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IN THE SUPREME COURT OF THE STATE OF IDAHO

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STEVEN B. CUMMINGS)
)
Plaintiff/Appellant,)
)
vs.)
)
ROGER L. STEPHENS,)
)
Defendant,)
)
And)
)
NORTHERN TITLE COMPANY OF IDAHO,)
INC.)
)
Defendant/Respondent.)
)

Docket No. 43081-2015

**RESPONSE BRIEF OF
NORTHERN TITLE COMPANY
OF IDAHO, INC.**

Appeal from Bear Lake County,
Case No. CV-2009-000183

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

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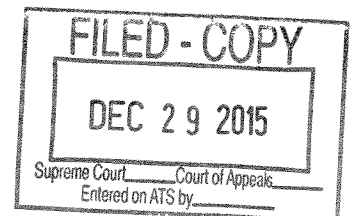


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STATEMENT OF THE CASE

Nature of the Case & Proceedings

This is the second appeal of a case involving “a judgment denying the buyer of real property an award of damages against the seller and awarding the buyer a judgment against a title company that prepared an inaccurate legal description of the real property.” *Cummings v. Stephens, et. al.*, 157 Idaho 348, 351, 336 P.3d 281, 284 (2014). (“*Cummings I*”). After trial the seller Steven Cummings (“Cummings”) appealed and the title company Northern Title Company of Idaho, Inc. (“Northern Title”) cross-appealed. The Court affirmed the district court’s denial of Judgment against the seller (“Roger Stephens”), and reversed Cummings’ Judgment against Northern Title. See *Cummings I*, 157 Idaho 348, 336 P.3d 281.

On remittitur, Northern Title renewed its pre-appeal motion for costs and fees. The district court found and Cummings does not dispute that Northern Title is the prevailing party, Cummings is not a prevailing party, and Roger Stephens is still a prevailing party. Upon determining each party’s prevailing party status, the district court awarded Northern Title its pre-appeal costs and fees. Pursuant to Rule 60(b), Northern Title then moved and the district court vacated Cummings’ Judgment and prior award of costs and fees.

1. The District Court Awarded Cummings with One Judgment.

At trial, Cummings alleged that Roger Stephens and Northern Title filed a correction deed, and thereby “breached the warranties of title in the Original Deed, converted the 83 acres lying east of the highway, and slandered Mr. Cummings’ title to the real property.” See *Cummings I*, 157 Idaho at 353, 336 P.3d at 286. Moreover as to Northern Title, Cummings

alleged it “breached the escrow agreement, breached the Idaho Escrow Act, breached its duty of good faith and fair dealing, committed negligence or gross negligence, and breached the policy of title insurance.” *Id.* Cummings also pinned that “Stephens and Northern Title caused him emotional distress.” *Id.*

At the end of Cummings’ case in chief, Roger Stephens (the seller) moved for involuntary dismissal. Cummings had not elected to call Roger Stephens as a witness, nor had Cummings called any of the realtors. See *Cummings I*, 157 Idaho at 356, 336 P.3d at 289. Instead, “Cummings only offered the testimony of the manager of Northern Title . . . [who] testified that Mr. Stephens did not participate in the modification . . . [i]n fact, there was no evidence that he was even present when those changes were made or knew that they were to be made.” *Id.* at 157 Idaho at 355-356, 336 P.3d at 288-289. The district court granted the request, dismissing Roger Stephens.

As to Northern Title, trial continued and the district court later issued its forty-eight (48) page decision. The district court found one judgment against Northern Title, based solely on one source of liability. However, the judgment did not implicate Northern Title’s actions as a title insurance agent.¹ Nor did the judgment implicate Northern Title as the escrow agent.² Instead,

1 *Cummings I*, 157 Idaho at 367, 336 P.3d at 300. (“Northern Title did not act negligently in performing any action insofar as it relates to its business as an insurance agent”).

2 The district court was incensed that Northern Title was an escrow agent and yet had unilaterally filed a corrective deed that excluded the property east of Highway 30. The district court went so far as to describe the conduct as willful misconduct, or gross negligence. See *Cummings I*, 157 Idaho at 368-369, 336 P.3d at 301-302. (J. Jones, dissenting). But the effect was nil. The correction had excluded property east of Highway 30, and the district court found

the district court looked to Northern Title’s drafting of a deed description, upon which Cummings purportedly relied.

Cummings was willing to pay an additional \$50,000 . . . in order to purchase what he believed was the entire Stephens ranch situated on both sides of the highway. This belief came based upon the negligent preparation of the legal description by Northern Title that identified land on the east side of the highway. The only harm that the Court can conclude that is outside the realm of speculation is that Cummings has been proximately harmed by this negligence in an amount of \$50,000.

Cummings I, 157 Idaho at 365, 336 P.3d at 298. (quoting district court).^{3,4}

2. The Court Denied Cummings’ Appeal.

Cummings appealed, asserting that the district court erred by (1) involuntarily dismissing Roger Stephens; (2) holding Roger Stephens as a prevailing party; (3) not upholding the original deed; (4) not quieting Cummings’ title to the eastern property; (5) not recognizing a tort of bad faith; (6) excluding Cummings’ expert; (7) not awarding Cummings with additional damages; and (8) not awarding Cummings with punitive damages. See *Cummings I*, 157 Idaho 348, 336 P.3d 281.

