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Cummings v. Stephens Appellant's Reply Brief 2 Dckt. 40793

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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

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I. WHETHER VIEWED FROM THE ANDERSON RULE OR FROM THE UNAMBIGUOUS TERMS OF THE DOCUMENTS, THE DISTRICT COURT IMPROPERLY HELD NORTHERN TITLE LIABLE FOR CUMMINGS' RELIANCE ON NORTHERN TITLE'S DESCRIPTION.

"Whether a duty exists is a question of law over which this Court exercises free review." *Gagnon v. Western Bldg. Maintenance, Inc.*, 155 Idaho 112, 306 P.3d 197, 200 (2013) (quoting *Turpen v. Granieri*, 133 Idaho 244, 247, 985 P.2d 669, 672 (1999)). "Although a person can assume a duty to act on a particular occasion, the duty is limited to the discrete episode in which the aid is rendered." *Udy v. Custer County*, 136 Idaho 386, 389, 34 P.3d 1069, 1072 (2001) (citing with approval *City of Santee v. County of San Diego*, 211 Cal.App.3d 1006, 259 Cal.Rptr. 757 (1989)).

As the District Court mentioned, Idaho does not recognize the tort of negligent misrepresentation, except for accountants. See *R.*, Vol. 8, 1622, fn. 115 (citing *Mannos v. Moss*, 143 Idaho 927, 155 P.3d 1166 (2007)). Similarly under *Anderson v. Title Insurance Company,* a local title insurance agent who produces a preliminary title report is not thereby transmuted into an abstractor. See *Anderson*, 103 Idaho 875, 879, 655 P.2d 82, 86 (1982).

A. The facts in the record do not support the District Court's imposition of abstractor liability.

Under *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, a title insurer's agent who takes on multiple roles does not impliedly become an abstractor. See *Brown's Tie & Lumber Co.*, 115 Idaho 60, 764 P.2d 423 (1988) (insurance agent not abstractor though simultaneously acting as insurer's agent, closing agent, and trustee for deed of trust). Rather, an insurance agent

is never impliedly an abstractor, and to impose such a duty, "it must be shown that the act complained of was a direct result of duties voluntarily assumed by the insurer in addition to the mere contract to insure title." *Id.* at 59 (emphasis added).

The District Court committed clear error when it found that Northern Title was acting as Cummings' abstractor. See *R.*, Vol. 8, 1593 (Finding of Fact No. 6); see also *id.* at 1622. The facts relied on by the District Court were as follows. First, the District Court relied on the fact that sometime in early 2007, the Stephens Trust's Realtor went to Northern Title to "start the initial title work." *Id.* at 1622, fn. 118 (citing Tr., Vol. 1, 380:11-13); see also *id.* at R. Vol. 8, 1593 (Finding of Fact, No. 3). There was never any mention that Northern Title, at this phase, voluntarily assumed the duty of an abstractor for the Stephens Trust, Cummings, or whether this "title work" was done for anything but title insurance.

Second, the District Court relied on the fact that "the title department within Northern Title [ ] was responsible for the legal description and not the escrow department." *R.*, Vol. 8, 1620. The evidence, however, clearly showed that Northern Title's "title portion" of the work, as the District Court called it, was done to facilitate title insurance. *Id.* The very testimony relied upon by the District Court to support its finding is an explanation by Northern Title, explaining how its "title department" was engaged to facilitate title insurance:

> Well, the title department would start the process first after an order has been submitted to them. Searching the property, creating the documentation, putting together the legal descriptions, any special exceptions, taxes, anything that they would need to compile to go into the report for the commitment for title insurance. Then that would be generated and sent. And then as an escrow officer, I would work off of

> that commitment for my instructions to generate the closing and to proceed with closing the transaction.

R., Vol. 8, 1620, fn. 111; see also Tr., Vol. 1, 372:20-373:4 (emphasis added). A few lines later, Northern Title emphasized again:

> Q: And then they'd [the title department] give that back to – they give that to the escrow officer?
>
> A: No. They give it to their processor.
>
> Q: The processor for who?
>
> A: For the title officer to put together a draft of a commitment.

Tr., Vol. 1, 375:3-8 (emphasis added).

Indeed, the District Court expressly found that the legal description upon which Cummings relied was created by Northern Title to facilitate title insurance:

> The first legal description that Northern Title prepared as part of the commitment for title insurance to be issued to Three Bars Ranch had a legal description that included property on the east side of the highway.

R., Vol. 8, 1603. This is the only legal description Cummings saw or ever relied upon. *Id.* at 1594 (Finding of Fact No. 21); see also *Tr.*, Vol. 1, 94:5-6. Additionally, there was no evidence that Northern Title voluntarily placed its legal description inside of the parties' REPC. Rather, the District Court ambiguously found "[t]he legal description that was prepared by Northern Title would be attached to the Real Estate Purchase and Sale agreement, the Commitment of Title Insurance, and the warranty deed conveying title from the Stephens to the buyer." *Id.* at 1593 (Finding of Fact No. 7, emphasis added).

Indeed when Northern Title's title department got involved again, it was to facilitate title insurance. The District Court found:

> "Prior to closing the real estate transaction, Dorothy Julian went into Northern Title's office and specifically asked Lori Thornock if the legal description . . . excluded all property on the east side of the highway."

R., Vol. 8, 1593 (Finding of Fact 9). But the actual testimony shows it was all to facilitate title insurance:

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

Tr., Vol. 1, 518:13-25 (emphasis added).

Cummings, looking to the deposition of Phillip Baum, argues more was at play and that "Three Bar Ranches, Inc., through Phillip Baum, verified that he . . . had seen and reviewed the REPC with 'Addendum One.' [before Cummings ever entered the picture]." *Appellant Reply/Cross-Resp's. Brief*, 27. Looking to Baum's deposition as cited, however, Baum only testified that he "reviewed the title commitment for this property as to the metes and bounds description of the property." *Published Baum Depo.*, 22:3-7.[1] Nowhere, in the entirety of the

1 In Phillip Baum's deposition, and again on appeal, Cummings tries to introduce the affidavit of Curtis Baum, Phillip Baum's brother. Based on clear signs of fabrication, this affidavit was deemed inadmissible. See *Order Granting Motion to Augment the Record* (Nov. 22, 2013); see also *Motion to Augment the Record* (Nov. 15, 2013, Addendum "A," attached thereto).

