UIdaho Law
Digital Commons @ UIdaho Law

Idaho Supreme Court Records & Briefs

4-18-2014

Golub v. Kirk-Scott, LTD Respondent's Brief Dckt. 41505

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation
"Golub v. Kirk-Scott, LTD Respondent's Brief Dckt. 41505" (2014). *Idaho Supreme Court Records & Briefs*. 4823.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/4823

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

No. 41505-2013

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALAN GOLUB and MARILYN GOLUB, husband and wife,

Plaintiffs/Respondents

vs.

KIRK-SCOTT, LTD, a Texas corporation; KIRK-HUGHES DEVELOPMENT, LLC, a Delaware limited liability company; GERALDINE KIRK-HUGHES and PETER SAMPSON, husband and wife; KIRK-HUGHES & ASSOCIATES, INC., a Nevada corporation;

Defendants/Appellants

and

KELLY POLATIS, an individual, and DELANO D. and LENORE J. PETERSON, husband and wife; INTERNAL REVENUE SERVICE; TOMLINSON NORTH IDAHO, INC., an Idaho corporation,

Defendants

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai

MATTHEW Z. CROTTY
CROTTY & SON, PLLC
421 W. Riverside, Suite 1005
Spokane, Washington 99201
Attorneys for Appellant
Kirk-Scott, LTD

MICHAEL T. HOWARD
WINSTON & CASHATT, LAWYERS
250 Northwest Blvd., Suite 206
Coeur d'Alene, Idaho 83814
Attorneys for Respondent

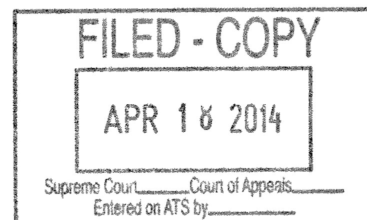


TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

A. Nature of the case/introduction. 1

B. Facts. 2

C. Course of proceedings. 5

ARGUMENT 6

A. The trial court did not abuse its discretion in refusing to vacate a default judgment entered over four years before the motion was made. 7

1. Rule 60(b) requires the moving party to prove the motion was brought within "a reasonable time"; Kirk-Scott failed to meet its burden to establish such reasonableness, including proof of when it became aware of the judgment. 8

2. A non-party to the judgment sought to be vacated is also required to establish timeliness. 11

3. While it is not Golub's burden to establish timelines, the only facts before the court demonstrate that Kirk-Scott did not act timely. 12

B. Even if the court were to address additional merits of the motion to vacate the default judgment, which was rendered unnecessary by the failure of Kirk-Scott to establish timeliness, no basis exists to void the judgment. 14

1. The Complaint and course of proceedings adequately established the amount of the judgment. 14

2. No basis existed under Rule 60(b)(5) or (6) to vacate. 18

C. The trial court properly granted summary judgment on the undisputed facts which established that Golub's Judgment had priority over all other interests. 19

1. Golub's judgment lien need not be supported by good faith or additional consideration to establish priority. 19

2. While not necessary, the undisputed facts established that Golub had no knowledge of Kirk-Scott's unrecorded Deed of Trust for "good faith" purposes. 24

3. Golub's judgment lien is valid. 30

D. The court properly found that Kirk-Scott's recording was invalid based on lack of acknowledgement and because it was filed in violation of the bankruptcy stay as a matter of law. 32

1. Kirk-Scott's September 17, 2010 recording is invalid because the Deed of Trust was not properly acknowledged or certified under Idaho or Nevada law. 32

2. Golub had standing to object to recordation of Kirk-Scott's deed of trust during bankruptcy stay. 35

E. Idaho law does not provide for a reduction in judgment based on the settlement paid by a co-defendant. 36

F. The court did not abuse its discretion in sanctioning the Appellants for an improperly brought motion. 37

G. Attorney fees are not recoverable. 40

CONCLUSION 40

TABLE OF AUTHORITIES

Cases | Page

Blanc v. Laritz, 119 Idaho 359, 806 P.2d 452 (Ct. App. 1991) 11, 12
Burns v. Baldwin, 138 Idaho 480, 65 P.3d 502 (2003) 11
Catledge v. Transport Tire Co., 107 Idaho 602, 691 P.2d 1217 (1984) 9
Credit Bureau v. Sleight, 92 Idaho 210, 440 P.2d 143 (1968) 34
Cuevas v. Barraza, 152 Idaho 890, 277 P.3d 337 (2012) 14
Davis v. Parrish, 131 Idaho 595, 961 P.2d 1198 (1998) 9
Dawson v. Cheyovich Family Trust, 149 Idaho 375, 234 P.3d 699 (2010) 13
Dillon v. Montgomery, 138 Idaho 614, 67 P.3d 93 (2003) 17
Duetz-Allis Credit Corp. v. Smith, 117 Idaho 118, 785 P.2d 682 (Ct.App. 1990) 7
EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) 36
First Sec. Bank of Idaho, N.A. v. Stauffer, 112 Idaho 133, 730 P.2d 1053 (Ct.App. 1986) 9
Gracie, LLC v. Idaho State Tax Com'n., 149 Idaho 570, 237 P.3d 1196 (2010) 19
Gunter v. Murphy's Lounge, LLC, 141 Idaho 16, 105 P.3d 676 (2005) 36
Hartman v. United Heritage Property & Casualty Co., 141 Idaho 193, 108 P.3d 340 (2005) ... 14
Idah-Best, Inc. v. First Security Bank of Idaho, 99 Idaho 517, 584 P.2d 1242 (1978) 31
In re Brooks, 79 B.R. 479 (Bankr. 9th Cir. 1987) 35
In re Estate of Bagley, 117 Idaho 1091, 793 P.2d 1263 (Ct. App. 1990) 19
In re Ellis, 441 B.R. 656 (Bankr. D. Idaho 2010) 35
In re Franck, 171 B.R. 893 (Bankr. D. Idaho 1994) 36
In re Fuel Oil Supply and Terminaling, Inc., 30 B.R. 360 (N.D. Tex. 1983) 35
In re Hegel, 2000 WL 33712298 (Bankr. D. Idaho 2000) 35
In re Jane Doe I, 145 Idaho 650, 182 P.3d 707 (2008) 7
In re Schwartz, 954 F.2d 569 (9th Cir. 1992) 35
In re Stivers, 31 B.R. 735 (Bankr. N.D. Cal. 1983) 35
Insight, LLC v. Gunter, 2013 WL 1730149 (Idaho 2013) 27, 29
Johnson v. Pioneer Title Co., 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983) 10, 15
Johnson v. Hartford, 99 Idaho 134, 578 P.2d 676 (1978) 15
Kiebert v. Goss, 144 Idaho 225 159 P.3d 862 (2007) 24
Kovachy v. DeLevsomine, 122 Idaho 973, 842 P.2d 309 (Ct.App. 1992) 10
Landvik v. Herbert, 130 Idaho 54, 936 P.2d 54 (Ct. App. 1997) 38
Lester v. Salvino, 141 Idaho 937, 120 P.3d 755 (2005) 39
McGrew v. McGrew, 139 Idaho 551, 82 P.3d 833 (2003) 11-12
Meyers v. Hansen, 148 Idaho 283, 221 P.3d 81 (2009) 9, 18
M&H Rentals, Inc. v. Sales, 108 Idaho 567, 700 P.2d 970 (Ct. App. 1985) 31
Mollendorf v. Derry, 95 Idaho 1, 501 P.2d 199 (1972) 34
Mountain Home Lumber Co., Ltd. v. Swartout, 30 Idaho 559 (1917) 22, 23
Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc., 153 Idaho 440, 283 P.3d 757 (2012) 8

Robison v. Bateman-Hall, 139 Idaho 207, 76 P.3d 951 (2003) 20
Schlieff v. Bistline, 52 Idaho 353, 15 P.2d 726 (1932) 17
Sherwood & Roberts, Inc. v. Riplinger, 103 Idaho 535, 650 P.2d 677 (1982) 7
State v. Rivera, 131 Idaho 8, 951 P.2d 528 (Ct. App. 1998) 21
State v. Yzaguirre, 144 Idaho 471, 163 P.3d 1183 (2007) 20
Stoner v. Turner, 73 Idaho 117, 247, P.2d 469 (1952) 9
Sun Valley Hot Springs v. Kelsey, 131 Idaho 657, 962 P.2d 1041 (1998) 26
United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010) 11
Telford v. Nye, 154 Idaho 606, 301 P.3d 264 (2013) 39
Viafax Corp. v. Stuckenbrock, 134 Idaho 65, 995 P.2d 835 (Ct. App. 2000) 11, 13
Wright v. Wright, 130 Idaho 918, , 950 P.2d 1257 (1998) 9

STATUES AND RULES

59 C.J.S. Mortgages § 298 26
I.A.R. 11 31
I.C. §6-805 37
I.C. §12-22-104 17
I.C. §55-606 .... passim
I.C. §55-612 26
I.C. §55-805 .... 33, 34
I.C. §55-811 32
I.R.C.P. 8(f) 15
I.R.C.P. 11 38
I.R.C.P. 11(a)(1) 38
I.R.C.P. 54(b) .... passim
I.R.C.P. 54(c) 15
I.R.C.P. 56 19
I.R.C.P. 59(a) 6, 37
I.R.C.P. 59(a)(1) (6) & (7) 37
I.R.C.P. 60(b) .... passim
I.R.C.P. 60(b)(4) 11, 18
I.R.C.P. 60(b)(5) & (6) 18
NRS 111.240 33
NRS 240.1665 34
NRS 240.1665(3) 34

STATEMENT OF THE CASE

A. Nature of the case/introduction.

Alan Golub (Golub) is a real estate agent who was forced to sue, among others, Geraldine Kirk-Hughes ("Kirk-Hughes"), Kirk-Hughes Development ("KHD"), and Kirk-Hughes and Associates (collectively "the Kirk-Hughes Defendants") for damages he incurred when a real estate commission he was owed was not paid based on the tortious interference and fraud of Kirk-Hughes and her various entities.

