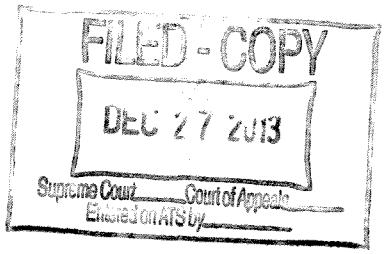
12-27-2013

# US Bank National Association v. Citimortgage Respondent's Brief Dckt. 41252

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 40627-2013

| | |
|---|---|
| U.S. BANK NATIONAL ASSOCIATION, N.D.,<br><br>Plaintiff/Appellant/Cross Respondent<br><br>vs.<br><br>CITIMORTGAGE, INC., a savings bank Organized and existing under the laws of New York;<br><br>Defendant/Respondent/Cross Appellant,<br><br>and<br><br>HERBERT T. THOMAS; JULIE A. THOMAS,<br><br>Defendants, | Case No. 40627<br>41252<br><br>District Court Docket No. CV11-497<br><br>**RESPONDENT'S BRIEF** |




Appeal from the District Court of the Fifth Judicial

District of the State of Idaho, in and for the County of Blaine

Honorable Robert Elgee
District Judge, Presiding

Terry Copple
Davison Copple, Copple, & Copple, LLP
199 N. Capitol Blvd., Ste. 600
P.O. Box 1583
Boise, Idaho 83701
Telephone: (208) 342-3658
Facsimile: (208) 386-9428

Attorneys for Appellant/Cross Respondent

Terri R. Pickens
Pickens Law, P.A.
398 S. 9th St., Suite 240
P.O. Box 915
Boise, Idaho 83701
Telephone: (208) 954-5090
Facsimile: (208) 954-5099

Attorneys for Respondent/Cross Appellant

## TABLE OF CONTENTS

## TABLE OF CASES AND AUTHORITIES

### CASES

**STATUTES**



**RULES**

## I. STATEMENT OF THE CASE

### A. Nature of the Case

This brief is filed by Defendant-Respondent/ Cross Appellant CitiMortgage, Inc. ("CitiMortgage"). This appeal concerns a priority dispute between Plaintiff/Appellant Cross Respondent U.S. Bank National Association, N.D. ("U.S. Bank") and CitiMortgage. The dispute arose between U.S. Bank and CitiMortgage when U.S. Bank filed a Complaint to judicially foreclose upon a deed of trust secured by the subject real property owned by Defendants Herbert T. Thomas and Julie A. Thomas (the "Thomas's"). U.S. Bank sought a determination by the District Court to declare that U.S. Bank had first priority lien position over CitiMortgage, and now appeals to reverse the trial court's determination that CitiMortgage has priority over U.S. Bank with regard to the subject property. CitiMortgage has filed a cross-appeal to reverse the District Court's decision that CitiMortgage was not entitled to attorney fees, and remand for findings with regard to the amount of fees to which it is entitled.

### B. Concise Statement of Facts

The facts in this case are straightforward and largely undisputed. On August 30, 2005, the Thomas's opened a home equity line of credit for $1.8 million with U.S. Bank ("HELOC"),[1] which was secured by a deed of trust upon the property in favor of U.S. Bank (the "The U.S. Bank Deed of Trust"). (R. Vol. I, pp. 18-25).

In October 2005, Blaine County Title ("BCT") was contacted by CitiMortgage to request a title commitment for the property. (R. Vol. I, p. 74, ¶ 7). BCT issued a Commitment for Title Insurance, effective October 19, 2005 (the "Commitment"). (R. Vol. I, p. 74, ¶ 8; R. Vol. I, pp. 79-86). Under the Commitment, CitiMortgage would be issued a policy under certain conditions including the delivery of a deed of trust from the Thomas's to CitiMortgage securing a note of

[1] While U.S. Bank explains what a HELOC is in the Appellant's Brief, pp. 1-2, no evidence exists in the record or was put before the trial court concerning bank and loan processes.

$4.99 million and the release of all deeds of trust on the property, including The U.S. Bank Deed of Trust. (R. Vol. I, p. 74, ¶ 9).

In November 2005, the Thomas's sought a loan from CitiMortgage to pay off and close the HELOC and other debts using real property located at 104 Grey Eagle, Sun Valley, Idaho (the "property") as collateral for the loan ("CitiMortgage Loan"). (R. Vol. I, p. 144, ¶¶ 7-9). Pursuant to the Thomas's loan application, CitiMortgage agreed to lend the Thomas's $4.99 million, which the Thomas's agreed would be secured by a first priority Deed of Trust in favor of CitiMortgage, encumbering the property. (R. Vol. I, p. 145, ¶¶ 10, 14-15; R. Vol. I, pp. 148-53).

In accordance with the Commitment, BCT commenced work to determine payoff amounts in order to release the U.S. Bank Deed of Trust. (*See* R. Vol. I, 75, ¶ 10). In a refinance, it was BCT's standard procedure to work with local branches in securing refinances where possible; because there was a local U.S. Bank branch in Ketchum, the work involving the payoff and reconveyance of the U.S. Bank Deed of Trust was accomplished locally. (R. Vol. I, pp. 75-76, ¶¶ 11, 28).

On November 22, 2005, Kathy Seal ("Seal"), escrow officer of BCT that assisted with handling the Thomas-CitiMortgage closing, received a fax from the local U.S. Bank branch, which was an Account Inquiry for Thomas's' U.S. Bank account ("Thomas Account"). (R. Vol. I, p. 75, ¶¶ 12, 15; R. Vol. I, p. 86). The Account Inquiry set forth the amount owed under the Thomas Account as of November 22, 2005, and stated the amount owing was $1,840,991.56, with interest accruing at $351.9752619 per diem. (R. Vol. I, p. 75, ¶ 16). Seal used that information from the Account Inquiry to calculate the amount owed on the Thomas Account as of November 30, 2013, which would be $1,843,807.40. (R. Vol. I, p. 75, ¶ 17). Using that information, Seal prepared the Settlement Statement for the CitiMortgage Loan. (R. Vol. I, p. 75, ¶ 18; R. Vol. I, R. Vol. I, pp. 87-91).

On November 23, 2005, the Thomas's closed on the CitiMortgage Loan in the office of BCT, where they signed the loan commitment, which memorialized their intent to close the U.S. Bank HELOC[2] (R. Vol. I, p. 76, ¶¶ 23-25; R. Vol. III, pp. 553-54, 557-64). On or about November 29, 2005, BCT prepared a disbursement worksheet and a check dated November 29, 2005, made out to U.S. Bank for $1,843.807.40, and stating on the face of the check that it was to "payoff loan" (the "Check"). (R. Vol. I, p. 76, ¶¶ 26-27; R. Vol. III, p. 554).

In a refinance dealing with local branches like U.S. Bank, it was standard procedure for BCT to deliver a demand for release of a deed of trust with the check payment. (R. Vol. I, p. 76, ¶ 28). It was also always standard procedure for BCT to staple such release demand letters to checks prior to hand delivering them to the local bank so as to be sure the checks reached their intended recipients. (R. Vol. I, p. 77, ¶ 33; R. Vol. II, p. 441, 69:4-22). The delivery of the check with the demand for release has always resulted in the release of the mortgage or deed of trust. (R. Vol. I, p. 76-77, ¶¶ 29-30). More specifically, during 2005 and 2006, BCT refinanced no fewer than eleven (11) U.S. Bank lines of credit under this procedure, and each of these closings resulted in the reconveyance of the respective The U.S. Bank Deed of Trust. (R. Vol. I, p. 77, ¶¶ 30-31).

BCT processed the Thomas's' CitiMortgage refinance in compliance with BCT's standard business procedure, as set forth above; thus here, BCT prepared their standard release demand letter ("Release Demand Letter") and the Check, which were then hand delivered to the local

[2] At his deposition, Herbert Thomas testified that he and his wife signed the loan commitment for the CitiMortgage Loan. (R. Vol. III, p. 553, 32:14-23). The Additional Conditions Rider portion of the loan commitment provided "In addition to being paid off, the U.S. Bank $2,000,000 home equity line of credit (as well as any other lines of credit secured by the subject property) is to be terminated." (R. Vol. III, p. 562, ¶ (B)(5); R. Vol. III, p. 554, 36:14-37:25). From these facts, the District Court found the Thomas's intended to close the U.S. Bank HELOC. (See R. Vol. IV, p. 777, ¶ 2 (ordering issue 5 of the First Order Limiting Trial Issues shall be clarified that, based off Herbert Thomas's' deposition and deposition exhibits, "As a matter of fact the Court concludes that Defendants Herbert and Julie Thomas ("Thomas") intended to payoff and close their U.S. Bank line of credit as part of the CitiMortgage refinance;..."). Nothing in the Second Order Limiting Trial Issues has been appealed by U.S. Bank.

U.S. Bank branch. (R. Vol. I, p. 77, ¶¶ 32-34; R. Vol. I, p. 93). The Release Demand Letter was made out to Ms. Lisa Guinn. (See R. Vol. I, p. 93).

Yet U.S. Bank did not reconvey its deed of trust. (*See* R. Vol. I, p. 115).

It is undisputed that the Ketchum branch of U.S. Bank received and processed BCT's Check on November 29, 2005, for the sum of $1,843,807.40. (R. Vol. I, p. 114; R. Vol. I, p. 138). U.S. Bank then deposited excess funds into the Thomas's U.S. Bank checking account. (R. Vol. III, p. 627, ¶ 10). It is also undisputed that Lisa Guinn processed the Check and applied it to the Thomas's' account in full satisfaction of the HELOC. (*See* R. Vol. I, pp. 115, 140). Instead, U.S. Bank has denied receiving the Release Demand Letter, which is the sole factual question in this case. (*See* Tr. p.38; ll. 11-22).

In or around 2005, U.S. Bank's branch payoff procedures were irregular. (Tr.212-13, ll.4-25, 1-14; Trial Exhibit 513) (stating U.S. Bank "did not have the controls like we do today on HELOCS"). Still, at that time, it's imaging, receiving and routing procedures of checks and "ancillary loan documents" (release demand letters would be an ancillary loan document) were apparently set and required the immediate separation of checks and release demand letters at the branch, which are then separately sent to different parts of the country to be imaged.[3] (R. Vol. III, p. 627, ¶ 14; *accord* R. Vol. III, pp. 619-623). Unfortunately, the original check is unavailable for inspection; after imaging the check, it was ultimately destroyed.[4] (Tr. 135, ll. 4-11).