District Court's decision, is it ever found that Northern Title's legal description existed prior to Northern Title's first title commitment of July 26, 2007. See *R.*, Vol. 8, 1588-1635. There is no testimony or documents that Northern Title agreed to act as an abstractor, that Northern Title provided the Realtors with a REPC in tandem with the title commitment, or that Northern Title received additional compensation to be an abstractor. *Id.*

In clear contradiction, the District Court found that "Northern Title was tasked with preparing the legal description that would be attached to the Real Estate Purchase and Sale Agreement . . . and ultimately the warranty deed conveying title . . . ." *R.*, Vol. 8, 1622 (citing to fn. 119, *Tr.*, Vol. 1 387:24-39:1-16). In reality, the very testimony relied upon for this erroneous finding plainly states that Northern Title provided a description to facilitate title commitment:

> Q: Well, how would they get there? When would you have gotten this real estate purchase agreement?
>
> A: I would have gotten the real estate purchase agreement without Exhibit A sometime around July 23rd is when it was submitted to us with Three Bar Ranches.
>
> Q: Okay. If you look at this agreement – okay. If you look where – let's find Section 1 of this, Ms. Thornock. It says, "Buyer agrees to sell the following described real estate hereinafter referred to as premises. Commonly known as the Stephens Ranch in the City, Montpelier, Bear Lake County, Idaho, legally described as: See Addendum 1.
>
> A: Yes.
>
> Q: So if you get this – got this real estate purchase contract in there, and it says, "See Addendum 1," wouldn't it be important to get that addendum?
>
> A: Didn't have it.

Q: I mean, you're the title company. You're the one that's going to be putting this transaction together, right?

A: Title was opened before we received this. The file was opened before we received a contract.

Q: But at some point you're going to request a contract before you start the title work?

A: Oftentimes realtors open title when they have a ranch prior to a buyer if they feel they have a buyer in line.

Q: And then when you get the contract, do you then send it to the title department?

A: Yes. We can send it to the title department. We can give them the information. They'll update the commitment.

Q: And so you're going to be sending them [the title department] the complete agreement; right?

A: They would normally get the complete agreement.

Q: Well, if you're the one – are you the one that's going to – you open the order?

A: No, I do not open the order.

Q: Okay. Somebody there at the company opens the order, and then they're supposed to send the real estate purchase – the full real estate purchase agreement to the title department; right?

A: Yes.

Q: And that would – I'm assuming would assume – wouldn't that include the legal description that the parties agreed upon?

A: If it was provided.

* * *

Q: Okay. So when did you go get it.

A: We didn't go get it. It was generated by us when we produced the title commitment on July 26th under pressure.

Q: Here's my question: I mean, turn to page number 232 on Exhibit 105.

A: Yes.

Q: Are you there?

A: Yes.

Q: Now this Addendum 1 was in your records; correct?

A: It would be in my records as part of the commitment.

Q: It's in your records because it came from - 232 is the Bates number that came from your file.

A: It came from my file, but not in this order.[2]

Q: Well, it's in the order that we got it. But my question to you – first of all –

A: The file was out of order.

Q: Who prepared this document? Do you know?

A: The title officer.

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

A: She prepared Exhibit A.

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

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2 See *Thornock Published Depo.*, 156:1-23 (Cummings' Counsel given Thornock's original file, later Trial Ex. "105," and making the file out of order).

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

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

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

Tr., Vol. 1 387:24-391:12.

Cummings again in his response brief raises the fact that Exhibit 105, Ms. Thornock's file, contained a copy of "Addendum One." See *Appellant Reply/Cross-Resp's. Brief*, 27. As the record above makes clear, however, Northern Title provided a legal description for its title commitment, Exhibit "A," not "Addendum 1" to the REPC. See *Tr.*, Vol. 1 387:24-39:1-16. Additionally, Evan Skinner admitted that he, not Northern Title, provided Cummings with a REPC that had "Addendum One" hand written over the top, and that such was his handwriting, not Northern Title's. See *Tr.*, Vol. 1, 806:23-25; see also *id.* at 391:6-9. Northern Title does not become an abstractor simply because its escrow manager keeps a copy of the parties' REPC. Indeed, the District Court held Northern Title did not undertake any additional duties as an escrow. See *R.*, Vol. 8, 1633 (Conclusion of Law No. 23). Therefore, contrary to Cummings' arguments, the fact that Exhibit 105 contains a legal description with "Addendum One" written on it by a realtor is not basis for imputing abstractor liability upon Northern Title.

The District Court's misapplication of the above facts was founded upon an improper presumption. Citing to a Texas case, the District Court held that "the agent is usually a title and abstract company . . . ." *R.*, Vol. 8, 1618 (citing *Cameron County Sav. Ass'n v. Stewart Title*

Guar. Co., 819 S.W.2d 600, 604 (Ct. App. Texas 1991). Whether or not this is true, under Idaho law, the presumption is improper. As many states do, Idaho requires out-of-state title insurance companies to operate through "agents." See I.C. § 41-2710. However, a title insurance agent is not impliedly an abstractor, and the issuance of a title commitment does not create or imply the duty of an abstractor. See *Anderson*, 103 Idaho at 879, 655 P.2d at 86 (holding title insurance company not impliedly acting as abstracter by issuing preliminary title report); see also *Brown's Tie & Lumber Co.*, 115 Idaho 60, 764 P.2d 423 (title insurer's agent also acting as escrow and trustee not liable as abstractor for twice misrepresenting status of title conveyed).

Thus, the District Court erroneously began its analysis with the presumption that Northern Title was providing abstractor services. The District Court and Cummings were fully apprised that such a presumption was inappropriate. See *R.*, Vol. 4, pp. 744-746 (*NT's Second Motion in Limine*); *id.* at Vol. 5, pp. 767-769 (*Memo. in Supp. of NT's Second Motion in Limine*). Cummings' time to address whether Northern Title was acting as an abstractor was at trial; and it never was. See *Latham v. Garner*, 105 Idaho 854, 862, 673 P.2d 1048, 1056 (1983) (holding "[t]he appropriate time to present evidence . . . was at trial and not after an adverse judgment"). The word abstractor was not even mentioned once during the entire trial. See *Tr.*, Vol. 1, 1-878.

"To fall outside the [*Anderson*] rule . . . it must be shown that the act complained of was a direct result of duties voluntarily assumed by the insurer in addition to the mere contract to insure title." *Brown's Tie & Lumber Co.*, 115 Idaho at 59, 764 P.2d at 426. The uncontested record, even those portions relied upon by the District Court, show Northern Title provided a

legal description to further title commitment. Cummings' reliance on the description was improper, and his claim for negligence should be dismissed.

B. Cummings cannot avoid the Anderson rule by bootstrapping the District Court's improper imposition of abstractor liability to the later re-recording of the corrective deed.

The principles of negligence do not give a plaintiff the discretion to pair any alleged acts with any alleged damages. Rather, a negligence cause of action requires a duty, a breach of that duty, and "a causal connection between the defendant's conduct and the resulting injury," and actual loss or damage. *Mugavero v. A-1 Auto Sales, Inc.*, 130 Idaho 554, 556, 944 P.2d 151, 153 (Ct. App. 1997) (citing *Brooks v. Logan*, 127 Idaho 484, 489, 903 P.2d 73, 78 (1995); *Western Stockgrowers Assoc. v. Edwards*, 126 Idaho 939, 941, 894 P.2d 172, 174 (Ct.App.1995)). Duty, conduct, and damages co-exist and precipitate one another. See e.g. *A.W. Brown., Inc. v. Idaho Power, Inc.*, 121 Idaho 812, 819, 828 P.2d 841, 848 (1992) (failure to prove obligation renders moot the need to resolve damages); see also *Smith v. David S. Shurtleff and Associates*, 124 Idaho 239, 242, 858 P.2d 778, 781 (Ct. App. 1993) (damages moot where causation not attributable to conduct complained of).