The Kirk-Hughes Defendants defended the case for a year and a half before Golub obtained a default judgment against them in March of 2009. That judgment was recorded on August 25, 2009. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 8*) It was re-recorded on October 28, 2010, as soon as KHD was out of bankruptcy. (*Id.*) While the bankruptcy of KHD was pending, and in violation of the automatic stay, Kirk-Scott Ltd. (Kirk-Scott), a company owned by Kirk-Hughes' sister Balinda Antoine, recorded a Deed of Trust on September 17, 2010 against the real property owned by KHD, claiming that Kirk-Scott was given an interest in the property in 2004. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 5*)

Golub subsequently filed this declaratory relief action to establish that his judgment lien had priority over all other claims on the real property owned by the Defendants and that he was thus entitled to proceed with foreclosure to collect his judgment. (*R. Vol. I, pp. 28-32*) Kirk-Scott and the Kirk-Hughes Defendants made a variety of motions and re-motions seeking to block Golub's priority, primarily based on attempting to vacate the underlying judgment that had

been rendered over six years before, and based on the September 2010 recordation of Kirk-Scott's Deed of Trust, purportedly given in 2004. The trial court refused to vacate the judgment, and granted summary judgment establishing the priority of Golub's judgment lien. (*R. Vol. I, pp. 414-421*) Kirk-Scott and the Kirk-Hughes Defendants now appeal the trial court's appropriate exercise of discretion and application of the law.

B. Facts.

In 2004, Mr. Golub was a real estate agent involved in the sale of properties to a Las Vegas attorney and developer, Geraldine Kirk-Hughes. Kirk-Hughes sought to purchase properties in Kootenai County to develop a golf course and residential community called "Chateau de Loire" (the "Project"). The properties purchased in furtherance of the Project included three parcels hereinafter referred to as the "Sloan properties" (tax numbers 5000 and 5850), the "Atkinson property" (tax number 8050), and the Peterson property.

Kirk-Scott Ltd. is a Texas company owned by Kirk-Hughes's sister, Balinda Antoine. On July 8, 2004 Kirk-Scott purchased the Sloan properties. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 1*) Three weeks later, on July 30, 2004, Kirk-Hughes' law firm, Kirk-Hughes Associates, purchased the Atkinson property. (*Id., Ex. 2)* Kirk-Hughes was assigned a Purchase and Sale Agreement on the Peterson property to acquire it for $6M; she let that sale lapse in October 2004, but five months later, the Peterson property was sold to Kirk-Hughes' business partner, Kelly Polatis, who deeded it to KHD the same day, thereby circumventing the large real estate commissions owed to Golub. (*R. Vol. I, pp. 162-169*)

Kirk-Hughes had formed KHD as a separate entity to hold title to, and develop the properties in October 2004. Kirk-Scott is a 51.5% member in KHD; Antoine herself is a 3% member of KHD. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 10, p. 23*) Kirk-Scott transferred the Sloan properties to KHD on November 18, 2004. That same day, KHD purportedly gave Kirk-Scott a Deed of Trust, listing the Sloan properties as well as the Atkinson property. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 5*) (Kirk-Hughes Associates did not transfer the Atkinson property to KHD until May 12, 2005.) (*Id., Ex. 4)* Kirk-Scott did not record the Deed of Trust at that time.

In October 2007, Golub brought suit against Kirk-Hughes, KHD, Kirk-Hughes Associates and the Petersons in CV 07-8038 alleging damages arising from his unpaid realtor fees, which were proximately caused by the tortious interference, fraud, and conspiracy of the Defendants. (*R. Vol. I, pp. 162-169*) After defending the case for a year and a half, the Kirk-Hughes Defendants failed to appear following withdrawal of their attorney, and the court entered an Order of Default against all defendants except the Petersons.[1] On March 12, 2009 the court entered a $941,000 judgment against the Kirk-Hughes Defendants. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 8*)

---

[1] The Petersons were the only defendant with a contract with Golub; all other claims against the defendants were in tort.

On April 6, 2009, KHD filed Chapter 11 bankruptcy in Nevada (09-15153-mkn) and the automatic stay prevented any further collection efforts against KHD. (*See Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 9*) Despite the purported $1.35M obligation to Kirk-Scott secured by the Deed of Trust, KHD did not list any secured claims regarding the property and did not list either Kirk-Scott or Balinda Antoine as a creditor on its Chapter 11 bankruptcy schedules. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 10, pp. 8, 12*) Neither Kirk-Scott nor Antoine filed a creditor's claim. (*See Augmented Record, May 3, 2013 Aff. of Michael T. Howard, ¶9*)

On August 10, 2009 the claims against Peterson (the only remaining claims) were settled and dismissed and the court signed an Order of Final Judgment and 54(b) certificate, allowing Golub to proceed with collection against all defendants except KHD because it was still in bankruptcy. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 11*) Golub recorded the judgment in Kootenai County on August 25, 2009. (*See Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 8*) A year later, on September 17, 2010, Kirk-Scott recorded a $1.35M Deed of Trust purportedly issued to it by KHD six years earlier. (*See Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 5*) At the time the Deed of Trust was recorded, KHD was still in bankruptcy and the automatic stay still in effect.

A month later, on October 28, 2010 at 11:17 a.m., KHD's bankruptcy was dismissed and the automatic stay was lifted. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 12*) On the same day at 3:45 p.m, Golub re-recorded his judgment against KHD and the

other defendants in Kootenai County. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, ¶10*)

On May 4, 2011 KHD filed Chapter 7 bankruptcy in Nevada (11-16944-mkn), which again stayed any collection efforts by Golub. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 13*) Despite its purported $1.35M Deed of Trust, KHD again did not list any secured claims to the property and did not list Kirk-Scott as a secured creditor on its Chapter 7 bankruptcy schedules. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 13*) Instead, Balinda Antoine is listed as a secured creditor on the schedules, but no creditors' claim was filed and the nature of the security interest is not identified. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 13, p. 10*) KHD's second bankruptcy case was closed on May 29, 2012 without discharge. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 14*)

C. Course of proceedings.

Based on the judgment lien on the real property held by KHD, Mr. Golub initiated a declaratory judgment action in January of 2013 to have the court declare his priority position over Kirk-Scott's 2004 Deed of Trust, so that he could proceed to collect against the real property. (*R. Vol. I, pp. 28-32*) On May 9, 2013, Golub moved for summary judgment on the issue of the priority. (*R. Vol. I, pp. 67-97*) On June 24, 2013, Kirk-Scott moved to vacate the March 11, 2009 Default Judgment pursuant to I.R.C.P. 60(b). (*R. Vol. I, pp. 111-113*)

On August 9, 2013, the trial court denied Kirk-Scott's motion to vacate and granted Golub's motion for summary judgment, finding his judgment lien to have priority over all other of the defendants' interest in the property. (*R. Vol. I, pp. 414-421*)

Kirk-Scott then moved to "alter or amend" the judgment pursuant to I.R.C.P. 59(a). (*R. Vol. I, pp. 440-442*) Golub's counsel contacted Kirk-Scott's counsel by letter, notifying him that the most recent motion was one for reconsideration of the motion to vacate which was specifically disallowed under I.R.C.P. 11(a)(2)(B); Kirk-Scott disagreed and proceeded. (*See R. Vol. I, pp. 491-492*) The Kirk-Hughes Defendants joined the motion. (*R. Vol. I, p. 549*) The court denied the motion and awarded sanctions on its own motion because there existed no authority for the motion, nor any good faith argument for extension of law to support the motion. (*R. Vol. I, pp. 548-557*)

Kirk-Scott now appeals the trial court's rulings, asserting that the court abused its discretion in not vacating the default judgment, erred in granting summary judgment, and abused its discretion in awarding sanctions.[2]

ARGUMENT

The Kirk-Hughes Defendants and Kirk-Scott have engaged in a variety of strategies in an attempt to block Golub's collection efforts on the only available asset the defendants own – the

---

[2] The Kirk-Hughes Defendants also appeal the summary judgment and sanctions in the consolidated action, which will be responded to separately.

real property held by KHD in Idaho. While these machinations are complex and meant to confuse, the relevant undisputed facts as properly ferreted out by the trial court are not. Golub is the judgment creditor on a $941,000 judgment against KHD granted in 2009 and recorded in 2010 on the real property KHD owns. Kirk-Scott filed a six-year-old Deed of Trust on the property in 2010, while KHD was in bankruptcy. No basis exists to vacate the default judgment, and Kirk-Scott's claim that Golub's judgment lacks priority over its Deed of Trust is not supported by the law or the facts, and the court properly exercised its discretion to award sanctions.