(and Cummings never disputed) that “[1] the rerecorded deed that excluded property on the east side of Highway 30 is not a false statement . . . [2] the property on the east side of the highway was never intended to be sold by Stephens . . . [3] the real estate deal did not include property east of the Highway . . . [4] Cummings has no right to recover any property, value, or interest for the Stephens’ property located on the east side of the highway.” *Cummings I*, 157 Idaho at 362, 336 P.3d at 295. In addition, “Cummings did not provide *any* evidence regarding the value of the property on the east side of the highway.” *Id.*

3 Emphasis and ellipses added.

4 The same can be found in *Cummings I, R.* Vol 8, p. 1627; see also *Larson v. State*, 435 P.2d 248, 249, 91 Idaho 908, 909 (1967). (Court can take judicial notice of prior appeal record).

On all fronts, Cummings' appeal failed. As to Roger Stephens, the district court had properly "granted the motion for an involuntary dismissal on the ground that there was no evidence that Mr. Stephens altered the deed"; thus "Cummings has not shown that the district court abused its discretion in finding that Mr. Stephens was the prevailing party regarding the claims brought against him." *Cummings I*, 157 Idaho at 353-360, 336 P.3d at 286-293. As to the district court's purported failure to recognize the original (non-corrected) deed and to quiet Cummings' title to the eastern property, "Cummings did not assert any claim for quiet title . . . [and] failed to prove that the transaction between him and Mr. Stephens included the sale of the property on the east side of the highway." *Id.* at 157 Idaho at 357, 336 P.3d at 290. In other words, Cummings had failed to assert, let alone prove such claims.

More particularly as to Northern Title, the Court found that the existence of a "tort of bad faith" against Northern Title as the escrow was irrelevant. The district court had expressly found, and Cummings did not dispute that Northern Title "acted in good faith," and reasonably denied the claim; the only information Northern Title had received was that "Cummings only received property on the west side of Highway 30 . . . [i]t was testified extensively at trial that Northern Title's understanding was that only the property on the west side was involved in the transaction." *Cummings I*, 157 Idaho at 359, 336 P.3d at 292. Based on the district court's uncontested findings, there had been no bad faith.⁵

⁵ See also *fn. 2, supra*, regarding Cummings' failure to prove his breach of contract claim against Northern Title as escrow.

Furthermore, Cummings averred on appeal that he was entitled to “additional damages” in connection with the eastern property. However, Cummings did not dispute his lack of entitlement to that eastern property:

. . . the property on the east side of the highway was never intended to be sold . . . Cummings was therefore never entitled to receive this property . . . was never the true owner of the property . . . has no claim over that property, value of that property, or any interest generated from that property in the form of CRP payments or otherwise . . . [and] did not provide any evidence regarding the value of the property”

Cummings I, 157 Idaho at 362-363, 336 P.3d at 295-296. (quoting district court).

Cummings’ last but no less futile arguments were that the district court erred in (1) excluding his valuation expert, and (2) punitive damages. Here again, however, Cummings failed to appreciate the circumstances. Cummings had vehemently argued for and gained the exclusion of Northern Title’s valuation expert, being disclosed two (2) months late. In contrast, “Cummings was more dilatory . . . because his disclosure was about three months late . . . [and] the district court clearly set forth what it required . . . [and warned that] witnesses not disclosed . . . will be excluded at trial.” *Cummings I*, 157 Idaho at 360, 336 P.3d at 293. Therefore, the exclusion was proper. *Id.* at 157 Idaho at 361, 336 P.3d at 294. As to punitive damages, the district court before trial denied Cummings’ request to amend, and though such was done “without prejudice, Cummings did not renew his motion at trial “nor did he ever renew it.” *Cummings I*, 157 Idaho at 364, 336 P.3d at 297. The, punitive damages were waived.

3. The Court Reversed Cummings’ Judgment.

As to the only source from which harm could be identified, the district court found that Northern Title was an “abstractor,” liable for negligently drafting a deed description:

Cummings was willing to pay an additional \$50,000 . . . in order to purchase what he believed was the entire Stephens ranch situated on both sides of the highway. This belief came based upon the negligent preparation of the legal description by Northern Title that identified land on the east side of the highway. The **only harm** that the Court can conclude that is outside the realm of speculation is that Cummings has been proximately harmed by this negligence in an amount of \$50,000.

Cummings I, 157 Idaho at 365, 336 P.3d at 298. (quoting district court, emphasis added).

However, the “legal description created by Northern Title [was] in the process of performing the title work to be done in order to issue a commitment for title insurance.” “There [was] no evidence that Northern Title assumed the duty of being an abstractor of title.”

Cummings I, 157 Idaho at 366-367, 336 P.3d at 299-300. Because Northern Title had no duty as an abstractor, the district court’s finding of negligence was error. *Id.* at 157 Idaho at 367, 336 P.3d at 300. Therefore, the Court reversed Cummings’ one and only judgment. *Id.*

Concise Statement of Facts

On November 5, 2014, the Court remitted this matter and ordered the district court to “forthwith comply with the directive of the Opinion, if any action is required.” *R.*, Vol. 1, p. 21. Northern Title renewed its motion for costs and fees, and on January 2, 2015 the district court held “**there’s no way I can hold the plaintiff as a prevailing party, and I find that Northern Title prevailed . . .**” *Tr.*, 32:15-18. (emphasis added). Later that same day the district court entered its *Minute Entry & Order*, holding that “Defendant Northern Title is the prevailing party” and awarding Northern Title its pre-appeal costs and fees. *R.*, Vol. 1, p. 61.

On January 6, 2015, the district court filed its *Amended Final Judgment on Costs and Fees as Between Cummings and Northern Title*. *R.* Vol. 1, pp. 63-64. However, the judgment

erroneously awarded Northern Title the same amount in costs and fees as awarded to Roger Stephens. *Id.* at pp. 58-59; *Cf. id.* at p. 61 (Northern Title entitled to \$136,533.62). Therefore, on January 8, 2015 the district court entered its *2nd Amended Final Judgment on Costs and Fees as Between Cummings and Northern Title*. *Id.* at pp. 65-66.