In a last ditch attempt to maintain liability against Northern Title, Cummings points to any conduct and any damages he can. First, Cummings raises a new argument, namely that Northern Title "assumed duties beyond that of a title and escrow agency when it decided it could determine the parties' intent"[3] and filed the corrective warranty deed. See *Appellant*

3 In reality, Northern Title testified that it was not its job to figure the intent of the transaction, but rather to follow its escrow instructions. See *Tr.*, Vol. 1, 468:16-18.

Reply/Cross-Resp's. Brief, 27-28. Cummings' argument is directly contrary to the District Court's final decision. See *R.*, Vol. 8, 1619 ("Northern Title did prepare the legal description to the property, but this happened in connection with other parts of its business, rather than as an escrow agent"); see also *id.* at 1620 (Northern Title's only misconduct in recording the corrective deed was "failing to get Cummings' authorization . . . a breach of the escrow agreement").

Factually and legally, Cummings' argument makes no sense. Under *Brown's Tie & Lumber Company*, "[t]o fall outside the [*Anderson*] rule . . . it must be shown that the act complained of was a direct result of duties voluntarily assumed by the insurer in addition to the mere contract to insure title." *Brown's Tie & Lumber Co.*, 115 Idaho at 59, 764 P.2d at 426. Further, "[a]lthough a person can assume a duty to act on a particular occasion, the duty is limited to the discrete episode in which the aid is rendered." *Udy*, 136 Idaho at 389, 34 P.3d at 1072 (citations omitted). Assuming, *arguendo*, that Northern Title voluntarily assumed the duty of an abstractor by re-recording the corrective deed, such happened 105 days after Cummings relied on Northern Title's title commitment. Cummings' attempt to pair a duty allegedly assumed long after the conduct complained of, is nonsensical.

Second, Cummings goes a step farther, arguing that the alleged damages connected with Northern Title's abstractor liability should literally be 'shifted' to Northern Title's alleged breach of the escrow contract. *Appellant Reply/Cross-Resp's. Brief*, 28 ("[e]ven 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"). The Court should be hard

pressed to shift damages from one (1) tort, to a 105 day later breach of contract.[4] Assuming, *arguendo*, the damages erroneously attributed by the District Court to Northern Title as an abstractor are transferrable to Northern Title's re-recording of the corrective deed, the result is again, nonsensical. The $50,000 assignment purchased by Cummings (the damages) obviously did not arise and were not caused by the 105 day later, re-rerecorded corrective deed.

The only conceivable damages, or *common denominator* between the erroneous title commitment and the re-recorded correction deed, is the value lost to Cummings; the eastern property.[5] Here again, however, Cummings' theoretical transfer fails; but this time, for lack of proof. Cummings testified that both the east and west sides of the Stephens Ranch were important, but for different reasons. See *Tr.*, Vol. 1, 197:16-17. On the west, there is a home, a homestead, a barn, a shop, hay sheds, crops and cattle stalls. *Id.* at 151:7-157:18. On the east, there is unfarmed CRP land. *Id.* 109:17-19. According to Cummings, he valued the property due to its "multifunctional" capabilities, envisioning an RV park, view lots, and agricultural property. *Id.* at 46:9-11; see also *id.* at 259:1-7. However despite the complexity of the property, the District Court found Cummings "did not provide any evidence regarding the value of the property on the east side of the highway." *R.*, Vol. 8, 1627.

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4 Title Commitment was issued on July 26, 2007; Corrective Warranty Deed was recorded on or about November 8, 2007.

5 See *Appellant Reply/Cross-Resp's. Brief*, 23 ("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 [sic] Ranch without the acreage on the east side").

On his own appeal, Cummings in conclusory fashion has argued that the District Court erred, because "Cummings' post trial brief set forth a number of consequential and proximate damages suffered as a result of Northern Title's misconduct." *Appellant's Brief*, 31. Later in his *Reply*, Cummings again in conclusory fashion argues he is "entitled to monetary damages equivalent to the value of that land." See *Appellant Reply/Cross-Resp's. Brief*, 29. However, "[a] general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. This Court will not search the record on appeal for error." *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 383, 234 P.3d 699, 707 (2010) (citing *Michael v. Zehm*, 74 Idaho 442, 445, 263 P.2d 990, 991 (1953); *Suits v. Idaho Bd. of Prof'l Discipline*, 138 Idaho 397, 400, 64 P.3d 323, 326 (2003)). Where Cumming's failed to prove beyond speculation the value of the eastern property, and again failed to properly raise the issue on appeal, the theoretical application of those damages to various causes of action is moot.

The District Court's improper imposition of abstractor liability cannot be bootstrapped to a later, completely different act. Cummings never "relied" on the first warranty deed of August 3, 2007, let alone the corrective deed of November 8, 2007. See *Tr.*, Vol. 1, 226:12-14 (admitting if he had read the closing documents, the closing deed description would have been "a major red flag"). Notwithstanding, even if Cummings' alleged eastern property damages is construed as a common denominator among different causes of action, Cummings failed to prove the value of that common denominator.

C. Even absent the Anderson rule, the documents unambiguously announce that Northern Title was not Cummings' abstractor of title.

Idaho Courts have long eschewed an appellant who takes a position on appeal inconsistent with his position at trial. See *Hunt v. Hunt*, 110 Idaho 649, 653, 718 P.2d 560, 564 (Ct. App. 1985) ("Mr. Hunt's position on appeal is entirely inconsistent with his position at trial . . . as Mr. Hunt failed to make this argument at trial, he is precluded from raising it for the first time on appeal") (citing *Baldners v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982)).

In his response, Cummings intentionally avoids and makes no reference to the contractual language of the title commitment. That title commitment, upon which Cummings relied, states:

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

Trial Ex. 35 (emphasis added). Similarly, Cummings makes no mention of the escrow agreement, which states:

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

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

Cummings disregards the above language, while in the same breath, arguing the "seminal doctrine followed in Idaho and universally, [is that] the intent of the parties is determined by the words of the written agreement" See *Appellant Reply/Cross-Resp's. Brief*, 18. Of course, Cummings made this argument as to the warranty deed, arguing against the introduction of parol

evidence. *Id*; *Cf. Belk v. Martin,* 136 Idaho 652,657, 39 P.3d 592,597 (2001) ("[p]arol evidence ... is allowed to clarify that a term of the contract was a mistake"); see also *Bailey v. Ewing*, 105 Idaho 636, 641, 671 P.2d 1099, 1104 (Ct. App. 1983) ("[p]arol evidence may also be used to show what that true intent was"); see also *West v. Bowen*, 127 Idaho 128, 130,898 P.2d 59, 61 (1995) (citing *Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 383, 414 P.2d 879, 884 (1966) ("[t]he doctrine of merger does not apply where ... there was a mistake").

