is "a deliberate, clear, unequivocal statement of a party about a concrete fact within the party's peculiar knowledge, not a matter of law and not opinion." *Universe Life Insurance Co. v. Liquidator for the Universe Life Insurance Company*, 144 Idaho 751, 759 171 P.3d 242, 250 (Idaho 2007) (citations omitted). In any case, neither the trial court nor this Court should rely on an exchange not involving witness testimony and based on the court's "notes" rather than the testimony on the record. Again such testimony is clear that there was no abandonment of recovery of the property as an option for relief.

Finally, Stephens errantly suggests that Cummings "did not challenge" the trial court's finding that Cummings had abandoned recovery of the property. Again, Cummings did continue to assert such remedy in the argument before the Court cited above. In addition, in his post trial brief, Cummings **did** propose the possible relief of recovering the property by rescinding the November 8, 2007, Warranty Deed . R. Vol 8, p. 1531. This issue was therefore quite clearly raised at the trial court and properly before this Court for review.

IV. Cummings Met his Evidentiary Burden for Relief.

Interestingly, rather than defend the trial court's basis for dismissing Cummings' claims, Stephens attempts to substitute reasons for dismissing the Complaint that had already been denied or simply not addressed by the trial court. As this Court has held on numerous occasions:

> Appellate court review is limited to the evidence, theories and arguments that were presented ... [in the district court]. In order to preserve an issue for appeal, the issue must be raised in the district court. This is because the district court must rule on an issue before it can be presented for appeal. We do not review an issue unless the parties can point to an adverse ruling on that issue in the record. Id. Appellate courts follow this rule because it would be unfair to overrule the district court on issues not presented to it on which it did not have an opportunity to rule.

Wattenbarger v. A.G. Edwards & Sons, Inc.,150 Idaho 308, 323-24, 246 P.3d 961, 976-77 (2010) (citations omitted). If Stephens did not believe that the trial court's actual conclusions of law were correct, then he should have appealed himself. He did not. Therefore, he must defend the trial court's rulings, and not raise arguments and claims above that were not addressed below.

In any case, as reiterated in his Appellant Brief, Cummings did present the evidence he needed at trial to prove that he was entitled to relief. It is vital to again point out the development of this case prior to trial. During the initial summary judgment proceedings, the trial court had already held that: 1) the August 3, 2007, Warranty Deed unambiguously conveyed the Stephens Ranch as it existed on both sides of HWY 30 to Cummings, and that 2) Stephens had by "self help" authorized the August 3, 2007, deed to be altered to remove the 83 acres on the east side of the highway. R. Vol. 1, p. 116. Moreover, the trial court at the very least acknowledged that Cummings had a claim against Stephens under the breach of the warranty deed. Id. pp. 129-30.

As specifically directed by the trial court, insofar as the claims against Stephens, the only question that was to be considered at trial was whether Stephens could justify a modification of the unambiguous deed through the rare exception of mutual or unilateral mistake. Tr. 940: 1-4.

In fact, via the "merger doctrine" (as set forth in Cummings' Appellant Brief) the only relevant or admissible evidence aside from the Warranty Deed was to that very question. In his case and chief, Cummings offered overwhelming evidence, including through the numerous writings and his and the prior purchaser Three Bar Ranches' dealings with the realtors, proving that he understood the intent of the purchase agreement to be what was contained in the merged warranty deed. Conversely, Stephens presented no testimony to suggest that both he and Cummings believed and understood the agreement to be anything different than what was in the signed warranty deed, listing agreement and REPC .

In his Response Brief, Stephens now claims that he had no involvement in altering the deed (i.e. that it was all Northern Title's fault) – while taking the inconsistent position that he should be provided the benefits of that altered deed. There was no dispute that Stephens' conduct, i.e. approaching Northern Title on November 8, 2007, to "correct the error" directly resulted in the modification of the deed on that very same day. Even if this Court were to somehow accept the notion that Stephens didn't specifically direct or expect Northern Title to alter the deed, Stephens most certainly ratified Northern Title's actions. Ratification of an act "may be by words or by conduct indicating an intention on the part of the principal to adopt the act as his own; and that such intention may be implied from an acceptance of the benefits of the unauthorized act." *Twin Falls Livestock Comm'n Co. V. Mid-Century Insurance Co.*, 117 Idaho 176, 182-83, 786 P.2d 567, 573-74 (Ct. App. 1989) citing *T.W. & L.O. Naylor Co. V. Bowman*, 39 Idaho 764, 768-69, 23 P. 347, 348 (1924). The fact that Stephens has accepted the benefit of

Northern Title's modification of the deed is unquestionably a ratification or "adoption" of the act which therefore makes Stephens liable for Northern Title's act. *Id.*

Stephens also argues that there was no "slander of title," although, again, the trial court did not address that claim in its ruling (which is why it was not raised in Cummings' Appellant Brief.) Cummings' slander of title claim was simply an alternative remedy for his relief. However, now that the issue has been raised by Stephens, the evidence in the record (or lack thereof) could easily be construed to support a slander of tile claim. This Court has held that the "wrongful recording" of a lien or deed that "clouds title" constitutes slander of title. *Rayl v. Shull Enterprises, Inc.*, 108 Idaho 524, 526, 700 P.2d 567, 569 (1984). Another element of slander of title includes "malice," which has been defined by this Court as "a reckless disregard for the truth or falsity of a statement" and that "an action will not lie where a statement in slander of title, although false, was made in good faith **with probable cause for believing it**." *Hogg v. Wolske*, 142 Idaho 549, 556, 130 P.3d 1087, 1095 (2006)(emphasis added).