Unfortunately, the record was still incomplete. The Court (on appeal) had awarded Northern Title its costs and fees, see *R.*, Vol. 1, pp. 29-30 (\$25,829.68), which the district court failed to include. Therefore on January 27, 2015, the district court entered its *Third Amended Final Judgment on Costs and Fees as Between Northern Title*, adding Northern Title's costs and fees on appeal. *Id.* at pp. 67-68. (bringing total cost and fees to \$162,363.30).

Northern Title then learned that Cummings' old \$50,000 Judgment, and his judgment for costs and fees, were still both on record with the Bear Lake County of Idaho. Further, opposing counsel refused to remove them. On February 5, 2015, and pursuant to Rule 60(b) of the Idaho Rules of Civil Procedure, Northern Title requested the district court to vacate Cummings' \$50,000 Judgment (as ordered by this Court) and his prior costs and fees. (as ordered by the district court). See *R.*, Vol. 1, pp. 69-70. Cummings objected, arguing that despite this Court's order to reverse his \$50,000 Judgment and despite the district court's subsequent orders, Northern Title was too late and its motion was "baseless." *Id.* at p. 73. The district court disagreed and vacated the judgments. *Id.* at 76-77.

ISSUES PRESENTED ON APPEAL

1. Whether upon reversal of Cummings' Judgment the district court had post-appeal jurisdiction to determine prevailing party status, costs, and attorneys fees?

Standard of Review: On January 2, 2015, the district court held that where Cummings' judgment was reversed, Northern Title and not Cummings was the prevailing party:

It just seems to me like I don't have much choice here but to go this way. And I'm not saying I wouldn't got this way if it was discretionary. It is discretionary. I am exercising my discretion . . . where after the Supreme Court's decision that said that it was wrong of me to award 50,000 to the plaintiff, there's no way I can hold the plaintiff as a prevailing party, and I find that Northern Title prevailed and order the cost and fees as I've outlined below.

Tr., Vol. 1, 32:10-18.

Whether the district court had jurisdiction is a question of law, over which this Court exercises free review. See *Downey Chiropractic Clinic*, 127 Idaho 283, 285, 900 P.2d 191, 193 (1995).

2. Whether Cummings has adequately raised that the district court abused its discretion in granting Northern Title's request for Rule 60(b) relief; and if so, whether the district court in fact abused its discretion and whether any such abuse was harmless?

Standard of Review: Cummings raises this issue only in passing. See *Appellant's Brief* at 9-10. To even consider an issue for review, assignments of error must be asserted with particularity and supported by sufficient authority; a general attack will not do. See *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010).

On February 20, 2015, the district court held that Northern Title's request was timely, and was appropriate where "the two challenged judgments are void and . . . because it is no longer equitable that the judgments should have prospective application given the subsequent rulings by the Idaho Supreme Court and this Court." *R.*, Vol. 1, p 77.

Rule 60(b) relief is reviewed under an abuse of discretion standard:

A trial court's decision whether to grant relief pursuant to I.R.C.P. 60(b) is reviewed for abuse of discretion. The decision will be upheld if it appears that the trial court (1) correctly perceived the issue as discretionary, (2) acted within the boundaries of its discretion and consistent with the applicable legal standards, and (3) reached its determination through an exercise of reason. A determination under Rule 60(b) turns largely on questions of fact to be determined by the trial court. Those factual findings will be upheld unless they are clearly erroneous. If the trial court applies the facts in a logical manner to the criteria set forth in Rule 60(b), while keeping in mind the policy favoring relief in doubtful cases, the court will be deemed to have acted within its discretion.

Waller v. State, Dept. of Health and Welfare, 146 Idaho 234, 237-38, 192 P.3d 1058, 1061-62 (2008) (citations omitted) (internal quotation marks omitted).

Even where granted erroneously, Rule 60(b) relief will not be disturbed where the error is harmless. See I.R.C.P. 61; see also *Taylor v. AIA Services Corp.*, 151 Idaho 552, 573, 261 P.3d 829, 850 (2011) ("courts are instructed to disregard error that does not affect the substantial rights of a party").

COSTS & ATTORNEYS FEES ON APPEAL

Costs on appeal are awarded as a matter of right. See I.A.R. 40. Attorneys fees on appeal are awarded if authorized by statute, contract, or rule. See *Capps v. FIA Card Services, N.A.*, 149 Idaho 797, 744, 240 P.3d 583, 590 (2010) (citations omitted); see also I.A.R. 41.

Like the first appeal (*Cummings I*), the parties agree that Idaho Code section 12-120(3) applies. See *Appellant's Brief*, 18. That section “mandates an award of attorney fees to the prevailing party on appeal as well as at trial.” *Chavez v. Barrus*, 146 Idaho 212, 225, 192 P.3d 1036, 1049 (2008). Should Northern Title prevail on appeal, the Court pursuant to I.A.R. 40-41 and I.C. § 12-120(3) should award Northern Title its costs as a matter of right and its attorneys fees incurred in litigating a commercial transaction.

Alternatively, Cummings’ appeal is without merit, and therefore pursuant to I.C. § 12-123, Northern Title is entitled to attorneys fees on appeal.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO DETERMINE PREVAILING PARTY STATUS, ATTORNEYS FEES, AND COSTS.

Cummings raises only one standard of review – “free review.” *Appellant's Brief*, 9. Cummings argues that the district court did not have post-appeal jurisdiction to determine and correct the prevailing party status, costs, and fees. On appeal, Cummings does not contest any of the district court’s particular findings or conclusions. Most notably, (1) Cummings is not a prevailing party; (2) Northern Title is the prevailing party; and (3) Northern Title is entitled to pre-appeal costs and fees of \$136,533.62.

