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Cummings v. Stephens Appellant's Brief 2 Dckt. 43081

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COPY

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 BRIEF

APPELLANT'S BRIEF

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

Honorable David C. Nye, District Judge, Presiding

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

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

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

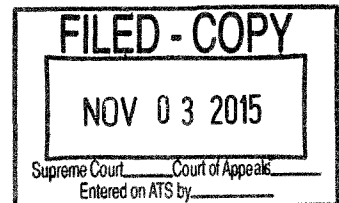


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STATEMENT OF THE CASE

NATURE OF THE CASE

This appeal addresses the post-appeal jurisdiction of the trial court to consider whether it can vacate pre-appeal awarding of attorney fees when not specifically directed to do so by the Supreme Court in its *Opinion*. It also addresses in the alternative what jurisdiction the trial court should have post-appeal to correct errors raised by either party that would be consistent with the Supreme Court's *Opinion*.

COURSE OF PROCEEDINGS/STATEMENT OF FACTS

The factual history of this case is contained within the record and decision in *Cummings v. Stephens*, 336 P.3d 281 (2014). In summary, in August of 2007, Plaintiff/Appellant Steven Cummings (Cummings) purchased a ranch in Bear Lake County near Montpelier, Idaho from the Roger L. and Barbara L. Stephens Trust. *Id.* 336 P.2d at 284-85. The real estate purchase contract which was assigned to Cummings for \$50,000 and the August 3, 2007, Warranty Deed described property that existed on both the west and east side of U.S. Highway 30. *Id.*

Defendant/Respondent/Cross-Appellant Northern Title of Idaho (Northern Title) served as the escrow agent in the transaction. *Id.* In November of 2007, Defendant Roger Stephens (Stephens) contacted Northern Title claiming that there was a "mistake" in the August 2007 Warranty Deed, in that it included 83 acres on the east side of Highway 30 which Stephens did not intend to be part of the sale. *Id.* 336 P.2d at 285. He contacted Northern Title

who – without any authorization from Cummings – altered and re-recorded the Warranty Deed on November 8, 2007, to remove approximately 83 acres on the east side of Highway 30. *Id.*

Cummings subsequently filed an action against both Stephens and Northern Title. *Id.* 336 P.2d at 285-86. In August of 2012, at trial, the district court dismissed Cummings’ complaint against Stephens. *Id.* On January 22, 2013, the district court issued findings of fact and conclusions of law finding that Northern Title was grossly negligent and/or committed willful misconduct, and had breached its contract with Cummings. *Id.* The district court further held that Northern Title was liable to Cummings in the amount of \$50,000 as “abstractor of title.” *Id.* The district court subsequently awarded Stephens’ attorney fees and costs against Cummings and Cummings’ attorney fees and costs against Northern Title. *Id.*

Cummings appealed the dismissal of his claims against Stephens and the award of Stephens’ fees and costs. *Id.* He also appealed the amount of the damages awarded by the district court for Northern Title’s misconduct. *Id.* Northern Title cross-appealed the district court’s finding that Northern Title was liable as “abstractor of title,” and that Northern Title had committed gross negligence, willful misconduct and breach of contract. *Id.* at 285, 286, and 302. It also appealed the district court’s awarding of Cummings’ attorney fees and costs against Northern Title, and the denial of Northern Title’s request for attorney fees and costs against Cummings. *Id.* R. Vol. I, p. 11.

In its September 19, 2014 *Opinion*, the Supreme Court affirmed the district court’s dismissal of Cummings’ claims against Stephens, and reversed the trial court’s judgment awarding Cummings damages for violations relating to Northern Title’s duty as “abstractor of

title.” *Id.* 336 P.2d at 297-300. The court’s directive contained in the “Conclusion” states as follows:

We affirm the dismissal of Mr. Cummings’ claims against Mr. Stephens and we reverse Mr. Cummings’ judgment against Northern Title. We award Mr. Stephens and Northern Title costs, including reasonable attorney fees, on appeal.

Id. at 300.

