9-19-2013

Cummings v. Stephens Appellant's Brief Dckt. 40793

IN THE SUPREME COURT OF THE STATE OF IDAHO

STEVEN B. CUMMINGS, Plaintiff/Appellant/Cross-Respondent, vs. ROGER L. STEPHENS, Defendant/Respondent/Cross-Respondent, and NORTHERN TITLE COMPANY OF IDAHO, INC., Defendant/Respondent/Cross-Appellant.	Bear Lake Co. Case No. CV-2009-000183 Idaho Supreme Court Docket 40793-2013

APPELLANT'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

Nathan M. Olsen, Esq.
Residing at Idaho Falls, Idaho, for Appellant and Cross-Respondent

Randall C. Budge, Esq.
Residing at Pocatello, Idaho, for Respondent/Cross-Respondent, Roger L. Stephens

Brad Bearnson, Esq.
Residing at Logan, Utah, for Respondent/Cross-Appellant, Northern Title Company

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NATURE OF THE CASE[1]

In August of 2007, the appellant/plaintiff Steven Cummings (Cummings) paid $850,000 in cash to purchase a farm near Montpelier, Idaho, commonly referred to as the "Stephens Ranch," consisting of approximately 367 acres on both sides of Highway 30. In November of 2007, the seller and defendant/respondent Roger Stephens (Stephens) approached defendant/respondent Northern Title Company of Idaho, Inc. (Northern Title), who acted as the escrow, closing and title agent in the transaction, claiming that he intended to sell only the property on the west side of the highway. Northern Title immediately altered the deed to reflect that intent without authorization from Cummings and contrary to the written instructions. After a trial on this matter, the trial court dismissed Cummings' claims against Stephens and held that Northern Title was grossly negligent, had committed willful misconduct, or both. It awarded Cummings $50,000 in damages and his attorney fees and costs, and awarded Stephens his attorney fees and costs.

In this case, this Court must decide whether a signed warranty deed as supported by the listing agreement, purchase agreement, title commitment and the statute of frauds should be disregarded if the seller did not intend to sell all of the property described in the deed. It will also determine what claims and damages are appropriate for a title & escrow agent's intentional misconduct and/or gross negligence – wherein such agent knowingly altered and re-recorded a

[1] A succinct yet comprehensive overview of Cummings' claims in this case was made in his counsel's opening statement at trial. Tr. pp. 4-8.

warranty deed eliminating some 83 acres from the original deed without obtaining original signatures from the seller and the authorization from the buyer and then, when asked to correct the problem, instead collaborated and ultimately indemnified the seller who benefitted from the altered deed.

COURSE OF PROCEEDINGS

Cummings filed his complaint on July 29, 2009, against Stephens requesting equitable relief, *i.e.*, that Stephens be prevented from conveying the portion of the property that had been wrongfully removed from Cummings, and for consequential damages. R. Vol. 1, pp. 1– 8. On March 18, 2010, Stephens filed his "Answer and Third Party Complaint" which, among other things, admitted that the trial court had both subject matter and personal jurisdiction over Stephens, that Stephens had "executed a Warranty Deed on August 3, 2007," and that "as grantor, Stephens warranted the title to property that was conveyed to (Cummings)" R. Vol. 1, pp. 9–20. Stephens also filed a Third Party Complaint against Northern Title for indemnity, contribution, and damages. R. Vol. 1, pp. 12-16.

Without notifying or seeking consent from Cummings, Northern Title then agreed to indemnify Stephens. R. Vol 4, p. 686. Stephens withdrew his Third Party Complaint. Then Northern Title's attorney, Brad Bearnson, entered an appearance as co-counsel for Stephens. R. Vol. 9, p. 1758, Vol. 4, p. 686 Bearnson later entered an appearance as counsel for Northern Title once it again became a party in the case. Id. Vol 9 p. 1761, Vol. 4 p. 686.

Cummings and Stephens filed cross motions for summary judgement that were heard October 20, 2010. The trial court issued its "Decision on Motion for Summary Judgment" on January 4, 2011. R. Vol. 1, pp. 106–32. The court held that the August 3, 2007, Warranty Deed was unambiguous and that "Cummings purchased all of the (land) west of the highway and that portion of Parcel A that is east of the highway" (the 83 acres.) R. Vol. 1, p. 117. However, relying solely on the affidavits of Stephens, his realtors, and a Northern Title employee, the court held that due to a "unilateral mistake" the August 3, 2007, deed should be "reformed" to reflect Stephens' intent to sell only the property on the west side of the highway. R. Vol. 1, pp. 120–130. The decision also ordered the Stephens to submit a reformed deed to the Court along with the judgment that excluded the disputed 83 acres from the August 3, 2007, Warranty Deed. R. Vol. 1, p. 131.

Cummings moved to reconsider the trial court's ruling on summary judgment, presenting testimony from Cummings, one of the realtors, and a prior buyer (Three Bar Ranches, Inc.) whose purchase contract rights Cummings had bought for $50,000, in support of Cummings position that the intent was always to include the entire ranch, including 83 acres east of the highway, in the sale. R. Vol.1, p. 166, Vol 2 pp. 188–410.

The motion for reconsideration was heard on March 17, 2011. In a ruling from the bench the trial court reversed its prior decision, holding that there were factual disputes as to whether there was "unilateral mistake" that justified a reformation of the deed that could only be resolved at trial. Tr. pp. 963–966. In particular, the court noted that Cummings had purchased "whatever

rights Three Bar (Ranches) had" and that Cummings needed to produce testimony from Three Bar Ranches at trial as to what was purchased. Tr. pp. 965–966.

After the court vacated its order granting summary judgment Cummings filed his amended complaint adding Northern Title as a defendant, requesting damages for breach of contract, negligence, bad faith, and other claims. R. Vol. 3, pp. 445–520, 573–574. Stephens filed an answer to the amended complaint wherein Stephens again admitted the allegations that "Stephens executed a warranty deed in favor of Cummings which deed transferred Stephens Ranch to Cummings" as described in the August 3, 2007, Warranty Deed attached to the Amended Complaint, R. Vol. 6, p. 1218; R. Vol. 4, p. 578, and that the August 3, 2007, Warranty Deed "transferred real property to the Plaintiff for consideration." R. Vol. 6, p. 1223; R. Vol. 4, p. 586.

On July 3, 2012, Cummings moved to amend his complaint to allege punitive damages against Northern Title. This motion was heard on July 17, 2012. The trial court denied the motion without prejudice, allowing Cummings to renew the motion at trial. Tr. p. 1200:13–20. On July 2, 2012, after Cummings' appraisal expert Gregory Kelley had been disclosed and deposed, Northern Title moved to exclude Mr. Kelley's testimony on the basis of "late disclosure." R. Vol 6, pp. 1062–1069. The court granted Northern Title's motion on July 17, 2012. Id.

The trial was held July 31, 2012, through August 3, 2012. At trial, Cummings testified for more than 1½ days pertaining to his intent in the transaction. Numerous exhibits were admitted, including the signed listing agreement, purchase agreement, title commitment, and escrow

agreement all culminating in the August 3, 2007, Warranty Deed which conveyed the Stephens Ranch as it existed on both sides of Highway 30. Tr. Ex.'s 1, 17, 35, 105, 111. As directed by the Court in its prior rulings, Cummings also provided testimony (by deposition) of Three Bar Ranches president and primary owner, Philip Baum, confirming that the intent – as reflected by the writings and representations made by Stephens' realtors to the company – was that the purchase included the Stephens Ranch as it existed on both sides of Highway 30. May 18, 2012, Phillip Baum Dep. pp. 10:22-25, 11:1-2, Tr. pp. 24:19-26, 25:1-14, 873:2-4.

After Cummings' case in chief, Stephens moved the trial court to dismiss Cummings' claims against him. under an IRCP § 50(a) "Motion for Directed Verdict." Noting that IRCP § 50(a) was not a proper motion, the court voluntarily converted Stephens' motion to an IRCP § 41(b) motion. Tr. p. 726:17–25, p. 727:1–9 Then without making any written findings of facts and conclusions of law as required under IRCP § 52(a), the court dismissed Stephens from the case holding that in "weighing the evidence . . . Stephens had no intention to sell the property east of the highway" and that there was "no evidence that Stephens altered the deed" and therefore Stephens had "no liability" in the case. Tr. p. 736:17–25, p. 737:1–25. At the time it made this decision the trial court had not yet heard any testimony from Stephens or any of the realtors. Shortly after this decision, Northern Title moved to deny Cummings the right to punitive damages. Without any argument the court ruled that "there is no punitive damages in this case." Tr. P. 738:2–11.