A. *On reversal of Cummings’ Judgment, the district court had post-appeal jurisdiction to correct its orders, including those regarding prevailing party status, attorneys fees, and costs.*

Ordinarily, the district court determines prevailing party status, costs and fees shortly after trial:

In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought . . . the extent to which each party prevailed . . . and upon so finding may apportion the costs between and among the parties in a fair and equitable manner”

I.R.C.P. 54(d)(1)(B). (emphasis and ellipses added). The application of Rule 54, however, can be extended. For instance “[a]fter 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.” *Hutchins v. State*, 100 Idaho 661, 666, 603 P.2d 995, 1000 (1979).

Obviously, the reversal of a judgment, especially the only judgment, can strongly impact a district court’s prior determination of prevailing party status, costs, and fees. Therefore, it is well established that upon reversal the district court is empowered “to make a determination of what party was the prevailing party and whether the prevailing party was entitled to attorney fees.” *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 413-474, 36 P.3d 218, 225-226 (2001).

Here, the district court clearly had post-appeal jurisdiction to determine prevailing party status, costs, and fees, and make any corrections necessary to its prior orders. By way of trial, Cummings had obtained one Judgment, and on appeal the Court reversed that Judgment. See *Cummings I*, 157 Idaho 348, 336 P.3d at 330. Therefore, the district court on remittitur had jurisdiction to reassess and make any corrections necessary in relationship to prevailing party status, costs, and fees. See *Great Plains Equip. Inc.*, 136 Idaho at 413-474, 36 P.3d at 225-226.

Cummings, however, argues that prevailing party status, costs and fees were not issues subsidiary to this Court’s reversal. See *Appellant’s Brief*, 9-17. In making his argument,

Cummings principally relies on *Hummer v. Evans*, 132 Idaho 830, 979 P.2d 1188 (1999), which held “[a] trial court has no authority to enter any judgment or order not in conformity with the order of the appellate court.” *Id.* at 132 Idaho at 833, 979 P.2d at 1191. Under this rule, the Court went on to hold that the district court’s post-appeal jurisdiction did not include pre-appeal costs and fees; it was limited to the “ministerial act” of entering judgment as directed. *Id.*

However, this case and *Hummer* are clearly distinguishable. Namely in *Hummer*, the Court did not reverse a judgment. Rather as stated in *Hummer I*, 129 Idaho 274, 923 P.2d 981 (1996), the Court vacated an *additur* of damages. *Id.* Thus in *Hummer II*, “the issue of attorney fees was not a subsidiary issue fairly comprised therein.” *Hummer II*, 132 Idaho at 832-833, 979 P.2d at 1190-1191. In stark contrast here, the Court in *Cummings I* affirmed the district court’s dismissal of Roger Stephens, and expressly held:

We reverse the judgment against Northern Title . . . his judgment against Northern Title must be reversed . . . [and again] we reverse Mr. Cummings’s judgment against Northern Title.

Cummings I, 157 Idaho at 367, 336 P.3d at 300.⁶ Therefore, unlike *Hummer* this case involves the reversal of Cummings’ one and only Judgment, leaving the district court “free to correct any error in its original findings and conclusions as to matters not passed on by the appellate court.” *Hutchins*, 100 Idaho at 666, 603 P.2d at 1000.

In addition to logic, the district court’s jurisdiction is supported by Rule 54 which leaves the determination of prevailing party status, costs and fees to the “trial court.” I.R.C.P. 54(1)(B). Notwithstanding, Cummings tenuously interprets *Hummer* to stand for the proposition that even

⁶ Brackets and ellipses added.

in the instance of reversal, a district court's post-appeal jurisdiction does not include costs and fees unless the appellate court expressly changes the prevailing party status, or vacates a prior cost and fee award. *R.*, Vol. 1, p. 55; see also *Appellant's Brief*, 10-11, 16.

For support, Cummings cites to three (3) cases and none of them support his proposition. For instance in *J.R. Simplot Co. v. Chemetics International, Inc.*, 126 Idaho 532, 887 P.2d 1039 (1994), the Court on first appeal was requested and declined to address prevailing party status. *Id.* at 259. On second appeal, the Court held:

[W]hen this Court reversed the jury verdict . . . relieving Chemetics of liability, the question of attorney fees was a "subsidiary issue fairly comprised therein." On remand **the district court had the jurisdiction to consider whether Chemetics was the prevailing party and to make an award of costs and attorney fees.**

J.R. Simplot Co. v. Chemetics Intern., Inc., (U.S. Inc.), 939 P.2d 574, 577, 130 Idaho 255, 258 (Idaho 997).⁷ Similarly here, the district court had denied "all of Cummings's claims against Northern Title **except one.**" *Cummings I*, 157 Idaho at 353, 336 P.3d at 286. (emphasis added). Because that one successful claim was founded on an erroneous theory of abstractor liability, the Court reversed. *Id.* at 157 Idaho at 367, 336 P.3d at 300. Therefore like in *Chemetics*, the district court had jurisdiction to reconsider pre-appeal costs and fees, and correct orders as necessary.

What Cummings fails to appreciate is that the district court's post-appeal jurisdiction is found as a result of the reversal, not as a result of an appellate court's decision to pass on or decide issues relating to prevailing party status, costs, or fees. For instance, in *Great Plains Equipment, Inc. v. Northwest Pipeline Corporation*, 132 Idaho 754, 771, 979 P.2d 624, 644

⁷ (emphasis, brackets, and ellipses added).