The *Opinion* did not explicitly reverse the district court’s finding of Northern Title’s gross negligence/willful misconduct, or breach of contract. *Id.* 336 P.2d at 300, 302. Nor did it vacate the district court’s awarding of Cummings’ attorney fees and costs. *Id.*

On September 22, 2014, Northern Title filed a “Petition for Rehearing” requesting the following relief:

- (1) the vacating of the district court’s order of costs and attorney fees against Northern Title,
- (2) the deeming of Northern Title as a prevailing party,
- (3) the district court’s jurisdiction in determining Northern Title’s costs and reasonable attorney fees, and
- (4) whether the costs and attorney fees awarded to Stephens should be augmented in an amount equivalent to those costs and fees incurred by Beamson & Caldwell, LLC on Stephens’ behalf.

R. Vol. I, p. 7.

Northern Title also filed a memorandum in support of its petition. R. Vol. I, pp. 10-14.

On November 5, 2014, the Supreme Court denied Northern Title’s Petition for Rehearing. On that same day the Court issued a “Remittitur” noting that it had announced its *Opinion* and had “denied” Northern Title’s Petition for Rehearing. It then Ordered:

That the District court shall forthwith comply with the directive of the Opinion, if any action is required.¹

On November 10, 2014, Northern Title filed a “Motion to Reopen Proceedings & Northern Title Company of Idaho, Inc’s Renewed Motion for Attorney’s Fees and Costs.” R. Vol. I, pp.23-24. The motion essentially requests that the district court “re-open” the case to award its pre-appeal attorney fees and costs. *Id.* On December 29, 2014, Cummings filed a “Motion to Strike Defendant Northern Title’s ‘Motion to Reopen Proceedings & Northern Title Company of Idaho, Inc’s Renewed Motion for Attorney’s Fees and Costs,’” followed up by a supporting memorandum. R. Vol. I, pp. 35-46.

Cummings argued in his motion that where the Supreme Court had not expressly vacated the award of attorney fees and costs against Northern Title even after Northern Title had petitioned for a rehearing on that issue, had not overturned the district court’s finding of Northern Title’s gross negligence and breach of contract, and had not remanded the case for further proceedings, that the district court lacked jurisdiction to award Northern Title’s pre-appeal attorney fees and costs. *Id.* Cummings also argued in the alternative, that if the district court did indeed have the latitude and jurisdiction to consider such issues, then it could also consider – on remand – correct theories for damages resulting from Northern Title’s conduct. R. Vol. I, pp. 55.

The district court held a hearing on the matter on January 2, 2015. *Tr.* pp. 1-32. The district court held that it had jurisdiction to reconsider whether Northern Title was the

¹ The Remittitur also retains the Supreme Court’s jurisdiction to decide attorney fees on appeal.

“prevailing party” in the case and whether Northern Title should be awarded its fees and costs. *Tr.* p. 14. LL 5-8. At that same hearing, it also proceeded to award Northern Title’s fees and costs, in the amount of \$136,533.62. *Id.* pp. 31-32. R. Vol. I, pp. 1-2. The district court *did not* rule on whether it had jurisdiction to vacate Cummings’ award of attorney fees and costs, which was not raised by Northern Title in its motion. R. Vol I, pp. 23-25. *Tr.* 1-32. It subsequently entered a “Third Amended Final Judgment on Costs and Fees as between Cummings and Northern Title” awarding \$162,363.30 in costs and attorney fees to Northern Title (which also included the award of attorney fees on appeal). R. Vol I, p. 67.

On February 5, 2015, Northern Title filed a “Motion to Vacate All Outstanding Judgments Against Northern Title” under IRCP § 60(b). R. Vol I, pp. 69-70. Cummings filed an objection to Northern Title’s motion on February 12, 2015, arguing that Northern Title had not stated with any particularity its basis or justification for re-opening the case yet again under IRCP § 60(b) and that the motion should therefore be stricken. *Id.* pp. 70-72. Cummings also reserved the right to “respond to the substance” of Northern Title’s 60(b) motion in the event the court allowed it to move forward. *Id.* p. 72. Without any hearing or notice to Cummings, the district court entered a “Post-judgment Order Vacating Prior Judgments in Favor of Steven Cummings Against Northern Title” on February 20, 2015. *Id.* pp. 76-77. Cummings subsequently appealed on March 20, 2015. *Id.* pp. 79-81.