A. The trial court did not abuse its discretion in refusing to vacate a default judgment entered over four years before the motion was made.

A trial court is vested with broad discretion in determining whether to grant a Rule 60(b) motion to vacate a judgment; it will be reviewed only upon a clear abuse of discretion. *In re Jane Doe I*, 145 Idaho 650, 182 P.3d 707 (2008). Thus, absent a showing of arbitrary disregard for the relevant facts and principles of law by the court below, the Supreme Court will affirm the lower court's decision to grant or deny relief. *Sherwood & Roberts, Inc. v. Riplinger*, 103 Idaho 535, 650 P.2d 677 (1982). Contrary to Kirk-Scott's argument, that discretion is not limited here by the concepts discussed in *Duetz-Allis Credit Corp. v. Smith*, 117 Idaho 118, 785 P.2d 682 (Ct. App. 1990). There, the court referenced the limitation on a trial court's discretion in a motion to vacate **only** when procedural safeguards have been ignored, such as notice to a party that has appeared before entry of the default. *Id.* at 120. No such notice defects are alleged here, and the trial court retained full discretion to determine the impropriety of setting aside a default judgment

six years after entry. In fact, the court's discretion to **grant** relief on a motion to vacate is bounded by the requirement that the party seeking relief demonstrate "unique and compelling circumstances which justify such relief." *Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 449-50, 283 P.3d 757 (2012).

Here, there are no such exceptional circumstances, but instead only the attempts of interrelated individuals and companies to block collection of a properly obtained judgment. Kirk-Scott asserts that the district court erred in ruling that it had not met its burden of establishing that its Rule 60(b) motion was brought within a reasonable time; while somewhat confusing, Kirk-Scott apparently asserts that (1) the trial court applied an improper standard in analyzing evidence of when Kirk-Scott was aware of the judgment; (2) Kirk-Scott had no adverse standing to attack it as a non-party; and (3) that once served with the Complaint in the Declaratory Action, it acted diligently. *(See Kirk-Scott Appellant's Brief at pp. 22-23)* None of these claims relieved Kirk-Scott of proving the timeliness of its motion, which it did not do. The trial court properly analyzed the facts, and exercised its discretion to deny the motion to vacate.

1. Rule 60(b) requires the moving party to prove the motion was brought within "a reasonable time"; Kirk-Scott failed to meet its burden to establish such reasonableness, including proof of when it became aware of the judgment.

Kirk-Scott sought relief from the Default Judgment under I.R.C.P. 60(b) which provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment...for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence...(3) fraud...misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged...or it is no longer equitable that the judgment should have prospective application; (6) any other reason justifying relief from the operation

> of the judgment. **The motion shall be made within a reasonable time**, and for reasons (1), (2), and (3), not more than six (6) months after the judgment...was entered...(emphasis added)

The party moving to have a judgment set aside bears the burden of proving his right to relief. *First Sec. Bank of Idaho, N.A. v. Stauffer*, 112 Idaho 133, 139, 730 P.2d 1053 (Ct. App. 1986). Whether a Rule 60(b) motion is timely is an issue of fact for the district court. *Davis v. Parrish*, 131 Idaho 595, 597, 961 P.2d 1198 (1998). A district court is only vested with the discretion to set aside a default judgment if the moving party has complied with the time for making such motion. *Catledge v. Transport Tire Co., Inc.*, 107 Idaho 602, 691 P.2d 1217 (1984).

It must appear that the movant has acted "promptly and diligently in seeking relief." *Stoner v. Turner*, 73 Idaho 117, 121, 247 P.2d 469 (1952) The trial court applies the proper standard in determining whether a movant acts within a reasonable time to set aside a default judgment when it bases its determination upon whether the movants acted "promptly" once they learned of the default judgment. *Wright v. Wright*, 130 Idaho 918, 922, 950 P.2d 1257 (1998). When a movant challenges a judgment under I.R.C.P. 60(b), the court examines the length of time between "the moment the judgment became apparent" to the movant, and the date the Rule 60(b) motion is filed. *Meyers v. Hansen*, 148 Idaho 283, 291, 221 P.3d 81 (2009). Whether a motion for relief from judgment is timely is a factual issue for the district court. *Meyers*, 148 Idaho 291.

After acknowledging these legal requirements, the district court denied Kirk-Scott's Rule 60(b) motion to vacate the default judgment because Kirk-Scott "has provided no evidence to the

Court as to when it became aware of the judgment in question," thus Kirk-Scott "has failed to meet its burden of showing that its Rule 60(b) motion is timely." (*R. Vol. I, p. 416*)

Kirk-Scott argues that it was inappropriate for the court to analyze when Kirk-Scott was "aware" of the judgment for the purposes of determining if it met its burden to establish that it acted within the required reasonable time. It is undisputed that Kirk-Scott made its motion under Rule 60(b), and that the court was entitled to engage in a fact specific inquiry on the reasonableness of the time within which the motion was brought. The timeliness requirement has been applied even when a non-party moves for relief under Rule 60(b). In *Johnson v. Pioneer Title Co. of Ada County*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983) the court analyzed whether a non-party met the time requirement in Rule 60(b) by filing its first motion to vacate within 21 days after entry of the judgment, even though it thereafter had to move to intervene and remake the motion; the court analyzed the pre-intervention and post-intervention conduct of the movant to determine if it met the timeliness requirement. A party seeking relief from a judgment must exercise due diligence in prosecution of its rights. *Kovachy v. DeLeusomme*, 122 Idaho 973, 975, 842 P.2d 309 (Ct. App. 1992).

As a result, the trial court here could certainly analyze the fact of when Kirk-Scott was aware of the judgment in determining the reasonableness in the timing of Kirk-Scott's motion. (In fact, as a majority member of KHD, the court could impute KHD's knowledge to Kirk-Scott.) Kirk-Scott's failure to present evidence to establish the motion was timely brought in turn establishes the court's correct exercise of its discretion. No basis exists to overturn the ruling.

2. A non-party to the judgment sought to be vacated is also required to establish timeliness.

Kirk-Scott asserts that it lacked standing to attack the default judgment under Rule 60(b) until the Declaratory Judgment action was filed, and thus its motion was automatically made within a reasonable time. There are several errors in this argument.

First, as noted in Golub's original brief in opposition to the motion to vacate, Kirk-Scott not only failed to establish that she brought the motion within a reasonable time from its entry, or a reasonable time from the first awareness of it, but also failed to offer any explanation why months went by after the Declaratory Judgment action was filed before it brought the motion to vacate. (Kirk-Scott apparently admits that it had some obligation to act at that time.) Kirk-Scott failed to meet its burden and no other facts are relevant. When a movant fails to offer an explanation for a delay of even a few months in asking for relief, a trial court finding that a movant did not act within a reasonable time is not erroneous. *Viafax Corp. v. Stuckenbrock*, 134 Idaho 65, 995 P.2d 835 (Ct. App. 2000).

Next, Idaho law recognizes (but limits) the right of a non-party to collaterally attack a judgment if it is void, and the non-party is adversely affected. *See Burns v. Baldwin*, 138 Idaho 480, 486, 65 P.3d 502 (2003). However, the rule governing relief from a judgment on the basis that the judgment is void does not provide a license for litigants to "sleep" on their rights. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010). An objection that a judgment is void under I.R.C.P. 60(b)(4) must be brought within a reasonable time. *Blanc v. Laritz*, 119 Idaho 359, 361, 806 P.2d 452 (Ct. App. 1991); *McGrew v. McGrew*, 139 Idaho 551, 559, 82 P.3d 833

(2003). That "reasonable time" is also measured by the time from actual notice of the judgment to when the objection is made. *Blanc*, 119 Idaho at 361. Thus, a non-party's "standing" to attack the judgment does not divest the court of its discretion to analyze the timeliness of its conduct in attacking the judgment. Idaho courts can properly analyze the timeliness of a motion by a non-party utilizing **all** the facts, i.e. when the default was entered, and how quickly the non-party moved to vacate, both before and after they were actually made a party. *See Johnson, supra.* The trial court did not err in requiring Kirk-Scott to affirmatively establish **some** basis that the motion was reasonably timely brought.