In this case, at the request or assent of Stephens an altered deed was purposely and improperly recorded which clouded the title to Cummings' property. Thus the primary element of slander of title has been met. Stephens' defense to such an act was that the altered deed "although false, was made in good faith **with probable cause for believing it**." *Id.* Again, Stephens offered no testimony of his own to suggest that he had "probable cause" to believe that the altered deed was "not false." In fact, there is a substantial amount of evidence to suggest that the August 3, 2007, Warranty Deed reflected his intent, including the listing agreement and

REPC. Further, by choosing to not provide any testimony at trial, Stephens cannot rely upon the hearsay statements of the realtors and escrow officers to suggest what his intent was. Again, pursuant to the seminal doctrine followed in Idaho and universally, the "intent" of the parties is determined by the words of the written agreement. Therefore, the only "probable cause" that can be relied upon is the unambiguous intent set forth in all of the writings in this case, that Stephens intended to sell the entire "Stephens Ranch" as it existed on both sides of the highway. The altered deed contrary to such intent constitutes slander of title.

Finally, in suggesting that the court's decision was "obvious from the record," Stephens attempts to obviate the explicit requirement under IRCP § 41(b) that the trial court issue written conclusions of law and fact. The case that Stephens relies on for such a proposition is when a rare exception to this rule was granted where the plaintiff failed to "prosecute" his claims. *Rudy-Mai Farms v. Petersen*, 109 Idaho 116, 705 P.2d 1071 (Ct. App. 1988). In any case, what is "obvious" from the record is that the trial court had no basis to ascertain that the intent of parties to be anything other than what was contained in the signed warranty deed, and that the altered warranty deed was improperly filed and recorded. Again, the trial court made no "conclusions of law" in its dismissal of Cummings' claims against Stephens from the bench, providing no theories or authority for its decision. This was a fatal error by the trial court which cannot be excused. Nevertheless, Cummings has provided the "obvious" theories and authority for why he should be provided relief.

V. Cummings Did Not Need to Provide the Testimony of Curtis Baum to Prove his Claims, and the Fact that Stephens is Raising such Issue Only Solidifies Cummings' Claims.

Stephens' "Statement of the Case" suggests that Cummings was required to provide the testimony of Curtis Baum, who signed the REPC on behalf of Three Bar Ranches, Inc. (which was later assigned to Cummings). (Stephens Response Brief pp. 3-4). This argument disregards the actual record and pre-trial proceedings. In granting Cummings' Motion for Reconsideration, the trial court indicated that the information provided in the affidavit of Curtis Baum (i.e. that the intent of the REPC was for the purchase the entire Stephens Ranch) would be important for Cummings to meet his "burden of proof" at trial. Tr. 965, 966. Specifically, the trial court indicated that:

> 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.**

Id. 966: 11-17 (emphasis added)

What Stephens omits in the "course of proceedings below" is that Cummings expended enormous effort and expense to track down and depose both Curtis Baum and his brother Philip Baum. Stephens further fails to mention that both he and Northern Title *strenuously* objected to and attempted several motions to have Curtis Baum's deposition and testimony *excluded* at trial. Tr. Pp. 1008, 1137-1151. Further ignored is that Philip Baum was actually the president and 95% owner of Three Bar Ranches, Inc., and had reviewed and approved the REPC, and confirmed each and every allegation set forth in Curtis Baum's affidavit. Baum Dep. pp 62: 12-19, 11-14,

Ex. 62, 63. In the end, Philip Baum was the more relevant and knowledgeable witness, which is why his testimony was provided at trial by Cummings rather than Curtis Baum.[3]

Thus, the actual record in this case does not support Stephens' argument. But more importantly, Stephens' raising of this issue only serves to further solidify Cummings' claims. Given the fact there was never any dispute that the REPC unambiguously included the entire Stephens Ranch should have made the tracking down of the initial buyer's testimony completely unnecessary. The writing speaks for itself. Nevertheless, Cummings did as the court directed. He "found a way to get the evidence in" and therefore even met the heightened standard of "burden of proof" set forth by the trial court. This is yet one more reason why the trial court erred in dismissing Cummings' claims against Stephens.

VI. Northern Title's Cross Appeal Merely Attempts to Re-Litigate Issues and Second Guess the Trial Court, while also Disregarding Contrary Facts and Findings in the Record.