On November 29, 2005, the CitiMortgage Deed of Trust was recorded with the Blaine County Recorder's office as Instrument No. 529429. (R. Vol. I, p. 145, ¶ 12; R. Vol. I, pp. 155-

[3] According to U.S. Bank personnel familiar with the process, all checks are separated from their ancillary documents. That is, all ancillary loan documents delivered to a local branch would be placed in a transmittal bag known as a "Green Bag," while checks made payable to U.S. Bank for the purpose or fendering payment are processed at the branch and the physical checks are then placed in a clear "Proof Bag." (R. Vol. III, 627, p. 627, ¶ 14; *accord* R. Vol. III, p. 620, ¶ 6(a)). The clear Proof Bag is then routed to Portland, Oregon, while the Green Bag is taken by courier to Fargo, North Dakota. (R. Vol. III, p. 628, ¶ 15; *accord* R. Vol. III, pp. 620-21, ¶ 6(b)-(c)).

[4] The original physical checks are "held" for 45-60 days after processing, then are shredded. (Tr. 135, ll. 4-11).

69). The Thomas's ultimately defaulted on both the U.S. Bank Loan and the CitiMortgage Loan, and this litigation ensued. (R. Vol. I, p. 145, ¶ 13; R. Vol. I, pp. 18-25).

**C. Course of Proceedings**

The proceedings in this case ultimately involved a total of three (3) summary judgment proceedings and a trial, which collectively sought to establish supporting facts and inferences relative to the narrow factual issue of whether the Release Demand Letter had been delivered to U.S. Bank. (*See* R. Vol. VI, pp. 1160-73).

On June 17, 2011, U.S. Bank filed its Complaint against Thomas and CitiMortgage seeking to judicially foreclose the U.S. Bank Deed of Trust. (R. Vol. I, pp. 18-26). More specifically in its Complaint, U.S. Bank sought an order declaring the CitiMortgage Deed of Trust "junior and subordinate to the lien priority of Plaintiff U.S. Bank." (R. Vol. I, p. 25, ¶ 7).

On July 22, 2011, CitiMortgage filed its Answer denying that the U.S. Bank Deed of Trust had priority and alleging affirmative defenses including, *inter alia*, that the CitiMortgage Deed of Trust had senior priority over the U.S. Bank Deed of Trust pursuant to I.C. §§ 45-1502 *et seq*. and I.C. § 45-901 *et seq*. and was thus not entitled to a judgment of foreclosure. (R. Vol. I, p. 33).

On September 13, 2011, U.S. Bank filed a Motion for Summary Judgment seeking to dispose of all issues in the case, including whether U.S. Bank had priority over the CitiMortgage Deed of Trust.[5] (R. Vol. I, pp. 70-72). On September 20, 2011, CitiMortgage filed its cross motion for summary judgment on the lien priority issue.[6] (R. Vol. I, pp. 184-85).

---

[5] U.S. Bank's Motion was supported by the Affidavit of Mathew Paulson in Support of Plaintiffs' Motion for Summary Judgment (R. Vol. I, pp. 50-69), its Brief in Support of Plaintiff's Motion for Summary Judgment (R. Vol. I, p. 38-49), and its Reply Brief in Support of Plaintiff's Motion for Summary Judgment (R. Vol. II, pp. 342-51). Additionally, U.S. Bank later supplemented its Motion with the Affidavits of Loren P. Madson (R. Vol. I, p. 186-95), Lisa Guinn (R. Vol. I, pp. 196-240), and Terry C. Copple (R. Vol. II, pp. 241-95).

[6] CitiMortgage's Motion was supported by the Affidavits of John Linnenbrink (R. Vol. I, pp. 143-69), Katie Scott (R. Vol. II, pp. 296-321), Kathy Seal (R. Vol. I, pp. 73-104), and Terri R. Pickens (R. Vol. I, pp. 105-142), and its Memorandum in Support of Motion for Summary Judgment (R. Vol. I, pp. 170-83).

On February 6, 2012, the trial court heard the parties' cross motions for summary judgment, and made certain findings and inferences with regard to whether the Release Demand Letter was delivered to U.S. Bank, and subsequently issued an Order Limiting Trial Issues Pursuant to Rule 56(d) ("First Order Re: Summary Judgment"). (R. Vol. III, p. 515-521). The First Order Re: Summary Judgment noted that, as agreed by the parties, the question of priority boiled down to a narrow question of fact concerning whether BCT delivered the Release Demand Letter to U.S. Bank. (R. Vol. III, p. 617).

The First Order Re: Summary Judgment expressly left four (4) issues of material fact that would remain for trial between U.S. Bank and CitiMortgage, namely: 1) whether the Check bore visible staple marks (thereby helping to confirm that the Release Demand Letter had been stapled to it and was thus received by U.S. Bank); 2) details concerning U.S. Bank's document scanning and processing procedures (referred to as the "green bag issue"); 3) an explanation of why two different copies of the payoff check were presented to the trial court[7]; and 4) whether the Thomas's instructed BCT to payoff and close the HELOC as part of the CitiMortgage Loan. (R. Vol. III, pp. 515-21). The District Court invited the parties to submit further motions for summary judgment on these four (4) issues for the purpose of further narrowing trial issues. U.S. Bank does not challenge any portion of the First Order Re: Summary Judgment.

On March 15, 2012, CitiMortgage filed its Second Motion for Summary Judgment,[8] where it sought to clarify and dispose of issues relating to different copies of the payoff check

[7] This issue was resolved at CitiMortgage's Second Motion for Summary Judgment. In her affidavit, Kathy Seal explained that the copy of the check attached to her first affidavit, (R. Vol. I, p. 92) was actually a check stub. (R. Vol. III, pp.540-41, ¶¶ 8-9). Seal's second affidavit then attached both the check stub and copy of the Check itself. (*See* R. Vol. III, pp. 544, 546).

[8] CitiMortgage's second motion was supported by the Affidavits of Kathy Seal (R. Vol. III, pp. 539-46) and Terri R. Pickens (R. Vol. III, pp. 547-73), its Memorandum in Support of Second Motion for Partial Summary Judgment (R. Vol. III, pp. 533-38), and its Memorandum in Further Support of Second Motion for Partial Summary Judgment (R. Vol. III, pp. 588-94). In opposition to CitiMortgage's second motion, U.S. Bank filed the Plaintiff's Opposition to Defendant CitiMortgage's Second Motion for Partial Summary Judgment (R. Vol. III, p 582-87) and the supporting affidavit of Michael E. Band (R. Vol. III, p 574-81).

(issue 3 in the First Order Re: Summary Judgment), and determining that the Thomas's, in fact, instructed BCT to payoff and close the HELOC as part of the CitiMortgage Loan closing (issue 4). (R. Vol. III, pp. 530-32). The District Court heard CitiMortgage's Second Motion for Summary Judgment, granted the motion, and issued its Second Order Limiting Trial Issues Pursuant to Rule 56(d) disposing of these issues. (R. Vol. IV, p. 776-78). U.S. Bank does not challenge any portion of the Second Order Re: Summary Judgment.

On April 27, 2012, U.S. Bank filed its Second Motion for Partial Summary Judgment[9] seeking an order finding that staple holes were visible on images of the Check (issue 1 in the First Order Re: Summary Judgment) and the "green bag issue" (issue 2), which clarified that the Check and Release Demand Letter would have been detached from one another at the Ketchum Branch and sent to separate processing centers to be imaged by U.S. Bank, the national association. U.S. Bank further sought summary judgment on certain issues of law that are brought for appeal here, and summary judgment on the ultimate issue of whether U.S. Bank had priority over CitiMortgage. (R. Vol. III, pp. 595-98). The District Court granted U.S. Bank's motion to the extent of clarifying the green bag issue, denied the motion with regard to the visibility of staple marks and priority, and declined to rule on the legal issues raised by U.S. Bank until trial.[10] (R. Vol. IV, pp. 779-82).

Consequently, as a result of its pretrial orders and findings and inferences made on the record, only the narrow question of whether staple holes were visible on scanned images of the Check possessed by U.S. Bank were left on for trial.

---

[9] U.S. Bank's Motion was supported by the affidavits of Tylor Peterson (R. Vol. III., p 619-624), Matthew G. Paulson (R. Vol. III., . 625-31), Vicky Salfeld-Kotiga (R. Vol. III., p 632-35), Keith J. Powers (R. Vol. III., p 636-53), Loren P. Madson (R. Vol. III., p 654-668), Deborah Mosher (R. Vol. III., . 669-83), Michael E. Band (R. Vol. IV., p 684-775), and its Memorandum in Support of Plaintiff U.S. Bank's Second for Partial Summary Judgment [sic] (R. Vol. III., p 599-618). Due to U.S. Bank's untimeliness in filing the motion, CitiMortgage was unable to submit a written response, but did not oppose the "green bag" issue.

[10] While the Third Order Limiting Issues Pursuant to I.R.C.P. 56(d) expressly references and incorporates its oral ruling at hearing on the matter, U.S. Bank has failed to include that hearing in the Reporter's Transcript on appeal.

On July 10, 2012, the trial was held. No expert testimony was presented to the trial court. Instead, U.S. Bank put on testimony of U.S. Bank employee Keith Powers ("Powers") about U.S. Bank imaging processes and various images of the Check, culminating in Power's lay opinion that staple holes were not visible on the scanned copies. CitiMortgage rebutted the testimony with paralegal Shannon Pearson's ("Pearson") testimony recounting her "low fi" experiment, which utilized copy equipment with the same or better dot pixels per square inch (dpsi) imaging capability. Pearson's experiment simply demonstrated that a check could in fact bear staple holes, which could be invisible on a good copied image of the check. (Tr. pp. 188-99, ll. 8-25, 1-11).

On September 24, 2012, the District Court issued its Findings of Fact and Conclusions of law and ultimately concluded that The CitiMortgage Deed of Trust had priority over The U.S. Bank Deed of Trust. (R. Vol. VI, pp. 1160-73). Importantly, the trial court's findings were based upon its rulings, findings, and inferences during all three (3) of the summary judgment proceedings in addition to the findings adduced from trial on the staple hole issue. (R. Vol. VI, pp. 1160-73.) The trial court held that because it was more probable than not that the Release Demand Letter was delivered to U.S. Bank with the Check, which was indisputably deposited by U.S. Bank on the day of closing, U.S. Bank bore the burden of releasing its deed of trust.