Kirk-Scott's assertion that the judgment did not adversely affect it until the declaratory judgment action was filed, such that it could move to vacate until then is also incorrect. Contrary to this argument, the trial court did not require Kirk-Scott to "guess" at the effect of Golub's judgment; a recorded judgment creates a lien on the real property of a debtor as a matter of law. I.C. §10-1110. Kirk-Scott claims it had an interest in the property. It is presumed to know the law, and there was no need for it to "guess" at whether Golub's recorded judgment potentially impacted the property. A deed of trust holder on property on which there was a judgment lien is indeed "affected" by the point of the entry of judgment and has a sufficient interest at that time if it intends to attack the judgment.

3. While it is not Golub's burden to establish timelines, the only facts before the court demonstrate that Kirk-Scott did not act timely.

The trial court did not abuse its discretion in ruling that Kirk-Scott had not met its burden of establishing timeliness of the motion. Even on appeal, Kirk-Scott continues to point to one

primary fact - - it filed a motion four months after being sued for declaratory relief (although it points to the three month period after her answer).[3] It fails to explain the four month delay, and no other analysis need to be done to establish that the court below did not abuse its discretion in denying the motion based on timeliness. *See Viafax, supra.*

Moreover, Kirk-Scott also fails to explain how lack of notice of the judgment is possible, in light of the fact that Kirk-Scott is a 51.5% member in KHD, the judgment debtors; Antoine herself is a member with 3% interest. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 10, p. 23*) KHD's bankruptcy petitions in 2009 and 2011 also listed Golub as a creditor, and a judgment creditor; Kirk-Scott and Antoine were in privity with KHD and would have known of the bankruptcy petitions and their contents. (*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 10, pp. 4, 17; Ex. 12, pp. 13,19*) In fact, Antoine was listed as a secured creditor on the schedules in the 2011 bankruptcy and would have been served with the pleadings. (*Id., Ex. 12, p. 10*) The trial court's discretion includes the ability to apply its findings of fact in a logical manner. *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 234 P.3d 699 (2010). Interestingly, Antoine claims that Golub was fully aware of her and Kirk-Scott's connections to the project via their history of involvement; surely the same was true of Antione/Kirk-Scott's knowledge of Golub's role, and pursuit of his damage claim. The trial court

---

[3] Kirk-Scott also cites to the conclusory statement in Antoine's Affidavit that she had no knowledge of the default judgment prior to being served with the declaratory action; that affidavit was not provided to the court in support of the motion to vacate the judgment. It was provided to the court on the motion to amend, and reconsideration of a Rule 60(b) motion is prohibited.

simply did not err in exercising its discretion to determine that factually, the motion to vacate was untimely under the rule.

B. Even if the court were to address additional merits of the motion to vacate the default judgment, which was rendered unnecessary by the failure of Kirk-Scott to establish timeliness, no basis exists to void the judgment.

1. The Complaint and course of proceedings adequately established the amount of the judgment.

In addition to its claim that its motion to vacate was timely, Kirk-Scott also argues that the default judgment was void based on its underlying argument that the amount of the judgment exceeded the amount pleaded in Complaint. While the district court did not abuse its discretion in finding the motion to have been untimely, Kirk-Scott also presented no evidence that the judgment could be voided.

The grounds on which a judgment can be voided are limited and narrowly construed. *Hartman v. United Heritage Property & Casualty Co.*, 141 Idaho 193, 108 P.3d 340 (2005). There must be some jurisdictional defect in the court's authority to enter the judgment, either because the court lacks personal jurisdiction or because it lack jurisdiction over the subject matter of the suit. *Cuevas v. Barraza*, 152 Idaho 890, 894, 277 P.3d 337 (2012).

Kirk-Scott apparently attempts to "void" the judgment by claiming that the amount of the judgment exceeded the trial court's jurisdiction. However, the judgment rendered did not differ from the relief sought in the Complaint, and thus the trial court did not err in refusing to declare it void. The Judgment entered by the court on March 11, 2009 provided:

> **This matter, having come before the Court upon Plaintiffs' Motion for Default Judgment and I.R.C.P. 54(b) Certificate against Debtor, and**

supported by the Affidavits of Michael T. Howard and Alan Golub, and the pleadings on file, the Court does hereby enter Judgment against Debtors as follows:

1. **Plaintiffs are granted judgment in the principal amount of $941,000.00;**

2. **Plaintiffs are granted pre-judgment interest at a rate of 12% beginning March 11, 2005 through entry of this judgment;**

3. **Plaintiffs are granted post-judgment interest to be determined by law from entry of this judgment.**

(*Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex.8*)

I.R.C.P. 54(c) states that a judgment by default is limited to the relief demanded in the Complaint. *See* I.R.C.P. 54(c). The Idaho Supreme Court has interpreted this provision in conjunction with I.R.C.P. 8(f) to mean that where no answer is filed, the relief granted cannot exceed that actually demanded somewhere in the complaint when considered in its entirety. *See, Johnson v. Hartford Ins. Group*, 99 Idaho 134, 138, 578 P.2d 676 (1978). The theory of this provision is that the defending party should be able to decide on the basis of the relief requested whether he wants to expend the time, effort, and money necessary to defend the action. *See id.*

Here, Golub's Complaint, when read in as a whole, fairly apprised KHD of the type and amount of damages claimed. The Complaint alleges:

- Geraldine Kirk-Hughes was the managing member of Kirk-Hughes Development and Polatis was an agent of Kirk-Hughes and Kirk-Hughes Development. (*R. Vol. I, pp. 163-164, ¶¶ 3.2, 3.3*)

- Golub and Pacific Realty had a "Listing Agreement" with Petersons for the sale of the Peterson Property; which entitled Golub and Pacific Realty to payment of a commission upon the sale of the Property. ((*R. Vol. I, p. 164, ¶ 3.5*)

- Golub secured a written sales agreement with Geraldine Kirk-Hughes to buy the Peterson Property. (*R. Vol. I, p. 164, ¶3.7)*

- Kirk-Hughes did not close on the Peterson Property, which was later sold to Polatis and transferred to Kirk-Hughes Development. (*R. Vol. I, p. 165, ¶¶3.11, 3.16, 3.17, 3.19*)

- As a result of Peterson's sale of the Peterson Property to Polatis and subsequent transfer to Kirk-Hughes Development, Peterson did not pay Golub the $941,000 commission under the Listing Agreement and Golub lost his interest in the Adkinson Property. (*R. Vol. I, p. 166 ¶ 3.23*)

- Pacific Realty assigned Golub its interests in the action. (*R. Vol. I, p. 164, ¶3.6*)

- Defendants were aware of the Listing Agreement between Petersons and Golub. (*R. Vol. I, p. 167, ¶6.2*)

- Defendants intentionally interfered with the contractual relationships and expectations of Golub when they acted to frustrate and circumvent the purpose of the Listing Agreement. (*R. Vol. I, p. 167, ¶6.3*)

- As a direct and proximate result of said breaches, Golub has been damaged in an amount to be proven at trial. (*R. Vol. I, p. 167 ¶6.4*)

- Wherefore, Plaintiff prays:

    - Judgment be granted in favor of Plaintiffs for all claims against Defendants in an amount to be proven at trial, but more than the jurisdictional limit in excess of $10,000.00;
    - Plaintiffs recover pre-judgment interest; and
    - For such other relief the Court deems just and equitable.

(*R. Vol. I, p. 169*)

When read as a whole, Golub's Complaint fairly apprised KHD that it was seeking from all Defendants as damages the $941,000 in commissions owed but never paid under the Listing Agreement with Peterson. It also fairly apprised KHD that Golub was seeking interest, which is

provided by statute at the rate of 12% for pre-judgment interest, and at an indexed rate for post-judgment interest. *See* I.C. §12-22-104; *Dillon v. Montgomery*, 138 Idaho 614, 617, 67 P.3d 93 (2003) (I.C. § 28-22-104(2) provides for the award of prejudgment interest at a rate of 12 percent on "[m]oney after the same becomes due." Prejudgment interest may be awarded under this statute where the amount of liability is liquidated or capable of ascertainment by a mathematical calculation.)

Moreover, unlike a typical judgment by default, KHD appeared, answered, and defended Golub's claims for over a year and a half before an Order of Default was entered. When an Answer is filed the court may grant any relief consistent with the case made by Complaint. *See Schlieff v. Bistline*, 52 Idaho 353, 15 P.2d 726 (1932). During that time, KHD was apprised more fully of Golub's claims and damages through discovery, to include the following:

> **INTERROGATORY NO. 1: Please describe in detail all damages you have allegedly suffered as a result of Defendants' conduct.**
>
> **ANSWER: Plaintiffs have suffered a loss of the principal amount of the commission due under the Listing Agreement with Peterson, based upon Peterson's Purchase and Sale Agreement with Kirk-Hughes. Plaintiffs have also suffered a loss of the interest due on that commission beginning November 12, 2004. Plaintiffs have also suffered a loss of the value of the Adkinson Property on the date it was transferred Kirk-Hughes. Plaintiffs have and continue to incur costs and attorney fees in pursuit of recovering the above-referenced damages.**
>
> **REQUEST FOR PRODUCTION NO. 1: Produce copies of all documents that illustrate or explain your alleged damages.**
>
> **RESPONSE: All documents relevant to this request have been previously produced, which include: 1) Net Listing Agreement; and 2) Peterson/Kirk-Hughes Purchase and Sale Agreement. This request will be supplemented as additional, relevant documents are discovered or identified.**

(*R. Vol. I, p. 355*)

The Purchase and Sale Agreement produced in discovery provided the sales price of the property. The Net Listing Agreement provided the method of calculating the realtor fees owed.