ISSUES PRESENTED ON APPEAL

1. Did the district court err in assuming jurisdiction to reverse its prior pre-appeal judgment awarding Cummings his attorney fees and further deciding to award Northern Title its pre-appeal attorney fees?
2. If the district court did properly retain jurisdiction to “correct errors,” should it have also considered correcting errors with regard to Northern Title’s liability in the case?
3. Should Cummings be awarded his attorney fees on appeal?

ARGUMENT

I. THE STANDARD OF REVIEW IS “FREE REVIEW”

The question of a trial court's jurisdiction "relating to the recovery of attorney fees or costs is one of law upon which an appellate court exercises free review." *J.R. Simplot Co. v. Chemetics Int'l, Inc.*, 130 Idaho 255, 257, 939 P.2d 574, 576 (1997).

II. THE DISTRICT COURT DID NOT HAVE JURISDICTION OR AUTHORITY TO VACATE CUMMINGS' AWARD OF ATTORNEYS FEES AND COSTS

After the appeal was concluded on November 5, 2014, Northern Title did not file a motion to vacate the pre-appeal award of attorneys fees and costs to Cummings. Further, it did not even raise the issue in the January 2, 2015, hearing. It instead filed a IRCP § 60(b) motion after the district court had entered its “Third Amended Final Judgment” on January 27, 2015. In so doing, Northern Title failed to meet the burden of demonstrating good cause for relief under a Rule 60(b) motion. *Lowe v. Lynn*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982). Relief under Rule 60(b) lies only for mistakes of fact, not mistakes of

law. *Berg v. Kendall*, 147 Idaho 571, 577, 212 P.3d 1001, 1007 (2009). Additionally, gross carelessness, ignorance of the rules, or ignorance of the law are insufficient bases for Rule 60(b) relief. *Ade v. Batten*, 126 Idaho 114, 118, 878 P.2d 813, 817 (Ct. App. 1994).

Northern Title provided no such “good cause” to justify its tardiness under any of the conditions set forth in IRCP § 60(b) Motion, and it was therefore inappropriate for the district court to grant the motion – particularly without any opportunity for Cummings to respond to the substance of the motion. R. Vol. I, pp. 70-72.

Even if the district court did properly consider Northern Title’s Rule 60(b) motion, it did not have jurisdiction to vacate Cummings’ pre-appeal award of attorney fees. The Idaho Supreme Court has made it explicitly clear that, after it has ruled, the trial court’s jurisdiction is limited to whatever directives that have been issued by the appellate court:

Where the appellate court remands a cause with directions to enter judgment for one of the parties, the judgment of the appellate court is a final judgment in the cause, and the entry thereof in the lower court is a purely ministerial act. ... A trial court has no authority to enter any judgment or order not in conformity with the order of the appellate court.

Hummer v. Evans, 979 P.2d 1188, 1191, 132 Idaho 830, 833 (1999)(citations omitted) (emphasis added).

The Court in recent years has addressed whether the trial court has jurisdiction to consider pre-appeal attorney fees and costs. When there is “a general reversal” a trial court is free to correct any error in its original findings and conclusions as to matters not passed on by the appellate court” which may cover issues “subsidiary” to the opinion including a determination of attorney fees. *J.R. Simplot Co. v. Chemetics Intern., Inc.*, 130 Idaho 255, 257-258, 939 P.2d 574, 576- 577 (1997). In *Great Plains Equipment, Inc. v. Northwest Pipeline*

Corp., the Court held that the trial court could consider the awarding of pre-appeal attorney fees and costs when the decision on appeal changes the “prevailing party.” *Id.* 136 Idaho 466, 474, 36 P.3d 218, 226 (2001). The Court most recently addressed this issue in *Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC*, No. 42216 (September 30, 2015). The Court held that “when there has been a change in the prevailing party due to reversal and this Court is ‘silent’ regarding pre-appeal fees and costs the trial court is free to award the same.” *Id.* p. 3.