After receiving post trial briefing from the parties, on January 22, 2013, the trial court issued its Memorandum Decision, Findings of Fact and Conclusions of Law on Cummings' remaining claims against Northern Title. R. Vol. 8, pp. 1588–1635. The court held that Northern Title's failure to obtain Cummings' authorization prior to altering the legal description and recording a warranty deed with a legal description that was altered from the description in the title commitment, on which the parties had agreed, constituted "gross negligence, willful misconduct or both." R. Vol. 8, p. 1605. The court also held that "the legal description on the rerecorded deed was outside of that contemplated and agreed to by the parties." *Id.* The court awarded Cummings $50,000 of "proximate" harms caused by Northern Title's conduct, but not equivalent to the value of the 83 acres that had been removed as a result of the re-recorded deed. The court never did make clear, however, whether the November 8, 2007, deed is valid, since the court had ruled that this altered deed was the exclusive result of misconduct by Northern Title, that Stephens had not altered the deed, and raised *sua sponte* that the court had no jurisdiction over modifying deeds for parties not named in the case. *Id.*

The court also denied Cummings' bad faith tort claim, holding that Idaho does not recognize that a bad faith claim can be brought against a title insurance company for the mishandling of its escrow duties. R. Vol. 8, pp. 1609–10. After the final judgment was issued in the case, Stephens sought for and was awarded attorney fees and costs in the amount of $116,754.62. R. Vol. 9, pp. 1802-1815.

STATEMENT OF FACTS

On July 22, 2007, while driving through the area on Idaho Highway 30, Steven Cummings noticed a for sale sign advertising the Stephens Ranch. R. Vol. 8, p. 1593 ¶10. He called the number on the sign and initially spoke with Stephens' listing agent, Dorothy Julian. Id. ¶ 12. Ms. Julian was dealing with a family matter and referred Cummings to one of her colleagues, Evan Skinner. Id. On July 23rd Skinner showed Cummings the property including land on both sides of Highway 30. Tr. pp. 24:14-24, 869-873. The property on the east side of Highway 30 included about 83 acres and was enrolled in the CRP program. Id. 24:21-25, 25:1-10. Skinner indicated that the property was under contract with another buyer, Three Bar Ranches, but later informed Cummings that Three Bar Ranches would be willing to sell its interest in the contract for $50,000. Id. 50:12-23.

On July 26, 2007, Cummings received a fax from Skinner containing Three Bar Ranches' signed Real Estate Purchase and Sale Agreement (REPC) and a commitment for title insurance. R. Vol. 8, 1594 ¶ 16, Tr. Ex. 29, 35. Cummings then conducted a cursory review of the legal description, confirming that "Parcel A" included the 83 acres on the east side of Highway 30. Tr. pp. 68-71 Cummings also further confirmed this fact by investigating the fence lines. Id.

On July 30, 2007, Cummings entered into a written assignment of the REPC between Three Bar Ranches and Stephens for the purchase of the Stephens Ranch as it then existed on both sides of Highway 30 near Montpelier, Idaho ($800,000 to seller and $50,000 to the original buyer). R. Vol. 8, p. 1594 ¶¶ 14-15, Tr. Ex's. 16, 105. As reflected in the listing agreement, the

REPC signed by Three Bar Ranches on July 2, 2007, contained no language excepting property on the east side of the highway from the sale. Id. Ex.'s 1, 105 In addition, the title commitment already prepared for Three Bar Ranches and on which Cummings was instructed to rely contained no such exception. Tr. Ex. 35. One version of the title commitment that was never delivered to or reviewed by either Three Bar Ranches or Cummings did contain exception language that excluded some of the property on the east side of the highway (not the 83 acres) which was not actually owned by Stephens. Tr. Ex. 140, (first fax). However, it is customary that the legal description contained on and "Exhibit A" of a title commitment identify property not owned by the seller so that it can ultimately be fixed in the warranty deed. Tr. pp. 598:23–25, 599: 1–19, Ex. 12.

On August 3, 2007, one day after Cummings had completed his side of the closing including deposited the necessary funds with Northern Title to complete the purchase, Stephens signed a warranty deed that conveyed the Stephens Ranch, as it existed on both sides of Highway 30, to Cummings, but excepting property on the east side of Highway 30 that, although included in the REPC, was not actually owned by Stephens. R. Vol. 8, p. 1596 ¶¶ 33-34; Tr. Ex.'s 17, 105. This warranty deed was recorded on August 3, 2007. A copy was sent to Cummings by Northern Title. Tr. Ex. 19. Cummings took possession of the property shortly thereafter. Northern Title also dispersed the $850,000 deposited by Cummings for the purchase.

Had all things remained the same, Cummings would have freely enjoyed the use and possession of the entire Stephens Ranch, including the 83 acres on the east side of the highway

and the CRP income from that property. But matters did not remain the same. Roger Stephens personally approached Northern Title on November 8, 2007, claiming that the August 3, 2007, deed was incorrect, and that the east side of the ranch was excluded from the sale. *See* Log Notes, Tr. Ex. 115; Tr. pp. 467:4–25, 468–471. Rather than confirm whether this was Cummings' intent, or even check the REPC and title commitment, Northern Title simply assumed that Stephens was correct and on that very same day, without obtaining a new original signature from Stephens as required under the escrow agreement and by regulation, or consent from Cummings, it altered the legal description in the August 3rd deed to remove the entire east side property of approximately 83 acres. R. Vol. 8, p. 1596 ¶¶ 35, 36, 38; Tr. Ex. 22. Northern Title's agent admitted that, had she learned that Cummings did not consent to changing the deed, Northern Title would have stopped all further action and allowed the parties to resolve their differences. Tr. pp. 470:16–25, 471:1-2.

Cummings did not become fully aware that the deed had been changed until he received the altered warranty deed and his title policy from Northern Title in April of 2008, eight months after the closing. R. Vol. 8, 1596 ¶¶ 39-40. The title policy description had been modified from the legal description in the title commitment so that it would not cover any property on the east side of the highway. This was contrary to Northern Title's own internal instructions, wherein Lori Thornock was instructed by the title officer Laurie Baird to issue the title policy in accordance with the real estate purchase agreement and title commitment. Tr. Ex. 115 (log note dated 04/07/2009.)

Cummings wrote to Northern Title, instructing them to correct the problem. R. Vol. 6. p. 1597 ¶ 42; Tr. Ex. 44. Upon receipt of Cummings' instructions, Northern Title conducted a review of the file, including the REPC. Apparently, there was an addendum to the contract in its file that was signed by Stephens but not by any of the buyers (either Three Bar Ranches or Cummings). Tr. Ex. 115 (6/05/2008 entry);July 25, 2012, Jay Davis Dep. pp. 32:9-35, 31-34, 35:1-16. (Davis Dep. admitted in lieu of live testimony by stipulation at Tr. 710:5-12.) An internal email from Northern Title's Vice President, Jay Davis, admitted that in order to adequately respond to Cummings claims, he needed a:

> signed copy of Addendum # 3...*this is the most important* because without I don't see that I have anything in writing from Mr. Cummings to change the legal from the way that it is attached to the REPC.[2]

Id. Davis Dep. Ex. 10; Tr. Ex. 120 (emphasis added)

Neither Cummings nor Three Bar Ranches ever did sign the addendum, nor were they even aware of existence until well after the transaction had closed.-Tr. pp. 121: 24–25, 122:1–4, Baum Dep. pp. 54:19-25, 55:1. Northern Title drafted a letter to Cummings claiming that it had written evidence that Cummings intended only to purchase the west side property, but the letter was never sent because no such evidence existed. Tr. Ex.'s 116; Davis Dep. 35:17-22.

After realizing its failure, rather than take corrective action, Northern Title instead reached out to collaborate with the realtors and Stephens, primarily to protect Stephens and its own actions, while working to discredit and impugn Cummings. Northern Title even went so far

[2] This is further confirmation that Northern Title both had the REPC *with the legal description* and was aware that the legal description had been changed.

as to enter into an all encompassing and "unconditional" indemnity agreement with Stephens in April of 2010. Davis Dep. Ex. 12. In this agreement Northern Title agreed to indemnify Stephens not only against Cummings' lawsuit against Stephens, but against all claims pertaining to the "closing of the transaction," the "issuance of the title commitment," the two warranty deeds filed, and even the issuance of Cummings' title policy. Id. Acting on the advice of his attorney, Brad Bearnson (who had also served as Stephens'counsel), Northern Title's Vice-President Davis refused to answer the question as to whether Northern Title harmed Stephens. Id. pp. 46:15–25, 47:1–15. When Davis was asked whether Northern Title had a duty or policies and procedures in place to remain a "neutral party" in a transaction that it is handling, his attorney interjected and answered:

> The witness has already stated that there are no policies or procedures established in that regard.