Instead of challenging either the factual or legal findings of the trial court in Cummings' favor, Northern Title instead devotes much of its appeal to re-try the case and second guess the trial court. The appellate courts have consistently held that "second guessing" the trial court does not warrant overturning a trial court decision. *See, In re Estate of Irwin*, 104 Idaho 876, 88, 664 P.2d 783, 787 (Ct. App, 1983). Appellate courts have not granted appeals where the appellant has merely disputed the trial court's factual findings and asked the Court to re-weigh conflicting evidence. *Mundell v. Stellmon*, 121 Idaho 413, 416, 825 P.2d 510, 513 (Ct, App.

[3] The fact that Phillip Baum was an appraiser and had performed a valuation of the property, including the 83 acres was also helpful. Baum Dep. 66:2-12.

1992). In addition appeals have been denied where the appellant has attempted to relitigate matters that were put to rest. *Ernst v. Hemenway & Moser Co.*, 126 Idaho 980, 988, 895 P.2d 581, 588 (Ct. App. 1995). Finally, the Court should also reject an appeal when the arguments "superficially read reasonably," but upon review are in fact unreasonably grounded." *O'beseky v. First Fed. Sav. & Loan Ass'n* 112 Idaho 1003, 1010, 739 P.2d 301, 309 (1987).

In its appeal, Northern Title in large part suggests that this Court ignore many of the trial court's findings of fact and conclusions of law, including that:

1) That Cummings and Stephens contracted with Northern Title to provide escrow services in the closing of the real estate transaction. R Vol. 8, p. 1595.

2) That on August 3, 2007, Northern Title recorded a warranty deed that it had prepared in accordance with the REPC and Title Commitment (as incorporated in the escrow agreement) in the Bear Lake County Recorder's office which granted Cummings the Stephens Ranch as it existed on both sides of HWY 30. Id. p. 1595-1596. Tr. Ex. 111, Sec. 11.

3) That on November 8, 2007, without obtaining any authorization from Cummings, and contrary to what was instructed in their own Escrow Instructions, Northern Title altered the legal description without obtaining original signatures to exclude property on the east side of the highway and re-recorded the deed. Id.

4) That this failure to obtain Cummings' authorization constituted gross negligence, willful misconduct or both. Id. p. 1605

A particularly poignant holding in the trial court's decision, to which Northern Title has not provided any factual or legal basis to suggest was an error, is as follows:

> Failing to get Cummings' authorization prior to altering the legal description and rerecording a warranty deed containing a legal description that was altered from the title commitment legal description that the parties had agreed upon constitutes gross negligence, willful misconduct, or both. There was not the slightest degree of care shown when Northern Title rerecorded the warranty deed. Northern Title did not get the authorization from Cummings before changing the legal description and rerecording the deed. Thornock's log notes suggest that Cummings was not even contacted until 13 days after rerecording the deed. The legal description on the rerecorded deed was outside of that contemplated and agreed to by the parties.
>
> Northern Title made the intentional choice to alter the legal description and rerecord a deed. It undoubtedly had knowledge that Cummings would be subjected to a substantial risk of harm. Regardless of whether or not they believed that by altering the legal description they were putting the legal description to what the parties agreed to, Northern Title knew that Cummings would have no ownership or other rights to the property on the east side of the highway after it rerecorded the deed with the new legal description.

Id. (emphasis added)

Northern Title also continues to disregard or misinterpret the relevant portions of the escrow agreement, Tr. Ex. 111. For instance, it wrongly suggests that Cummings was represented by the realtors, when in fact the escrow agreement explicitly indicates that the realtors were Stephens' agents, i.e the "sellers" and "listing" agent, thus negating any notion whatsoever that Northern Title could rely on representations from these realtors on behalf of Cummings. Id. In fact, Lori Thornock confirmed that the realtors did not represent Cummings in her testimony. Tr. 560: 17-19. Finally, Northern Title cannot justify in any way how the alleged

oral instructions of a realtor[4] should somehow trump the intent set forth in the signed REPC, particularly given the provision in the escrow agreement it continues to disregard stating:

> The undersigned Buyer and Seller affirm that the legal description appearing in the commitment is satisfactory, and authorize Escrow Agent to record documents delivered through escrow which contain said legal description(s) necessary or proper for the issuance of the requested title insurance policy(ies).

Id., Sec. 11

Simply put, as reiterated by the trial court, Northern Title did not meet the most basic responsibility under its escrow contract when it decided to re-record a warranty deed not in accordance with the legal description in the title commitment as reviewed and "contemplated" by the parties as it was bound to do. The trial court held that Northern Title was liable for this conduct and Northern Title has provided no legal or factual basis to overturn that decision.

Northern Title also fails to adequately challenge the trial court's basis for the $50,000 damage award against Northern Title. Of course, Cummings has argued on his appeal that the Court should have awarded him the value of the acreage or the land itself on the east side, including any income that he would have earned from the property. Instead, the court awarded Cummings the difference between what he paid for what he intended to be the entire Stephens Ranch as it existed on both sides of the highway and what Stephens accepted for what he allegedly intended to be Stephens Ranch without the acreage on the east side. R Vol, 8 1629.