(1999), the Court vacated prior lien foreclosures. Because the lien statute no longer justified the award of fees, the Court also vacated the prior fee award. *Id.* However, the Court passed on the issue of prevailing party. On subsequent appeal, the Court agreed that because of the reversal the district court “**had jurisdiction to make a determination of what party was the prevailing party and whether the prevailing party was entitled to attorney fees.**” *Great Plains Equip., Inc.*, 136 Idaho at 413-474, 36 P.3d at 225-226. (emphasis added).

In contrast here, while the Court found that Northern Title was not an abstractor, and thus Cummings’ one and only Judgment could not stand. Such did not, *ipso facto*, dictate the appropriateness of trial fees awarded under Idaho Code § 12-120(3). The underlying transaction was still a commercial transaction, justifying an award of fees. See *Cummings I*, 157 Idaho at 368, 336 P.3d at 300. Furthermore, the reversal did not *ipso facto* dictate that Cummings was 100% no longer a prevailing party. As Justice Jones argued in his dissent, the Court did not overturn the district court’s finding that Northern Title’s actions constituted negligence, gross negligence, or willful misconduct in relationship to the escrow agreement. See *Cummings I*, 157 Idaho at 368-369, 336 P.3d at 301-302. (J. Jones, dissenting).⁸

Simply put, upon reversal of a judgment the district court’s post-appeal jurisdiction to consider costs and fees is not lessened by the fact that the determination will require some discretion. For instance in *Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 315 P.3d 792 (Idaho 2013), the Court reversed the judgment *but also* the award of

⁸ But see also *fn. 2*, supra. (regarding district court’s ample reasoning of why such conduct could not amount to a judgment).

fees; the prevailing party was not entitled to enforce the contract upon which *both* the judgment *and* the fees were based. *Id.*⁹ On remand, the district court erroneously held that it lacked jurisdiction to address costs and fees, and on subsequent appeal the Court pointed out (again) that because of the reversal, the district court had jurisdiction to determine pre-appeal costs and fees. See *Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC*, 44216 (Sept. 30, 2015). The issue was so obvious in fact that the Court ordered a new judge to be appointed, and Justice Eismann’s concurring opinion at the first **bold** header stated “[t]he District Court Had Post-Appeal Jurisdiction to Determine the Prevailing Party and Award Costs.” *Id.*¹⁰

Here, the district court did just that and Cummings does not dispute its findings:

It just seems to me like I don’t have much choice here but to go this way. And I’m not saying I wouldn’t got this way if it was discretionary. It is discretionary. I am exercising my discretion . . . where after the Supreme Court’s decision that said that it was wrong of me to award 50,000 to the plaintiff, there’s no way I can hold the plaintiff as a prevailing party, and I find that Northern Title prevailed and order the cost and fees as I’ve outlined below.

Tr., Vol. 1, 32:10-18.

Cummings’ argument that the district court lacked jurisdiction is without merit. The Court reversed Cummings’ one and only judgment and the district court therefore had jurisdiction to determine and correct any orders regarding prevailing party status, costs and fees.

⁹ Notably, at that first appeal the Court did not address pre-appeal prevailing party status, nor the amount of costs or fees. *Id.*

¹⁰ Emphasis in original.

B. Cummings' argument that this Court decided the parties' pre-appeal prevailing party status, costs, and fees is without merit.

In *Cummings I*, Northern Title argued that if it prevailed on appeal the district court should be ordered to make Northern Title the prevailing party. However, the Court did not address the issue in its Opinion, holding “[b]ecause the remaining issues raised by Northern Title in its cross-appeal sought to reverse the award of damages for other reasons, we need not address those issues.” *Cummings I*, 157 Idaho at 367, 336 P.3d at 300. After the Court issued its Opinion, Northern Title petitioned for a rehearing requesting the Court to address Northern Title’s pre-appeal prevailing party status, costs and attorneys fees. See *R.*, Vol. 1, 6-14. Without comment, the Court denied the request. See *Order Re Additions to Clerk’s Record Filed in District Court* (Aug. 27, 2015). (taking judicial notice of the order). Cummings argues that by denying Northern Title’s petition for rehearing, the Court decided the issue on the merits. *Appellant’s Brief*, 11.

Obviously, the Court’s order denying Northern Title’s request for a rehearing was not a decision on the merits. As Rule 54 to the Idaho Rules of Civil Procedure makes clear, prevailing party status and the award of costs and fees rests in the sound discretion of the **trial court**. See I.R.C.P. 54(1)(B). Furthermore, “[a]fter 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.” *Hutchins*, 100 Idaho at 666, 603 P.2d at 1000.

In this case, Counsel for Cummings *admitted* on remittitur that *Cummings I* was silent as to pre-appeal prevailing party status, costs, and fees:

OLSEN: So it [Northern Title] presented all of those issues in front of the Supreme Court in a petition for rehearing, and the Court denied that petition. And so that in itself is a direction from the Court –

COURT: How? Couldn't it just as likely be the Supreme Court saying, "We're not going to even address this because our prior opinions in other cases make this very clear?"

OLSEN: Well, I think, your Honor, it's important to remember, too, that Northern Title filed a cross-appeal on all of those issues.

COURT: I understand that.

OLSEN: And they did not – that appeal was not granted.

COURT: Was it even addressed though?

OLSEN: Well, I would say, your Honor, that –

COURT: Show me in the opinion where it said anything about that. I didn't find it.

OLSEN: Well, in the opinion, your Honor, it does indicate in the procedural history part of it that, yes, they did appeal that issue.

COURT: But where did the Supreme Court address that issue?