Following entry of Judgment in the matter, CitiMortgage filed its Memorandum of Costs and Fees seeking attorney fees as a matter of right pursuant to I.C. §§ 45-1514 and 45-915, under I.C. § 12-121, and pursuant to I.C. § 10-1210, which U.S. Bank opposed. On December 3, 2012, the Court heard the attorney fees issue and ruled that CitiMortgage's request was denied.

## II. ADDITIONAL ISSUE PRESENTED ON APPEAL

Did the District Court err when it denied CitiMortgage's attorney fees, concluding that CitiMortgage was not entitled to its fees?

## III. ARGUMENT

### A. Standard of Review

The appellate court will set aside a trial court's findings of fact only if they are clearly erroneous. *Neider v. Shaw,* 138 Idaho 503, 506, 65 P.3d 525, 528 (2003). In deciding whether findings of fact are clearly erroneous, the appellate court determines whether the findings are supported by substantial, competent evidence. *Id.* Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven. *Ransom v. Topaz Marketing, L.P.*, 143 Idaho 641, 643, 152 P.3d 2, 4 (2006). Substantial and competent evidence is "relevant evidence that a reasonable mind might accept to support a conclusion." *Henderson v. Eclipse Traffic Control & Flagging, Inc.*, 147 Idaho 628, 631, 213 P.3d 718, 721 (2009). Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven. *Argosy Trust v. Wininger*, 141 Idaho 570, 572, 114 P.3d 128, 130 (2005). Substantial and competent evidence is less than a preponderance of evidence, but more than a mere scintilla. *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993). Substantial and competent evidence need not be uncontradicted, nor does it need to necessarily lead to a certain conclusion; it need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder. *See Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974).

The appellate court exercises free review over the District Court's conclusions of law to determine whether the court correctly stated the applicable law and whether the legal conclusions are sustained by the facts found. *Neider*, 138 Idaho at 506, 65 P.3d at 528; *Conley v. Whittlesey*, 133 Idaho 265, 269, 985 P.2d 1127, 1131 (1999); *Willis v. Willis*, 33 Idaho 353, 357-58, 194 P. 470, 472 (1920).

This Court is tasked to determine whether the factual findings of the District Court are supported by substantial and competent evidence or whether its findings are clearly erroneous. Once that determination is made, this Court must exercise free review over the District Court's conclusions of law which will ultimately decide this case. CitiMortgage submits that after this Court reviews the findings of fact and conclusions of law made by the District Court, this Court will affirm the District Court's decision that CitiMortgage has priority over U.S. Bank, and will determine as a matter of law that the Release Demand Letter was sufficient to make demand under I.C. § 45-1514. CitiMortgage further submits that it is entitled to attorney fees under I.C. §§ 45-1514 and 45-915, or in the alternative, I.C. §§ 12-121 or 10-1210, and that the matter should be remanded for an entry of order requiring a finding of the amount of those fees.

### B. Legal Analysis

The District Court's decision that CitiMortgage delivered the Release Demand Letter to U.S. Bank on November 29, 2005, and therefore has priority over U.S. Bank, is supported by substantial and competent evidence and cannot be disturbed on appeal. Furthermore, the Release Demand Letter is sufficient to demand release of the U.S. Bank Deed of Trust pursuant to I.C. § 45-1514. Finally, CitiMortgage is entitled to its attorney fees due to U.S. Bank's failure to reconvey its deed of trust.

#### 1. The District Court's Findings Support the Conclusion that the Release Demand Letter was Delivered

As a threshold matter, U.S. Bank incorrectly frames the case as solely dependent on the narrow factual issue of whether staple marks are discernable on copies of the Check. In so arguing, U.S. Bank ignores the record. The District Court's ultimate conclusion that the Release Demand Letter was delivered to U.S. Bank was based on numerous inferences and facts that

were established during a series of summary judgment motions as well as a trial, where the lone remaining factual issue of staple marks remained. Simply put, the question of whether staple holes were visible on copies of the Check was simply not dispositive of the issue.[11]

Prior to making any findings and inferences, the District Court properly framed the sole issue in the case as follows:

> It's an issue of fact. It's a—counsel have agreed it's a court trial, and there are cross-motions on this identical issue. Each party submitted affidavits. The sole issue is what happened to the release demand letter and what are the most probable inferences. And so I'm going to give you all the inferences that I can draw from the evidence. And I have heard both of you say we're going to be back here in six months if you don't make a ruling on this, but there are some little teeny, tiny issues of fact that are not resolved that I'm going to raise – I think the evidence raises questions, and I'll tell you what those are when I'm done.
>
> But I'm going to give you all the probable inferences that I arrive at to this point. I'm going to narrow the issues under Rule 56(d), and then I'm going to say, all right, when we get to trial, here's the only issue on this that I'm going to permit unless someone else—unless someone, for good cause shown or whatever, moves the Court and says we've got some additional evidence on this point we want to submit.

(Tr. p. 57, ll. 1-20; *see also* Tr. p. 76, ll. 2-9)(noting the trial court would not accept any other evidence on the issue of delivery of the Release Demand Letter without prior motion to the court and a finding of good cause. U.S. Bank made no such motion.).

The District Court made over a dozen findings and inferences bearing on the narrow issue of whether the Release Demand Letter was delivered to U.S. Bank that were completely unrelated to the staple hole issue. Importantly, none of these findings and inferences have been challenged by U.S. Bank on appeal. This is important because irrespective of what the court found at trial regarding the existence of staple holes, in the context of the other undisputed facts and inferences

[11] The Court's conclusion that the Release Demand Letter was delivered to U.S. Bank expressly incorporated and was based upon more than the narrow trial issue of whether staple marks were visible on U.S. Bank's copies of the Check. The District Court's decision was based on 1) oral findings and most probable inferences made in open court at hearing on the parties' cross motion for summary judgment, 2) the Order Limiting Trial Issues Pursuant to Rule 56(d), 3) Order Granting in Part and Denying in Order Limiting Trial Issues Pursuant to Rule 56 (d), 4) Second Order Limiting Trial Issues Pursuant to Rule 56(d), 5) Third Order Limiting Trial Issues Pursuant to Rule 56(d), and 6) Order Regarding Stipulation of the Parties Regarding Herbert T. Thomas and Julie A. Thomas. (R. Vol. VI, pp. 1161-62).

in the record—practically all of which militate in CitiMortgage's favor—the trial court's decision is supported by substantial and competent evidence.

For instance, it was uncontested that the Thomas's sought to refinance the U.S. Bank loan through CitiMortgage and used BCT to close the refinance, (R. Vol. VI, pp. 1162-64, ¶¶ 3-6, 11-13); that BCT made an inquiry to U.S. Bank about the payoff amount, which was answered by Lisa Guinn of U.S. Bank with a screenshot, which she faxed over to BCT (R. Vol. VI, pp. 1162-63, ¶¶ 7-8); that BCT prepared the Release Demand Letter, (Tr. p. 58, ll. 7-11); that the Release Demand Letter called for hand delivery, (Tr. p. 58, ll. 12); that it was BCT's procedure to "always" staple the check to release demand letters, (Tr. p. 64, ll. 8-13; R. Vol. VI, p. 1164, ¶ 15); that the Check was deposited by U.S. Bank the same afternoon the CitiMortgage Loan was closed, (Tr. p. 58, ll. 13-21; R. Vol. VI, p. 1165, ¶ 18); and that the Thomas's intended, and instructed BCT as closing agent, to payoff and close the HELOC as part of the CitiMortgage closing. (R. Vol. IV, pp. 776-78).

The court noted, and U.S. Bank did not dispute, that given the communications between BCT and U.S. Bank, U.S. Bank knew the payoff was coming from a title company—not the Thomas's seeking to ask to zero down their line of credit, (Tr. pp. 73-74, ll. 21-25, 1-5; R. Vol. VI, p.1163, ¶ 10); that only U.S. Bank knew about any prepayment penalty that could have caused U.S. Bank not to immediately close the HELOC, (R. Vol. VI, p. 1163, ¶ 9; *see also* Tr. p. 73, ll. 5-21); and that the "payoff" versus "pay down" procedures U.S. Bank used in November 2005 were irregular. (R. Vol. VI, p. 1168, ¶ 24).

Undisputed evidence provided the basis for the trial court to make certain reasonable inferences supporting that the Release Demand Letter was delivered, which U.S. Bank likewise never contested and are not the basis of this appeal. These include the court's observation that the Release Demand Letter calls for delivery to U.S. Bank employee Lisa Guinn, and that the

Check was most likely received by Lisa Guinn[12], (*see* Tr. pp. 58-59, ll. 22-25, 1-22, noting it is the most reasonable inference that the Release Demand Letter was delivered because it is undisputed that U.S. Bank received the Check and the only document in evidence directing delivery of the check was the Release Demand Letter itself); that "payoff" means "close the line of credit, release the deeds of trust," and the Check itself uses the term "Payoff," in the very terms of U.S. Bank a "key" term – not "Pay to Zero." (Tr. p. 61, ll. 10-17, 21-22).

Moreover, the District Court invited U.S. Bank to come forward with certain evidence which could lead to inferences in favor of U.S. Bank, which U.S. Bank ultimately declined to do. (*See* Tr. p. 76, ll. 2-9). For instance, the District Court observed U.S. Bank argued there was a certain significance to U.S. Bank's "Payoff Form" versus U.S. Bank's "Pay To Zero Form." (Tr. p. 60, ll. 14-16). Yet U.S. Bank put no evidence in the record about who was supposed to fill out either the Payoff Form or the Pay To Zero Form, whether such form was actually required to be filled out by BCT, or whether any such form was anything other than an internal form, which is the inference the District Court ultimately drew from the documents presented by U.S. Bank. (Tr. pp. 60-61, ll. 16-25, 1-9). Regardless, it was undisputed that in or around November 2005, U.S. Bank's branch payoff procedures were irregular. (Tr.212-13, ll.4-25, 1-14; Trial Exhibit 513) (stating U.S. Bank "did not have the controls like we do today on HELOCS").

Given the District Court's extensive findings of facts and expressly stated inferences it drew from undisputed facts concerning whether it was more likely than not that the Release Demand Letter was delivered,[13] the District Court's decision was not reversible error and must be upheld on appeal.

---

[12]U.S. Bank does not dispute, and has never called into question the observation of the Court at the parties' cross motions for summary judgment, the inference that Lisa Guinn of the Ketchum Branch of U.S. Bank processed the Check and applied it to the Thomas's' account in full satisfaction of the HELOC. (*See* R. Vol. I, pp. 115, 140).