Accordingly, the March 11, 2009 Judgment entered by the Court did not differ from the relief sought in the Complaint or asserted and learned during the subsequent year and a half of litigation between the parties. The court did not lack "jurisdiction" to enter the default judgment.

2. No basis existed under Rule 60(b)(5) or (6) to vacate.

As outlined above, as a non-party to the judgment, Kirk-Scott could only challenge the Default Judgment on the basis it was void under Rule 60(b)(4). Thus, its challenge to the denial of its motion based on the failure of the court to analyze any basis under I.R.C.P. 60(b)(5) and (6) is irrelevant. (The court's appropriate finding on timeliness also moots this claim on appeal.) Irrespective of that, no basis exists under either of these grounds to vacate the judgment.

First, Kirk-Scott's claim that the judgment was "prospective" under Rule 60(b)(5) and thus subject to vacation misapplies the definition of "prospective." A prospective judgment is one in which the judgment is "executory" or involves the supervision of changing conduct or conditions, such as a continuing decree of injunction. *Meyers v. Hansen*, 148 Idaho 283, 290, 221 P.3d 81 (2009). A compensatory damage award is not a prospective judgment. *Id.* Golub's judgment was simply a compensatory damage award. Golub had the right to the award, and there was no necessity for the court to monitor future performance.

Similarly, no basis exists under Rule 60(b)(6) based on any "catchall" basis, which requires "unique and compelling" circumstances to justify the relief. *In re Estate of Bagley*, 117 Idaho 1091, 1093, 793 P.2d 1263 (Ct. App. 1990). The only circumstance Kirk-Scott addresses is again the amount of the judgment based on the state of the pleadings before the court. As outlined above, the pleadings, including the affidavits in support of the judgment, put the defendants on more than adequate notice to enable them to determine the efficacy of resisting the Complaint, which they in fact did, until withdrawal from the suit.

C. The trial court properly granted summary judgment on the undisputed facts which established that Golub's Judgment had priority over all other interests.

The Supreme Court reviews a ruling on summary judgment under the same standard as the trial court. *Gracie, LLC v. Idaho State Tax Com'n.*, 149 Idaho 570, 237 P.3d 1196 (2010). Summary judgment is proper if the undisputed facts establish no genuine issue of material fact for trial. I.R.C.P. 56. If a case proceeds as a bench trial in front of the district court, the district court, as the trier of fact, is entitled to arrive at the most probable inference based upon the undisputed facts before it, and grant summary judgment despite the possibility of conflicting inferences. *Gracie*, 149 Idaho at 572. The appellate court thus engages in the same analysis, and the undisputed facts and reasonable inferences here establish Golub's right to summary judgment.

1. Golub's judgment lien need not be supported by good faith or additional consideration to establish priority.

Kirk-Scott asserts that the trial court should have found that Golub's judgment lien is inferior to Kirk-Scott's Deed of Trust under I.C. §55-606 because the trial court failed to find

that Golubs exercised "good faith" or provided additional consideration in addition to the judgment itself. This is a misapplication of the requirement of the priority statute; those requirements apply to purchasers or encumbrancers, and not to those holding judgment liens.

Idaho Code section 55-606 governs the treatment of a judgment lien in determining priority of interests in real property and provides:

> Every grant or conveyance of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or encumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument **or** valid judgment lien that is first duly recorded. (Emphasis added)

I.C. §55-606.

Kirk-Scott's position rests upon an misinterpretation of I.C. §55-606 that conditions the priority of a judgment lien upon good faith and the giving of valuable consideration. Courts interpreting a statute are to give effect to legislative intent. *See Robison v. Bateman–Hall, Inc.*, 139 Idaho 207, 210, 76 P.3d 951 (2003). The interpretation of a statute must begin with the literal words of the statute. *State v. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183 (2007). The plain meaning of a statute therefore will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results. *Id.* If the language of the statute is capable of more than one reasonable construction it is ambiguous. An ambiguous statute must be construed to mean what the legislature intended it to mean. *Id.* To ascertain legislative intent, the Court examines 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.*

By its plain terms, I.C. §55-606 does not condition the priority of a judgment lien upon good faith or the giving of additional consideration. When read as a whole, the statute provides protection to one of two classes of interest holders: (1) a purchaser or encumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument; **or** (2) a valid judgment lien. In appropriate statutory interpretation, the word "or" indicates alternative things; the word "or" in a statute should be given its usual "disjunctive meaning." *State v. Rivera*, 131 Idaho 8, 10, 951 P.2d 528 (Ct. App. 1998). The clauses here must be read disjunctively, because the use of the word "lien" more than once would otherwise be redundant and superfluous if the statute were not intended to distinguish a valid judgment lien from a lien by any another instrument taken in good faith for consideration.

A review of the legislative history behind the 1989 amendment to the statute supports this reading. Prior to 1989, the statute did not include reference to judgment liens. In 1989, the legislature amended the statute by including the single phrase "or valid judgment lien." (*R. Vol. I, p. 346*) The stated purpose of the amendment provides:

> This legislation would provide that a valid judgment lien that is first duly recorded has priority over subsequently recorded grants or conveyances of an estate in real property.

(R. Vol. I, p. 347)

The minutes of the Judiciary and Rules Committee further provide:

> Senator Crapo presented this legislation and stated that it clarifies the effect of a valid judgment lien regarding a grant or conveyance of an estate in real property. The Supreme Court has recently allowed a judgment to be eliminated if the property is sold before collection can be made.

(*R. Vol. I, p. 350*)

Reading the statute to require a judgment lienholder to exercise good faith or produce additional consideration is somewhat of a square peg in a round hole, and leads to an absurd result. The necessity of good faith and consideration serves the purpose of protecting the purchaser; a purchaser must exercise good faith to determine whether any prior interests exist on the property so that he knows what he is purchasing. The failure the possessor of an interest in property to provide would-be purchasers with notice of that prior interest necessarily may not use the failure to disclose to their advantage. This principle is based upon the notion of a bargained for exchange to allow the purchaser of an interest in land to know what he or she is buying.

A lien by judgment is wholly different. A judgment lien is not bartered for or exchanged for value; the holder obtains its interest as a matter of a statutory lien granted to judgment creditors. *See* I.C. §10-1110. It exists as a matter of law, and not in an exercise of reaching a deal with the record owner or others. The judgment creditor cannot protect itself by choosing not to have been injured by the property owner, which give it its lien rights. There is no additional consideration necessary to give rise to the rights, nor is there any notice or knowledge of other superseding interest that impacts its rights; it simply is.

Kirk-Scott relies upon *Mountain Home Lumber Co., Ltd. v. Swartout*, 30 Idaho 559, 166 P. 271 (1917) for the proposition that a judgment is not valuable consideration for the purposes of determining a bona fide purchaser. Notwithstanding the fact that *Mountain Home* was decided on creditor / debtor principles in 1917, a time well before the legislature enacted

I.C. §55-606 and amended it to specifically include judgment liens in 1989, Kirk-Scott misreads the facts and opinion in *Mountain Home* and its reliance is therefore misplaced.

The court in *Mountain Home* was tasked with determining the priority of various interests in real property. There, one Mr. Garrett had executed a warranty deed in property to one Mr. Swartwout. Mountain Home Lumber was a creditor of Garrett's and obtained a money judgment against him, which became a lien on real property in his name. Unbeknownst to Swartwout, Mountain Home foreclosed upon its judgment lien by sheriff's sale. At the sale, Mountain Home bid the amount of the judgment it was owed and received a Sheriff's Deed to the property. In holding that Swartwout's warranty deed had priority over Mountain Home's Sheriff's Deed, the court noted that Mountain Home's creditor's bid was not a valuable consideration (for the Sheriff's Deed), as it was simply cancellation of a pre-existing indebtedness. *See Mountain Home*, 30 Idaho at 561. Contrary to Kirk-Scott's reading, the *Mountain Home* court did not address the validity or priority of Mountain Home's judgment lien and provides no authority for Kirk-Scott's position.

Accordingly, neither the text of I.C. §55-606 nor the courts interpreting it require that any finding of good faith or additional consideration, beyond the underlying obligation giving rise to the judgment, is necessary for the holder of a valid judgment lien to avail himself to the protections of I.C. §55-606. Kirk-Scott's argument underscores the absurdity that such a read of the statute would result in, and the trial court properly awarded Golub priority as a judgment lienholder without such findings.

2. While not necessary, the undisputed facts established that Golub had no knowledge of Kirk-Scott's unrecorded Deed of Trust for "good faith" purposes.