Id. pp. 47:17–25, 48:1–21.

At trial Cummings provided expert testimony from Lenore Katri, who had more than 30 years experience as an escrow agent. Tr. pp. 580-64. (Her testimony was unrefuted by any other expert witness.) Ms. Katri testified in detail about the staggering number of errors made by Northern Title, from the beginning to the end of the transaction. In her opinion those errors constituted a breach of the standard of care. Id. Ms. Katri categorized Northern Title's failures into two basic areas:

1) Failing to obtain written instructions and/or confirm in writing with the parties pertinent matters with regard to the transaction (compare with IDAPA 18.01.25 01. which requires written instructions from the parties) and,

2) Failing to act as a neutral or impartial agent. (compare with IDAPA 18.01.25 02, requiring agents to act "without partiality.")

In addition, Ms. Katri opined that no circumstance could ever justify altering and re-recording a deed to remove acreage without first obtaining the written consent of both parties. Id. 637:6–25, 638–639, 640:1–4.

Aside from the loss of the 83 acres and the lost CRP income, Cummings testified as to the other harms caused by Northern Title. Those included lost opportunities, devastation, emotional distress, and a loss of sense of well-being and trust. R. Vol. 6, p. 1597; Tr. pp. 125:20-25, 126:1-8, 132:2-25, 139-141, 142:1-6. Cummings testified that his relief should include both monetary damages *and* the "benefit of his bargain," including a clearing of the title to include the 83 acres on the east side of Highway 30. Tr. p. 138:7-13. There is no evidence that Cummings "abandoned" the property itself, but in fact had consistently testified that he wanted what he had "bargained for" *in addition to* monetary damages for wrongs that were committed in how this transaction was handled. Id.

ISSUES PRESENTED ON APPEAL

1. Should the trial court have invalidated the November 8, 2007, Warranty Deed that it held was improperly altered and re-recorded contrary to the contemplated intent of the parties, therefore making the original signed August 3, 2007, Warranty Deed the only valid deed?

2. Did the trial court improperly dismiss Stephens under the "involuntary dismissal" provisions of IRCP 41(b) without any findings of fact or conclusions of law?

3. Did the trial court err in dismissing the Cummings' claims based on Stephens' alleged "intent" that was contrary to the unambiguous writings and the statute of frauds?

4. Should the trial court have awarded proximate and consequential damages for Northern Title's negligence and breach of contract equivalent to the lost value of the property including income resulting from Northern Title's improper altering and re-recording of the deed?

5. Does the State of Idaho recognize a bad faith tort claim against a title and escrow agent governed under Idaho's insurance statutes relating to its escrow services, and if so, did Northern Title commit bad faith in the way it handled its fiduciary duties?

6. Did the trial court err in not allowing non-economic damages resulting from Northern Title's misconduct and/or gross negligence?

7. Did the trial court err in not awarding punitive damages for Northern Title's conduct?

8. Did the trial court err in excluding Cummings' appraisal expert?

9. Did the trial court err in awarding Stephens his attorney fees and costs?

10. Should Cummings be awarded his attorney fees on appeal?

ARGUMENT

I. Standard of Review

A. Conclusions of law are freely reviewed

Where there has been an appeal of a bench trial "an appellate court will defer to findings of fact based upon substantial evidence, but will review freely the conclusions of law reached by stating legal rules or principles and applying them to the facts found." *Shettel v. Bamesberger*, 130 Idaho 217, 2210, 938 P.2d 1255, 1258 (Idaho App. 1997) (*see also Zanotti v. Cook,* 129 Idaho 151, 153, 922 P.2d 1077, 1079 (Idaho App. 1996) ("Appellate judges should defer to findings of fact based upon substantial evidence, but they ought to review freely the conclusions of law reached by stating legal rules or principles and applying them to the facts found.")

B. Involuntary Dismissals under IRCP § 41(b)

In reviewing a ruling for involuntary dismissal under IRCP § 41(b), the appellate court will uphold factual findings made by the district court in granting the motion for involuntary dismissal so long as the findings are not "clearly erroneous." *Staggie v. Idaho Falls Consol. Hospitals, Inc.*, 110 Idaho 349, 715 P.2d 1019 (Idaho App. 1986). However, the appellate court will review freely any statements of law and the court's conclusion that the facts as found did not entitle the moving party to any relief. *Id.*

C. Interpretation of unambiguous contracts

Interpretation of an unambiguous document is a question of law and, therefore, a matter of free review. *C&G Inc. v. Rule*, 135 Idaho 763, 765, 25 P.3d 76, 78 (2001).

D. The denial of punitive damages and exclusion of witness

The standard of review for the trial court's decision to deny punitive damages is abuse of discretion. *Polk. V Robert D. Larrabee Family Home Ctr.*, 135 Idaho 303, 17 P.3d 247 (2000). The standard of review for the court's decision to exclude witnesses is also abuse of discretion. *Noble v. Ada County Elections Bd.*, 135 Idaho 495, 20 P. 3d 679 (2000). **E. Standard for abuse of discretion**

When reviewing an exercise of discretion, a court on appeal conducts a three-tiered inquiry. The lower court must have (1) correctly perceived the issue as one of discretion, (2) acted within the outer boundaries of its discretion and consistently with legal standards applicable to specific choices available to it, and (3) reached its conclusion by an exercise of reason. *Dunagan v. Dunagan*, 147 Idaho 599, 213 P.3d 384 (2009).

II. The Court's IRCP § 41(b) Ruling Without Written Findings of Fact and Conclusions of Law Was Err

In ruling on an IRCP § 41(b) motion, the trial court must comply with IRCP § 52(a) which provides, in pertinent part that

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment . ..

Powers v. Tiegs, 108 Idaho 4, 696 P.2d 855 (1985). Moreover, "bench remarks"do not substitute for nor rise to the dignity of written findings of fact and conclusions of law . . . and where the trial court's findings of fact and conclusions of law were embodied in a single paragraph . . .

[s]uch cursory treatment does not satisfy the requirements of IRCP §§ 41(b) and 52(a), making appellate review virtually impossible." *Id.*

In this case, the trial court's findings of fact and conclusions of law with regard to its Rule 41(b) dismissal of Stephens can be boiled down to the following statement from the bench:

> In weighing the evidence, it seems very clear to me that Stephens had no intention to sell the property east of the highway; that Stephens never authorized the sale of the property east of the highway; that both the real estate agents and the title company understood and knew that Stephens was not selling property east of the highway. The title company admitted on the stand that it made a mistake in the deed language and made a mistake twice, and that mistake included land Stephens did not intend to sell. There's no evidence that Stephens altered the deed either the first or second time. That it was changed, at most, there is evidence that he may have consented to the changes in order for those – for the deeds to comply with his original intent. If there is liability here, that liability lies either with Northern Title or the real estate agents. I do not see where it lies with Mr. Stephens. And I understand that creates a problem when it comes to remedies as far as the real property itself, but Mr. Cummings abandoned that remedy on the stand. And I think we're looking simply here now at monetary damages and how much they are. It may be on the final decision in this case that he wins on the conversion theory as far as the CRP crops. If he does, he's going to win against Northern Tile, though, because of the findings of fact that I'm making at this time. I do not believe Mr. Stephens has any liability in this case. I believe it lies solely with Northern Title and/or the reals estate agents. And so that's my decision.

Tr. pp. 736: 17–25, 737:1–21.

This ruling leaves very little for the appellate court to review – very few findings of fact, and virtually no conclusions of law. Moreover, this ruling was made without any actual testimony from Roger Stephens, and without the testimony from any of the realtors (which came later in the trial during Northern Title's case in chief). The trial court's Memorandum Decision, Findings of Fact and Conclusions of Law filed January 22, 2013, pertained only to the remaining

claims against Northern Title and referenced the trial transcript as to its findings of fact and law on its Rule 41(b) dismissal of Stephens. R. Vol. 8, p. 1589.