[13] The trial court noted for the first time at cross motions for summary judgment, "Looking at the probable inferences – and I would say to start with, I see no presumptions either way. There are no presumptions in the law

### 2. The District Court Properly Declined to Consider Unintroduced Affidavit Testimony and Evidence At Trial

U.S. Bank's first issue is that "the District Court failed to notice and consider crucial relevant evidence." Appellant's Brief, p. 26. More specifically, U.S. Bank argues the District Court should have "noticed" evidence "of what stapled check images look like," which were attached to the *Affidavit of Keith Powers in Support of Plaintiff U.S. Bank's Second Motion for Partial Summary Judgment.* Appellant's Brief, p. 26.

In support of its argument, U.S. Bank does not cite any testimony of Keith Powers at trial, but instead points to the *Affidavit of Keith Powers in Support of Plaintiff U.S. Bank's Second Motion for Partial Summary Judgment. See* Appellant's Brief, p. 26-27 (citing R. Vol. III, pp. 636-53). Yet Power's affidavit and exhibits attached thereto were not only not evidence at trial, but were expressly disregarded for summary judgment purposes pursuant to the District Court's *Third Order Limiting Trial Issues Pursuant to Rule 56(d).*[14] (*See* R. Vol. IV, p. 780, ¶ 2). For all these affidavit exhibits' importance, U.S. Bank never sought to introduce those exhibits or Powers' testimony concerning the exhibits at trial, and cannot now claim the trial court was compelled to consider the evidence for trial on the narrow issue of whether the copies bore visible staple holes.[15]

### 3. The District Court Properly Relied on Evidence in the Record

U.S. Bank's second issue is that the District Court "relied on facts not in the record" when making the solitary factual finding that imaging machinery could have "refilled" the staple holes

---

that work in either party's favor here. . . This is a hand delivery issue, as I see it, and there's no presumptions—there's no legal analysis or presumptions to put on this issue of delivery. I think it's a – both sides start—it's an even heat here." (Tr. pp 57-58, ll. 21-24, 2-6).

[14] The Third Order Limiting Trial Issues Pursuant to Rule 56(d) cites specifically to the hearing, which U.S. Bank has failed to put into the record. (See R. Vol. IV, p. 780, stating the order was based upon "...reasons stated in the record...").

[15] U.S. Bank cites myriad Idaho case law for the proposition that the trial court must weight conflicting evidence at trial, but fails to explain how or why unintroduced evidence must be considered by the trial court.

with existing paper. Appellant's Brief, p. 28 (citing R. Vol. VI, p. 1167, ¶ 12). Yet this finding was supported by the testimony of both Powers and of Pearson at trial.

On cross examination, Powers testified about the refilling of paper as follows:

> Q. (By Ms. Pickens) Could there be a situation where once a staple is removed, the paper folds back and covers up the hole?
> A. I suppose it's possible.

(Tr. p. 176, ll. 1-4).

Powers further conceded this "possibility" when he then testified that he could not see staple marks on copied pages 3 or 4 of CitiMortgage's Trial Exhibit 516, which was later shown to be copied under functionally indistinguishable conditions.[16] (Tr. p. 180, ll. 15-22; Tr. pp. 197-198, ll. 4-25, 1-12).

Additionally at trial, Pearson established that staple holes could, in fact, be refilled with existing paper. Pearson testified that although she did not see the existence of staple marks on pages 3 or 4 of Trial Exhibit 516, those were copies of a check that had, in fact, born staple marks prior to scanning them. (Tr. pp. 197-199, ll. 4-25, 1-11). As U.S. Bank's counsel conceded at trial, a witness should be able to offer any testimony about her observations of a demonstration, if relevant. (*See* Tr. p. 191, ll. 17-19). As will be further discussed in response to another of U.S. Bank's arguments concerning the admissibility of Pearson's experiment, *see* discussion infra, pp. 20-25, Pearson's testimony and observations in producing Trial Exhibit 516 are admissible and were properly considered by the Court.

Because it is "the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of witnesses," this Court has held that it is constrained to "liberally construe the trial court's findings of fact in favor of the judgment entered." *Borah* v. *McCandless*, 147 Idaho 73, 77, 205 P.3d 1209, 1213 (2009). The testimony from both parties'

[16] Both the U.S. Bank check processing system and Pearson's "experiment" involved copying a stapled check at a quality of 400 dpsi or better. (*See* Tr. pp. 177-79, ll. 18-25, 1-3; Tr. pp. 197-199, ll. 4-25, 1-11).

witnesses served the basis of the District Court's finding that "staple holes could be refilled with existing paper." (*See* R. Vol. VI, p. 1167, ¶ 22.) To the extent that finding contributes to the ultimate decision that the Release Demand Letter was delivered (and, thus, CitiMortgage has priority), this Court is constrained to liberally construe the findings of fact in favor of the judgment entered for CitiMortgage.

Additionally, the District Court, as the trier of fact, is free to draw reasonable inferences from the underlying facts. *See Edwards v. Conchemco, Inc.*, 111 Idaho 851, 854, 727 P.2d 1279, 1281 (Ct. App. 1996)("Weighing of relative probabilities is a function to be performed by the trier of fact."). It is reasonable to make the inference that that holes could have been covered up, and is squarely within the fact finder's day-to-day experience that when punched by a staple, paper is not necessarily punched out and may refold over a hole.

The District Court properly relied on evidence in the record in determining the Check was stapled, and therefore delivered with, the Release Demand Letter.

#### 4. The District Court Properly Considered and Allocated the Burden of Proof

U.S. Bank's third issue deals with the question of whether the District Court properly considered and allocated the burden of proof in this case. U.S. Bank breaks up the issue into three (3) largely redundant arguments, none of which squarely identifies what U.S. Bank assigns as error. The District Court's findings make clear that CitiMortgage proved the Release Demand Letter was delivered by a preponderance of the evidence. Moreover, the District Court correctly concluded that I.C. §§ 45-1514 and 45-915 places the burden on U.S. Bank to release the deed of trust once the obligation has been satisfied and demand has been made.

### a. CitiMortgage Proved the Release Demand Letter was Delivered by a Preponderance of the Evidence

The crux of U.S. Bank's argument concerning burden of proof is that CitiMortgage did not prove by a preponderance of the evidence that the Release Demand Letter was delivered. There is simply no basis for U.S. Bank's contention.

This Court has framed the issue of burden of proof as follows:

> The term 'burden of proof' has two distinct meanings. In its strict sense, the terms denotes the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises, whether civil or criminal. In a secondary sense, the term 'burden of proof' is used to designate the obligation resting upon a party to meet with evidence a prima facie case created against him -- that is, the duty of proceeding with evidence at the beginning, or at any subsequent stage of the trial in order to make or meet a prima facie case.

*Harman v. Northwestern Mut. Life Ins. Co.*, 91 Idaho 719, 721, 429 P.2d 849, 852 (1967) (citing with approval 29 Am.Jur.2d, Evidence, § 123, p. 154).

Concerning the first prong of the term "burden of proof," CitiMortgage met its duty of establishing the truth of the proposition that BCT had delivered the Release Demand Letter with the Check by a preponderance of the evidence. Nearly all the evidence put forward at summary judgment and at trial was brought forth by CitiMortgage in support of delivery of the Release Demand Letter. *See* discussion supra, pp. 11-14. Moreover, much of the relevant evidence offered by U.S. Bank lent itself to inferences contradicting U.S. Bank's allegations and supporting the inference that U.S. Bank had most likely received the Release Demand Letter with the Check, but had apparently misplaced or disregarded it following delivery. (*See*, e.g., R. Vol. IV, pp. 779-81, determining on U.S. Bank's second motion for summary judgment that the Check and Release Demand Letter would have been separated and sent out to different locations to be imaged; R. Vol. VI, p. 1163, ¶ 10, noting the issue of prepayment penalty raised by U.S. Bank did not lend itself to any inferences in its favor). This possibility was conceded by Powers

at trial. (*See* Tr. p. 181, ll. 7-10, agreeing that "under any circumstance in and about any business there is a possibility of human error.").

Substantial evidence submitted by CitiMortgage exists supporting the finding that it was more likely than not that the Release Demand Letter was delivered with the Check and, thus, CitiMortgage has priority under I.C. § 45-1514.

**b. The District Court Correctly Placed the Burden on U.S. Bank**

As to the second prong of the term "burden of proof," denoting the duty of a party to make his prima facie case before judgment can be entered in his favor, the District Court correctly held that U.S. Bank had the duty to release the deed of trust upon satisfaction of the obligation and delivery of demand pursuant to I.C. §§ 45-1514 and 45-915. (*See* R. Vol. VI, p. 1170, ¶¶ 4-6).

As a plaintiff seeking to establish priority in a judicial foreclosure action, U.S. Bank bore the responsibility to prove that it had the right to judicially foreclose. Furthermore, I.C. § 45-1514 expressly placed the duty to release the U.S. Bank Deed of Trust upon satisfaction and delivery of demand.

In this case, U.S. Bank has asserted a claim against CitiMortgage to the effect that U.S. Bank's lien on the Property must be subordinated to U.S. Bank because U.S. Bank has no record of receiving a Release Demand Letter. (*See* R. Vol. I, p. 21, ¶ VII)(alleging in the Complaint, "Defendant CitiMortgage, Inc. . . . claims an interest in the foregoing real property pursuant to a Deed of Trust. . . . The lien priority of the foregoing Deed of Trust should be declared by this Court to be junior in its priority to that of the Plaintiff."); *accord* Appellant's Brief, p. 4 (conceding "U.S. Bank sought judgment, *inter alia*, that the U.S. Bank Deed of Trust was senior in priority to the CitiMortgage Deed of Trust."). Thus, as part of U.S. Bank's prima facie case, it

was U.S. Bank's duty to proceed with evidence and make its case why it was entitled to judicially foreclose the property ahead of defendant CitiMortgage.

Having conceded CitiMortgage had caused the HELOC to be satisfied, the only relevant question for U.S. Bank to prove was that no demand had been made of it as required under I.C. §§ 45-1514 and 45-915. Following the finding that, by a preponderance of the evidence, the Release Demand Letter had been delivered, the District Court correctly concluded that I.C. §§ 45-1514 and 45-915 placed the burden of proof on U.S. Bank as the holder of the deed of trust to release it upon demand or written request, which U.S. Bank failed to do. (R.1170, ¶¶ 4-6).[17]

Because CitiMortgage met its burden of proof that it delivered the Release Demand Letter, the burden of proof shifts to U.S. Bank to prove its that demand was not made and it was not put on notice. *See Pace v. Hymas*, 111 Idaho 581, 585, 726 P.2d 693, 697 (1986). Yet U.S. Bank failed to put on substantial evidence supporting its argument that the missing letter was due to anything more than human error once it arrived at the Ketchum Branch of U.S. Bank.