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[4] It should also be noted that there is no contemporaneous record documenting alleged conversation wherein Dorothy Julian instructed Lori Thornock to change the legal description from the way it was in the REPC. What would have been an important development in the process was not noted in Northern Title's log notes anywhere. Tr. Ex. 33, 115.

This theory for damages, although not satisfactory to Cummings, is certainly logical and based on facts, not speculation. It matters not that $50,000 of the amount spent by Cummings was allocated to Three Bar Ranches, Inc. for the assignment of the REPC. Again, the basic facts are that Cummings was willing to impart with $850,000 to obtain the entire Stephens Ranch. Once again, Northern Title has no basis to argue that the damages set by the trial court were "speculation" but instead were based on the evidence before the court.

Northern Title also does not provide any authority or argument challenging the actual trial court's findings in denying Northern Title's defense that it should be absolved of liability for Cummings' "own negligence" or "failure to mitigate damages." R. Vol 8, p. 1630. Northern Title did not address any of the trial court's analysis of the facts under Idaho's "comparative negligence" statute under IC § 6-801, finding that there was no evidence that Cummings was negligent. The court noted that even if Cummings had done a more thorough review, i.e. obtained a survey, extensively reviewed the closing documents etc... he still would have believed that he was purchasing the entire Stephens Ranch. Id.

Instead, in yet another attempt to re-try the case, Northern Title spends pages of its brief contriving some scenario to suggest Cummings engaged in some type of conspiracy or "went dark" after allegedly finding out that the warranty deed had been altered. (Cross Appellant Brief 25-28). Of course Cummings strongly refuted any such notion at trial. In any case, as acknowledged by the trial court, whatever occurred after Northern Title altered the deed has absolutely no relevance to any defense for its improper actions.

Even then, Northern Title's version of the events falls apart when considering all of the facts. For instance, it fails to indicate that it did not send Cummings the altered Warranty Deed until April of 2008 – five months after it had altered the deed. Tr. pp. 343: 12-25, 344: 1-12, 346: 10-17. Moreover, it fails to note that it made no mention of altering the deed in its correspondence to Cummings after it had changed the deed. Tr. Ex. 42. Thus, Cummings had no real knowledge of the unauthorized change to his deed until April of 2008, shortly after which he retained counsel and sent a demand letter to Northern Title in May of 2008 (to which it never responded). If anybody "went dark," it was Northern Title, not Cummings – thus further supporting his bad faith claim.

It is also errant to suggest that Cummings did not "cooperate to adjust clerical errors." Trial Ex. 111 ¶ 20. First, as noted by the trial court, altering a deed to remove 83 acres was not addressing a "clerical error," but rather a "legal error." R. Vol 1, p. 111. Moreover, as of August 3, 2007, the Warranty Deed granting Cummings the Stephens Ranch was signed and recorded and $850,000 of Cummings' money had been dispersed to Stephens and the other parties, including Northern Title for its services. There was nothing more required of Cummings at that point under the Escrow Contract.

Northern Title's "mitigation of damages" argument also rejected by the trial court is puzzling let alone not applicable. Cummings is not under any obligation to turn around and sell the property he just purchased as a means to "mitigate damages" for property that was improperly taken from him. Cummings' way of trying to mitigate damages was first writing to

the parties to resolve the situation and then filing an action to recover the property. Moreover, Northern Title's reliance on Evan Skinner to suggest that there was a buyer willing to pay "the same price" for the property is complete speculation.

In conclusion, it is simply inappropriate for Northern Title to be retrying all of these allegations and faulty arguments heard and rejected by the trial court. Cummings does not have enough space in his brief to correct and refute all of these facts and issues already discarded by the trial court. Based on what it has indicated the recent past, this Court has no time or patience for reviewing the more than 1,600 page transcript and many thousands of pages of documents developed over a 4½ year time frame – a second time. *See, Hopper v. Swinnerton*, 2013 Opinion No. 116, p. 5 (Nov. 26, 2013). Northern Title has in large part failed to provide an appropriate issue for appeal which should therefore be denied.

VII. Northern Title's Reliance on the "Anderson Rule" Should not Excuse its Misconduct and further Lacks Factual Support.

Northern Title's reliance on the "Anderson Rule," i.e. that it was not the "abstractor of title," and therefore should escape liability is also misplaced. Again, the trial court found that Northern Title had violated the escrow agreement and acted with gross negligence and/or willful misconduct – justifying damages to Cummings regardless of whether Northern Title was the "abstractor of title" or not. Nevertheless, there is sufficient evidence in the record that Northern Title did take on extra duties outside of the limited duty of preparing a title commitment for the purpose of preparing title insurance, thus in effect making it liable as an "abstractor of title."

