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Cummings v. Stephens Appellant's Reply Brief Dckt. 43081

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STEVEN B. CUMMINGS, an individual
residing in Idaho,

Plaintiff/Appellant,

vs.

ROGER L. STEPHENS, an individual
residing in Providence, Utah; and
JOHN DOES, I-X,

Defendants,

and

NORTHERN TITLE COMPANY OF
IDAHO, INC., an Idaho corporation,

Defendant/Respondent.

Bear Lake Co.
Case No. CV-2009-000183

Idaho Supreme Court
Docket 43081-2015

APPELLANT'S REPLY BRIEF

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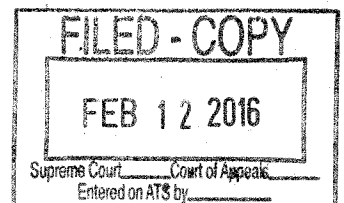
Appeal from the Sixth Judicial District Court
of the State of Idaho, in and for the County of Bear Lake

Honorable David C. Nye, District Judge, Presiding

Nathan M. Olsen, Esq.
Residing at Idaho Falls, Idaho, for Appellant

Randall C. Budge, Esq.
Residing at Pocatello, Idaho, for Defendant, Roger L. Stephens

Brad Bearnson, Esq.
Residing at Logan, Utah, for Respondent, Northern Title Company



INTRODUCTION

Respondent's (Northern Title) Response Brief in large part does not refute the narrowly defined arguments of Appellant's (Cummings) brief. Cummings again references the points and authorities of his Appellant Brief showing that the district lacked jurisdiction or otherwise erred in granting Northern Title its pre-appeal attorney fees although the Supreme Court had not vacated Cummings' pre-appeal attorney fees, and alternatively the district court erred in not allowing Cummings to address errors not passed on by the Supreme Court. Most of Northern Title's response is simply irrelevant for the purposes of this appeal. Additionally, Northern Title makes a number of errant and/or misleading assertions that are addressed herein, and upon further review, ironically, lend *further* support to Cummings' Appeal.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DETERMINING THAT NORTHERN TITLE WAS THE PREVAILING PARTY BECAUSE CUMMINGS' JUDGMENT FOR ATTORNEY FEES WAS NOT VACATED.

Northern Title's Response Brief is misleading, suggesting that there was only one "judgment" originally issued by the district court. (Resp. Brief pp. 1-3). In fact, there were two judgments against Northern Title – one for \$50,000 filed by the district court on January 22, 2013, and the other for \$112,448.09 on April 12, 2013. (See Clerk's Record in *Cummings v. Stephens* Dock. # 40793-2013, R. Vol. 8, pp. 1586-87, R. Vol. 9, pp. 1816-17.) Only the district court's \$50,000 judgment for Northern Title's negligence as abstractor of title was vacated by the Supreme Court in its September 2014 opinion in *Cummings v. Stephens*, 157 Idaho 348,

367, 336 P.3d 281, 300 (2014)(*Opinion*). There is no indication in the *Opinion* that the April 12, 2013, Judgment for attorneys fees and costs was vacated. *Id.* Moreover, Northern Title's "petition for rehearing" which specifically requested that the Supreme Court vacate the attorney fee judgment was denied by the Supreme Court. R. Vol. I, pp. 7-14.

After the appeal, Northern Title "renewed" its motion for attorneys fees that had been denied prior to the appeal. R. Vol. I, pp. 23-24. Northern Title did not move the district court to vacate its prior judgment against Northern Title for attorneys fees, and that issue was not before the court in its January 2, 2014, hearing. Hence, it was entirely contradictory for the district court to determine that Northern Title was now the "prevailing" party after appeal, when in fact there remained a rather substantial attorney fee judgment against Northern Title.

Throughout its brief, Northern Title repeatedly touts that it was the prevailing party on appeal. However, this assertion is irrelevant for the purposes of Cummings' current appeal. In fact, there is nothing in the *Opinion* that changes the prevailing party status at the district court. There was no complete vindication of Northern Title's liability and conduct in the case.

In fact, to reiterate the points made in Cummings' Appellant Brief, the Supreme Court's *Opinion* did not disturb any of the district court's findings that *as the escrow agent* Northern Title breached its contract with Cummings, and committed gross negligence and/or wilful misconduct. (See again discussion in Appellants Brief, pp. 13-14.) In other words, all the Supreme Court did in its *Opinion* was to find that Northern Title should not have been liable as "abstractor of title." It did not alter any of the district court's holdings with regard to Northern Title's liability as "escrow agent."

Regardless, the district court clearly erred when it decided to make Northern Title the prevailing party while there was still a \$112,000 judgment against Northern Title for an award of attorneys fees and costs. It is important to note that this judgment was not based solely upon Northern Title's liability as "abstractor of title" but also upon its liability as "escrow agent." Northern Title's attempts to misconstrue the record, quote statements made by the court and counsel at hearings completely out of context or which are irrelevant, does not alter the fact that Cummings' attorney fee judgment against Northern Title had not been vacated by the Supreme Court and Northern Title had not even moved to vacate the judgment. The district court erred and Cummings' appeal should be granted.