OLSEN: **And that I can't say. It doesn't specifically address it, other than that it denied their petition for rehearing.**

COURT: **And I agree. They clearly denied the petition for rehearing, but I think it's saying a lot to interpret why they denied it.**

OLSEN: **Right.**

Tr., Vol. 1, 4:21-5:25.¹¹ The Court's silence was just that – silence. A discretionary matter was left to the district court, the district court exercised its discretion and Cummings does not dispute

¹¹ Emphasis added.

that (1) Cummings is not a prevailing party; (2) Northern Title is the prevailing party; and (3) Northern Title is entitled to pre-appeal costs and fees of \$136,533.62.

The Court should deny Cummings' appeal. The Court's Opinion reversed Cummings' one and only Judgment, was silent as to pre-appeal prevailing party status, costs, and fees, and thus the district court properly exercised its post-appeal jurisdiction. See I.R.C.P. 54.

C. Upon remittitur, the district court's jurisdiction was limited to subsidiary issues not passed on but fairly comprised within the Court's Opinion.

A district court does not "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.'" *Hummer*, 979 P.2d at 1191, 132 Idaho at 833. In fact, even in the event of a general reversal, the district court is still only "**free to correct any error in its original findings and conclusions as to matters not passed on by the appellate court.**" *Chemetics*, 130 Idaho at 257-258, 939 P.2d at 576-577. (quoting *Hutchins*, 100 Idaho at 666, 603 P.2d at 1000) (emphasis added).

Cummings' vague argument that the district court should seek out a "correct theory" is without merit. At trial, the district court denied Cummings' claims against Stephens, and all of Cummings' claims against Northern Title "**except one.**" See *Cummings I*, 157 Idaho at 353, 336 P.3d at 286.¹² That one successful claim was "**[t]he only harm**" that the district court could identify, and it was reversed. *Id.*¹³ On appeal, Cummings did not contest the district court's

¹² Emphasis added.

¹³ Emphasis added.

findings; namely that Northern Title was in no way liable as an insurance agent;¹⁴ that Roger Stephens never intended to sell, and the transaction did not include the eastern property; that Cummings had *zero* entitlement to the eastern property; or that Cummings failed to provide *any* evidence of its value.¹⁵ Nor did Cummings dispute that Northern Title acted in good faith.¹⁶

Thus, the time for Cummings to address and seek out a “correct theory” was at trial or at least on his first appeal, not now. See *Ade v. Batten*, 126 Idaho 114, 117, 878 P.2d 813, 816 (Idaho App. 1994). (holding Rule 60(b) is not a substitute for timely appeal). Cummings nonetheless argues that if the district court has jurisdiction to consider pre-appeal costs and fees, it should “have been afforded . . . consideration of a reinstatement of damages based on a correct theory[.]” *Appellant’s Brief*, 17-18. For at least three (3) reasons, Cummings’ argument fails.

First, the district court’s post-appeal jurisdiction was limited to **correcting** its original findings and conclusions, i.e. that conflict with this Court’s decision. See *Chemetics*, 130 Idaho at 257-258, 939 P.2d at 576-577. On his first appeal, Cummings challenged the district court’s (1) dismissal of Roger Stephens; (2) purported failure to uphold the original deed; (3) purported failure to quiet title; (4) decision that Roger Stephens was a prevailing party; (5) refusal to recognize a tort of bad faith; (6) exclusion of Cummings’ expert at trial; (7) purported failure to award Cummings with additional damages; and (8) purported failure to award punitive damages.

14 See *Cummings I*, 157 Idaho at 367, 336 P.3d at 300.

15 *Id.*

16 *Id.*

See gen. *Cummings I*. The Court addressed each purported error, and as to each, held that there was no error.¹⁷ Because the district court had not erred in denying Cummings' claims, there was no need for a correction of those denials. Further, where there was no need for correction there was no post-appeal jurisdiction. See *Chemetics*, 130 Idaho at 257-258, 939 P.2d at 576-577.

Second, even if a "correct theory" existed, Cummings does not raise it. See *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 812, 252 P.3d 71, 93 (2011). ("this Court will not consider issues raised for the first time on appeal"). Below, Cummings never moved the district court to consider alternative theories of relief. Instead, he vaguely asserted that "[i]f the proceedings are re-opened, what would then prevent Cummings from seeking a reinstatement of damages based upon some other theory than abstractor of title?" *R.*, Vol. 1, 55. What that "other theory" might be Cummings did not say. Similarly on appeal, Cummings vaguely asserts that "a reinstatement of damages based on a correct theory would not be inconsistent with the Supreme Court's Opinion." *Appellant's Brief*, 18. Again, Cummings does not even suggest a "correct

¹⁷ *Cummings I*, 157 Idaho at 353-367, 336 P.3d at 286-300. (holding district court sufficiently addressed reasons for dismissing Stephens, and evidence "was sufficient for the district court to find that Mr. Cummings has failed to prove his claims against Stephens"; "[t]he district court did not make any ruling regarding the validity of the Original Deed"; Cummings waived claim to real property during trial, did not dispute the finding that he was not entitled to the property, and "did not assert any claim for quit title . . . or to void the Corrective Deed"; "Cummings has not shown that the district court abused its discretion in finding that Mr. Stephens was the prevailing party"; Cummings failed to prove bad faith where he failed to challenge any of the district court's findings; "in excluding Mr. Cummings's expert witness . . . the district court acted in a manner that was consistent with the applicable legal standards"; "district court did not err in failing to award him additional damages; Cummings "waived any claim" for punitive damages; "he has not prevailed on appeal")

theory.” *Cf.* I.A.R. 35(a)(6). Where Cummings has failed to adequately raise the issue, the Court should disregard it.