Browns Tie & Lumber Co. v. Chicago Title Co. of Idaho, 115 Idaho 56, 59, 764 P.2d 423, 426 (1988). As found in the trial court's memorandum decision, Northern Title was asked to assist in preparing the legal description well before it prepared the title commitment and prior to when there was a prospective buyer, having been contacted by the listing agent Dorothy Julian to assist with the preparation of the legal description. R. Vol 8, pp. 1593 ¶ 3, 1620,1622. Moreover, Northern Title took on the responsibility of "preparing the legal description that would be attached to the REPC." Id. 1622. The court further indicates that such assistance was "in connection with the other parts of its business" than that of Escrow Services. Id. 1619.

Northern Title devotes several pages in its brief fixated on when or how it obtained "Addendum One" to the REPC– suggesting that "prior to July 26, 2007, it did not have a title commitment description." (Cross-Appellant Brief at 13-18.) It is difficult to see how this allegation has any relevance. In any case, it is simply untrue. The original buyer, Three Bar Ranches, Inc., through Phillip Baum, verified that he and his brother Curtis had seen and reviewed the REPC with "Addendum One" *and* the Title Commitment with the legal description prior to when the REPC was initially signed on July 2, 2007. Baum Dep. pp.19-25, Ex. 65, Ex. 63. The title commitment itself was prepared for "Three Bar Ranches, Inc." Id. Northern Title never refuted this testimony. In addition, a copy of the REPC including "Addendum One" with no initials and no fax headers was produced directly from Northern Title's records. Tr. Ex. 105.

Northern Title also assumed duties beyond that of a title and escrow agency when it decided that it could determine parties' intent in the transaction *outside* of what was contained in

the REPC and other writings including the Warranty Deed and Title Commitment. The escrow agreement did not grant Northern Title the right to ascertain the intent of the parties other than what was contained in the title commitment and written REPC. Tr. Ex. 111, Sec. 11. Moreover, Northern Title was restricted to following the "joint" direction of the parties. Id. By allegedly relying upon the representations of realtors over that of the written documents and joint direction of the parties in support of altering the deed and/or making any other changes that affected the transaction, Northern Title most certainly acted beyond its charge as the title & escrow agent. Thus, even as "abstractor of title" Northern Title was liable for its gross negligence and willful misconduct.

Of further note, the trial court suggests that Cummings was entitled to such damages for Northern Title's violation of its duty as "abstractor of title." Even if this Court were to find that Northern Title did not take on such role, it is not prevented from awarding such damages from Northern Title's misconduct as to its escrow duties. "Where the lower court reaches the correct result by an erroneous theory, this Court will affirm the order on the correct theory." *Row v. State*, 135 Idaho 573, 21 P.3d 895 (2001). Any way the Court construes Northern Title's wrongful conduct, Cummings was damaged.

VIII. Northern Title Did Not Address Cummings' Arguments Pertaining to Damages.

Northern Title sidesteps and/or misstates Cummings' issues on appeal with regard to the trial court's errors in determining damages. With regard to damages (aside from punitive

damages which are addressed *infra*), Cummings makes two points which were not addressed in Northern Title's response:

1) In the event that the Court does not restore Cummings' title to the 83 acres restored, then he is entitled to monetary damages equivalent to the value of that land – which title was removed directly as a result of Northern Title's wrongful conduct. Further, Cummings is entitled to the CRP income of that property, which was stipulated by the parties at trial. *Tr.* pp. 715-716. Northern Title incorrectly cites the record to suggest that the lessee "Phelps" was entitled to the CRP payments, when *as stipulated* it was Stephens who kept the CRP income. *Id.* It also contradicts the trial court's finding of fact. R. Vol. 8, p. 1592 ¶ 2. Moreover, Cummings provided extensive testimony that he was anticipating the CRP income which the realtors represented to him that he would receive as the owner of the property. Tr. pp. 24: 21-25, 25:1-14, 138: 15-19. This testimony was corroborated by his wife, Laura Cummings. Tr. 872. Conversely, Northern Title never provided any evidence or testimony to contradict the Cummings' testimony, and any attempt to do so now is speculation. The fact remains that the only evidence presented at trial, including the stipulation of the parties, indicated that had Cummings retained title to the east side acreage subject to the CRP, he would have had the CRP income – which, again, was lost directly as a result of Northern Title's conduct.

2) Because the trial court did not recognize a claim for the tort of bad faith, Cummings was deprived of damages caused by that bad faith. As such, those damages remain undetermined.

In essence, all that Cummings is requesting on appeal is that this Court confirm his right to damages equivalent to the value of the property including income (in the event the property is not returned to him) and to damages for Northern Title's bad faith conduct. What and how much those damages are would be remanded to the trial court for determination.

Northern Title inaccurately cites the record the Court with regard to Cummings' damage claim for emotional distress. It provides a block quote from Cummings' attorney claiming that Cummings "stipulated" to dismissing that claim against Northern Title, when upon actual review, Cummings was agreeing only to dismiss the claim against *Stephens*. Tr. pp 721-22. Northern Title also falsely indicates to the Court that Cummings' emotional distress only stems from the stress of litigation, when in fact, the record reflects much more. Tr. pp. 124:10-25, 125.