In contrast to the deed description, no one has alleged mistake as to Northern Title's title commitment, and for the first time ever, Cummings seeks to distance himself from the title commitment, arguing "[t]he title commitment itself was prepared for Three Bar Ranches, Inc. . . . Northern Title never refuted this testimony." See *Appellant Reply/Cross-Resp's. Brief*, 27. This is entirely inconsistent with Cummings' position below.

When Cummings was faxed the real REPC, which did not have a legal description, he called the Realtors back and "[d]emanded the documents." *Tr.*, Vol. 1 62:25-63:16; see also Trial Ex. 29. During trial, Counsel then handed to Cummings *Skinner's REPC* and Northern Title's title commitment attached thereto, stating "before I ask you about that document, Mr. Cummings, was there anything else that you -- in addition to the Addendum 1, was there anything else that you requested from Exit Realty with regard to the purchase agreement?" *Id.* at 63:23-64:2. Cummings responded "most importantly was the -- they had run a preliminary title commitment from Northern Title." *Tr.*, Vol. 1, 64:3-4. Cummings unequivocally relied on Northern Title's title commitment:

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

Tr., Vol. 1, 277:15-278:2 (emphasis added). Similarly:

> Q: Okay. Now, when the title commitment wasn't in Three Bar Ranches' name, that was sent to you for your review, was that a concern for you in relying on that title commitment?
>
> A: Excuse me. Could you restate –
>
> Q: The fact that the title commitment was in Three Bar Ranches' name, was that a concern to you?
>
> A: That was not a concern to me. It's the property that was the legal description that was being checked. The name change is all that needs to take place once that's all been performed.

Tr., Vol. 1 358:25-359:9 (emphasis added).

In contrast, Northern Title's position has always been the same. Namely, the District Court's imposition of abstractor liability was improper for three reasons. First, Northern Title provided its title commitment to further title insurance, and second, both the title commitment and *Escrow General Provisions* make clear that Northern Title is not the parties' abstractor. See *Supra*. Third, "[p]olicies of insurance, as other contracts, are to be construed in their ordinary meaning and where the language employed is clear and unambiguous, there is no occasion to construe a policy other than the meaning as determined from the plain wording therein."

Anderson, 103 Idaho at 878-879, 655 P.2d at 85-86 (citing *Thomas v. Farm Bureau Mutual Insurance Co. of Idaho, Inc.*, 82 Idaho 314, 318 (Idaho 1960)).

Unlike Cummings' waffling attempt, Northern Title has always taken the position that Cummings had no basis to rely on a title commitment issued to Three Bar. See Trial Ex. 35 ("this Commitment shall be only to the named proposed Insured"); see also See *R.*, Vol. 5, 759-764, 767-769 (Northern Title motioning the District Court to bar evidence of Cummings' reliance on the title commitment where Cummings is not the "proposed insured"). The title commitment was, as Cummings admits, issued to Three Bar. See *Tr.*, Vol. 1, 546:3-22 (Northern Title never received request to issue title commitment to Cummings); see also *id.* at 282:2-8 (Cummings never requested title commitment in his name). Thus, the District Court's imposition of liability was a violation of law, where Northern Title (1) provided the legal description to facilitate title commitment; (2) the title commitment was expressly limited to insure title; and (3) Three Bar, not Cummings, was the "proposed insured."

The Court should dismiss the District Court's finding of negligence against Northern Title. The written contracts upon which Cummings "relied" runs directly contrary to the District Court's imposition of abstractor liability. The documents are unambiguous, and Cummings' attempt to distance himself from them comes too late.

II. THE DISTRICT COURT DISREGARDED NORTHERN TITLE'S AUTHORITY; AND ITS OWN FINDINGS MAKE CLEAR THAT NORTHERN TITLE DID NOT ACT WITH GROSS NEGLIGENCE AND WILLFUL MISCONDUCT.

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

Reser, 143 Kan. 831, 57 P.2d 101, 103 (1936)). Like every contract, the escrow contract "must be construed, if possible, so to give force and effect to every part thereof." *Twin Lakes Village Property Ass'n, Inc. v. Crowley*, 124 Idaho 132, 137, 857 P.2d 611, 616 (1993) (citing *Wright v. Village of Wilder*, 63 Idaho 122, 125, 117 P.2d 1002, 1003 (1941); *George v. University of Idaho*, 121 Idaho 30, 36, 822 P.2d 549, 555 (Ct.App.1991)).

The District Court committed legal error interpreting Northern Title's authority under the *Escrow General Provisions*, leading to the erroneous conclusion that Northern Title was not "authorized" to correct a clerical mistake. See *R.*, Vol. 8, 1603-1605; see also *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 723, 291 P.3d 399, 406 (2012) ("[w]en the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law"). The District Court and Cummings have continually ignored the breadth of authority granted to Northern Title under the *Escrow General Provisions*.

First, the *Escrow General Provisions* provide the source and scope of Northern Title's authority.

> Subject to the terms of this agreement, Escrow Agent agrees to act as an escrow agent in closing the transaction described above. Escrow Agent is not the agent of any single party. Rather, Escrow Agent agrees to prepare documents . . . record documents . . . and otherwise close the transaction in accordance with the joint direction of the parties.

Trial Ex. 111, ¶ 1. Similarly, Northern Title's duties and powers are governed by "the terms of the escrow agreement." *Foreman*, 83 Idaho at 485, 364 P.2d at 366 (quotation omitted).

Under the *Escrow General Provisions*, the instructions Cummings could rely on, and the instructions Northern Title could rely on, were very different. The agreement clearly distinguishes between the authority vested in the "Escrow Agent," and the rights of the remaining "parties." For Cummings, he could rely only on instructions received by Northern Title in writing. If conflicting oral or written instructions arose, reliance was barred:

> The parties agree that the only representations of Escrow Agent upon which they are entitled to rely or act are those that are in writing and executed by Escrow Agent and that the parties are not entitled to act or rely on conflicting oral or written terms or directions given to Escrow Agent prior to closing.

Trial Ex. 111, ¶ 3 (emphasis added).