Third, Cummings’ suggestions **are** inconsistent with this Court’s Opinion. Under the “right result – wrong theory rule,” if the “lower court reaches the correct result by an erroneous theory, this Court will affirm the order on the correct theory.” *Nampa & Meridian Irr. Dist. v. Mussell*, 139 Idaho 28, 33, 72 P.3d 868, 873 (Idaho 2003). (citation omitted); see also *Idaho Sch. for Equal Ed. Opp. v. Evans*, 123 Idaho 573, 580, 850 P.2d 724, 731 (1993). In fact, “[t]his Court must uphold the finding and judgment of the trial court if it is capable of being upheld on any theory.” *Berry v. Koehler*, 86 Idaho 225, 233, 384 P.2d 484, 489 (1963). In *Cummings I*, the Court did not uphold the district court’s judgment on an alternative theory – because it could not. In fact, the Court expressly ordered that the “judgment against Northern Title **must** be reversed.” *Id.* at 157 Idaho at 367, 336 P.3d at 300. (emphasis added). The suggestion, therefore, that the district court should have jurisdiction to rummage for alternative theories to keep Cummings’ Judgment alive is not “a subsidiary issue fairly comprised” within the Court’s Opinion. *Hummer*, 132 Idaho at 832-833, 979 P.2d at 1190-1191.

The Court should deny Cummings’ appeal. The district court was ordered to reverse Cummings’ Judgment, and his vague suggestion that the district court had post-appeal jurisdiction to rummage for an “other theory” is without merit.

II. THE DISTRICT COURT PROPERLY GRANTED NORTHERN TITLE'S REQUEST FOR RULE 60(b) RELIEF.

Cummings argues that the district court did not have post-appeal jurisdiction to entertain Rule 60(b) relief. Importantly, Cummings does not contest any of the district court's findings or conclusions. Most notably, (1) Cummings' \$50,000 Judgment and judgment of costs and fees for \$112,448.09 are void, and (2) the prospective application of these judgments would be inequitable. See *R.*, Vol. 1, p 77. Instead, Cummings' sole argument is that pre-appeal costs and fees were not an issue fairly subsidiary to this Court's reversal, and thus the district court lacked jurisdiction to entertain a request for Rule 60(b) relief. See *Appellant's Brief*, 10-14.

Northern Title's response to Cummings' jurisdictional argument is contained *supra*. Therefore, Northern Title limits the following to those arguments Cummings made in passing, as contained in *Appellants' Brief*, pp. 9-10.

A. *Cummings raises this issue only in passing and the Court should not give credence to his empty argument.*

For the Court to consider an issue on appeal, the appellant's brief "shall contain, in the argument section, the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with the citations to the authorities, statutes and parts of the transcript and record relied upon." I.A.R. 35(a)(6).

Cummings does not adequately assign an error against the district court for granting Northern Title's request for Rule 60(b) relief. First, Cummings does not raise the applicable standard of review, and does not dispute the district court's findings. Cummings never argues an

“abuse of discretion” standard, a requisite analysis to overturn a district court’s Rule 60(b) relief. See *Appellant’s Brief*, 1-20; see also *Waller*, 146 Idaho at 237-38, 192 P.3d at 1061-62 (stating standard for review). Nor does Cummings dispute that his costs and fees were rendered void and became inequitable upon the district court’s subsequent finding that Cummings is not a prevailing party. See *Tr.*, Vol. 1 32:15-18 (holding Cummings is no longer a prevailing party); see also *R.*, Vol. 1, p. 61 (holding “Defendant Northern Title is the prevailing party”); see also *Id.* at p. 77. (“void” and inequitable).

Second, Cummings does not make a cognizable argument. For Cummings to raise an issue he must at least (1) assert assignments of error with particularity and (2) support his position with sufficient legal or record authority.

Where an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court. A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. This Court will not search the record on appeal for error. Consequently, to the extent that an assignment of error is not argued and supported in compliance with the I.A.R., it is deemed to be waived.

Bach, 148 Idaho at 790, 229 P.3d at 1152. (emphasis added).¹⁸

In only one paragraph, Cummings vaguely alleges that Northern Title’s motion lacked “good cause.” *Appellant’s Brief*, 10. Why it lacks good cause Cummings does not say. Further, Cummings cites to the record only once, nonsensically referencing to the last page of Northern Title’s Rule 60(b) motion and the first page of Cummings’ response. *Id.* at 10. (citing *R.* Vol. 1,

¹⁸ Citing *Randall v. Ganz*, 96 Idaho 785, 788, 537 P.2d 65, 68 (1975); *Michael v. Zehm*, 74 Idaho 442, 445, 263 P.2d 990, 993 (1953); *Suits v. Idaho Bd. of Prof'l Discipline*, 138 Idaho 397, 400, 64 P.3d 323, 326 (2003); *Suits v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005)).

pp. 70-72). Cummings' does not even cite to the order that granted Northern Title's Rule 60(b) relief. *See R. Vol. 1, pp. 70-72*

In contrast, this Court has repeatedly held "we will not consider assignments of error not supported by argument and authority in the opening brief." *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (Idaho 2006). Cummings is fully aware of this rule. See e.g. *Cummings I*, 157 Idaho at 362, 336 P.3d at 295. (refusing to address Cummings' unsupported arguments). (quoting *Hogg*, 142 Idaho at 559, 130 P.3d at 1097). Where Cummings has failed to provide the Court (and this Appellant) with the most basic of supported argument, the Court should disregard Cummings' general, unexplained attack.

The Court should not consider Cummings' bald attack against the district court's Rule 60(b) relief. Cummings fails to cite or address the abuse of discretion standard, does not contest the district court's findings, and does not point to or support any assignable error with particularity.