By failing to issue written findings of fact and conclusions of law the trial court failed to comply with Rule 41(b). *Powers v. Tiegs*, 108 Idaho 4, 696 P.2d 855 (1985). This error alone at the very least requires the case to be remanded for further review.

III. The Unambiguous August 3, 2007, Warranty Deed Conveying the Stephens Ranch on Both Sides of Highway 30 to Cummings Should be Upheld

Ironically, even if the appellate court were to adopt the trial court's finding of facts stated from the bench and also in its January 22, 2013, Memorandum Decision, there is no legal or factual dispute that the August 3, 2007, Warranty Deed should be upheld as the only valid deed therefore conveying the Stephens Ranch as it existed on both sides of Highway 30 to Cummings. At the very outset of this case, Cummings simply requested that the August 3, 2007, Warranty Deed which conveyed the Stephens Ranch as it existed on both sides of Highway 30 be enforced. There is no reason not to do that now.

There has never been any dispute either from the trial court or from the defendants/respondents that the August 2007 Deed was unambiguous. R. Vol 1, p. 117. That being the case, pursuant to the ancient principle of the "statute of frauds" supported by well established precedent in Idaho, this deed was the controlling and defining document on what property was conveyed to Cummings. As this Court has recently emphasized: "For over 100 years, the (Idaho) supreme court has held that a contract for the sale of real property must speak for itself and that a court may not admit parol evidence to supply any terms of the contract." *Ray*

v. Frasure, 145 Idaho 625, 628; 200 P.3d 1174, 1177 (2009) This Court has further illustrated the doctrine of merger: "when a deed is delivered and accepted as performance of the contract to convey, the contract is merged in the deed." *Capstar Radio Operating Co. v. Lawrence*, 143 Idaho 704, 152 P.3d 575 (2007) Thus, "though the terms of the deed may vary from those contained in the contract, the deed alone must be looked to determine the rights of the parties." *Id.* "Prior stipulations are merged in a final and formal contract executed by the parties, and this rule applies to a deed or a mortgage based upon a contract to convey." *Estes v. Barry*, 132 Idaho 82, 967 P.2d 284 (1998)

Cummings' initial motion for summary judgment, filed in May of 2010, simply requested that the title to his property be cleared according to the warranty deed that Stephens had signed in conveying the property. In his cross motion for summary judgment, Stephens did not argue that the August 3, 2007, deed was "unambiguous" (or that he was not the seller for that matter), but that because of "mutual" or "unilateral mistake" the August 3, 2007, deed should be reformed to reflect Stephens' stated intention to sell only the property on the west side of the highway. R. Vol 1, p. 131. The trial court initially held that the August 3, 2007, deed was "unambiguous" and further held that there was no "mutual mistake." Id. However, the court granted Stephens' motion on the basis of "unilateral mistake" and further ordered Stephens to present a modified deed to the Court. Id. After Cummings moved to reconsider by presenting evidence including the signed affidavit of original buyer Three Bar Ranches representative Curtis Baum confirming what Cummings understood as the intent, the trial court vacated its

ruling, specifically holding that whether there was a "unilateral mistake" was now a question of fact to be determined at trial. Tr. pp. 963–966

The evidentiary burden that Stephens had to meet to set aside the written deed is extremely strict, as has been repeatedly emphasized by this Court:

> A grantor seeking to show that an absolute conveyance is not what it naturally purports to be has the burden of making strict proof of such fact. Having given the transaction the form of a bargain sale, slight and indefinite evidence should not be permitted to change its character. The writing itself stands as the clearly ascertained intention of the parties which must be enforced unless it is shown by convincing evidence that it was under a different mutual intention of the parties that the instrument was delivered and accepted. From an examination of the authorities it appears that, while the same formula of words has not always been used, the rule has been uniformly announced, in such cases, to be that the proof must be clear, satisfactory and convincing. This court has repeatedly held that one who seeks to prove that an instrument which purports on its face to be an absolute conveyance of title is in fact a mortgage must do so by that degree of proof.

Hill v. Daugherty, 63 Idaho 12, 18, 115 P.2d 759, 765 (1941) (citations omitted)

Moreover,

> A party seeking reformation of an instrument bears a heavy burden of proof. The evidence must be clear and satisfactory, leaving but little, if any, doubt of the mistake. It must be made out by the clearest and most satisfactory testimony, such as to leave no fair and reasonable doubt on the mind that the writing does not correctly embody the real intention of the parties. A mere preponderance of the evidence will not suffice, and the burden of proof is on the party alleging the mutual mistake. *Collins v. Parkinson*, 98 Idaho 871, 874 (Idaho 1978)

See also, *O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 909, 188 P.3d 886, 991 (I2008)(citations omitted); (The mistake must be common to both parties, and must be proven by clear and convincing evidence) and *Hughes v. Fisher,* 142 Idaho 474, 482, 129 P.3d 1223 (2006) (citations omitted) (The party alleging the mutual mistake has the burden of proving it by clear

and convincing evidence.) In addition to being proven by clear and convincing evidence, the mistake must be common to parties *at the time of contracting*. *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997). See also, *Hughes v. Fisher*, 142 Idaho 474, 482 (2006) Further, the party alleging the mistake has the burden of proving it. *Collins v. Parkinson*, 96 Idaho 294, 296, 527 P.2d 1252, 1254 (1974)

Finally, reforming a contract based on unilateral mistake is typically not accepted in Idaho except for under the rare exception that there is an *admission* of knowledge by one party of the other party's unilateral mistake to which the party with the knowledge of the unilateral mistake unfairly takes advantage of the other party's mistake. See *Belk v. Martin*, 126 Idaho 652, 39 P.3d 592 (2001) *See., e.g., Cline v. Hoyle,* 108 Idaho 162, 697 P.2d 1176 (1985); *Ed Sparks and Sons v. Joe Campbell Const. Co.,* 99 Idaho 139, 578 P.2d 681 (1978); *Dennett v. Keunzli*, 130 Idaho 21, 936 P.2d 219 (Ct. App. 1997) (petition for review denied).

Thus, when this matter was brought to trial, more than three years after the complaint was filed, and at the five year anniversary date of the transaction itself, as directed by the trial court Cummings meticulously submitted his testimony, the testimony of Three Bar Ranches and numerous writings that supported his testimony that the intent as reflected by the warranty deed was to purchase the Stephens Ranch on both sides of the highway. The burden should have then shifted to Stephens to demonstrate with clear and convincing evidence that both Cummings *and* Three Bar Ranches' intent and/or an admission of knowledge that the sale was only to include the west side of the property.

Instead, the trial court went a completely different and unexpected direction.[3] Again, the trial court did not provide any conclusions of law, other than to hold that because "Stephens had no intention to sell the property east of the highway" and further that "there's no evidence that Stephens altered (the November 8, 2007) deed" that Stephens had "liability" in the case. Tr. pp. 736:17-25, 737: 1-24.

The essence of the trial court's decision is that all that mattered in the interpretation of the real estate contract was the "intent" of the seller, *regardless* of what was contained in the written contract as merged into the warranty deed. Even assuming Stephens' "intent" was to not sell the east side, not holding Stephens liable to the unambiguous warranty deed was a legal error by the trial court. This Court has held that:

> A party's subjective, undisclosed intent is immaterial to the interpretation of a contract. As explained in 17 Am.Jur.2d, Contracts, § 347 (2004): A party's subjective, undisclosed intent is immaterial to the interpretation of a contract, as under the objective law of contract interpretation, **the court will give force and effect 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**. The court will not attempt to ascertain the actual mental processes of the parties in entering into the particular contract; rather the law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest.

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[3] Even if the Court were to consider whether the rare exception of unilateral mistake would apply here, it would only have the after-the-fact testimony of the realtors that they "told" Cummings that the purchase only included the west side property. This would still fall woefully short of the burden of proof, in that 1) the realtors' testimony is strongly refuted by Cummings, 2) it contradicts all of the signed writings, including the listing agreement, purchase agreement, title commitment and warranty deed, 3) there is no evidence hat the realtors informed Three Bar Ranches that the sale only included the west side, and 4) Cummings signed an agreement indicating that he was not to rely on any oral representations by the realtors with regard to the legal description, but rather rely solely on the writings. Tr. Ex. 9, signed document entitled "Buyer Due Diligence," section "Notice From Company," and ¶¶ 3, 9.