Here, there were conflicting instructions. Prior to closing, Northern Title had been orally instructed that the deed description should include only the property west of Highway 30. See *R.*, Vol. 8, 1593 (Findings of Fact 8 and 9). Also prior to closing, on August 2, 2007, Cummings signed the *Escrow General Provisions*. See *Tr.*, Vol. 1, 88:4-19. In contrast to the oral instructions received, the *Escrow General Provisions* signed by Cummings prior to closing purported to convey the western and eastern property. *Id.* at 1595 (Findings of Fact 27 and 28). Therefore, Cummings did not retain authority against Northern Title to rely[6] on the conflicting

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6 Interestingly here, Cummings admitted that he never actually relied on the legal description at closing, and if he had, it would have been a "major red flag." See Tr., Vol. 1, 220:12-221:10 (admits second title commitment legal description used at closing but did not see it); see also *id.* at 226:12-14 (Cummings did not review closing documents, admitting the legal description would have raised a "major red flag"); see also *Liebelt v. Liebelt*, 118 Idaho 845, 801 P.2d 52 (Ct. App. 1990) (holding that failure to read a contract "constitutes nothing more than gross negligence on the part of that party").

written instructions any more than the Stephens Trust retained authority to rely on the conflicting oral instructions.

The instructions Northern Title was authorized to rely and act upon were very different from the other parties. Much broader:

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

Trial Ex. 111, ¶ 2 (emphasis added). This is a contract provision, which should have been given "force and effect to every part thereof." *Twin Lakes Village Property Ass'n, Inc.*, 124 Idaho at 137, 857 P.2d at 616 (citations omitted).

Paragraph 2 of the *Escrow General Provisions* authorizes Northern Title to act on the written or oral directions received, whether given by the parties, the parties' official representatives, or any "person who has dealt with Escrow Agent on behalf of them in this transaction." Trial Ex. 111, ¶ 2. Comparing paragraph 2 of the *Escrow General Provisions* to paragraph 3, if the writings and/or oral instructions conflicted, the parties clearly granted Northern Title the discretion to determine what its instructions were. The *Escrow General Provisions* allowed this power to be limited, but neither Cummings nor the Stephens Trust requested a limitation. See Trial Ex. 111, ¶ 2.

Additionally, Northern Title's receipt of conflicting instructions did not necessitate paralysis. Under paragraph 17, Conflicting Instructions & Disputes were triggered when the "Escrow Agent becomes aware of any conflicting demands or claims concerning escrow." Trial Ex. 111, ¶ 17 (emphasis added). If such arose, Northern Title *at its option* could stop acting and/or file an action in interpleader. *Id.* Here, the first time Northern Title became aware of Cummings's dispute was long after the corrective deed was filed. See *R.*, Vol. 8, 1597 (Findings of Fact Nos. 42-43, letter from Cummings' Counsel on May 30, 2008); see also Trial Ex. 117.

Further, Northern Title had been given the authority to "prepare documents," and to require the correction of clerical errors as it "deemed necessary." Trial Ex. 111, ¶¶ 1, 20. Indeed, even though Northern Title prepared and filed the corrective deed, the District Court held "Northern Title did not voluntarily undertake any duties of an escrow agent outside of the escrow agreement." *R.*, Vol. 8, 1633 (Conclusion of Law No. 23).[7]

Given the conflicting instruction from the Realtors, Cummings argues he was not "represented" by the Realtors, and therefore Northern Title cannot rely on their instructions. See *Appellant Reply/Cross-Resp's. Brief*, 22. However, official representation was not required. Under paragraph 2,

> The parties authorize Escrow Agent to close the transaction, record documents, disperse funds, and otherwise act in accordance with the written Settlement Statement and any written or oral directions or agreements given to Escrow agent by the parties or their representatives. The parties agree that Escrow Agent is entitled to act on the direction of the realtor, attorney or other person who has dealt with Escrow Agent on behalf of them in this transaction.

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7 Neither Cummings nor Northern Title has disputed this holding on appeal.

Trial Ex. 111, ¶ 2. As mentioned *supra*, the above provision "must be construed, if possible, so to give force and effect to every part thereof." *Twin Lakes Village Property Ass'n, Inc.*, 124 Idaho at 137, 857 P.2d at 616 (citations omitted). The first sentence of paragraph 2 speaks of instructions through a party's "representatives." Trial Ex. 111, ¶ 2. The second sentence, however, is broader, extending Northern Title's instructions to any "person who has dealt with Escrow Agent on behalf of them in this transaction." *Id.* Such makes sense; Northern Title is not privy to listing agreements between realtors, buyers and sellers. See *Tr.*, Vol. 1, 426:23-427:1.

Based upon the undisputed finding of the District Court, "Northern Title had multiple conversations with the real estate agents, Dorothy Julian and Evan Skinner, and it was quite clear to Northern Title that the Stephens only intended to sell their property located on the west side of the highway." *R.*, Vol. 8, 1593 (Finding of Fact No. 8). Further undisputed testimony shows that during the transaction, the Realtors dealt with Northern Title on Cummings' behalf.

When Cummings wanted the title commitment, he demanded it from the Realtors, not Northern Title. See Tr., Vol.1, 63:23-64:4. Additionally Exhibit 35, Skinner's REPC, and Northern Title's Title Commitment, begins with a fax header from Skinner stating "Title Co. said we can close [b]y next Wed." Trial Ex. 35. Simply put, in the few days of this 1031 cash transaction, Cummings was working through the Stephens Trusts' Realtors:

Q: All right. During the period of the transaction, did you have any direct contact with Mr. Stephens, the Seller?

A: No.

Q: Did you have any direct contact with any of the principals for Three Bar Ranches?

A: No.

Q: So all your negotiations with them were though – was it Evan Skinner?

A: Yes.

Tr., Vol. 1, 98:21-99:5; see also *id.* at 187:17-188:2; see also *id.* at 210:2-12. Even when it came to getting documents from Northern Title, Cummings went through the Realtors:

Q: The legal description is one of the documents – one of the three or four documents you were asking for?

A: That's correct.

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

A: That's correct.

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

A: At this juncture?

Q: Yes.

A: I do not believe so.

Tr., Vol. 1, 311:9-20.

Indeed, the document that allegedly formed Cummings's entire misconception was obtained when he "demanded" the Realtors to provide a legal description, and in return, the Realtors pressured Northern Title for a hurried title commitment, produced that same day on July 26, 2007. See *Tr.*, Vol.1, 63:23-64:4 (Cummings "demanding" the Realtors to get him the

documents); see also *id.* at 390:10-12 (title commitment produced on July 26th "under pressure"); see also *R.*, Vol. 8, 1594 (Cummings relied on July 26, 2007 fax). Again, after Cummings was involved, Julian came to Northern Title and demanded to know whether the description excluded all eastern property. See *R.*, Vol. 8, 1593 (Finding of Fact No. 9); see also *Tr.*, Vol. 1, 519:3-4 and 519:12-22 and 520:21-521:9 (first title commitment sent July 26, 2007, error in title commitment detected a "couple of days" after). Therefore, Northern Title was "entitled to act on the direction of the realtor . . . who [had] dealt with Northern Title on behalf of Cummings in this transaction." Trial Ex. 111, ¶ 2.