Kirk-Scott incorrectly asserts that the trial court failed to "consider" the good faith elements of I.C. §55-606, which provides a judgment lien that is duly recorded has priority, if acquired in "good faith." This matter was extensively briefed to the court, and in finding that Golub held a valid judgment lien against the property which had priority, it by necessity found that no issues of fact existed to establish Golub had actual knowledge of Kirk-Scott's prior interest. This court's de novo analysis should similarly find.

Kirk-Scott asserts that regardless of any recording deficiencies, Golub's judgment lien is inferior to its Deed of Trust because Golub had knowledge of the encumbrance at the time he recorded his Judgment and therefore did not take in "good-faith" under I.C. §55-606. However, Kirk-Scott has failed to present any evidence to contradict Golub's testimony or create an issue of fact regarding whether Golub held such knowledge.

On a motion for summary judgment, once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to show that a genuine issue of material fact does exist; a non-moving party must come forward with evidence by way of affidavit or otherwise which contradicts the evidence submitted by the moving party, and which establishes the existence of a material issue of disputed fact. *See Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862 (2007). The appellate court analyzes the evidence in the same fashion under its standard of review on summary judgment, and Kirk-Scott has not come forth with evidence to preclude summary judgment.

Here, Golub provided the following testimony regarding his knowledge of Kirk-Scott's Deed of Trust:

> 12. I was not aware of the transfer of the Sloan properties from Kirk-Scott to Kirk-Hughes Development on November 18, 2004.
>
> 13. I was not aware of the transfer of the Atkinson property from Kirk-Hughes Associates to Kirk-Hughes Development on May 12, 2005.
>
> 14. I was not aware that Kirk-Scott had executed a Deed of Trust to Kirk-Hughes Development prior to Kirk-Scott recording one during Kirk-Hughes Development's bankruptcy on September 17, 2010.

(R. Vol. I, p. 96)

> Q. All right. Prior to 2013 when you were first handed a physical copy of the November 18, 2004 Kirk-Scott deed of trust, did you have any idea that Kirk-Scott claimed an interest in the properties?
>
> A. I did not know of any claim of interest in the properties or this deed of trust. No, I did not.

(R. Vol. I, p. 99)

Kirk-Scott cites the affidavits of Balinda Antoine, Geraldine Kirk-Hughes, and Darlene Moore for the purpose of attempting to create an issue of fact by contradicting Golub's testimony that he had no knowledge of Kirk-Scott's claimed Deed of Trust at the time he recorded his Judgment. However, a careful reading of the proffered testimony reveals that Golub's testimony remains uncontroverted.

More specifically, the affidavits submitted to contradict Golub's testimony only provide evidence that Golub had knowledge of a ***desire or intent*** to encumber the property; they provide no evidence that he had knowledge that such an encumbrance ***actually*** attached to any of the subject properties.

> As between a mortgagee and another claimant, one who has actual notice of the other's prior claim or lien generally takes subject to it, even though the prior claim or lien is unrecorded.
>
> . . .
>
> In order to have this effect, the notice or knowledge must be acquired prior to the attaching of the rights of the party to be affected by it. Actual notice of a mortgage is express, direct information. Notice does not mean a formal written warning served on a party. Instead, it means actual knowledge of the fact in question, regardless of how it was acquired. However, **it must be knowledge of the actual existence of the prior conveyance or encumbrance and not merely information of a purpose or agreement on the part of the grantor to make or give it**.

59 C.J.S. Mortgages § 298 (emphasis added).

Construing the priority of interests under I.C. §55-612, the Idaho Supreme Court has similarly held that knowledge of an intent to create or acquire an interest in property is not a legally recognizable interest that would constitute an adverse claim for purposes of defeating the status as a bona fide purchaser. In *Sun Valley Hot Springs Ranch, Inc. v. Kelsey*, 131 Idaho 657, 661, 962 P.2d 1041 (1998), the Court explained this concept as follows:

> In discussing whether a party had actual or constructive notice in regards to determining its bona fide purchaser status, this Court in *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 874 P.2d 528 (1994), concluded that a party's prior notice of another party's use of a well did not create a real property right in the party using the well. A purchaser's prior notice of another party's use of property does not create any real property right in the using party that would serve as an adverse claim that could defeat the purchaser's status as a bona fide purchaser. *Id.* at 725-26, 874 P.2d at 536-37. Where notice of another party's "use" of property does not create a property right in the using party, it follows that notice of another party's "intent" to use property in the future would not create a property right in that party.

Sun Valley Hot Springs Ranch, Inc., 131 Idaho at 661.

In a recent decision addressing the same issue presented here, the Court in *Insight, LLC v. Gunter*, 154 Idaho 779, 302 P.3d 1052 (2013), rejected evidence similar to that proffered by Kirk-Scott, holding:

> It is not technically possible for IM to have notice of an encumbrance on property before that encumbrance actually comes into existence. Though IM knew that Summitt was intending to execute a deed of trust, that was notice of an intent to subsequently encumber property, not notice of an actual encumbrance on property. Therefore, the district court's finding that IM had notice of the Gunters' deed of trust is clearly erroneous.

Insight, 154 Idaho at 783-84.

Here, none of the evidence cited by Kirk-Scott contradicts Golub's testimony that he had no knowledge of Kirk-Scott's encumbrance prior to recording his Judgment in October 2010. The following provides the sum total of evidence Kirk-Scott relies on for this issue:

Affidavit of Balinda Antoine

> [During a presentation in Coeur d' Alene in 2004] I wanted to make it clear to Mr. Golub that Kirk-Scott Ltd. wanted first position title to the property. For if the project went bad I wanted to at least be able to recover the property and didn't want my loan secured by a piece of property that had other liens associated with it. I wanted to make clear, and made clear, that Kirk-Scott wasn't going to loan $1,350,000 without getting a deed to the property.
>
> Kirk-Scott, Ltd. protected its $1,350,000 loan with a deed of trust. Again, Mr. Golub was aware that Kirk-Scott, Ltd. **would** be using such a deed to secure its interest in the property **because I told him that in the presentation he gave at the Coeur d' Alene Resort**.

(R. Vol. I, p. 250) (emphasis added)

Ms. Antoine's Affidavit does nothing more than demonstrate her intent to gain some future security for the properties being purchased. Her statements to Golub in this regard pre-dated the purported Deed of Trust by many months.

<u>Affidavit of Geraldine Kirk-Hughes</u>

> In September 2004...I told Mr. Golub that I was forming a separate entity to develop the land, and that title to all the properties **would** be transferred to the new company. **I specifically told Mr. Golub that I was giving my sister a mortgage or deed of trust** to secure Kirk-Scott, Ltd.'s interest.

(*R. Vol. I, p. 313*) (emphasis added)

> In November of 2004, your affiant requested Darlene Moore to prepare a Note and Deed of Trust in favor of Kirk-Scott, Ltd. to cover the monies spent by Balinda Antoine to acquire the Sloan parcel. Your affiant specifically informed Alan of this ....

(*R. Vol. I, pp. 315-316*)

> After Ms. Moore prepared the Note and Deed, your Affiant signed the same. ...

(*R. Vol. I, p. 316*)

Ms. Kirk-Hughes' Affidavit demonstrates her September 2004 intent to give **<u>Balinda Antoine</u>** (as opposed to Kirk-Scott, Ltd.) a future mortgage **or** deed of trust. It then states that Golub was informed of **<u>a request to prepare</u>** a Deed of Trust to Kirk-Scott in November 2004. Finally, it evidences that **<u>after</u>** the document was prepared, it was executed by Ms. Kirk-Hughes.

Importantly, Ms. Kirk-Hughes' Affidavit does not provide the evidence necessary to contradict Golub's testimony; that Golub had knowledge that a Deed of Trust encumbering the properties at issue here had been executed in favor of Kirk-Scott. Like that of Ms. Antoine, Ms. Kirk-Hughes' Affidavit goes no further than to provide evidence that Golub was informed of an intent to provide Kirk-Scott with a Deed of Trust interest in the property at some point in the

future; not that he had knowledge that one had in fact been created. *See e.g., Insight,* 154 Idaho at 783-84. (It is not technically possible to have notice of an encumbrance on property before that encumbrance actually comes into existence.)

Affidavit of Darlene Moore

> In November of 2004...I advised Alan that it was my belief that Ms. Kirk-Hughes was still interested in the property and still interested in pursuing the development because she had just recently created a corporation called Kirk-Hughes Development and had **asked me to prepare a Note and Deed of Trust in favor of her sister, Balinda Antoine**, to exchange for the title to the Sloan property that had been purchased in Kirk-Scott, Ltd. name. Alan had proposed that Ms. Kirk-Hughes use the Sloan parcel to acquire financing to assist Ms. Kirk-Hughes in purchasing the Peterson property. I told them this was not possible as **I had already prepared the mortgage in favor of Balinda**.

(*R. Vol. I, pp. 306-307*) (emphasis added)

> In 2006 ... 3) I reminded Alan that Balinda Antoine had a mortgage on the Sloan parcel so there would be no asset to collect against.