IX. Punitive Damages should have been Allowed by the Trial Court.

Northern Title's argument pertaining to punitive damages also lacks basis and misstates the record. First, it incorrectly indicates that Cummings "waived" his punitive damages claim because he didn't "re-motion" the trial court for punitive damages at trial as the trial court had instructed. Northern Title Resp. pp. 18-19. The irony here is that Cummings did not need to "re-move" the trial court for punitive damages – *because at trial it was Northern Title who moved the trial court to deny Cummings punitive damages*. Tr. 738: 6-13. In other words, Cummings did not need to raise the issue because Northern Title did it for him.

Cummings recognizes that the standard for reversing a trial court's decision on punitive damages is abuse of discretion. However, notwithstanding the references from the trial court's

memorandum decision cited by Northern Title on page 17 of its response brief, it is still clear that the court did err on two of the elements of abuse of discretion, in that its decision was not consistent with applicable legal standards and/or it did not reach its conclusion by an exercise of reason. *Dunagan v. Dunagan*, 147 Idaho 599, 213 P.3d 384 (2009).

Cummings again refers to his argument on punitive damages contained within his appellant brief which were not really refuted by Northern Title. Its worth noting again that the trial court did find that Northern Title had committed "gross negligence and/or willful misconduct or both." R Vol. 8, p. 1605. The trial court further held that Northern Title "did not show" the "slightest degree of care" for Cummings when it altered the deed and knew that "Cummings would be subjected to a substantial risk of harm" in altering the deed. Those findings by the trial court itself suggest the "harmful state of mind" or "extreme disregard" for potential consequences to Cummings that constitute the legal standard for punitive damages. *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 254, 245 P.3d 992 (2010) (citations omitted). Of further note, even if Northern Title "had the understanding" that Stephens intended to sell the west side, its conduct was even more egregious, further illustrating that it knew changing the deed would deprive Cummings the east side property. The same is also true for its alleged attempt to "contact Cummings," even it was on the same day Stephens approached Northern Title about changing the deed.[5] It cannot alter its reckless conduct after the fact.

[5] It is worth noting that the altered deed was recorded at 2:33 PM, November 8, 2007, – the same day that Stephens made the request Northern Title – further diffusing any such notion that a "good faith" effort was made to obtain Cummings' prior authorization prior to altering the deed. Tr. Ex. 22. Making that claim even more dubious is the fact that Northern Title has alleged the

Moreover, the trial court did not consider Northern Title's conduct after it became aware of Cummings' claim. Again, after its own Vice-President recognized that it had "nothing in writing" to justify altering the deed, instead of correcting the problem, it abandoned all duties of neutrality and its fiduciary responsibilities to Cummings by picking sides (well before it was even brought into the case by Cummings). Given how far Northern Title deviated from its duties when it knew that it had erred, any "exercise of reason" should conclude punitive damages are warranted. It is difficult to perceive how a title & escrow company charged by law to demonstrate neutrality and to strictly follow the instructions given by its fiduciary could have behaved any worse than Northern Title did in this case. If punitive damages should ever be considered against a licensed title and escrow company, this is it.

X. There is No Reason that Idaho should not Recognize a Bad Faith Tort Against an Escrow Agent Acting under his Fiduciary Responsibilities.

Northern Title does not provide any authority to suggest that a bad faith tort *is limited* to insurance companies who fail to pay claims in a timely manner. As argued in Cummings' appellant brief, a bad faith tort has its basis in the violation of fiduciary or "special relationship" that exists outside of the contract with the parties. Such duties most certainly exist *under law* for escrow agents governed under Idaho's insurance code who have strict and crucial duties to

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excuse of not providing the Title Policy to Cummings for more than eight months after the transaction was closed because it was waiting for further instruction from him as to whether he wanted to the property quitclaimed to his trust. If Northern Title felt that it should delay such matters for that long pending direction from Cummings, how possibly could it justify altering his deed to remove his title 83 acres without his authorization on the same day that Stephens requested the change?

act as a neutral agent, follow the written instructions, and not record documents without obtaining original signatures. (See again Cummings Appellant Brief.) This fact distinguishes this case from *Foreman v. Todd*, 83 Idaho 482, 364 P.2d 365 (1961) cited by Northern Title in its brief, which did not involve an entity governed under the insurance statutes with specific escrow duties as set forth. Moreover, the facts and issues of that case have no application to this one. This Court should recognize a bad faith tort and require the trial court to consider the claim.

XI. Northern Title's Response to Cummings' Argument Pertaining to the Exclusion of the Appraisal Expert Disregards Key Facts in the Proceedings Including its Wrongful Conduct.