II. THE DISTRICT COURT PROVIDED CUMMINGS NO DUE PROCESS UNDER THE RULES OF CIVIL PROCEDURE TO REFUTE THE SUBSTANCE OF NORTHERN TITLE'S RULE 60(B) MOTION.

After the district court had (errantly) entered an award of attorneys fees and costs against Cummings to Northern Title, Northern Title then moved the district court to vacate its prior judgment against Northern Title awarding Cummings' attorney fees and costs. R. Vol. I, pp. 69-70. In so doing, Northern Title did not identify *any* excuses or justification under the criteria set forth under IRCP § 60(b)(1)-(6) for why it had not moved to vacate Cummings' attorney fee judgment at the time that it "renewed" its motion for attorney fees, and for that matter waiting until after judgment had been entered. *Id.*

Simply put, Northern Title's motion to vacate the judgment was inexcusably late and not properly before the district court under IRCP § 60(b)(1)-(6). Cummings'

immediate response was to object to Northern Title's improperly filed motion, while at the same time reserving all rights to address the "substance" of the motion in the event that the Court were to entertain the 60(b) motion. R. Vol. I, pp. 70-72. In other words, Cummings first wanted a ruling from the Court as to whether it was appropriate to even consider Northern Title's motion which did not comply with the restrictions of Rule 60(b). But in the event that the Court would allow the motion to be heard, Cummings explicitly notified the Court that he reserved his right and opportunity to refute the substance of the motion – *i.e.* whether it was even appropriate for the district court to vacate Cummings' attorney fee judgment. *Id.*

The district court ended up completely disregarding Cummings' rights under IRCP § 7(b)(3) to refute the motion, and instead, without any notice or hearing, issued a ruling granting Northern Title's 60(b) motion and further stating its own basis for granting the motion rather than relying upon any causes stated by Northern Title. R. Vol. I, pp. 66-67. Cummings was afforded no opportunity to issue a response or even argue against the motion. The district court simply acted on its own accord without an such due process being afforded to Cummings.

As indicated in Cummings' Appellant Brief, Northern Title had no basis in which to file its Rule 60(b) motion. There was no "excusable neglect" or other "factual error," etc... that justified its tardy filing. Even if Northern Title were to overcome this defect, the district court errantly granted Northern Title's motion *without* giving Cummings the right to respond

to its substance or merit. This provides yet an additional reason why Cummings' appeal should be granted.

III. THE DISTRICT COURT PROVIDED CUMMINGS NO REAL OPPORTUNITY TO ADDRESS ITS OTHER ERRORS NOT PASSED ON BY THE SUPREME COURT.

In its Response, Northern Title complains that Cummings did not elaborate further on errors the district court could address if it had jurisdiction, *i.e.* errors "not passed on" by the Supreme Court in its *Opinion*. However, during the post appeal proceedings, the district court gave Northern Title extreme latitude on its various requests, including overlooking a number of rules of civil procedure and making assumptions about what was not in the Supreme Court's *Opinion*. However, it took the opposite approach with Cummings – essentially depriving him of his due process to address such matters.¹

Nevertheless, Cummings did raise the issue of whether the proceedings could be reopened to consider Northern Title's liability in his pleadings before the district court. R. Vol. I, pp. 55-56. He was simply cut off from doing any further. It became abundantly apparent that any additional pleadings or argument that Cummings could have filed would have been an exercise in futility. Upon his motion being denied by the district court, Cummings instead chose to utilize his right to appeal, and thus allow this Court to review the issues and provide further direction.

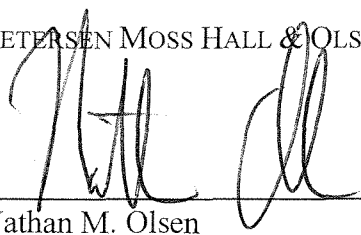
¹ The Court should be advised that after this appeal was filed that Cummings has moved to disqualify the presiding judge for his disparate and inequitable treatment of Cummings in this case and resulting bias, including what has been described herein. That motion is pending as of the date of this brief.

CONCLUSION

Again, the issues before the Court on this appeal are narrow and concise – whether the district court erred in vacating Cummings’ award of attorney fees and costs and awarding Northern Title’s pre-appeal attorney fees and costs, or alternatively/additionally whether the district court can exercise jurisdiction to consider alternative remedies for Northern Title’s misconduct as escrow agent. Northern Title’s attempts to put process and confusion above considering the merits of the case clearly is an attempt to shield or disregard the shameful manner in which it conducted its duties as Cummings’ escrow agent. It would not be in the interest of justice, and in fact would be a perversion of justice, to penalize Cummings despite Northern Title’s unclean hands. As such, vacating Cummings’ judgment for attorneys fees and costs – incurred as a direct result of Northern Title’s conduct – and adding insult to injury by awarding Northern Title’s fees and costs – was not an appropriate decision made by the district court on post-appeal and should be reversed.

DATED this 9th day of February, 2016.

PETERSEN MOSS HALL & OLSEN



Nathan M. Olsen

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 9th day of February, 2016, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with Rule 5(b), I.R.C.P.

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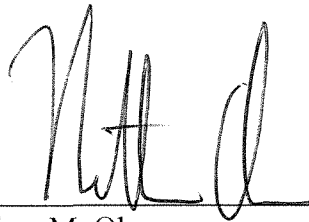
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