J.R. Simplot Co. v. Bosen, 144 Idaho 611, 614,167 P.3d 748, 751 (2006)(emphasis added)

Thus, for the trial court not to look to the unambiguous deed and written contract to ascertain the intent of the parties in the transaction was an error. Upholding the trial court's decision to rely on what Stephens "thought" he intended in selling the property would in effect render the statute of frauds and the merger doctrine meaningless. *Id.*

IV. Cummings is Entitled to the Property Described in the August 3, 2007, Warranty Deed

Another unexpected turn taken by the trial court was when it suggested that although it could award damages to Cummings on his claims against Stephens, it could not "award the property back" because Roger Stephens was named in the complaint, and not the "Roger L. and Barbara L. Stephens Family Trust" and therefore the court could not "force non-parties to sign over deeds to property" when they are "not in the case." Id. pp.728-730, 731:12-15. The trial court also "recalled" that Cummings has "abandoned" his interest in the property in lieu of monetary damages. *Id.* It is not clear whether these comments from the bench were part of the court's actual ruling, in that the it ultimately found Stephens to not be "liable" and therefore Cummings was not entitled to any relief for his claims against Stephens. However, it has at the very least caused some confusion and inconsistency that may require clarification from this Court. In any case, Cummings is entitled to the property that was described in the August 3, 2007, Warranty Deed – including the 83 acres on the east side of the highway that are excluded in the improperly altered and recorded November 8, 2007, Warranty Deed.

First it was a factual error to presume that Cummings had abandoned his interest in the property. During his direct testimony, Cummings was clear that he wanted "what he bargained for" which of course included the property contained in the deed, as well as any income that he would have earned including the CRP income. Tr. p. 138:7-13 The trial court misconstrued testimony during Cummings' examination to mean that Cummings had "abandoned" any interest on the excluded property in lieu of monetary damages. Id. The context of that testimony was pertaining to damages suffered from Northern Title's conduct, not remedies under the warranty deed. Id. Because Northern Title was not a party on the warranty deed, the only kind of relief that was available to Cummings from such conduct was monetary damages.

Second, in suggesting *sua sponte* that it had no "jurisdiction" over the property or the seller on the warranty deed, the trial court took an incongruent position with both what Stephens had already admitted *and* its prior rulings where it had exerted jurisdiction. 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 6, pp. 1215-18. Stephens further admitted that he was the "grantor" and signer of the August 3, 2007, Warranty Deed. Id. 1218. The court itself had exercised jurisdiction over the property 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. Put simply, until the trial court's comments on the last day of trial, *neither* party had any reason to believe that court did not have jurisdiction over the property. Both parties had prepared for

trial with that understanding. If there was an issue with jurisdiction in Cummings' initial notice pleadings, that issue had long been remedied in accordance with IRCP § 15(b) wherein "issues not raised in the pleading are tried by express or implied consent of the parties." Because Stephens and the trial court had previously accepted jurisdiction over the property, such issue was tried by consent as if had "been raised in the pleading." *Id.* To hold otherwise would be unfair and error.

Third, the trial court took yet another irreconcilable position by (apparently) providing equitable relief to Stephens but not to Cummings. In its January 22, 2013, Memorandum Decision & Order, the trial court confirmed "the legal description on the (November 8, 2007) rerecorded deed was outside of that contemplated and agreed to by the parties." R. Vol 8, p. 1605. This ruling should have in essence nullified that improperly recorded deed – which would have meant that the only valid deed was the August 3, 2007, Warranty Deed with the original signatures of the sellers – thus simply resulting in Cummings simply obtaining "what he had bargained for." However, while in the same breath the trial court denied Cummings his requested relief, it apparently exercised jurisdiction to allow Stephens to hold onto what property he "intended" to sell and keep. In other words, if the court could not exercise jurisdiction to clear Cummings' title to the property, it could not accept an improperly modified deed to reflect Stephens' intention, particularly when it had *further* ruled that Stephens had no hand in modifying the deed. As reiterated previously, at trial Stephens did not even try to put on case that met the strict evidentiary burden to modify an unambiguous deed based on mistake.

Thus, the only valid deed in this case is the August 3, 2007, Warranty Deed. Any equitable relief and damages should be fashioned around that basic and established fact. To not do so is error.[4]

V. The Trial Court Did Not Go Far Enough in its Damage Award to Cummings and Allowing Additional Claims for Northern Title's Misconduct

Cummings does not dispute the trial court's holding that Northern Title was "grossly negligent" and/or committed "willful misconduct." However, the court fell well short in both its justification for the amount of damages awarded to Cummings as well as the types of claims (and its associated damages) that should have been allowed.

A. If Stephens is allowed to keep the east side property, Cummings is entitled to the value of that property, including lost income, as damages.

This is an unusual circumstance where one error of the trial court has resulted in another error, and may end up being largely corrected by fixing the initial error. If this Court determines that the August 3, 2007, Warranty Deed is the only valid deed, then Cummings will have been provided the specific relief of having the title to his property cleared – leaving other types of damages, such as lost income during the time it took to clear the deed, i.e. the CRP income, in play. The Court would then consider such other types of damages, as discussed *infra* for Northern Title's misconduct. However, if in the end, Stephens is allowed to keep the property, then it is most certainly error not to award Cummings the amount equivalent to the value of that property which was *directly* lost as a result of Northern Title's misconduct.

[4] Cummings also raised this issue in his post trial brief on types of relief available due to Northern Title's improper conduct. R. Vol 8, pp. 1530-1531.

The trial court held that Northern Title's conduct constituted a breach of contract, gross negligence, and/or misconduct. The measure of damages from a breach of contract is based on the "expectation interest" of the injured party, as determined by a) "loss of value" caused by the breach, b) any other incidental or consequential loss, and c) any other cost or loss avoided by not having to perform. *Rest. Of Law, 2nd, Contr.* § 347 . See, also, *Lamb v. Robinson*, 101 Idaho 703, 705, 620 P.2d 276, 278 (1980) (injured party entitled to damages "foreseeable" at the time of contract.) Idaho's jury instruction manual identifies various types of "proximate" damages for negligent conduct, including "economic" damages such as past and future earnings lost as a result of the injury, or opportunity costs, as well as non-economic damages such as the suffering of physical and mental pain. IDJI2d § 9.01.

Cummings' post trial brief set forth a number of consequential and proximate damages suffered as a result of Northern Title's misconduct. R. Vol 8, pp. 1524-1530. Among other damages listed, (again assuming that Stephens retains the 83 acres) Northern Title's breach directly resulted Cummings being deprived of the 83 acres lying on the east side of the highway and any foreseeable income that was generated from that property, i.e. the CRP funds. Id. The parties stipulated that the annual CRP payment at $3,221.23, with 4 years remaining on the contract 2012 for a total of $12,884.92. *Tr.* pp. 715-716 Cummings would have earned $16,106.15 from 2008. Id. Thus, the "foreseeable" income established by the evidence that Cummings lost was $28,991.07. Cummings proposed value of the lost property was also covered in detail in the brief.

However, rather than award Cummings these basic consequential and proximate damages, the trial court made the rather curious decision that because *Stephens* never "intended" to sell the east side property, that Cummings was never entitled to the value of that property. R. Vol 8 p. 1627. Instead, the Court came up with $50,000 in damages which was the difference between what Cummings was willing to pay for the entire Stephens Ranch ($850,000), and what Stephens was willing to accept for the west side of the Stephens Ranch ($800,000.) Id. p. 1628.

Even assuming that *Stephens* never "intended" to sell the east side property, there is absolutely no question that *Northern Title's* improper altering and recording of the November 8, 2007, deed directly resulted in Cummings losing title to the 83 acres on the east side of the highway. Had the deed never been altered, Cummings' title to that property would have remained clear according to the unambiguous August 3, 2007, Warranty Deed. If that deed wasn't truly reflective of the "intent" of the parties, then it would have been incumbent upon Stephens to institute an action to modify the deed under the heightened evidentiary burden of proof required for reformation by mistake. That did not occur. Therefore, Cummings was damaged. It was therefore error for the trial court not to award damages equivalent to the lost value and income of the property.

B. The trial court's holding that there is no bad faith tort in Idaho for an escrow agent licensed under Idaho's insurance laws is an error.

Cummings' 2nd Amended Complaint alleged the tort of bad faith for Northern Title's conduct in its fiduciary role as a licensed title & escrow agent. R. Vol. 4, pp. 588-590. Rather than even consider this claim, without citing any authority the trial court summarily decided that

Idaho does "not recognize" the tort of bad faith for escrow services being provided by title insurance companies regulated under the Idaho insurance statutes. R. Vol. 8, p. 1610. Although such a claim may be novel to Idaho, there is no reason why a bad faith tort against a title agency in its performance of escrow services shouldn't be allowed. This may very well be a case of first impression for this Court, but not one without some supportable theories and authority.