(*R. Vol. I, pp. 307-308*)

Like that of Ms. Kirk-Hughes', Ms. Moore's Affidavit only purports to establish that she informed Golub that she prepared *some* instrument, but provides no testimony that Golub had knowledge that an instrument encumbering the property was actually executed. Moreover, Moore's Affidavit is unclear as to whether she informed Golub that she prepared a Deed of Trust or a mortgage.[4] Clearly, if she informed Golub that she had prepared a mortgage, it cannot be said that he had knowledge of a Deed of Trust.

---

[4] Deeds of Trust differ from Mortgages in that deeds of trust always involve at least three parties, where the third party holds the legal title, while in the context of mortgages, the mortgagor gives legal title directly to the mortgagee.

What is clear from Ms. Moore's Affidavit is that whatever encumbrance was intended, she informed Golub that it related solely to the Sloan property[5] and was in favor of Balinda Antoine; **not** Kirk-Scott, Ltd.[6]

Golub has provided undisputed evidence that he had no knowledge of Kirk-Scott's purported encumbrance on the properties at issue here. The Affidavits of Antoine, Kirk-Hughes, and Moore do not contradict that evidence or otherwise create an issue of fact because they do not show that Golub was in any manner aware of the Deed of Trust after it came into existence on November 18, 2004.

Where, as here, defendants failed to produce any admissible evidence controverting Golub's testimony, the trial court properly made a summary ruling that Golub had priority and no prior knowledge of Kirk-Scott's Deed of Trust.

3. Golub's judgment lien is valid.

In challenging the grant of summary judgment on the lien property, Kirk-Scott returns again and again to the validity of the underlying judgment. That attack should fail with its motion to vacate the default judgment as outlined above. Moreover, the law does not preclude a judgment lien's priority based on lack of additional consideration or based on lack of an I.R.C.P. 54(b) certificate. (The lack of consideration has been fully addressed above and will not be repeated here.)

---

[5] Ex. A to the November 18, 2004 Deed of Trust identifies only two of the three Sloan parcels, and includes the Atkinson parcel.

[6] Ms. Moore's Affidavit provides no foundation to establish she has personal knowledge of a mortgage executed in favor of Balinda Antoine.

Kirk-Scott asserts that Golub's judgment lien is invalid because an I.R.C.P. 54(b) certificate was not recorded with the judgment. However, at the time Golub recorded the judgment on October 28, 2010 Golub did not require a 54(b) Certificate because the court had already entered judgment against all parties on all issues.

An order or judgment is final if it disposes of all remaining claims, leaving none pending. *See* I.R.C.P. 54(a); *Idah-Best, Inc. v. First Security Bank of Idaho N.A. Hailey Branch*, 99 Idaho 517, 519, 584 P.2d 1242 (1978); *M&H Rentals, Inc. v. Sales*, 108 Idaho 567, 700 P.2d 970 (Ct. App. 1985). A certificate of final judgment is only required where the court seeks to direct entry of final judgment upon one or more, but less than all of the claim or parties. *See* I.R.C.P. 54(b). Rule 54(b) is designed to prevent piecemeal appellate litigation. By its own terms, it is inapplicable to a judgment that leaves no claims undecided. *See M&H,* 108 Idaho at 569.

Here, the Court entered a Judgment against all Defendants except Peterson on March 11, 2009. (*See Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 8*) At that time, all claims against KHD were resolved but were not final for purposes of appeal because the claims against Peterson remained unresolved. *See* I.R.C.P. 54(b); I.A.R. 11. KHD filed a Notice of Bankruptcy on April 6, 2009, which prevented any further proceedings against it. (*See Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 9*) On August 10, 2009 the Court entered an Order, dismissing the remaining claims against Peterson. (*See Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 11*) However, because the Judgment against KHD remained in bankruptcy stasis, it lacked finality for appeal purposes and the Court entered a Rule 54(b) Certificate with regard to the remaining Defendants. (*See Augmented*

Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 11) When the Order of Dismissal was entered in KHD's bankruptcy on October 28, 2010, the automatic stay was lifted and the Default Judgment against KHD became final automatically without the need for a 54(b) Certificate. Golub recorded the Judgment abstract later that day. (*See Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 8*) Accordingly, Golub's October 28, 2010 Judgment lien is valid.

D. The court properly found that Kirk-Scott's recording was invalid based on lack of acknowledgement and because it was filed in violation of the bankruptcy stay as a matter of law.

In addition to the undisputed fact that Golub had no actual knowledge of the Kirk-Scott Deed of Trust, the trial court properly found that when it was finally recorded, it lacked legal effect because it did not have the signer acknowledgement, and was filed in violation of the bankruptcy stay. As a result, the filing was void and could not establish any constructive notice to defeat Golub's priority. Issues of law are reviewed de novo. *State v. Olson,* 138 Idaho 438, 440, 64 P.3d 967 (Ct. App. 2003).

1. Kirk-Scott's September 17, 2010 recording is invalid because the Deed of Trust was not properly acknowledged or certified under Idaho or Nevada law.

Idaho Code section 55-811 governs the effect of recording a transfer in real property:

> Every conveyance of real property *acknowledged* or proved, *and certified, and recorded* as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgag(e)es. ...

I.C. §55-811 (emphasis added). Idaho Code section 55-805 requires an instrument to be acknowledged in order to record it:

> Before an instrument may be recorded, unless it is otherwise expressly provided, its execution must be acknowledged by the person executing it … or if executed by a limited liability company, by the manager, member or other person executing the same on behalf of the limited liability company … ; **provided, that if such instrument shall have been executed and acknowledged in any other state** or territory of the United States, or in any foreign country, **according to the laws of the state … the same shall be entitled to record, and a certificate of acknowledgement indorsed upon or attached to any such instrument … shall be prima facie sufficient to entitle the same to such record**.

I.C. §55-805. (emphasis added)

Like Idaho, Nevada law requires a <u>certificate of acknowledgment</u>; something more than the bare notary signature at issue here:

> Every conveyance in writing whereby any real property is conveyed or may be affected **must be acknowledged or proved and certified in the manner provided in** this chapter and **NRS 240.161 to 240.169**, inclusive.

NRS 111.240. (emphasis added)

> 3. A certificate of a notarial act is sufficient if it meets the requirements of subsections 1 and 2 **and** it:
>
> (a) **Is in the short from set forth in NRS 240.166 to 240.169 inclusive**;

NRS 240.1655(3). (emphasis added)

> **NRS 240.1665 Short form for acknowledgment in representative capacity.**
>
> **Upon compliance with the requirements of NRS 240.1655, the following certificate is sufficient for an acknowledgment in a representative capacity:**
>
> **State of Nevada**
>
> **County of __________**

This instrument was acknowledged before me on ______ (date) by ________ (name(s) of person(s)) as ________ (type of authority, e.g. officer, trustee, etc.) ______________ of (name of party on behalf of whom instrument was executed)

(Signature of notarial officer)

(Seal, if any)

NRS 240.1665

Here, it is undisputed that the Deed of Trust lacks the certificate of acknowledgment required under Idaho and Nevada law and, therefore, was not entitled to recordation under I.C. §55-805. This result is not affected by the fact that the Kootenai County Recorder allowed its recordation. *See Credit Bureau of Preston v. Sleight*, 92 Idaho 210, 215, 440 P.2d 143 (1968) ("An instrument recorded without an acknowledgment or with a defective acknowledgment is not entitled to be recorded and 'cannot impart constructive notice.'") Neither is the result affected because Golub "was not confused." (*See Appellant's Brief, p. 34*) Kirk-Scott mistakenly cites *Mollendorf v. Derry*, 95 Idaho 1, 501 P.2d 199 (1972), which lacks the cited quote, and has nothing to do with acknowledgment or recordation deficiency. Similarly, *Matheson v. Harris*, 98 Idaho 758, 572 P.2d 861 (1977) addressed whether a Earnest Money Agreement defectively acknowledged by the vendors rendered the document "false" for the purpose of establishing the elements of slander of title, and is irrelevant. Whether Golub could understand the Deed once showed to him is also wholly irrelevant as to the effect of failing to properly acknowledge the Deed before filing. Idaho law is clear that the Deed lacked validity.

2. **Golub had standing to object to recordation of Kirk-Scott's deed of trust during bankruptcy stay.**

Apparently now conceding that a Deed of Trust filed in violation of a bankruptcy is void under *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992), Kirk-Scott limits its appeal by asserting that the trial court erred in finding that Golub had standing to enforce violation of the bankruptcy stay. Kirk-Scott's position on standing is irrelevant in this case because Golub does not seek redress from the bankruptcy court for Kirk-Scott's bankruptcy stay violation. Neither Golub nor KHD needs to challenge Kirk-Scott's post-petition recordation because it is void a matter of federal law.

Kirk-Scott's position on standing is only relevant if its violation of the bankruptcy stay is *voidable*. In such a circumstance, Golub would need to establish his standing in the bankruptcy proceeding to challenge the violation. Indeed, the authority relied upon by Kirk-Scott involves issues of standing in federal bankruptcy court, not state court. *See, e.g. In re Brooks*, 79 B.R. 479 (Bankr. 9th Cir. 1987); *In re Stivers*, 31 B.R. 735 (Bankr. N.D. Cal. 1983); *In re Fuel Oil Supply and Terminaling, Inc.*, 30 B.R. 360 (N.D. Tex. 1983).