### 5. The District Court Properly Admitted and Considered the Testimony of Shannon Pearson

Notwithstanding that Powers admitted at trial the thesis of Pearson's experiment—that it was possible that no staple marks were visible because the paper refilled the hole prior to copying—U.S. Bank incorrectly argues that Pearson's testimony was not admissible at trial.

---

[17] While delivery in the context of reconveyance of a deed of trust has not yet been addressed by this Court, the Court's rationale of delivery in other contexts appears similarly appropriate here. For instance, the Court has long held that "the real test of the delivery of a deed is this: Did the grantor by his acts or words, or both, intend to devest [sic] himself of title? If so, the deed is delivered." *See Flynn v. Flynn*, 17 Idaho 147, 160, 104 P. 1030, 1034 (1909) (holding "the burden of proof was upon the respondents to show under the facts of the case that there was no delivery of the deed."). Where evidence exists that a deed of conveyance was duly executed, the prima facie presumption arises that it has been duly delivered and the burden of proof thus rests on the party who asserts nondelivery. *See Brummund v. Romig*, 59 Idaho 312, 317, 81 P.2d 1085, 1088-89 (1938).

### a. The District Court Properly Admitted Pearson's Testimony Because the Experiment Was Substantially Similar to the Original Event

U.S. Bank incorrectly argues Pearson's trial testimony concerning her observations about the ability of existing paper to refill staple holes cannot be considered because stapling and copy conditions were not "substantially similar" to the stapling and copy conditions of U.S. Bank's check imaging.

A witness's testimony recounting tests based upon different test conditions than existed at the time of the original event will be upheld on appeal. *Stoddard v. Nelson*, 99 Idaho 293, 298, 581 P.2d 339, 344 (1978). "The determination of whether test conditions are sufficiently close to actual conditions is left to the discretion of the trial court and will be reviewed on appeal only upon a showing of an abuse of discretion." *Id.* In considering Pearson's testimony about her observations and results of the experiment, the District Court properly used its discretion to allow Pearson's staple hole and check imaging experiment, implicitly finding it was sufficiently similar to U.S. Bank's imaging of staple holes on checks: both involved stapled paper which was then copied at equivalent dpsi.[18]

U.S. Bank relies on *Lopez v. Allen*, 96 Idaho 866, 538 P.2d 1170 (1975)—an Employer Liability Act case involving expert testimony about a creeping clutch pulley brake in a tractor causing an employee's injuries—for the proposition that Pearson's testimony concerning the ability of staple-punched paper to refill a hole prior to copying. The *Lopez* case is so distinguishable from the case at bar that it actually helps emphasize how the general rule concerning such comparative testimony is proper in this case.

In that case, a defendant's rebuttal expert witness attempted to recreate the mechanical braking accident under obviously incomparable conditions. There, the faulty clutch pulley brake

[18] Powers testified that dpsi ("dots per square inch") of U.S. Bank's or its predecessor's system was 400 dpsi. Pearson's experiment was done at 400 dpsi.

had been adjusted prior to the experiment determining whether that particular tractor had a tendency to creep. Further, the tractor at issue had been used during an unknown period of time and to an unknown extent prior to the experiment and did not account for the physical capabilities of the 13 year old compared to the adult mechanical expert in operating the creeping tractor. *Id.* at 871, 538 P.2d at 1175. These variances between the original and test case were obviously so fundamental to the question of whether the tractor creeped that the two were not "substantially similar."

Here, no such variances are material, if any such variances exist at all. First and foremost, the testimony here was not from an expert,[19] nor was the subject matter so specialized such that expert testimony was even necessary: it is within the common knowledge of any fact finder that a staple hole could be refilled with existing paper prior to being copied such that copy holes are invisible, just like any fact finder has life experience sufficient to note that dots on a copied page could just as easily be staple holes. *See, e.g., Lopez*, 96 Idaho at 871, 538 P.2d at 1175 (noting expert testimony is needed only to the extent necessary "to assist the [fact finder] in an intelligent understanding of the issues").

Second, the District Court determined that the experimental conditions here were sufficiently similar so that Pearson's testimony was relevant and probative under I.R.E. 401. Both the original and recreated staple hole experiment dealt with check-weight paper, and the recreated experiment took place under equal or even more stringent conditions of 400 dpsi.[20]

U.S. Bank urges this Court to find as a matter of law that the recreated experiment not be considered because "the conditions of the experiment were completely dissimilar to the original

---

[19] U.S. Bank mistakenly urges this Court to reject Pearson's experiment because it "was not conducted by an expert at all." Appellant's Brief, p. 36. Of course, there is no requirement that all experiments need be conducted by an "expert," and U.S. Bank likewise did not introduce any expert testimony at trial.

[20] Power's affidavit testimony states that the dpsi of the U.S. Bank imaging equipment is 200 dpsi. (R. Vol. II, p. 641, ¶ 15). Powers testified at trial that 400 dpsi would show more image, and would thus be more superior of an image, to 200 dpsi. (*See* Tr. pp. 178-79, ll. 22-25, 1-3).

event," Appellant's Brief, p. 36, but fails to explain how any such variances were material given the obvious simplicity of narrow question at hand (whether a staple hole could be refilled so as to be unseen on a 400 dpsi copy). Alternately put, the "sophistication" of an imaging machine clearly has no bearing on the possibility of holes to be refilled with existing paper. On the other hand, comparable dpsi of the respective machines is relevant, of which Pearson's was of better quality. (*See* Tr. pp. 178-79, ll. 22-25, 1-3, testifying that 400 dpsi would show more than 200 dpsi). Ultimately, however, observations of an experiment against the Check image was one of weight, which the trial court properly undertook as the fact finder.

Pearson's experiment was sufficiently close to the original copy conditions, and there is no indication that the District Court's decision to admit the testimony was in error.

**b. The District Court Properly Admitted Pearson's Testimony as a Rebuttal Lay Witness to Powers**

Next, U.S. Bank argues Pearson was not permitted to testify because she was not admitted or qualified as an expert. U.S. Bank argues that because observations and opinions concerning the ability of paper to refill a hole and/or visibility of staple holes on copies are scientific, technical or otherwise based on "specialized knowledge," the testimony is within the scope of Rule 702, and is thus inadmissible. Appellant's Brief, p. 37. U.S. Bank is incorrect.

In support of its argument, U.S. Bank cites the Third Circuit opinion, *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995), for the proposition that I.R.E. 701 must be construed to "protect against the use of lay witnesses to obtain admission of unreliable or prejudicial experiments." Appellant's Brief, p. 38. Yet *Asplundh Mfg.* has been entirely superseded on the point of law upon which U.S. Bank relies. *See Estate of Knoster v. Ford Motor Co.*, 200 Fed. Appx. 106, 111, fn. 3 (3d Cir. 2006). Moreover, that case, like Federal Rule of Evidence 701 that superseded *Asplundh Mfg.* does not deal with admission of

experiments. Instead, the issue in that case is a comment on the admission of opinions by lay witnesses whose opinion is not reasonably reliable or helpful to the fact finder, and thus should be excluded so as not to mislead a jury.[21]

In its briefing, U.S. Bank takes the inconsistent position of conceding that a lay witness may testify as to investigatory findings and conclusions reached in the course of that person's regular experience, but argues that Pearson's experience as a paralegal who obviously works with stapled and copied documents on a daily basis does not qualify Pearson to testify about her observations related to her experiment. U.S. Bank also argues that Pearson's testimony was inadmissible because the experiment was "likely conducted at the behest of her employer," Pickens Law. U.S. Bank fails to distinguish between Pearson and Powers, who was a U.S. Bank employee brought in expressly to opine about whether he could see staple marks.[22]

Moreover, Pearson's testimony—like the testimony of Powers—was not expert testimony about specialized knowledge bearing on the possibility of staple holes to be refilled or otherwise invisible on a copy. Instead, Pearson's testimony in the form of opinions or inferences was limited to those that were rationally based on her perception of her own experiment, and helpful to a clear understanding of her testimony opening up the possibility of the invisibility of staple holes on a copy of a stapled check, which was the ultimate fact to be proven at trial and is squarely within the province of I.R.E. 701. *See In re S.W.*, 127 Idaho 513, 518, 903 P.2d 102, 107 (Ct. App. 1995); *see also Smith v. Praegitzer*, 113 Idaho 887, 749 P.2d 1012 (Ct. App. 1988) (lay witness opinion is admissible as probative, competent evidence, and the weight to be given it rests with the trier of fact). The trial court clearly considered and weighed the testimony of

[21] Again, it is notable that U.S. Bank employee Keith Powers was likewise not an expert in the case, yet offered an opinion as to the absolute invisibility of the Check full of "noise"—small dots and marks throughout the image—which should meet similar objections under I.R.E. and F.R.E. 701, if any are warranted at all.

[22] It is notable that nowhere in the record does Powers testify that he ever compared the original, physical Check to the copies in U.S. Bank's system—much less has any experience doing so with other check images to verify that as an absolute rule, there is never an occasion by which an original check could bear staple marks that would be unseen on a copy.

both Pearson and Powers in considering whether staple holes could be deemed to have actually existed on the actual Check in view of each person's testimony, and the exhibits introduced at trial.

### c. The District Court Properly Weighed Pearson's Testimony

Finally, as to the weight of Pearson's testimony, U.S. Bank argues that because Pearson did not offer an opinion as to the existence of staple holes in a copy of the Check, that none of her testimony should have been considered by the trial court.

As discussed above, the essence of Pearson's testimony was to establish the observation and inference that while staple holes could exist in an original check, a scanned check could lack visible staple marks, as permitted by I.R.E. 701. Idaho Rule of Evidence 402 requires, "All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible." Further, "relevant evidence" is defined as, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401.

The trial court properly relied on Pearson's testimony to the extent that the testimony assisted the trial court in establishing that staple marks are not always visible on copies (a fact that was also admitted by Powers), took notice of U.S. Bank's Trial Exhibits which had a significant amount of "noise" and may have otherwise contained a holes where any one of the dust specks appeared, took notice of BCT procedures[23] to "always" staple checks to demand letters when delivering them to banks as part of closing transactions, and rationally found that the Check was stapled to the Release Demand Letter. The trial court's findings were based on substantial and competent evidence, and therefore must be upheld by this Court.