In responding to Cummings' claim that the trial court improperly excluded his appraisal expert, Northern Title disregards or misstates several pertinent facts and proceedings, including the following:

1) That Cummings did disclose his expert appraisal witness by the court's deadline in the scheduling order of March 13, 2012. R. Vol. 6, pp. 1096-1100.
Further, the disclosure contained the expert's qualifications and a summary of his testimony and specifically indicated that the disclosure would be supplemented with an appraisal report when it was ready. Id.

2) Rather than object to Cummings' expert disclosure, Northern Title requested available deposition dates for Cummings' expert, which were subsequently set for June 14, 2012. Supp. Vol 1, pp. 40-42. At no point until two days prior to the deposition did Northern Title request the appraisal. Such report was then provided to Northern Title within 24 hours. Id. p. 11.

3) Even after deposing Cummings' appraiser for nearly six hours, including going over the appraisal in detail, Northern Title did not object to the expert until it filed a motion to exclude on July 2, 2012, nearly three weeks after the expert's deposition and nearly four months after Cummings had first disclosed his expert. R. Vol. 6 pp. 1060-62.

4) Conversely, Northern Title's *verified* June 4, 2012, response to Cummings' discovery request pertaining to expert witness disclosures states that: "Defendant Northern Title has not yet obtained a statement of opinions from expert witnesses in this matter." Supp. Vol 1, pp. 28-29. Yet, near the end of its deposition of Cummings' appraiser on June 14, 2012, Northern Title presented a previously undisclosed appraisal conducted by Craig Warren dated February 7, 2012. Id. pp. 10-11. This meant that Northern Title had held onto this appraisal for several months, falsely denying under oath that any such appraisal was performed, and waiting for an the optimum time to sandbag Cummings.[6]

5) To address this improper conduct, Cummings filed an IRCP 37(b) Motion to Exclude and for Sanctions on June 19, 2012. Id. pp. 5-6. The Court issued its written decision excluding Northern Title's expert on July 6, 2012. R. Vol. 6, pp. 1233-37.

These additional facts and proceedings ignored by Northern Title alters the perspective on this issue. Any objection that Northern Title might have had to not receiving the appraisal at the time of the expert disclosure deadline was subsequently waived when it decided to go ahead

[6] Of further note, Northern Title does not have any evidence in the record suggesting that its appraisal expert was intended to be a "rebuttal" expert to that of Cummings' expert. That was never indicated in any of its pre-trial disclosures. The very fact that Northern Title's appraisal was prepared (but not disclosed) many months before Cummings' appraisal in itself proves this point.

and depose the expert without ever requesting the appraisal until just before the deposition. Further, Northern Title only decided to object to the expert after its improper conduct had been exposed. That was not a proper basis on which to object to Cummings' appraisal expert.

Cummings' argument remains that in considering all of the facts, the trial court abused its discretion in excluding Cummings' appraiser as a "quid pro quo" for Northern Title's conduct. It was an improper exercise of reason for the trial court to equate Cummings' conduct with that of Northern Title. There was not a "balancing of the equities" or "due consideration for less harsh sanctions" as is required before the court take the draconian action of excluding a witness that may have relevant information in the case. *Noble v. Ada County Elections Bd.*, 135 Idaho 495, 499-500 20 P. 3d 679, 683-84 (2000) (citations omitted).

Moreover, not allowing the testimony of his appraiser resulted in "manifest injustice" to Cummings. Notwithstanding the many thousands of dollars that Cummings expended on the appraisal in addition to the time and cost of the deposition, Cummings was prevented from presenting expert testimony as to the value of the 83 acres on the east side of the highway, and the value that this acreage added to the Stephens Ranch as a whole. Although still possible based on the evidence in the record, this made the court's job of deriving such values much more difficult. Indeed, the trial court noted in its decision that "there was no appraisal presented to the court" suggesting that this was a primary reason it could not to award Cummings a monetary judgment equal to the value of that property. R. Vol 8, 1629. The exclusion of this evidence that did indeed exist at great expense and harm to the merits of the case was "unjust."

Finally, there is no equal comparison of the consequences to Northern Title and Cummings respectively for the expert exclusions. Without question, the consequence was much more devastating to Cummings than Northern Title – particularly given the fact that Northern Title's appraisal was likely not relevant because it valued of the property at a point in time many years after the transaction, whereas Cummings' appraisal contained a value contemporary to the time of the transaction. R. Vol 6, 1162-1190. In the end, Northern Title was willing to giving up its much less relevant expert to obtain the benefit of excluding the highly relevant and damaging opinion of Cummings' expert. This trade off, the proverbial sacrificing of a pawn to take the queen, is not the "balancing of the equities" envisioned by this Court in determining the remedies for the late disclosure of evidence in discovery, and was therefore err.

XII. Neither Stephens or Northern Title are Entitled to their Attorney Fees.

A. Northern Title has not shown that the trial court abused its discretion in awarding Cummings fees and denying Northern Title's fees.