Next, Cummings argues that Northern Title had no authority to file a corrective deed because the District Court, years before trial, referred to the erroneous description as a "legal error," rather than a clerical error. See *Appellant Reply/Cross-Resp's. Brief*, 22 (citing *R.*, Vol. 1, 111). Whatever the District Court meant by such a term, this was clearly a clerical error.

By way of analogy, errors under Rule 60(a) refer to "clerical errors." See *Silsby v. Kepner*, 140 Idaho 410, 412, 95 P.3d 28, 30 (Utah). The 9th Circuit explains the "distinction between 'clerical mistakes' and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of 'blunders in execution' whereas the latter consist of instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination." *Blanton v. Anzalone*, 813 F.2d 1574, 1577, fn. 2 (1987).

The District Court expressly found, and Cummings does not challenge, that Northern Title intended for its title commitment description, the same title commitment description referred to in the *Escrow General Provisions*, to exclude all property east of Highway 30. See *R.*, Vol. 8, 1593 and 1595 (Findings of Fact 9-10, 25-27). The first time Northern Title discovered a lack of exclusionary language, Northern Title corrected the error, and sent the Realtors a new title commitment. See *Tr.*, Vol. 1, 520:17-521:9. This second but still erroneous legal description was used at closing. See *R.*, Vol. 8, p. 1598 (Finding of Fact No. 28). The only difference between the legal description used at closing, and the corrected legal description recorded November 8, 2007, was *moving* to the top the verbiage "EXCEPT ALL OF THAT PORTION OF THE FOLLOWING DESCRIBED LAND LYING EASTERLY OF U.S. HIGHWAY 30." See Trial Ex. 11; see also Trial Ex. 17. Given Northern Title's undisputed understanding, the *Escrow General Provisions* contemplated that clerical correction as Northern Title "deemed necessary." Trial Ex. 111, ¶¶ 1, 20.

Notwithstanding, even if Northern Title breached the *Escrow General Provisions* by failing to get Cummings' signature, the District Court's finding of gross negligence and willful misconduct done "without Cummings's [sic] knowledge or authorization" was clearly erroneous. *R.*, Vol. 8, 1607. As the Court in *Sartain v. Fidelity Financial Services, Inc.* held, "[a] correction deed does not bestow new title on the grantee; rather, it is the confirmation of a title already possessed." *Sartin*, 116 Idaho 269, 272, 775 P.2d 161, 164 (Idaho App. 1989). Similarly, Northern Title was not attempting to convey new title upon Cummings or Stephens.

Further, the District Court's own specific findings are contrary to its conclusion of gross negligence and willful misconduct:

> During November 2007, Thornock tried to contact Cummings to let him know that Northern Title was changing the legal description on the warranty deed but was only able to leave a voicemail on his answering machine.[8]
>
> . . .
>
> Northern Title's actions, in rerecording the November 8 warranty deed, were made in good faith and on the reasonable belief that the property on the east side of Highway 30 was not to be included in the transaction.[9]
>
> . . .
>
> Northern Title did not rerecord the deed for the purpose of harming or injuring Cummings. Thornock testified that a portion of Northern Title's purpose in rerecording the deed was to protect Cummings from potential lawsuits that might be brought against him over the mistaken conveyance of the property on the east of Highway 30.[10]
>
> . . .
>
> However, Northern Title had the understanding all along that the sale was to include only that property on the west side of Highway 30. Northern Title therefore contested Cumming's claims in good faith.[11]
>
> . . .
>
> Northern Title's information was that Cummings only received property on the west side of Highway 30.[12]

R., Vol. 8, pp. 1596, 1599-1600, 1611-1612, 1616 (emphasis added). The above specific findings go directly against the District Court's conclusory imposition of gross negligence,

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

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

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

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

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

which requires "[t]he want of even a slight care and diligence." *Strong v. Western Union Telegraph Co.*, 18 Idaho 389, 405-406, 109 P. 910, 916 (1910). Under the District Court's own findings, with diligence Northern Title quickly recorded a *correction*, which under the *Escrow General Provisions*, Cummings would have been required to sign irrespective of his objection. See Ex. 111, ¶ 20.

Further, Northern Title did not act with willful misconduct. As explained recently by this Court, willful misconduct "involves both intentional conduct and knowledge of a substantial risk of harm." *Carrillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 751, 274 P.3d 1256, 1266 (2012) (emphasis added). The District Court in conclusory fashion held Northern Title "had knowledge that Cummings would be subjected to a substantial risk of harm." See *R.*, Vol. 8, p. 1605. But this directly clashes against the District Court's specific findings. Namely, that Northern Title's only information was that the sale included only that property west of Highway 30, that such was Northern Title's understanding all along, and that Northern Title was trying to protect Cummings when filing the corrective deed. *Id.* at 1599-1600, 1611-1612, 1616. Thus, under the District Court's own findings, Northern Title did not have "knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man." *Carrillo*, 152 Idaho at 751, 274 P.3d at 1266 (quoting *State v. Papse*, 83 Idaho 358, 362–63, 362 P.2d 1083, 1086 (1961)). Where Northern Title's only knowledge was that Cummings had not bought the eastern property, there was no knowledge of a substantial risk of harm, and therefore no willful misconduct.

The District Court committed legal error in disregarding the breadth of authority granted to Northern Title as Escrow. Northern Title was simply following its instructions. Cummings "must look to [his] grantors, not to the depository nor its officer, for title." *Foreman*, 83 Idaho at 486, 364 P.2d at 367. Notwithstanding, for a contract that required Cummings' compliance irrespective of his objection, the District Court's specific findings of fact do not match its clearly erroneous conclusion.

III. THE DISTRICT COURT'S COMPUTATION OF DAMAGES WAS NOT FACTUALLY OR LEGALLY SUPPORTED AND NORTHERN TITLE PREVAILED.

It has long been the rule that "where a contract is assignable the assignee acquires all the rights of the assignor and takes the contract subject to all of the obligations of the assignor therein stipulated." *Anderson v. Carrigan*, 50 Idaho 550, 555, 298 P. 673, 674 (1931). An assignment, however, "may not materially change the duty or increase the burden of the obligor." *Van Berkem v. Mountain Home Development Co.*, 132 Idaho 639, 642, 977 P.2d 901, 903 (1999) (citing *Lockhart Co. v. B.F.K., Ltd.*, 107 Idaho 633, 635, 691 P.2d 1248, 1250 (Ct. App. 1984)); see also 6 Am. Jur. 2d Assignments § 108 (2014) (assignee cannot recover more than the assignor could recover).

This "Court reviews a district court's determination of damages pursuant to a clearly erroneous standard." *Stephen v. Sallaz & Gatewood, Chtd.*, 150 Idaho 521, 529, 248 P.3d 1256, 1264 (2011) (citations omitted). An amount of damages will be affirmed only if supported by "substantial and competent" evidence. See *Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*,

153 Idaho 440, 457, 283 P.3d 757, 774 (2012); see also *Weatherhead v. Griffin*, 123 Idaho 697, 706, 851 P.2d 993, 1002 (Ct. App. 1992).