[23] BCT's procedures to always include a release demand letter with the payoff check and the procedure to always staple checks is relevant habit and routine practice of the business in accordance with I.R.E. 406.

### 6. The District Court Properly Found That the Release Demand Letter was Stapled to the Check and Delivered to U.S. Bank on November 29, 2005, By a Preponderance of the Evidence

Finally, U.S. Bank incorrectly argues that it introduced uncontradicted evidence at trial concerning the invisibility of staple marks at trial, so it is entitled to reversal of the District Court's judgment declaring CitiMortgage has priority. In addition to the extensive undisputed evidence brought forward by CitiMortgage during pretrial motions concerning the delivery of the Release Demand Letter as part of the closing, which the Court observed in its final ruling following trial, there was sufficient evidence at trial for the trial court to find that staple holes may have existed on the Check.[24]

First, as discussed at length above, the visibility of staple holes was not dispositive to the trial court's ruling that the Release Demand Letter was delivered to U.S. Bank. *See* discussion supra, pp. 11-14.

Second, Power's own testimony was contradictory of his opinion that no staple holes were visible. Powers testified on cross that it was possible that staple holes were on the actual Check, but could be refilled prior to copying, thus rendering them invisible on the copies Powers examined. (Tr. p. 176, ll. 1-4). Powers likewise testified that dots on various portions of U.S. Bank's Trial Exhibit 56 could be staple marks as they correlated with separately scanned images of the Check. (Tr. pp. 172-73, ll. 3-25, 1-15). Powers specifically testified that it was possible that there could have been a staple hole anywhere in the "Endorse Here" language on the Check that would not be detected on the scan. (Tr. 175:10-16). This testimony was expressly relied upon by the trial court in finding that the Check and Release Demand Letter had been stapled together. (*See* R. Vol. VI, pp. 1166-67, ¶ 21).

[24] Attached hereto as Addendum 1 is the Release Demand letter from Blaine County Title. Attached hereto as Addendum 2 is a copy of the Check.

Third, the Court ultimately found, and the record is uncontradicted, that BCT's routine practice is to staple checks to demand letters:

> Q: ... **how do you know that whichever Blaine County Title person took the check and Release Demand Letter from Blaine County Title to U.S. Bank didn't somehow perhaps accidentally separate the Release Demand Letter and the check in transit**?
>
> ...
>
> A: The check was stapled to the letter.
>
> Q: And you personally saw the check stapled to the letter?
>
> A: No, I didn't personally see that. We have covered that. I didn't personally see the letter that I recall. I may have. **Letters of this nature that are delivered locally are stapled, not paper clipped, for that very reason. So that it doesn't get separated from the letter. If that letter did get separated from that check it would not have been delivered**.

(R. Vol. II, p. 441, 69:4-22; R. Vol. II, p. 444, 25:18-22; *see also* R. Vol. I, p. 76, ¶ 28; R. Vol. VI, p. 1164, ¶ 15).

Given the uncontradicted evidence that BCT's routine practice was to deliver a demand for release of a deed of trust with the payment, substantial and competent evidence existed supporting the conclusion that it was more likely than not that the Check was delivered with the Release Demand Letter in this case. *See* I.R.E. 406 ("Evidence of . . . the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove the conduct of the person or organization on a particular occasion was in conformity of the habit or routine practice.")

Fourth, and finally, the trial court was fully able to compare the check images introduced by U.S. Bank as Trial Exhibit 56 on its own to determine if staple marks looked to be apparent. In this respect, while admitted at trial, Power's opinion about the actual visibility of staple marks was conclusory and ultimately not useful given it did not aid the trial court in determining something it could see on its own.[25]

---

[25] Attached as Addendum 1 to this brief is the Release Demand Letter from Blaine County Title. Attached as Addendum 2 to this brief is a copy of Check.

### C. The Release Demand Letter Properly Demanded Reconveyance

U.S. Bank's last argument on appeal is that "the Release Demand Letter was ineffective as a demand for reconveyance for failure to comply with I.C. § 45-1203." Appellant's Brief, p. 42. However, this argument fails because the letter properly made demand upon U.S. Bank as required by I.C. §§ 45-1514 and 45-915, and because I.C. § 45-1203 is inapplicable.

The interpretation of a statute is a question of law over which this Court exercises de novo review. *V-I Oil Co. v. Idaho State Tax Com'n*, 134 Idaho 716, 718, 9 P.3d 519, 521 (2000). The objective of statutory interpretation is to derive legislative intent. *Albee v. Judy*, 136 Idaho 226, 230, 31 P.3d 248, 252 (2001). Analysis begins with the language of the statute, which is given its plain, usual and ordinary meaning. *BHC Intermountain Hosp., Inc. v. Ada County*, 150 Idaho 93, 93, 244 P.3d 237, 239 (2010). Any ambiguities in the statute must be construed with legislative intent in mind, which is ascertained by examining not only the literal words of the statute, but the reasonableness of the proposed interpretations, the policy behind the statute, and its legislative history. *Id.* (citations omitted). Where the language of a statute is unambiguous, there is no need to consult extrinsic evidence. *City of Sun Valley v. Sun Valley Co.*, 123 Idaho 665, 667, 851 P.2d 961, 963 (1993).

As the beneficiary of its deed of trust, U.S. Bank was required to reconvey its interest immediately upon satisfaction of the Thomas's' obligation and delivery of the Release Demand Letter. Idaho Code § 45-1514 states:

> Upon performance of the obligation secured by the deed of trust, the trustee upon written **request of the beneficiary shall reconvey** the estate of real property described in the deed of trust to the grantor; providing that **in the event of such performance and the refusal of any beneficiary to so request or the trustee to so reconvey, as above provided, such beneficiary or trustee shall**

> **be liable as provided by law[26] in the case of refusal to execute a discharge or satisfaction of a mortgage on real property**.

I.C. § 45-1514 (emphasis added).

The above-referenced "law" governing liability in the case of the beneficiary's failure to reconvey a deed of trust is I.C. § 45-915, which provides in relevant part as follows:

> **When any mortgage, affecting the title to real property, has been satisfied, the holder thereof or his assignee must immediately, on the demand of the mortgagor, purchaser, or the successor in interest of either**, execute, acknowledge, and **deliver to him a certificate of the discharge thereof so as to entitle it to be recorded, or he must enter satisfaction or cause satisfaction of such mortgage or affecting the title to real property, to be entered of record** . . .

I.C. § 45-915 (emphasis added); *see also Brinton v. Haight,* 125 Idaho 324, 329, 870 P.2d 677, 682, fn. 4 (1994), noting I.C. §§ 45-1514 and 45-915 must be construed in *pari materia*).

It is undisputed that the Thomas's satisfied their obligation with U.S. Bank. Thus, in order to effect a reconveyance, only "demand" was required to evoke I.C. §§ 45-1514 and 45-915's mandate that U.S. Bank "immediately" reconvey its deed of trust. *See Brinton,* 125 Idaho 324, 332, 870 P.2d 677, 685 (1994)(noting that "Section 45-1514 is identical in purpose to Section 45-915 in that both mandate that the encumbrance 'shall' be released upon satisfaction of the obligation"). Further, the Release Demand Letter unambiguously demanded reconveyance of the U.S. Bank Deed of Trust. (*See* R. Vol. V, p. 1110).

U.S. Bank does not address the mandate of I.C. §§ 45-1514 and 45-915 upon it as beneficiary in its briefing, but rather points to the non-mandatory statute I.C. § 45-1203 as authority that BCT was first "required" to follow I.C. § 45-1203 in making demand upon U.S. Bank. *See Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 1143, 150 (1995)(noting that when used

[26] The referenced law governing liability in the case of refusal to execute a discharge or satisfaction of a mortgage is I.C. § 45-915. *Brinton v. Haight,* 125 Idaho 324, 329, 870 P.2d 677, 682, fn. 4 (1994).

in a statute, the word "shall" means mandatory, and "may" is permissive). U.S. Bank misconstrues the statute.

In short, U.S. Bank argues that because demand was not dated and did not set forth the disclosures of I.C. § 45-1203, it was "ineffective." However, I.C. § 45-1203 is inapplicable according to the plain language of the statute, which provides:

> § 45-1203. Procedure for reconveyance
>
> A title insurer or title agent **may** execute and record a reconveyance of a trust deed upon compliance with the following procedure:
>
> (1) Not less than thirty (30) days after payment in full of the obligation secured by the trust deed and receipt of satisfactory evidence of payment in full has been effected, the title insurer or title agent may either: (a) mail a notice by certified mail with postage prepaid, return receipt requested, to the beneficiary or a servicer at its address set forth in the trust deed, and at any address for the beneficiary or servicer specified in the last recorded assignment of the trust deed, if any, and at any address for a beneficiary or servicer shown in any request for notice duly recorded pursuant to section 45-1511, Idaho Code; or (b) hand deliver a notice to the beneficiary or servicer. The notice shall be in substantially the following form and shall be accompanied by a copy of the reconveyance to be recorded:
>
> . . . .
>
> (2) Sixty (60) days shall elapse following the mailing, in the case of certified mail, or delivery, in the case of hand delivery, of the notice prescribed in subsection (1) of this section.
>
> (3) If the title insurer or title agent has not upon expiration of that sixty (60) day period received any objection under section 45-1204, Idaho Code, the title insurer or title agent may then execute, acknowledge, and record a reconveyance of the trust deed in substantially the following form:
>
> . . . .
>
> (4) A reconveyance of a trust deed, when executed and acknowledged in substantially the form prescribed in subsection (3) of this section shall be entitled to recordation and, when recorded, shall constitute a reconveyance of the trust deed identified therein, irrespective of any deficiency in the reconveyance procedure not disclosed in the release or reconveyance that is recorded other than forgery of the title insurer or title agent's signature. . . .

I.C. § 45-1203 (emphasis added).

The plain language of the statute simply provides a mechanism for a title company to unilaterally record a reconveyance if a lender has failed to record a reconveyance itself, and only if the title company wishes to do so. In that event, the title company has the ability—but not the

duty—to undertake the following procedures set out in I.C. § 45-1203, which require specific content in order to give appropriate notice to the deed holder.[27] Yet nothing exists in Idaho code or case law that places a duty upon title companies to take such affirmative steps to compel the release of a deed of trust.[28] *See generally* Chapter 12, Title 45, Idaho Code (stating a title insurer or title agent "may" take steps to reconvey a deed of trust).