However, unlike what occurred in all three of these decisions *Chemetics Intern, Inc.*, *Great Plains Equipment, Inc.* and *Sky Canyon Properties, Inc.*, in this case the Supreme Court did not change the prevailing party or did not explicitly vacate or reverse the pre-appeal awarding of the attorneys fees and costs to Northern Title.

The directive found the “Conclusion” in the initial *Chemetics* opinion stated as follows:

The verdict in favor of Simplot on these Counts is accordingly reversed and the award of attorney fees is vacated. This matter is remanded so that Simplot's attorney fee award as the prevailing party on Count III may be modified in accordance with this opinion.

J.R. Simplot Co. v. Chemetics Intern., Inc., 126 Idaho, 532, 536, 887 P.2d 1039, 1043 (1997) (emphasis added)

This vacating of the attorney fee award was referenced in the second *Chemetics* decision addressing the pre-appeal awarding of attorneys fees upon remand. *J.R. Simplot Co. v.*

Chemetics Intern., Inc., 130 Idaho at 258, 939 P.2d at 577. The directive in the original *Great Plains Equipment, Inc.* opinion is also similar.

For the above stated reasons, we set aside the judgment and decree regarding foreclosure of the mechanic's liens, the Utah bond claims and unjust enrichment claims, with the exception of the judgment permitting foreclosure of Michetti's claim of lien. We also vacate the awards of prejudgment interest, attorney fees and costs entered in favor of the

plaintiffs, except for the awards of those items to Michetti on its claim of lien foreclosure.

Great Plains Equipment, Inc. v. Northwest Pipeline Corp., 132 Idaho 754, 775, 979 P.2d 627, 648 (1999) (emphasis added).

The second *Great Plains Equipment, Inc.* opinion dealing with the awarding of pre-appeal attorney fees on remand also makes specific reference to the Court's prior decision to vacate the attorney fee award:

The opinion of *Great Plains I* established that the awards of costs and fees to the certain plaintiffs were to be vacated and that no attorney fees or costs were to be awarded on appeal.

Great Plains Equipment, Inc. v. Northwest Pipeline Corp., 36 P.3d at 226, 136 Idaho at 474 (2001).

Finally, the Court's directive in the recently decided *Sky Canyon Properties, LLC* is also very similar. The directive in the initial opinion is as follows:

We reverse the judgment of the district court and its award of court costs and attorney fees. We remand this case with directions to enter a judgment consistent with this opinion. We award costs and attorney fees on appeal to the appellants.

Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC, 155 Idaho 604, 609, 315 P.3d 792, 797 (2013)

Again the second decision makes specific reference to the vacating of the fees and costs:

In prior proceedings, this Court reversed the district court's judgment in favor of The Golf Club at Black Rock (Golf Club) and its award of costs and attorney fees.

Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC, No. 42216 at 1. (Emphasis added.)

The apparent trend in each of these opinions is that a critical component of determining whether the “prevailing” party has changed on appeal includes a reversal of any awarded attorney fees and costs.

Conversely, the initial *Opinion* in this case denies Cummings’ appeal against both Northern Title and Stephens, grants Northern Title’s appeal insofar as the district court errantly held that Northern Title was liable as “abstractor of title,” but then does not grant Northern Title’s appeal on the finding of gross negligence/willful misconduct and breach of contract, nor does it vacate or reverse the district court’s pre-appeal awarding of attorney fees and costs to Cummings. *Cummings v. Stephens*, 336 P.3d at 300, 303. As such, the directive of the Court directed in the conclusion of the *Opinion* is as follows.

We affirm the dismissal of Mr. Cummings’ claims against Mr. Stephens and we reverse Mr. Cummings’ judgment against Northern Title. We award Mr. Stephens and Northern Title costs, including reasonable attorney fees, on appeal.

Id. p. 300.

In essence, the Supreme Court did not “pass on” or “abstain” from the issue of pre-appeal attorney fees, but rather did not grant Northern Title’s appeal on the award of attorney’s fees and costs. Indeed, as acknowledged by Justice Jim Jones in his concurring and dissenting opinion: “(T)he district court’s finding of ‘gross negligence, willful misconduct, or both’ effectively stands.” *Id.* p. 300 In other words, because the Supreme Court did not reverse the district court’s findings on the issue of gross negligence/willful misconduct (in addition to not overturning the “breach of contract”), and did not vacate the award of attorneys fees and costs,

its rulings did not constitute a “general reversal” and/or a changing of the “prevailing party” despite the fact that it vacated the \$50,000 judgment against Northern Title.