With Cummings' lack of evidence regarding the value of the eastern side, the District Court erroneously made a damage call. As Cummings puts it, the District Court attempted a back-door valuation of the eastern property:

> [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 [sic] Ranch without the acreage on the east side.

Appellant Reply/Cross-Resp's. Brief, 23; see also *R.*, Vol. 8, 1629. Contrary to Cummings' assertion, this was anything but "logical."

As pointed out earlier by this Court, "[e]ven with the testimony of expert witnesses, it is frequently quite difficult to determine the fair market value of real property." *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 259, 846 P.2d 904, 910 (1993). Real property can be evaluated several ways, including methods known as the "sales comparison approach," the "cost" approach, or the "income" approach. See *Riverside Development Co., v. Vandendberg*, 137 Idaho 382, 385, 48 P.3d 1271, 1274 (2002); see also *Canyon County Bd. Of Equal. V. Amalgamated Sugar Co., LLC*, 143 Idaho 58, 61, 137, P.3d 445, 448 (2006). The complexities of real property valuation aside, at its heart the fair market value is determined by what a "willing buyer would pay a willing seller." See *Logan v. Grand Junction Associates*, 111 Idaho 670, 671, 726 P.2d 782, 783 (Ct. App. 1986).

Clearly, what amount the Stephens Trust was willing to accept for the west, and what amount Cummings was willing to pay for the west and the east, do not by combination magically reveal the damage amount at question, the east side. The assignment did not say anything about the east side. See *Baum Assignment*, Trial Exhibit 14. Further, Cummings did not value it that way, and unequivocally testified that when he bought the assignment, he was "valu[ing] the property as a whole." *Tr.*, Vol. 1, 133:14-134:15.

Even more fundamentally, Cummings was an assignee. Because an assignment does not require notice to the obligor, an assignee has no more rights than his assignor. See 6 Am. Jur. 2d Assignments § 108 (2014). In other words, an assignment price is not indicative of what a willing assignee (Cummings) would pay an oblivious obligor (the Stephens Trust). Rather, an "assignment is a contract between the assignor and the assignee, and is interpreted or construed in accordance to rules of contract construction." *Purco Fleet Services, Inc. v. Idaho State Dept. of Finance*, 140 Idaho 121, 125, 90 P.3d 346, 350 (2004) (citing 6 Am.Jur.2d Assignment § 1 (1999). Therefore, the assignment price is simply indicative of what a willing assignee (Cummings) would pay for the REPC, and what a willing assignor (Three Bar) would accept.

With the correct analysis between assignee and assignor, the District Court's damage call crumbles. The District Court never made a factual finding as to what Three Bar thought it was selling Cummings. Notwithstanding, the exercise would have been futile. For instance, if Three Bar thought it was selling only the west, and Cummings thought he was buying the east and the west, the assignment would lack mutual assent, and the price would be no more indicative of the eastern value than the District Court's current erroneous computation. Even if mutual assent did

exist, however, evidence as to the eastern value would still be required; the REPC price of $800,000 by Three Bar, and the assignment price of $850,000 by Cummings, merely indicates that two people value the same property differently.

At day's end, the District Court's illogical computation of damages was a back-door attempt to circumvent Cummings' failure to prove his case. Cummings could have called a Stephens Trustee to value the property; or even arguably Cummings himself could have testified as to the value. See *McFarland v. Joint School Dist. No. 365*, 108 Idaho 519, 522, 700 P.2d 141, 144 (Idaho App. 1985) ("[o]f course, the owner of property may testify as to its value. . . . [because the] owner is presumed to be familiar with the property's current value . . . ."); see also *Christensen v. Nelson*, 125 Idaho 663, 873 P.2d 917 (Ct. App. 1994) (purchaser qualified to opine on value of property); see also *C.H. Bancroft v. Smith*, 80 Idaho 63,323 P.2d 879 (1958) (purchaser qualified to opine on value of property as of day purchased) (overturned on other grounds). Notwithstanding, neither were done at trial, nor is that issue on appeal.

A defendant can prevail on a claim in two ways: a successful defense or a plaintiff's failure to prove his case.[13] Cummings failed to prove his case, and neither he nor the District Court can escape that reality through an illogical computation of damages.

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13 See *Intermountain Real Properties, LLC, v. Draw, LLC*, 155 Idaho 313, 311 P3d 734, 741 (2013) ("Draw's successful defense makes it the prevailing party"); see also *Harris, Inc. v. Foxhollow Construction & Trucking, Inc.*, 151 Idaho 761, 770, 264 P.3d 400, 409 (2011) ("Harris' contract action against Johnson fails because Harris failed to prove up its claim for damages").

IV. CUMMINGS' CONCLUSORY ARGUMENTS DO NOT JUSTIFY THE DISTRICT COURT'S FAILURE TO EVEN CONSIDER MITIGATION: CUMMINGS HAD THE DUTY AND FAILED TO TAKE ADVANTAGE OF AN UNDISPUTED OPPORTUNITY TO MITIGATE.

"The duty to mitigate, also known as the doctrine of avoidable consequences, provides that a plaintiff who is injured by actionable conduct of a defendant is ordinarily denied recovery for damages which could have been avoided by reasonable acts . . ." *Belk v. Martin*, 136 Idaho, 652, 660, 39 P.3d 592, 600 (Idaho 2001) (citation omitted, ellipsis in original). Generally speaking, the duty to mitigate arises when the plaintiff was aware or should have been aware of the defendant's breach. See *Industrial Leasing Corp. v. Thomason*, 96 Idaho 574, 578, 532 P.2d 916, 920 (1974).

The District Court's disregard of Cummings' duty to mitigate was legal error, and its disregard of undisputed, reasonable mitigation measures, was clearly erroneous. See *Gagnon v. Western Bldg. Maintenance, Inc.*, 155 Idaho 112, 306 P.3d 197, 200 (2013) (existence of duty is question of law); see also *Collins v. Collins*, 130 Idaho 705, 710, 946 P.2d 1345, 1350 (Ct. App. 1997) (mitigation is a question of fact, requiring substantial and competent evidence); see also See *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 261, 846 P.2d 904, 912 (1993).

Cummings tries to put up a wall of ignorance, arguing he had no duty because he had "no real knowledge" of the corrective deed until April of 2008. See *Appellant Reply/Cross-Resp's. Brief*, 25, 31. That is not what the District Court found:

> During November 2007, Thornock tried to contact Cummings to let him know that Northern Tile was changing the legal description on the warranty deed but was only able to leave a voicemail on his answering machine.

R., Vol. 8, 1596 (Finding of Fact No. 37).