The plain language of I.C. §§ 45-1514 and 45-915 are that the beneficiary "shall" "immediately" release the deed of trust upon satisfaction and demand. In contrast, the language of I.C. § 45-1203 is permissive, while merely providing an alternative option for recording a reconveyance exercisable by a third party title company a minimum of several months after demand has been made. Moreover, such is the most reasonable interpretation because taking the alternative approach urged by U.S. Bank would render I.C. §§ 45-1514 and 45-915 meaningless.

Given the plain language of I.C. §§ 45-1514 and 45-915—and notwithstanding the ability of a title company to follow up under I.C. § 45-1203—the demand for reconveyance was effective as a matter of law.

### D. CitiMortgage is Entitled to Attorney Fees Pursuant to I.C. §§ 45-915 and 45-1514 Due to U.S. Bank's Failure to Reconvey Its Deed of Trust

CitiMortgage submits the final question before this Court, which is whether the District Court should have awarded fees against U.S. Bank. CitiMortgage identified three (3) statutory bases for award of its fees in defending the action, namely, I.C. §§ 45-1514 and 45-915, I.C. § 12-121, and I.C. § 10-1210. The District Court denied fees based of the first two grounds after

---

[27] Idaho Code § 45-1202 gives authority to a title insurer or title agent to reconvey a trust deed under the procedures set forth in I.C. § 45-1203. Specifically, if the title insurer or title agent complies with the requirements of I.C. § 45-1203, then the title agent or title insurer **is authorized to reconvey the deed of trust "whether or not it is then names as a trustee under the trust deed."** In other words, I.C. § 45-1203 only applies if a title insurer or a title agent intends to "execute and record a reconveyance of a trust deed," I.C. § 45-1203, regardless of the named beneficiary and trustee.

[28] Even a cursory review of the statutes reveals that both statutes use the permissive "may" throughout; not once is the mandatory "shall" used. Clearly, compliance with I.C. §45-1202 and 45-1203 is not mandatory as U.S. Bank states.

making specific findings, which CitiMortgage contends was an abuse of discretion. Additionally, however, the District Court did not make findings based on I.C. § 10-1210, which is reversible error.

### 1. CitiMortgage is Entitled to Its Fees Under I.C. §§ 45-1514 and 45-915

The District Court denied an award of CitiMortgage's fees under I.C. §§ 45-1514 and 45-915 for two independent reasons, first, that CitiMortgage was not entitled to fees because they were not claimed and proven at trial (Tr. 235:15-24); and second, because there was a bona fide dispute and no showing of bad faith. (Tr. 241:17-24).

First, the District Court abused its discretion because Idaho Code §§ 45-1514 and 45-915 require an award of attorney fees when a lender fails to reconvey a deed of trust as a matter of law. Section 45-1514 provides, in full, as follows:

> Upon performance of the obligation secured by the deed of trust, the trustee upon written request of the beneficiary shall reconvey the estate of real property described in the deed of trust to the grantor; providing that in the event of such performance and the refusal of any beneficiary to so request or the trustee to so reconvey, as above provided, **such beneficiary or trustee shall be liable as provided by law in the case of refusal to execute a discharge or satisfaction of a mortgage on real property.**

(Emphasis added).

Turning to I.C. § 45-915—the parallel statute addressing satisfaction of a mortgage on real property alluded to in I.C. § 45-1514—payment of damages are addressed as follows:

> When any mortgage, affecting the title to real property, has been satisfied, the holder thereof or his assignee must immediately, on the demand of the mortgagor, purchaser, or the successor in interest of either, execute, acknowledge, and deliver to him a certificate of the discharge thereof so as to entitle it to be recorded, or he must enter satisfaction or cause satisfaction of such mortgage or affecting the title to real property, to be entered of record; and any holder, or assignee of such holder, who refuses to execute, acknowledge, and deliver to the mortgagor, purchaser, or the successor in interest of either, the certificate of discharge, or to enter satisfaction, or cause satisfaction of the mortgage to be entered, as provided in this chapter, **is liable to the mortgagor, purchaser, or his grantee or heirs,**

> **for all damages which he or they may sustain by reason of such refusal, and shall also forfeit to him or them the sum of $ 100.**

(Emphasis added).

Construing the damages provision of I.C. § 45-915, this Court first held that the attorney fees were recoverable as damages in *Cornelison v. United States Bldg. & Loan Ass'n*, 50 Idaho 1, 292 P. 243 (1930), holding as follows:

> Error is also sought to be predicated upon the action of the court in finding and concluding that respondents are entitled to recover $ 400 as damages. C. S., sec. 6369, *supra*, provides that **any mortgagee who refuses to cause satisfaction of the mortgage to be entered when fully paid shall be liable to the mortgagor for all damages sustained by reason of such refusal. Attorney's fees incurred as the result of necessity of bringing action to compel cancelation of the mortgage are recoverable as damages**. (2 Jones on Mortgages, 8th ed., p. 765, citing *Kelly v. Narregang Inv. Co.*, 41 S.D. 222, 170 N.W. 131.)

*Cornelison*, 50 Idaho at 11, 292 P. at 246.

Subsequently, in *Head v. Crone*, 76 Idaho 196, 279 P.2d 1064 (1955), the Court reaffirmed the rule that any violation of I.C. § 45-915 would require the lender failing to release the mortgage to pay the attorney fees resulting from the lender's wrongful refusal. *See id.* at 201-02, 279 P.2d at 1066-67. Thus, read in *pari materia* with I.C. § 45-915, Section 45-1514 requires that U.S. Bank pay CitiMortgage's attorney fees as costs in accordance with I.R.C.P. 54(e)(5) for failing to release the U.S. Bank Deed of Trust on the property, without qualification.[29]

Here, the District Court's decision not to grant attorney fees in this case was an abuse of discretion. The District Court's determination of whether grounds existed to award attorney fees is subject to an abuse of discretion standard of review. *See State v. Byington*, 132 Idaho 589, 592, 977 P.2d 203, 206 (1999) (citing *Miller v. EchoHawk*, 126 Idaho 47, 878 P.2d 746 (1994) ("Factual findings that are the basis for an exercise of discretion . . . are subject to a substantial

[29] Attorney fees as allowed by contract or statute must be "deemed as costs in an action and processed in the same as costs," which shall be supported by an affidavit of the attorney. I.R.C.P. 54(e)(5).

and competent evidence standard of review.")). In reviewing an exercise of discretion, this Court must consider "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

In this case, the District Court did not perceive the issue as one of discretion. CitiMortgage defended the action and as such was not required to plead or present evidence of damages as attorney fees. Instead, I.C. §§ 45-1514 and 45-915 require an award of fees after the action has been finally determined by the court. Additionally, a plain reading of the statute reveals that CitiMortgage is entitled to all damages—including attorney fees—irrespective of any penalty assessed against U.S. Bank for bad faith practices.[30] Common sense shows that both provisions should not be made contingent on the mindset of a lender: attorney fees simply make the wronged party whole, while any statutory fine that is "penal in nature" should therefore be "strictly construed," therefore requiring a showing of bad faith.

---

[30] Idaho case law does not indicate an award of attorney fees must be treated the same as the $100 penalty provision in I.C. § 45-915. While the penalty portion necessarily requires some mens rea on the part of the lender, damages and attorney fees have consistently been treated separate and apart from the penalty analysis in Idaho case law. The clear and unambiguous language of I.C. § 45-915 sets out two separate categories of recovery—disjunctive and separated by a comma and including the connective "and" for even further clarity—for any violation of the Statute: first, "damages which he... may sustain by reason of such refusal"; and second, a forfeit—which is a fine or "penalty"—of $100. Statutory interpretation begins with the literal words of the statute, giving the language its plain, obvious and rational meaning. *Hayes v. Kingston,* 140 Idaho 551, 553, 96 P.3d 652, 654 (2004). On its face it is apparent that the statute deals with an award of "damages" and a forfeit of $100 as a "statutory penalty" differently.

For instance, in *Head v. Crone*, 76 Idaho 196, 200-201, 279 P.2d 1064, 1065-66, the Court addressed with the $100 penalty provision separate and apart from attorney fees payable by the wrongful lender. In that case, only after discussing whether prospective profits could be deemed certain enough to be chargeable as damages against the lender, the Court then turned toward its analysis of the $100 penalty referenced in the suit. Furthermore, common sense shows that both provisions should not be made contingent on the mindset of a lender: attorney fees simply make the wronged party whole, while any statutory fine that is "penal in nature" should therefore be "strictly construed," therefore requiring a showing of bad faith, as case law suggests.

Furthermore, even if bad faith was required before attorney fees are awarded, there were no findings made with regard to whether the matter was a "bona fide dispute or a good controversy exists" sufficient to support a denial of attorney fees. Consequently, the District Court acted outside of acceptable legal standards and did not reach its decision by an exercise of reason.

**2. CitiMortgage is Entitled to its Fees Under I.C. § 12-121**

Next, the District Court erred when it declined to award CitiMortgage its attorney fees pursuant to I.C. § 12-121. The basis of the denial was that it found there was an actual dispute as to delivery of the Release Demand Letter, without considering that U.S. Bank required to be brought to trial the question of visibility of staple marks on a copy of a check, which the District Court at all times warned would not be dispositive of the issue. The court's denial of fees under I.C. § 12-121 did not take into account the procedural nature of the Statute. See *Wetzel v. Goldsmith* (In re Comstock), 16 Bankr. 206, 209 (Bankr. D. Idaho 1981)(noting that I.C. § 12-121 "deals instead with the inherent right of courts to control, when circumstances demand, vexatious practices before them."). Idaho Code § 12-121 inherently recognizes the trial court's power to award fees where a party acts in bad faith or vexatiously, which in some cases could warrant an award of attorney fees in order to make the prevailing party whole. See id. at 210.

In pursuing the case, U.S. Bank took a hard line stance. U.S. Bank ignored the District Court's repeated warnings that staple marks on electronically-stored copies of checks would not be dispositive of the priority issue and proceeded to trial on that single issue. U.S. Bank filed multiple nearly identical summary judgment motions on timelines and addressing issues outside the Court's scheduling and partial summary judgment orders. U.S. Bank filed numerous obviously defective affidavits and futile motions to strike many of CitiMortgage's papers, which the Court declined to grant. Taken together, it is clear that U.S. Bank pursued its case against

CitiMortgage frivolously, unreasonably, and in bad faith for the singular, inappropriate, and vexatious purpose of running up attorney fees. As such, it is the inherent right of the court to control such vexatious practices by awarding CitiMortgage its fees pursuant to I.C. § 12-121.