As supported by precedent in other jurisdictions specific to escrow services and some Idaho authority generally pertaining to bad faith torts for agents governed under Idaho's insurance statutes, Cummings' post-trial brief set forth various theories and elements that the Court may rely upon in fashioning a bad faith claim for escrow services. R. Vol. 8, pp. 1517-1523. Central to this claim is the title & escrow's fiduciary duties, or "special relationship between the insurer and insured" the violation of which gives rise to a "bad faith" claim. *White v. Unigard Mut. Ins. Co.* 112 Idaho 94, 730 P.2d 1014 (1986) This Court justified the need for such a claim by recognizing that the "statutory scheme to regulate the insurance industry fails to provide sufficient incentive" alone to prevent wrongs, therefore allowing private claims to be based on such statutes (i.e. bad faith or negligence.) *Id.* 112 Idaho 94, fn 3 730 P.2d 1014, fn 3

Cummings suggests that the basis for a bad faith claim should include insurance regulations pertaining to the performance of escrow duties by a title agency, including the following:

1) Failing to obtain written instructions and/or confirm in writing with the parties pertinent matters with regard to the transaction which requires written instructions from the parties) and,

2) Failing to act as a neutral or "impartial" agent

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In addition, Northern Title failed to follow the emphasized provision in the escrow agreement, that, that ***"Documents recorded MUST contain original signatures***." Tr. Ex. 111, Sec. 20 (emphasis as stated.) Not obtaining original signatures of Stephens in re-recording the deed was particularly devastating to Cummings, in that it clouded the title to his property, resulting in loss of income and other rights to the property, and the many years of litigation leading where we are at this moment.

It also important to note that although an escrow agent's duty is narrow and finite, it fulfills a *critical* and fiduciary role in the real estate transaction. The buyer entrusts the escrow agent to receive and disperse his funds (in this case $850,000) in exact accordance with his *written* instructions, and to properly and appropriately obtain and record the deed to the property which he has agreed to purchase. Nothing more, nothing less.

This Court has recognized the importance of that role. "An escrow holder cannot be the agent of only one of the parties" but rather it is an "special agent of both parties" with "duties and powers limited to the terms of the escrow agreement." *Foreman v. Todd,* 83 Idaho 482, 485-485; 364 P.2d 365, 366, 367 (1961). Further, such agent is the:

> trustee of an express trust with duties to perform for each of the parties, which duties neither can forbid without the consent of the other.

Id.

The escrow agent's strict and independent duties are further explained in *All American Realty, Inc. v. Sweet*, 107 Idaho 229, 229; 687 P.2d 1356, 1357 (1984) (citing Am Jur.2d "Escrow" 16).

> Where a person assumes to and does act as the depositary in escrow, he is absolutely bound by the terms and conditions of the deposit and charged with a strict execution of the duties voluntarily assumed. He is held to strict compliance with the terms of the escrow agreement; and he may not perform any acts with reference to handling the deposit, or its disposal, which are not authorized by the contract of deposit.

Id.

The *All American Realty* court also makes clear the serious liability and damages that occur when the escrow agent fails in his duty:

> Since the depository is bound by the terms of the deposit and charged with the duties voluntarily assumed by him, the rule is that liability attaches to him if he improperly parts with his deposit

Id. At 1357-58, 230-231. (Emphasis added.)

Other jurisdictions have recognized that there may be a bad faith claim when which an escrow officer violates his " duty to act with scrupulous honesty, skill, and diligence." *Baker v. First Am. Title Ins. Co.*, 2009 Ariz. App. LEXIS 823, 17-18 (Ariz. Ct. App. Oct. 27, 2009) (citations omitted.) Arizona further recognizes that bad faith may also extend to circumstances where the escrow agent fails to act with utmost honesty and fairness." *Burkons v. Ticor Title Ins. Co. of Cal.*, 168 Ariz. 345, 355, 813 P.2d 710, 720 (1991). Other examples of actions that constitute bad faith by an escrow agent may include a failure of "properly preparing the documents necessary for the transaction to take place," as well as prematurely delivering funds held in escrow. See, *Ansonia Realty Co. v. Ansonia Associates*, 142 A.D.2d 514 (N.Y. App. Div. 1st Dep't 1988), and *Baker v. First Am. Title Ins. Co.*, at 17-18

Cummings established a number of facts that suggest Northern Title's bad faith, as cited *infra*. First, it stepped well outside of its strict fiduciary and statutory duties by altering and re-recording a deed contrary to the escrow instructions and which "was outside of that contemplated and agreed to by the parties." Its bad faith conduct escalated from there. Contrary to the instructions of the title agent, Northern Title then issued a title policy that did not insure the property as described in the title commitment and real estate purchase contract. When Cummings requested that Northern Title correct its error, rather than correct the problem or even respond, it completely abandoned its responsibility to remain a neutral party by first collaborating with Stephens and his agents against Cummings and then ultimately agreeing to indemnify and protect Stephens from *any* claims arising out of the transaction. Indeed, from beginning to end, the record is clear Northern Title and Stephens have been a united front against Cummings – which is utterly inappropriate and a violation of Northern Title's strict escrow duties to remain a neutral party and further to act in its limited yet essential role to simply follow written instructions. Morever, this was all done knowing that it did not "have anything in writing" from Cummings "which was most important" to prove that he intended only to purchase the west side of the Stephens Ranch. Finally, at trial, Cummings offered the expert testimony of Lenore Katri who itemized the numerous standards violated by Northern Title, testimony that went un-refuted.

It is worth noting that Northern Title's Vice-President Jay Davis was asked the very basic question whether the company maintained a policy of "neutrality" in its treatment of customers.

The question was answered by Northern Title's attorney who said that Mr. Davis had already answered that "there were no such policies." Davis Dep. 48:1-21. The fact that Northern Title – as an escrow agency – has no policy of neutrality is an egregious violation of its fiduciary duties and is the foundation springing forth the numerous wrongs that were committed in this case.

Given the supporting authority and facts, it was a legal error for the trial court not to recognize a bad faith tort claim for Northern Title's conduct. Such a claim opens up other types of damages outside of contractual damages. These include "economic" damages such as past and future earnings lost as a result of the injury, or opportunity costs, as well as non-economic damages such as the suffering of physical and mental pain. IDJI2d § 9.01. See also, *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 149 Idaho 299, 314, 149 Idaho 299, 314 (2010)(holding that the jury properly awarded damages for damage to family finances and substantial emotional and mental stress.) Again, it is important to note that had Northern Title not altered the deed, Cummings would have enjoyed the possession and use of the property he purchased on the properly executed deed. The burden would have been upon Stephens to set aside the deed. Instead, Northern Title improperly shifted that burden to Cummings forcing him to file a lawsuit and subsequently endure the anguish and suffering now entering its sixth year since the purchase was closed. This has further resulted in immense suffering, escalating costs and opportunity costs resulting from Northern Title's bad faith conduct. Such damages are worth reconsideration in the event that this Court recognizes a bad faith claim against Northern Title.

In addition, as discussed *infra* Northern Title's bad faith conduct should result in a consideration of punitive damages.

C. The trial court erred by not considering punitive damages for Northern Title's conduct.

Given the compelling facts of this case, it was an abuse of discretion for the trial court to not allow a claim for and award punitive damages. Pursuant to I.C. § 6-1604(2), the threshold for granting a motion to amend a complaint to add a punitive damages claim is where the Court "after weighing the evidence presented, the court concludes that, the moving party has established at (a) hearing a reasonable likelihood of proving facts at trial sufficient to support and award of punitive damages." *Id.*

In Idaho, an award of punitive damages is warranted where there is :

> an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard of its likely consequences. The justification for punitive damages must be that the defendant acted with an extremely harmful state of mind, whether that be termed malice, oppression, fraud, or gross negligence; malice, oppression, wantonness; or simply deliberate or willful.

Kuhn v. Coldwell Banker Landmark, Inc., 150 Idaho 240, 254, 245 P.3d 992 (2010)(citations omitted)

How the defendant's harmful state of mind is termed is unimportant. See *Seinger Law Office, P.A. v. N. Pacific Ins. Co.*, 145 Idaho 241, 250, 178 P.3d 606, 615 (2008). This Court has reiterated that terms "malice, oppression, wantonness; or simply deliberate, or willful" are all acceptable terms to define "the harmful state of mined" requirement. *Id.*

The courts have also provided guidance as to what constitutes punitive damages in a contractual relationship.