Additionally, Cummings own affidavit states that in November of 2007, he "received a message from Stephens that changes were made to the Warranty Deed." *Tr.*, Vol. 1, 322:9-11; see also *Cummings' Affidavit*, Trial Ex. 49, ¶ 6. Similarly, Cummings testified that in November of 2007, he received a letter from Roger Stephens that stated "I had to go to Northern Title and found that they had made a mistake on the land description . . . ." *Id.* at 342:12-16; see also *Stephen's Nov. 27, 2007 Ltr.*, Trial Ex. 21. Then in December of 2007, Cummings admits he sought out, for the first time, Three Bar to "get clarity on what the agreement between the buyer and the seller was." *Id.* at 324:3-7.[14] Substantial, undisputed facts evidenced Cummings' duty to mitigate.

It was also undisputed that Cummings did nothing to mitigate the alleged damage to his investment property. He made no effort to buy any replacement property. See *Tr.*, Vol.1, 259:8-13. Cummings never even investigated the market on similar property values. *Id.* at 259:14-19. Further, undisputed evidence was produced wherein Cummings was offered to sell the property at a price of $850,000, and did nothing to pursue it. *Id.* at 799:16-800:8.[15]

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14 Cummings also admitted that on March 27, 2008, when he sent another letter to Northern Title, again mentioning nothing about the corrective deed, he "clearly knew that there's a problem." Tr., Vol. 1, 326:22-327:5; see also Trial Ex. 43.

15 In conclusory fashion, Cummings baldly asserts he had no duty to mitigate damages by reselling, or at least trying to resell, the investment property; and that the proposed sale was speculative. See *Appellant Reply/Cross-Resp's. Brief*, 25. As to his first point, Cummings provides no legal basis. As to his second point, Skinner, the same Realtor who Cummings relied on for the sale, testified that he informed Cummings that there was a willing buyer for the same

Cummings has repeatedly complained about the four (4) years of litigation that he himself pursues. Yet from December of 2007 until now, he has done nothing to mitigate his damages. The District Court committed error when it failed to find a duty to mitigate, and based on the undisputed facts, Cummings could have but failed to recapture his entire purchase price.

V. SHOULD NORTHERN TITLE PREVAIL, CUMMINGS SHOULD PAY FOR NORTHERN TITLE'S ATTORNEY FEES AND COSTS ON APPEAL AND BELOW.

In a profession that destroys so many trees, an attorney may incorporate a matter by reference. In fact, under Idaho Appellate Rule 35 "in cases involving more than one appellant or respondent, including cases consolidated for purposes of appeal, any number of parties to the appeal may join in a single brief, and any party may adopt by reference any part of the brief of another party." I.A.R. 35(g).

Here, Cummings makes much ado about the length of Northern Title's briefing, even to the point of erroneously stating that Northern Title had previously submitted "100 pages of briefs (not including covers)." See *Appellant Reply/Cross-Resp's. Brief*, 5. Notwithstanding Cummings' inaccuracy, he then later argues that Northern Title failed to make any argument or cite any authority for entitlement to fees on appeal. *Id.* at 37. Cross-Appellant Northern Title would refer Cummings to page 10 of *Cross Appellant's Brief*, wherein "[p]ursuant to Rule 35(g) . . . Northern Title hereby incorporates by reference the *Response Brief of Northern Title Company of Idaho, Inc.*, specifically those arguments set forth supporting an award of attorney

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property at $850,000.00. See Tr., Vol. 1, 799:16-800:8. It has long been the rule that a party's failure to object to evidence once it is offered constitutes a waiver as to its admissibility. See e.g. *Eastern Idaho Loan & Trust Co. v. Blomberg*, 62 Idaho 497, 113 P.2d 406 (1941).

fees and costs on appeal." *Cross Appellant's Brief*, 10 (emphasis in original). The reasons and law for awarding Northern Title its costs and fees on appeal are stated therein, and apply equally to Northern Title as an Appellant as it does to Northern Title as a Respondent.

On a more substantive basis, within those incorporated arguments, Northern Title referred to paragraph seventeen (17) of the *Escrow General Provisions* as a contractual basis for awarding Northern Title its costs and fees. See *Response Brief of Northern Title Company of Idaho, Inc.*, 7. Where an interpleader action was never initiated, paragraph four (4) of those same *Escrow General Provisions* provides an additional, if not more appropriate basis, for an award of all of Northern Title's fees and costs on appeal and at trial:

> In the event the Escrow Agent initiates or is joined as a party to any litigation relating to this escrow, Buyer and Seller jointly and severally agree to pay all costs, expenses and attorney's fees incurred by Escrow Agent in such litigation.

Trial Ex. 111, ¶ 4.

Should Northern Title prevail on appeal, the Court should award Northern Title its appellate costs and fees under the *Escrow General Provisions*, Idaho Code section 12-120(3), and Idaho Appellate Rule 40(a). Under these same authorities, if Northern Title prevails on appeal, it should be deemed a prevailing party for purposes of trial, and awarded its costs and fees below.

CONCLUSION

The District Court committed legal error. Based upon Cummings' reliance on a title commitment, the District Court imposed upon Northern Title the duties of an abstractor. The

record, even the specific portions of the transcript relied upon by the District Court, all evidence that the legal description made by Northern Title was to facilitate title insurance. The District Court's imposition was a violation of the *Anderson* rule, and should be reversed with Cummings' claim for negligence dismissed.

Additionally, in violation of contract law the District Court disregarded the title commitment and *Escrow General Provisions*, which expressly contemplated that Northern Title was not Cummings' abstractor. To escape this reality, Cummings for the first time tries to distance himself from the very documents he has argued he can rely on. Further, Cummings' asks this Court to bootstrap the District Court's finding of negligence damages to an alleged breach of contract occurring months later. However, the District Court's damage call was clearly erroneous; a failed attempt at circumventing Cummings' failed case.

Further, the District Court disregarded the very authority the Stephens Trust and Cummings granted Northern Title as Escrow. Northern Title was expressly authorized to act upon the Realtor's instructions, especially where Cummings had used those same Realtors to work with Northern Title. Where the written instructions signed by Cummings prior to closing conflicted with Northern Title's truly understood instructions, the *Escrow General Provisions* contemplated in advance the mishap, and expressly authorized Northern Title to make clerical corrections as it deemed necessary. Northern Title was following its instructions in good faith, Cummings was required to comply with that correction, and Northern Title's filing of a correction deed was not gross negligence or willful misconduct.

In closing, Cummings has pursued this litigation for roughly four (4) years, has done nothing to mitigate his damages, and has caused numerous parties to incur substantial attorney fees and costs that far outweigh any potential value of the eastern side of the Stephens Ranch. Northern Title respectfully requests the Court to grant its appeal, find Northern Title a prevailing party as a matter of law, award Northern Title its fees and costs on appeal, and remand the matter for a determination of Northern

DATED this 10th day of February, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of February, 2014, I served a true and correct copy of the above and foregoing **CROSS APPELLANT'S REPLY**, to the following person(s) by U.S. Mail and Email:

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