Lending even further support to this argument is the Supreme Court’s denial of Northern Title’s petition for re-hearing on these very issues. Northern Title’s petition sought relief on the following issues:

- (1) the vacating of the district court’s order of costs and attorney fees against Northern Title,
- (2) the deeming of Northern Title as a prevailing party,
- (3) the district court’s jurisdiction in determining Northern Title’s costs and reasonable attorney fees, and
- (4) whether the costs and attorney fees awarded to Stephens should be augmented in an amount equivalent to those costs and fees incurred by Bearnson & Caldwell, LLC on Stephens’ behalf.

Respondent/Cross-Appellant’s Petition for Rehearing – R. Vol. I, p. 8.

Northern Title’s Memorandum in support of its Petition acknowledged that:

In issuing its *Opinion* the Court reversed “the judgment” against Northern Title, but did not expressly vacate the District court’s cost and fee order against Northern Title. Nor did the Court remand the matter for a determination of Northern Title’s costs and fees as a prevailing party.

R. Vol. I, p. 11.

In denying Northern Title’s petition, the Supreme Court effectively upheld and confirmed its initial *Opinion* which did not vacate the district court’s award of attorney fees and costs and which did not deem Northern Title as a “prevailing party” pre-appeal. The Court definitively addressed this issue, and therefore it was an error for the district court to countermand the Supreme Court’s direction and vacate Cummings’ award of fees and costs.

III. THE DISTRICT COURT ERRED IN GRANTING NORTHERN TITLE'S PRE-APPEAL ATTORNEY FEES AND COSTS

Because the Supreme Court did not expressly reverse or vacate Cummings' pre-appeal award of attorney fees and costs, there was no change in the "prevailing party" nor a "general reversal" that therefore allowed the district court to consider the awarding of such fees. In fact, the Supreme Court did not even "remand" the case for further consideration.

After the Supreme Court denied Northern Title's and Cummings' petitions for rehearing, it ordered the following:

That the District Court shall forthwith comply with the directive of the Opinion, if any action is required.

R. Vol. I, pp. 21-22.

The Supreme Court has been explicitly clear that there can be no further implicit jurisdiction, even for a determination of attorney fees, when the directive requires nothing more than an entry of judgment consistent with its opinion. *Hummer v. Evans*, 132 Idaho at 833, 979 P.2d at 1191.

In fact, the Supreme Court's decision under *Hummer v. Evans* is somewhat similar to this case. In *Hummer*, the Supreme Court reversed an additional damages award that had been granted to the Plaintiff in the trial court, holding that the Plaintiff's theory of damages for wrongful termination was not a tort-based claim but rather a contractual claim. Therefore, the Plaintiff had "not proven her (additional) damages with reasonable certainty." *Id.* 132 Idaho at 832, 979 P.2d at 1190. The directive of the Court at issue the *Hummer* case was as follows:

The district court's conclusion that Hummer's termination was a violation of public policy is affirmed. She is entitled to the initial award of damages and costs. The district court's grant of additur damages is reversed. Each party has prevailed in part on appeal. No costs or attorney fees are awarded.

Id.

The Remittitur stated that:

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Opinion, if any action is required; and

Id.

After the initial appeal, the Plaintiff in *Hummer* filed a Renewed Motion for Attorney Fees with the trial court, which was denied and subsequently appealed. Upon appeal, the Supreme Court expressly rejected the Plaintiff's reliance on *Chemetics* that the determination of attorney fees at the trial level was subsidiary to the Court's directive, making the following clear distinction:

After the Court's decision in *Hummer I*, the only action within the jurisdiction of the district judge was the ministerial act of entering any amended judgment necessary as a result of this Court's ruling reversing the damages award. The district judge did not, as Hummer appears to argue, have the power to revisit discretionary issues of the case simply because the Remittitur allowed the district judge to comply with "the directive of the Opinion, if any action is required."