However, federal law is clear that the recordation of a Deed of Trust or other instrument attempting to perfect an interest in real property during the stay is *void. See In Re Schwartz, supra; In re Ellis*, 441 B.R. 656, 662 (Bankr. D. Idaho 2010) ("If a creditor attempts to create an unauthorized post-petition lien on property of the estate, that transfer is void as a violation of the automatic stay."); *In re Hegel*, 2000 WL 33712298 (Bankr. D. Idaho 2000) (the offending party

need not have knowledge of the stay, since it is the violation of the stay, and not the mens rea, which controls); *In re Franck*, 171 B.R. 893, 895 (Bankr. D. Idaho 1994).

Being void, the act of recordation is ineffective as a matter of federal law and the issue of Golub's standing is moot, and the trial court did not err.

E. Idaho law does not provide for a reduction in judgment based on the settlement paid by a co-defendant.

Kirk-Scott has cited no relevant authority for its argument that the amount received from a settling defendant in a tort case must be offset against a judgment obtained from non-settling co-defendants. The cases Kirk-Scott has cited involve situations where damages were awarded or recovered at trial for specifically defined identical damage, particularly in contract cases.

For example, in *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 105 P.3d 676 (2005), a jury was specifically instructed to award damages for breach of contract and a tortious interference claim, but then defined the damages recoverable under each claim as the same, i.e. the lost income for the remainder of a breached base term. Under that circumstance, the trial court granted a new trial on the concept the instruction incorrectly allowed a "double damage." In *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the court addressed a situation in which an employee could pursue arbitration for employment claims while the EEOC simultaneously pursued an action for the same back pay or damages sought by the employee. The court simply found that if the employee recovered specific relief, the right to recover the same damages by the EEOC would be limited. Neither these cases nor the other random courts cited by Kirk-Scott address the situation at bar.

Here, a plaintiff settled with a tortfeasor and thereafter obtained a judgment against a co-defendant on tort claims. Unlike the other instances, there was no judicial finding that the settling defendant paid an amount based on identically defined damages; the non-settling defendants did not go to trial and did not utilize the apportionment of fault available under Idaho law to determine what percentage of fault each tortfeasor had. *See* I.C. §6-802. Nor is this a contract case in which the damage for breach is a specified amount which may not be recovered twice.

Idaho law in fact recognizes the multiple recoveries that a plaintiff can obtain via a settlement. A release by an injured person of one tortfeasor who is not jointly and severally liable to the injured person, whether before or after judgment, does not discharge the other tortfeasor "or reduce the claim against another tortfeasor." I.C. §6-805. The parties here are not joint and severally liable, and no basis exists to reduce the judgment by the settling amount.

F. The court did not abuse its discretion in sanctioning the Appellants for an improperly brought motion.

Kirk-Scott specifically brought its "Motion to Amend the Judgment" under I.R.C.P. 59(a)(1), (6), and (7). By its terms, I.R.C.P. 59(a) allows for grant of a new trial where one has occurred. Where, as here, no trial took place, Kirk-Scott's Motion under I.R.C.P. 59(a) could not be sustained and the trial court properly rejected any assertions or argument relying upon I.R.C.P. 59(a). Kirk-Scott was notified by Golub's counsel of the apparent error and given an opportunity to withdraw its motion, but chose not to do so. (*R. Vol. I, pp. 491-492*) The trial court awarded sanctions because Kirk-Scott's "motion to amend" was in reality a motion to

reconsider the trial court's ruling on the motion to vacate, which was prohibited under Rule 11(a)(2)(B):

> [] A motion for reconsideration of any order of the trial court made after entry of final judgment may be filed within fourteen (14) days from the entry of such order; **provided, there shall be no motion for reconsideration of an order of the trial court entered on any motion filed under Rules** 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, **60(a), or 60(b).**

I.R.C.P. 11(a)(2)(B) (Emphasis added)

Thus, Kirk-Scott's Motion to Amend lacked a reasonable basis in law or fact. I.R.C.P. 11(a)(1) governs the signing of pleadings and other papers and provides in relevant part:

> The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief **after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law**, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation...If a pleading, motion or other paper is signed in **violation of this rule, the court, upon motion or upon its own initiative, shall impose** upon the person who signed it, a represented party, or both, **an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred** because of the filing of the pleading, motion, or other paper, **including a reasonable attorney's fee**.

I.R.C.P. 11(a)(1) (Emphasis added).

Whether a motion is sanctionable under I.R.C.P. 11 is determined by assessing the knowledge of the relevant facts and law that reasonably could have been acquired at the time the document was submitted to the court. *See Landvik v. Herbert*, 130 Idaho 54, 936 P.2d 697 (Ct. App. 1997). And whether a court abuses its discretion depends on an analysis of: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the lower

court acted within the boundaries of such discretion and consistently with applicable legal standards; and (3) whether the court reached its decision by an exercise of reason. *Telford v. Nye*, 154 Idaho 606, 610, 301 P.3d 264 (2013). The imposition of Rule 11 sanctions is a management tool used to "weed out" misguided filings. *Lester v. Salvino*, 141 Idaho 937, 940, 120 P.3d 755 (Ct. App. 2005).

At the hearing on the motion, the court asked counsel for appropriate authority for bringing a Rule 59 motion as a basis to reconsider a grant of summary judgment – counsel could not cite to such authority. (*Tr. Vol. I, pp. 103-104*)[7]

Here, the trial court certainly recognized this matter was one for the exercise of its discretion, and specifically inquired of counsel its basis for filing an apparently improper motion, which counsel failed to do. The trial court issued a detailed and reasoned opinion for sanctions which should not be disturbed on appeal.

Given KHD's long history of utilizing this Court to delay Golub's collection efforts, coupled with Kirk-Scott's successive filings, sanctions for the time necessary to respond to this Motion were warranted and appropriate.

---

[7] The authorities Kirk-Scott cites for the first time on appeal are distinguishable, but irrelevant to the trial court's exercise of discretion at the time of the sanctions award.

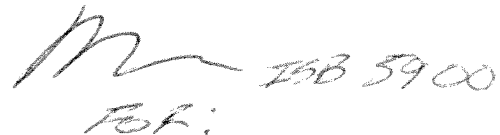
G. Attorney fees are not recoverable.

This action sought declaratory relief on the priority of a judgment lien; the judgment was based solely on tort claims. There exists no bias for an award of attorney fees to the prevailing party.

CONCLUSION

For the foregoing reasons, the trial court's ruling: (1) denying Kirk-Scott's motion to vacate; (2) granting Golub's motion for summary judgment; and (3) awarding sanctions should be affirmed.

DATED this 16th day of April, 2014.

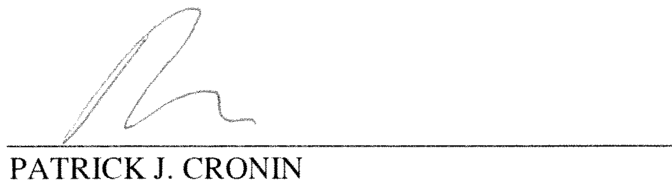


MICHAEL T. HOWARD, IBA No. 6128
WINSTON & CASHATT, LAWYERS
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 16th day of April, 2014, caused a true and correct copy of the attached RESPONDENT'S BRIEF postage prepaid to the following parties:

Michael S. Bissell Campbell & Bissell, PLLC Corbet Aspray House 820 W. 7th Avenue Spokane, WA 99204 Attorney for Defendants-Appellants, Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, Inc., Geraldine Kirk-Hughes, and Peter Sampson	**VIA REGULAR MAIL** ☒ **VIA CERTIFIED MAIL** ☐ **HAND DELIVERED** ☐ **BY FACSIMILE** ☐ **VIA FEDERAL EXPRESS** ☐
Matthew Z. Crotty Crotty & Son Law Firm, PLLC 421 W. Riverside Ave., Suite 1005 Spokane, WA 99201 Attorney for Defendant-Appellant, Kirk-Scott, Ltd.	**VIA REGULAR MAIL** ☒ **VIA CERTIFIED MAIL** ☐ **HAND DELIVERED** ☐ **BY FACSIMILE** ☐ **VIA FEDERAL EXPRESS** ☐
Ryan M. Best Best Law, PLLC 421 W. Riverside Avenue, Suite 1005 Spokane, WA 99201	**VIA REGULAR MAIL** ☒ **VIA CERTIFIED MAIL** ☐ **HAND DELIVERED** ☐ **BY FACSIMILE** ☐ **VIA FEDERAL EXPRESS** ☐
Douglas S. Marfice Ramsden & Lyons P.O. Box 1336 Coeur d'Alene, ID 83816	**VIA REGULAR MAIL** ☒ **VIA CERTIFIED MAIL** ☐ **HAND DELIVERED** ☐ **BY FACSIMILE** ☐ **VIA FEDERAL EXPRESS** ☐



PATRICK J. CRONIN