> The award of punitive damages in the context of a contractual relationship seems to be based on conduct which is unreasonable and irrational in the business context. The act shows a lack of professional regard for the consequence of the breach of the contractual agreement. When parties enter into a contract, they assume not only the contractual duties imposed by their agreement, they assume a duty to act in good faith. If a party breaches its duty to act in good faith, it may be liable for not only the usual damages resulting from the breach, but also punitive damages.

Cuddy Mountain Concrete, Inc. V. Citadel Constr. Inc., 121 Idaho 220, 824 P.2d 151, 169-61 (Ida. App. 1992)

In addition, the courts have "long allowed" a punitive damages claim in situations where there is a "fiduciary duty" by a party such as an insurer that has acted in "bad faith." *Hall v. Farmers Alliance Mut. Ins. Co.*, 145 Idaho 313, 179 P.3d 276 (2008); *See also, Robinson v. State Farm Mut. Auto. Ins. Co.*, 137 Idaho 173, 45 P.3d 829 (2002); *Walston v. Monumental Life* Ins. Co., 129 Idaho 211, (1996); *Myers v. Workmen's Auto Insurance Co.*, 140 Idaho 495, 95 P.3d 977 (2004) These decisions point out that there may be "numerous situations arise where the breaking of a promise may be an extreme deviation from standards of reasonable conduct, and, when done with knowledge of its likely effects, may be grounds for an award of punitive damages." *Id.* (citations omitted.)

The Court should further consider the following factors when deciding whether to allow the question of punitive damages to go to the jury:

(1) The presence of expert testimony;
(2) Whether the unreasonable conduct actually caused harm to the plaintiff;

(3) Whether there is a special relationship between the parties, as in a insured-insurer relationship;
(4) Proof of a continuing course of oppressive conduct, and
(5) Proof of the actor's knowledge of the likely consequences of the conduct.

Cheney v. Palos Verdes Inv. Corp. 104 Idaho 897, 665 P.2d 661 (1983)

In denying Cummings' claim for punitive damages, the trial court disregarded a number of facts that viewed in cumulation warrant such a claim. The fact that Northern Title was held to be "grossly negligent" and/or having committed "willful misconduct" in the improper altering and rerecording of a deed with a legal description "not contemplated" by the parties in itself justifies punitive damages. *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho at 254 Moreover, after this egregious act Northern Title continued with a steady pattern of conduct that suggested an "extreme deviation from the standard of conduct" with a "harmful state of mind" toward Cummings. This included the documented collaboration and ultimately the indemnification of Stephens against Cummings' claims, knowing that it had no proof that Cummings' intentions were any different than what was contained in the writings and which it was directed to do under the escrow instructions.

In addition, as referenced *infra* Cummings provided the testimony of its expert, Lenore Katri meticulously testified as to the staggering number of errors made by Northern Title from beginning to the end of the transaction that in her opinion constituted a breach of the standard of care. She concluded her testimony that she had never witnessed the type of improper conduct demonstrated by Northern Title in all of her more than 30 years of experience in the industry. *Tr.* 640:2-6

Northern Title's conduct warranting punitive damages can be summed as thus: First, it improperly altered and re-recorded a deed against the intent of the writings and without any consent from Cummings, and act that was found to be willful mis-conduct or grossly negligent. Second, it did not act with any sense of neutrality whatsoever and has actively and aggressively defended Stephens at extraordinary expense to Cummings. The combination of these two factors is what makes Northern Title's conduct particularly aggravating. In essence, Northern Title has not demonstrated one shred of its obligation and duty toward ensuring that the purchaser's (Cummings) instructions were followed, while at the same time taking extreme and inappropriate measures to support the seller (Stephens). This clearly fits within the "outrageous" or "willful and deliberate" conduct of a fiduciary suggesting a "bad state of mind" that justify punitive damages, and it was an abuse of discretion for the trial court to hold otherwise. *Cheney v. Palos Verdes Inv. Corp.* 104 Idaho 897, 665 P.2d 661

D. The trial court erred in excluding the testimony of Cummings' appraiser.

In a pre-trial decision that may ultimately have an effect on damages in this case, the trial court also excluded the testimony of Cummings' disclosed appraisal expert. Tr. p. 1124. This history leading up to this decision is worth noting. On March 13, 2013, Cummings disclosed as an expert appraisal witness "Gregory Kelley." R. Vol. 6, pp. 1096-1100. Mr. Kelley's qualifications and experience were attached to the disclosure, and there was an indication that he would testify with regard to the value of the property. Id. The disclosure also indicated that his report would be forthcoming and would be supplemented. Id. After this disclosure, Northern

Title requested available deposition dates which resulted in a "Notice of Deposition"issued on May 7, 2012, for Mr. Kelley's deposition for June 14, 2012. Supp. Vol 1, pp. 40-42. Northern Title did not request a copy of Mr. Kelley's appraisal report until two days before the deposition, which was immediately provided. Id. p. 11. Mr. Kelley was then deposed by Northern Title and Stephens for more than six hours at the scheduled deposition. Near the end of Mr. Kelley's deposition, Stephens and Northern Title's attorneys presented to Mr. Kelley a previously undisclosed appraisal report prepared by its experts on February 7, 2012. Id. This report had not been disclosed in the defendants' prior expert disclosures. Id. pp. 10-11. Nor had it been disclosed in Northern Title's verified discovery responses (well after Cummings had made his expert disclosures) which requested whether such report had been prepared. Id. pp. 9-12.

Cummings subsequently moved the court to exclude Northern Title's appraisal expert based on the extreme lateness of the disclosure – even though the report had been prepared months earlier, and the misrepresentations made in Northern Title's verified discovery responses wherein the false statement was made that "Defendant Northern Title has not yet obtained a statement of opinions from expert witnesses in this matter." Id. 4-6. The trial court granted Cummings' motion by written decision filed on July 6, 2012. R. Vol. 6, pp. 1233-37

After Cummings had filed his motion to exclude and the court had heard his motion, Northern Title filed its own motion to exclude Mr. Kelley on July 2, 2012. R. Vol. 6 pp. 1060-62. The basis for this motion was that Mr. Kelley's report was not timely supplemented. Id. The

trial court granted Northern Title's motion from the bench on July 17, 2012. The court's justification for excluding Mr. Kelley was simply:

> This is going to be my ruling on Kelley and on Northern Title's expert: Neither one of them is going to testify at trial, because their opinions were late disclosed. If the parties want to work out a stipulation to let them both testify, that's between you.

Tr. p. 1134:7-15. After Northern Title refused to stipulate with regard to the experts, Cummings moved to reconsider, pointing out the imbalance of the equities with regard to the trial court's decision, i.e. that Cummings was more prejudiced by not having an appraisal expert than Northern Title. Tr. pp. 1205:14-25, 1206, 1207:1-6. Cummings even proposed that the appropriate resolution may be to allow Northern Title the opportunity for a rebuttal witness. Id. Although acknowledging that the exclusion was a "harsh remedy," the trial court denied the motion. Id. p. 1211:19-25.

Under IRCP § 26(e), parties are allowed to "seasonably" supplement their responses to discovery. What is acceptable to the Court with regard to timing of such supplementation is within the discretion of the Court, and may include supplementation of expert testimony all the way up to the eve of trial depending on the circumstances. See, *Hopkins v. Duo-Fast Corp.*, 123 Idaho 205, 843 P.2d 207 (1993). In reviewing such supplementation, the trial judge should request an explanation of the late disclosure, weigh the importance of the testimony in question, determine the time needed for preparation to meet the testimony, and consider the possibility of a continuance. *Viehweg v. Thompson*, 103 Idaho 265, 271, 647 P.2d 311, 317 (Ida. App. 1982). The Court should also admit the testimony where there has been no prejudice. *Wiseman v.*

Schaeffer, 115 Idaho 537, 539, 768 P.2d 800, 802 (Ida. App. 1989) Finally, if the court finds that the disclosures are late, in imposing sanctions the Court "must balance the equities by comparing the culpability of the disobedient party with the resulting prejudice to the innocent party and consider whether lesser sanctions would be effective." *Noble v. Ada County Elections Bd.*, 135 Idaho 495, 499-500 20 P. 3d 679, 683-84 (2000) (citations omitted) The basic idea is that the court should always be considering ways to ensure that the case is tried on its merits while at the same time ensuring that no party is unfairly prejudiced.