### 3. The Court Erred in Failing to Address an Award of Fees Under I.C. § 10-1210

At hearing on attorney fees, the District Court abused its discretion by failing to make findings under I.C. § 10-1210 before denying CitiMortgage's attorney fees award.

Idaho Code § 10-1210 authorizes an award of costs in declaratory actions[31] "as may seem equitable and just." The Court may utilize I.C. § 10-1210 as an alternative to I.R.C.P. 54(d)(1)(D) to apportion discretionary costs "upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party." *Univ. of Idaho Foundation, Inc. v. Civic Partners, Inc.*, 146 Idaho 527, 545, 199 P.3d 102, 120 (2008). However, an award of costs under I.C. § 10-1210 is proper where a party chooses to pursue "novel arguments and approaches to try to advance [its] interests and to relieve itself of its obligations." *Id.* at 545-46, 199 P.3d at 120-121. Where equity and justice shows that, as between the parties, one party should bear those costs, the court should so order. *Id.* Here, for the reasons more fully set forth above with regard to CitiMortgage's fee award pursuant to I.C. § 12-121, equity and justice requires that as between the parties, U.S. Bank should be required to pay CitiMortgage's attorney fees because it chose to pursue legally and factually unsupportable arguments, and despite the Court's repeated warnings, chose to run up attorney fees and in its pursuit of choosing to take inapposite issues to trial.

---

[31] In its *Complaint*, U.S. Bank requested that "lien priority of the [CitiMortgage] Deed of Trust ... be declared by this Court to be junior in its priority to that of [U.S. Bank]", ¶ VII, at pg. 4; and requesting in its prayer for relief, "That the liens and interests of any of the remaining Defendants herein be declared junior and subordinate to the lien priority of Plaintiff U.S. Bank....", at pg. 7.

It is proper that this case be remanded to District court because the Court failed to make findings specific to I.C. § 10-1210.

## IV. ATTORNEYS' FEES AND COSTS ON APPEAL

Idaho Appellate Rules 40 and 41 allow for an award of costs and attorney fees to the prevailing party. Attorney fees on appeal are appropriate under I.A.R. 41 if the appellate court is left without an abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation. *Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990). An award of attorney fees is appropriate if the appeal does no more than simply invite the appellate court to second-guess the trial court on conflicting evidence, or if the law is well settled and the appellant has made no substantial showing that the lower court misapplied the law, or on review of discretion, no cogent challenge is presented with regard to the trial judge's exercise of discretion. *Pass v. Kenny*, 118 Idaho 445, 449, 767 P.2 153, 157 (Ct. App. 1990); *Blaser v. Cameron*, 121 Idaho 1012, 1018, 829 P.2d 1361, 1367 (Ct. App. 1991).

In the present case, U.S. Bank is vigorously arguing that the District Court's decision, which was based on conflicting evidence, should be reversed. U.S. Bank erroneously argues that disputed evidence is undisputed, that the trial court failed to cite its standard of review of the evidence when the court made specific findings based on the preponderance of the evidence and concerning burden of proof pursuant to I.C. §§ 45-1514 and 45-915. Because U.S. Bank has brought this appeal unreasonably and without foundation, has made no substantial showing that the District Court misapplied the law, and has failed to cogently challenge the trial court's exercise of discretion, CitiMortgage should be entitled to their attorney fees on appeal.

For the foregoing reasons, CitiMortgage respectfully requests it be awarded attorney fees on appeal.

## V. CONCLUSION

The District Court properly found that that the CitiMortgage Deed of Trust has priority over the U.S. Bank Deed of Trust, that the Check was stapled to the Release Demand Letter and delivered to U.S. Bank, and that the Release Demand Letter was effective to require that U.S. Bank reconvey the deed of trust. However, the District Court erred by failing to award CitiMortgage its attorney fees under I.C. §§ 45-1514 and 45-915, by failing to award CitiMortgage its fees under I.C. § 12-121, and by failing to make additional findings awarding CitiMortgage its fees under I.C. § 10-1210.

Respondent/Cross Appellant respectfully requests that this Court affirm the District Court and find that Respondents have priority over Appellants. Respondent/ Cross Appellant further respectfully requests that this Court reverse the District Court's decision that Respondent/Cross Appellant is not entitled to attorney fees, and award their their costs and fees on appeal.

RESPECTFULLY SUBMITTED this 27 day of December, 2013.

PICKENS LAW, P.A.

By: _____
Terri R. Pickens
Attorney for CitiMortgage, Inc.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of December, 2013, two true and correct copies of the foregoing document were served as follows:

| | |
|---|---|
| Terry C. Copple<br>Davison, Copple, Copple & Copple, LLP<br>199 North Capitol Blvd., Ste. 600<br>P.O. Box 1583<br>Boise, Idaho 83701<br>*Attorney for Plaintiff* | [ ] First Class Mail<br>[ ] Facsimile<br>[ ] Overnight Delivery<br>[✓] Hand delivery |

Terri R. Pickens

# ADDENDUM 1

BCT
BLAINE COUNTY TITLE

360 Sun Valley Rd.
Ketchum, ID 83340
Phone (208) 726-0700 / (800) 346-6879
Fax (208) 726-8406

## RELEASE DEMAND LETTER

**Date:** **Escrow Number:** 5014425

US Bank
Attn: Lisa Gwen
Hand Deliver

| | | |
|---|---|---|
| RE: | Your Loan No. | 00003000398652 |
| | Borrower: | Herbert T. Thomas and Julie A. Thomas, husband and wife |
| | Property Address: | 104 Grey Eagle<br>Sun Valley, Idaho 83353 |

In connection with the above-referenced escrow, please find our check # **13219** in the amount of **$1,843,807.40.** You are authorized to use said funds in connection with your Loan Number **00003000398652** when you are in a position to deliver a Deed of Reconveyance of a Deed of Trust or Release of Mortgage from the above referenced borrower, recorded as Instrument No. **526727.**

We demand that the Deed of Reconveyance or Release of Mortgage be delivered to the undersigned within 30 days, as provided by statute.

Please forward any excess funds or escrow reserves to your borrower at:

| | |
|---|---|
| Name: | Herbert T. Thomas and Julie A. Thomas, husband and wife |
| Address: | PO Box 2136<br>Sun Valley, ID 83353 |

Please forward all original documents to:

Blaine County Title Associates
PO Box 3176
Ketchum, ID 83340
Attn: Reconveyance Dept.

If you have any questions, please don't hesitate to contact the undersigned at 208-726-0700 / 800-346-6879

Thank you,
BLAINE COUNTY TITLE

Renee Osenga

# ADDENDUM 2

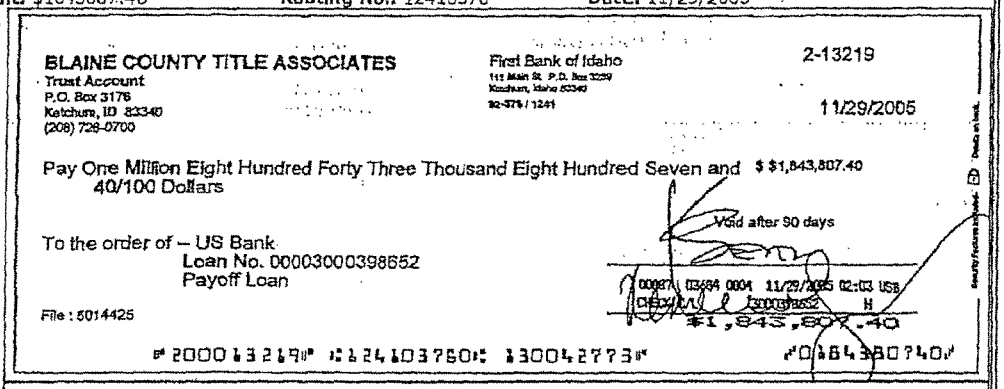
**U.S. Bank Confidential Communication**

Requested by: Jacob Collier

This check image contains confidential information. If you print this image, please store it in a secure place to avoid unauthorized usage of this information. Increased security awareness when discarding or destroying this document is recommended.

**Item #2**
**Account No.:** 130042773 **Check No.:** **Sequence No.:** 003535158296
**Amount:** $1843807.40 **Routing No.:** 12410376 **Date:** 11/29/2005

**Front:**



BLAINE COUNTY TITLE ASSOCIATES
Trust Account
P.O. Box 3176
Ketchum, ID 83340
(208) 726-0700

First Bank of Idaho
111 Main St. P.O. Box 3029
Ketchum, Idaho 83340
92-376 / 1241

2-13219

11/29/2005

Pay One Million Eight Hundred Forty Three Thousand Eight Hundred Seven and 40/100 Dollars $ $1,843,807.40

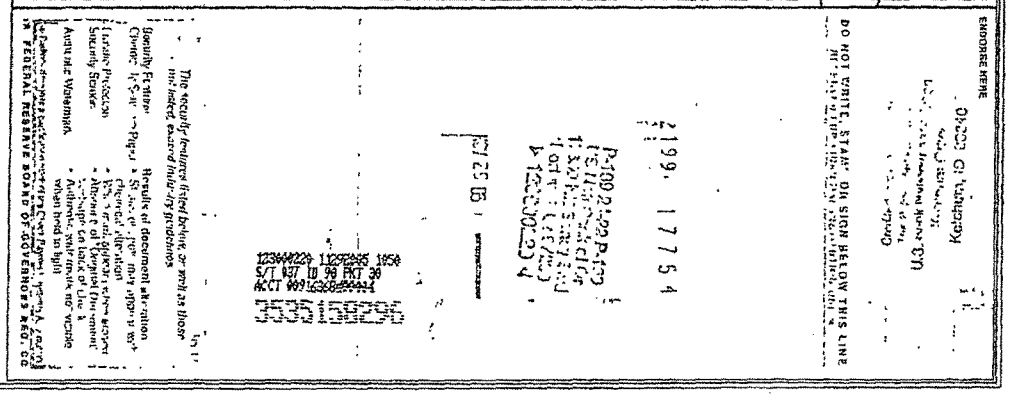
Void after 90 days

To the order of – US Bank
Loan No. 00003000398652
Payoff Loan

File : 5014425

⑈ 2000132197⑈ ⑆124103760⑆ 130042773⑈ ⑈0184380740⑈

**Back:**



DO NOT WRITE, STAMP OR SIGN BELOW THIS LINE

Ketchum, ID 83340

ENDORSE HERE

Blumberg No. 6114 DEFENDANT'S EXHIBIT OM510