Rather than provide any facts or argument suggesting that the trial court abused its discretion in awarding Cummings his fees for prevailing against Northern Title and not awarding Northern Title its fees because it clearly did not prevail, Northern Title – again – devotes several pages of its brief to re-trying the case and raising all of the same arguments soundly rejected by the trial court. Northern Title failed to demonstrate that the trial court's holdings were not consistent with applicable legal standards and/or it did not reach its conclusion by an exercise of reason that:

1) in an "overall view" of the case that Cummings prevailed because he was awarded the requested relief in monetary damages for Northern Title's gross negligence and/or willful misconduct,

2) that Cummings was entitled to his fees and costs under the commercial transaction provisions of IC § 12-120(3), and

3) that the fees and costs Cummings incurred which the trial court awarded were reasonable and necessary. *Dunagan v. Dunagan*, 147 Idaho 599, 213 P.3d 384. Northern Title also fails to make a proper argument or cite any authority that it should be entitled to its fees on appeal.

B. Cummings should be awarded his fees against Stephens on appeal if he prevails.

In the event that Cummings prevails, he should be awarded his attorney fees pursuant to Section 27 of the REPC which entitles him to "reasonable costs and attorney's fees, including such costs and fees on appeal." Tr. Ex. 105, Sec. 27.

C. Stephens is not entitled to his fees on appeal, and it was err for the trial court to award him fees.

Inconsistent with his prior admissions and conduct, Stephens has now taken the position that he was not the "seller" of the property. If this Court were to accept this position, that means Stephens was not the party that entered into the REPC with Cummings in which it is attempting to use as a basis for the awarding of fees. Moreover, it also means that there was never any "commercial transaction" between Stephens and Cummings justifying the award of fees under

12-120(3). Therefore, even if he were to prevail on appeal, Stephens has no contractual or statutory basis for the awarding of his fees. Moreover, the trial court's awarding of his fees would be an abuse of discretion because there is no longer any applicable legal standard for awarding Stephens his fees. *Dunagan v. Dunagan*, 147 Idaho 599, 213 P.3d 384.

Moreover, in reviewing the "overall" case it is difficult to ascertain what "exercise of reason" would justify awarding Stephens his fees and costs even if the dismissal of Cummings' claims against him stands. This is true given the fact that the trial court held 1) Stephens signed a warranty deed and REPC which granted Cummings the entire ranch, and 2) but for Northern Title's wrongful conduct, Cummings would have retained the entire ranch. In other words, if the trial court's ruling were upheld, the only party that had any liability was Northern Title. Thus, the only party that should be required to pay the fees and costs associated with that liability is Northern Title.

Finally, Stephens has no basis on which to obtain his fees on appeal pursuant to IC § 12-121. There is no support or basis to suggest that Cummings has pursued this appeal "frivolously, unreasonably or without foundation" particularly since the trial court never issued any written conclusions of law or fact prior to dismissing Stephens from the case. *Munich v. Gem State Developers, Inc.* 99 Idaho 911, 591 P.2d 1078 (1979).

SUMMARY/CONCLUSION
This Case is a Prime Example of the Need for the Statute of Frauds and Fiduciary Duties for Escrow Agents

As this case nears seven years since Cummings' purchase of the Stephens Ranch, and has involved many thousands of pages of testimony, argument and documents and the accompanying enormity of legal expenses and grief, there can be no better reason of why Idaho has adopted statute of frauds. With its roots in 17th Century England, the statute of frauds was created and aptly termed for the purpose of limiting fraud in unwritten contracts by requiring the intent of a real property purchase agreement to be determined in writing as merged into the deed.

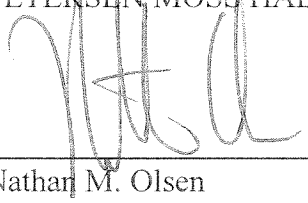
A purchaser of real property should have assurance and peace of mind that 1) the signed and recorded deed describes the property which he has purchased and 2) that the monies he deposits to his licensed escrow agent is distributed only in accordance with what he has instructed consistent with that purchase. The buyer should not have to face the potential nightmare that at some future point, that without his authorization, the deed to his property will be changed based on some intent, mischief or other purpose not his own, particularly from individuals he entrusts to follow his specific direction. To allow such conduct would and has resulted in uncertainty, stress, massive costs and ultimately chaos.

With that in mind, the trial court was correct in finding that Northern Title failed in its strict and critical duties. But the trial court's catastrophic error was that it allowed the "intent" of the parties to be something different than what was contained in the writings, not the least of which is the only properly executed Warranty Deed.

Much of the time and expense in this case could have been avoided had the writings simply been upheld in the initial summary judgment proceedings. Nevertheless, nothing prevents this Court from correcting this error by returning the focus to the long established principles set forth in the statute of frauds, merger doctrine, warranty deeds, and fiduciary duties of an escrow agent, thus allowing Cummings – who has done nothing wrong in this case – to be made whole for the harms caused by the defendants.

DATED this 16th day of January, 2014.

PETERSEN MOSS HALL & OLSEN



Nathan M. Olsen

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 16th day of January, 2014, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with Rule 5(b), IRCP/

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