In this case, it is apparent that the trial court did not adequately "balance the equities" in excluding Cummings' appraisal expert. Although Northern Title's expert was also excluded, its conduct leading to the exclusion was far more egregious and prejudicial to Cummings. Northern Title had failed to disclose its expert report when it was required to and when it was requested, even though it had such report in its possession. It further claimed under oath that it had no report. Conversely, although Cummings expert did not provide his appraisal at the time of his disclosure, Northern Title made no request of the report until only a couple of days prior to the expert's deposition, after which it was promptly supplied. The defendants then were able to depose Cummings' expert for more than six hours almost two months prior to the trial. Moreover, Cummings moved to excluded Northern Title's expert immediately after he was sandbagged with Northern Title's appraisal report at Mr. Kelley's deposition. Whereas, Northern Title waited nearly four months after Mr. Kelley was disclosed (on March 13, 2012) and three weeks after his deposition (June 12, 2012) to move to exclude Mr. Kelley (on July 3,

2012). Up until that moment, Northern Title had not complained of any prejudice from Cummings' supplemental disclosures.

Finally, the impact of the exclusion of Cummings' appraisal expert was much more harsh than the exclusion of Northern Title's expert. The exclusion of Mr. Kelley made it much more difficult to provide a value on the east side property that was improperly excluded by Northern Title's altering of the deed – which had a direct impact on the value of the damages. In other words, although Northern Title's late disclosure was more prejudicial than Cummings' disclosure, the harsh sanction of excluding both experts was far more harmful to Cummings. This was not a proper "balancing of the equities" by the trial court, nor a real attempt to find an alternative remedy that would allow the case to be tried on its merits. *Noble v. Ada County Elections Bd.*, 135 Idaho 495, 499-500 20 P. 3d 679, 683-84; *Viehweg v. Thompson*, 103 Idaho 265, 271.

V. Stephens Should Not Have Been Awarded His Attorney Fees

The trial court awarded Stephens his attorney fees and costs because as the "prevailing party" and even though the court had indicated *sua sponte* on the last day of trial that Stephens was "not a party" to the Warranty Deed and therefore the real estate purchase contract (which Stephens cited as a basis for his fees). R. Vol 9, pp. 1802-1815 Naturally, if this Court rules in Cummings' favor on appeal, then Stephens is certainly not the prevailing party and the trial court's decision on fees and costs should be reversed. However, even if this Court does not

disturb the trial court's decision with regard to Stephens, he should not be awarded his fees and costs.

The Idaho Rules of Civil Procedure only provides a "right" of the awarding of fees and costs to the "prevailing party" in the "action." IRCP § 54(d)(1)(A). In determining whether a party should be awarded costs, the court must conduct an analysis of whether the party truly prevailed, and (of particular relevance to this case) must consider the "final judgment or result of the action in relation to the relief sought by the respective parties." *Id* at (B). Such an analysis requires a "careful consideration of the relevant factual circumstances and principles of law, and without arbitrary disregard for those facts and principles of justice." *Decker v. Homeguard Systems,* 105 Idaho 158, 161, 666 P.2d 1169, 1171 (Ida. App. 1983). The dismissal of a claim "does not necessarily mean that the party against who the claim was made is a prevailing party." *Chenery* v. *Agri-Lines Corporation*, 106 Idaho 687 (Ida. App. 1984) "Dismissal of a claim may be one of many factors to consider. When the claim was dismissed may be another." *Id.* Finally, in considering all of the relevant facts and claims, the Court also has the option of determining that there is no prevailing party when "both parties" have prevailed on their claims. *Jones v. Whiteley*, 112 Idaho 886, 736 P.2d 1340 (Ida. App. 1987).

In considering all of the circumstances and claims in this case, Cummings should not have to pay Stephens his fees and costs as the "prevailing party." The net effect of the trial court's decision is that Stephens is able to hold onto property that Northern Title included in an improperly altered and rerecorded warranty deed. In other words, Stephens will have benefitted

notwithstanding Northern Title's improper conduct. However, Cummings also obtained some relief resulting from Northern Title's improper conduct. Thus, according to the trial court, the only culpable party in this action was Northern Title – who should bear the responsibility for everyone's attorney fees and costs.

In fact, in reviewing all of the relevant facts in this case, requiring Cummings to pay Stephens' attorney fees and costs has the perverse effect of *benefitting* Northern Title even though it is the culpable party. That is because as was established and admitted on the record Northern Title has agreed to indemnify Stephens. Thus, by awarding fees to Stephens, Northern Title is the one who will recoup the costs even though it is the party at fault. It was therefore an error for the trial court to award Stephens his fees and costs when there was only one culpable party and further which will ultimately benefit that culpable party.

VI. Cummings Should be Entitled to His Attorney Fees on Appeal

Cummings should be awarded his attorney fees on appeal pursuant to I.C. § 12-120(3), and by contract. Idaho courts allow for the grant of attorney fees only when authorized by contract or by statute. *Keevan v. Estate of Keevan*, 126 Idaho 290, 298, 882 P.2d 457, 465 (Ida. App. 1994). In this case, there is both a contractual and statutory basis for awarding attorney fees and costs incurred by Cummings.

In this case, (with regard to Stephens) the real estate purchase agreement contains an attorney fee and costs section. Section 27 of that agreement provides:

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

Tr. Ex. 34. Thus if Cummings prevails on appeal with regard his claims against Stephens, he by contract is entitled to his fees and costs.

With regard to his claims against Northern Title, Cummings is entitled to an award of his attorney fees and costs under Idaho Code § 12-120(3). A commercial transaction is defined as all transactions except transactions for personal or household purposes. Id. An award of attorney fees is proper if the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover. *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723 728, 152 P.3d 594, 599 (2007). There are some decisions that discuss whether the commercial transaction constituted the "gravamen" of the lawsuit. *See, e.g., Dennet v. Kuenzli*, 130 Idaho 21, 936 P.2d 219 (1997); *Cox v. Clayton*, 137 Idaho 492, 50 P.3d 987 (2002).

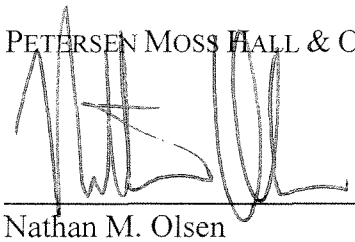
In this case, the trial court has already awarded Cummings his attorney fees against Northern Title based in Idaho Code § 12-120(3). R. Vol. 9, 1802-1815. There is no reason that Cummings shouldn't be awarded his fees on that basis if he prevails on appeal. *Lexington Heights Dev., LLC v. Crandlemire*, 140 Idaho 276, 287, 92 P.3d 526, 537 (2004).

CONCLUSION

Pursuant to the foregoing, this Court should grant Cummings' appeal. It should remand this case to the trial court, directing that an order and judgment be entered invalidating the improperly recorded November 8, 2007, deed and awarding damages to Cummings for lost income and the cost associated with having to clear his deed. In the event that the November 8, 2007, deed is upheld, Cummings should be awarded the value of the excluded property including its lost income, and his appraiser should be allowed to provide his testimony and report as to that value. Cummings' bad faith and punitive damages claims against Northern Title should be allowed, and a new trial should be held with regard to damages on those claims, and any other types of damages that should have been awarded based on Northern Title's misconduct and/or gross negligence. Finally, the trial court's awarding of Stephens' attorney fees should be reversed and Cummings should be awarded his fees on appeal.

DATED this 17th day of September, 2013.

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 17th day of September, 2013, 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), I.R.C.P.

Persons Served:	Method of Service:
Randall Budge, Esq. RACINE OLSON NYE BUDGE & BAILEY P.O. Box 1391 Pocatello, Idaho 83204-1391 FAX: (208) 232-6109 EMAIL: rcb@racinelaw.net	(✓) mail ( ) hand ( ) fax ( ) email *Attorneys for Roger L. Stephens*
Brad Bearnson, Esq. BEARNSON & CALDWELL 399 N. Main Street, Ste. 270 Logan, Utah 84321 FAX: (435) 752-6301 EMAIL: bbearnson@bearnsonlaw.com	(✓) mail ( ) hand ( ) fax ( ) email *Attorneys for Northern Title Company*

Nathan M. Olsen