Indeed, the language of the Remittitur provides that the opinion of the Court directs whether any continuing jurisdiction of the district judge exists. In this case, our ruling did not open the door for the district judge to address substantive issues in the case. This case is unlike *Chemetics*, where our reversal of the verdict in the first appeal in and of itself changed the prevailing party and thus granted the district judge jurisdiction to address any issue, like attorney fees, that was related to the result in the appeal.

In contrast, the implicit holding of *Hummer I* was that the district judge would have no jurisdiction to do anything other than enter an amended judgment. Jurisdiction to address a subsidiary issue such as attorney fees did not arise as a result of our holding.

Id. (Emphasis added.)

As discussed *infra* in Section II, the directive in each of the other Supreme Court decisions which allowed jurisdiction for the consideration of pre-appeal fees are distinctly different than what was contained in the *Hummer* Opinion and the *Cummings* Opinion. Again, in both *Cummings* and *Hummer*, the Court did not remand the case for any further proceedings, and – despite Northern Title’s Petition for Rehearing requesting as such – the Court did not reverse or disturb the district court’s holding that Cummings was the prevailing party against Northern Title and its subsequent order awarding Cummings’ attorney fees. It was therefore an error for the district court to award Northern Title its pre-appeal attorneys fees and costs.

IV. IF THE DISTRICT COURT HAD JURISDICTION TO CORRECT PRE-APPEAL ERRORS RAISED BY NORTHERN TITLE, IT SHOULD CONSIDER ERRORS RAISED BY CUMMINGS

The central argument posed by Northern Title in its “Motion to Re-Open Proceedings” to consider pre-appeal attorneys fees was that the district court liberally had jurisdiction to “correct any error in its original findings and conclusions as to matters not passed on by the appellate court.” (Reply brief . pp., citing *Hutchins v. State*, 100 Idaho 661, 603 P.2d 995 (1979).) If that is indeed the case, then Cummings should have been afforded the opportunity to suggest corrections as well, consistent with the Supreme Court’s Opinion. In other words, if Northern Title should be allowed to “re-open the proceedings” to consider additional issues including the correction of errors, Cummings should be afforded that opportunity as well. Cummings raised this issue before the district court, which was completely disregarded. R. Vol I, pp. 55.

As indicated in the *Opinion*, the Supreme Court did not reverse any of the district court's findings that Northern Title was grossly negligent, committed willful misconduct and breach of contract. Nor did it vacate Cummings' award of attorney fees and costs as the prevailing party. It simply reversed the district court's damages decision based on Northern Title as the "abstractor of title." If proceedings are re-opened, the consideration of a reinstatement of damages based on a correct theory would not be inconsistent with the Supreme Court's *Opinion*.

V. CUMMINGS SHOULD BE AWARDED HIS ATTORNEY FEES AND COSTS ON APPEAL

Cummings should be awarded his attorney fees on appeal pursuant to I.C. § 12-120(3). Idaho courts allow for the grant of attorney fees only when authorized by contract or by statute. *Keevan v. Estate of Keevan*, 126 Idaho 290, 298, 882 P.2d 457, 465 (Ida. App. 1994). With regard to his claims against Northern Title, Cummings is entitled to an award of his attorney fees and costs under Idaho Code § 12-120(3). A commercial transaction is defined as all transactions except transactions for personal or household purposes. *Id.* An award of attorney fees is proper if the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover. *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723 728, 152 P.3d 594, 599 (2007).

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

CONCLUSION

Pursuant to the foregoing, the district court erred in vacating Cummings' award of attorney fees and costs, and the awarding of Northern Title's pre-appeal attorney fees and costs. Alternatively or in addition, the case should be remanded to the district court for further consideration of Northern Title's liability consistent with the *Opinion*.

DATED this 29th day of October, 2015.

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 29th day of October, 2015, 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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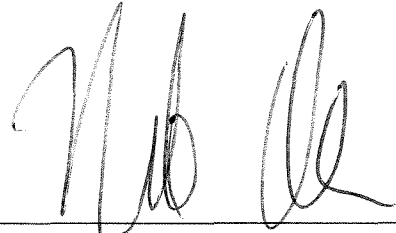
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