B. Notwithstanding, the district court's order granting Northern Title's request for Rule 60(b) relief is supported by the law and the record.

i. The district court's order granting Northern Title's request for Rule 60(b) relief was lawful.

Under Rule 60(b)(5), the Idaho Rules of Civil Procedure "provides a means of obtaining relief from a final judgment which is based on a prior judgment that has been reversed, or otherwise vacated, or if it is no longer equitable that the judgment should have prospective application." *Stuart v. State*, 128 Idaho 436, 437, 914 P.2d 933, 934 (1996). (quoting I.R.C.P.

60(b)(5)). Additionally, under Rule 60(b)(4) relief is proper if a judgment is “void.” I.R.C.P. 60(b)(4); see also *State v. Peterson*, 153 Idaho 157, 163, 280 P.3d 184, 190 (Ct. App. 2012). (to be void means court “lacks jurisdiction over the subject matter”).

First, the district court properly found that Cummings’ \$50,000 Judgment is void. The Court ordered that the Judgment “must be reversed.” *Cummings I*, 157 Idaho at 353, 367, 336 P.3d at 286, 300. When this Court orders a reversal, “[a] trial court has no authority to enter any judgment or order not in conformity with the order of the appellate court.” *Hummer*, 132 Idaho at 833, 979 P.2d at 1191. Therefore, when Northern Title motioned the district court to vacate Cummings’ Judgment, the district court lacked jurisdiction to do anything but vacate the Judgment. See *Peterson*, 153 Idaho at 163, 280 P.3d at 190. Cummings, in contrast, argued that Northern Title’s request was “baseless.” *R.*, Vol. 1, p. 73. The district court disagreed, properly holding that Cummings’ Judgment was void. *Id.* at p. 77.¹⁹

Second, the district court properly vacated Cummings’ pre-appeal costs and fees. Due to the reversal, the district court held “there’s no way I can hold the plaintiff as a prevailing party, and I find that Northern Title prevailed” *Tr.*, 32:15-18. Later that same day in its *Minute Entry & Order*, the district court ordered “Defendant Northern Title is **the** prevailing party.” *R.*, Vol. 1, p. 61.²⁰ Thus, Rule 60(b)(5)²¹ was implicated. A district court may grant relief “from a

¹⁹ In addition, the district court correctly relied upon I.R.C.P. 60(b)(5), finding that prospective application of the reversed Judgment would not be equitable. *R.*, Vol. 1, p. 73. Cummings does not dispute these findings.

²⁰ Emphasis added.

final judgment which is based on a prior judgment that has been reversed, or otherwise vacated, or if it is no longer equitable that the judgment should have prospective application.” *Stuart*, 128 Idaho at 437, 914 P.2d at 934. As explained in *Curl v. Curl*, 115 Idaho 997, 1000, 772 P.2d 204, 207 (1998), Rule 60(b)(5) directly applies when a change to a prior judgment renders a later judgment, in the same case, inappropriate. *Id.*

That is what happened here. The Court reversed Cummings’ Judgment, which rendered his subsequent judgment for costs and fees potentially improper.²² That judgment for costs and fees became entirely improper when the district court found that Cummings is not a prevailing party:

It is discretionary. I am exercising my discretion . . . where after the Supreme Court’s decision that said that it was wrong of me to award 50,000 to the plaintiff, there’s no way I can hold the plaintiff as a prevailing party, and I find that Northern Title prevailed and order the cost and fees as I’ve outlined below.

Tr., Vol. 1, 32:10-18.²³ Cummings does not dispute these findings. Therefore, where Cummings’ prior Judgment was reversed, and his prevailing party status was changed, the

21 Even if reliance on Rule 60(b)(5) was somehow erroneous, Cummings is not a prevailing party. Therefore, his prior judgment for costs and fees is clearly inequitable. See e.g. I.R.C.P. 60(b)(6).

22 See *Cummings I, R.* Vol. 9, pp. 1805. (“[e]ach Count of Cummings’ Amended Complaint sought damages for the failure to get what he bargained for – the property on the east side of the highway. The Court awarded him \$50,000 for that failure. Therefore, Cummings did prove the gravamen of his case. He is the prevailing party as between Cummings and Northern Title”); see also *R.* Vol. 9, p. 1816. (Final Judgment on Costs and Fees, dated Apr. 12, 2013); *Cf. R.* Vol. 8, p. 1586 (Final Judgment of \$50,000, dated Jan. 22, 2013).

23 Emphasis added.

prospective application of his judgment for costs and fees became inequitable. See I.R.C.P.

60(b)(5).²⁴

On appeal, the **only** basis that Cummings argues Rule 60(b) should not apply was because Northern Title did not show a “mistake of fact.” *Appellant’s Brief*, 8. Cummings misses the mark. He cites to *Berg v. Kendall*, 212 P.3d 1001, 1006-1007, 147 Idaho 571, 576-577 (Idaho 2009), a case clearly distinguishable by the fact that it involved Rule 60(b)(1), not Rule 60(b)(4) or Rule 60(b)(5). *Id.* Northern Title’s relief was not granted because of a mistake:

[T]here are valid reasons for granting the motion, particularly under subsection (4) because the two challenged judgments are void and subsection (5) because it is no longer equitable that the judgments should have prospective application given the subsequent rulings of the Idaho Supreme Court and this Court.

R., Vol. 1, p. 77.²⁵

24 Cummings does not argue whether his judgment for costs and fees was or was not a “prospective judgment.” See *Rudd v. Rudd*, 105 Idaho 112, 118, 666 P.2d 639, 645 (1983). (“the crucial issues are whether the judgment has prospective application and whether it is no longer equitable that it have such application”). However, “any component of the order is a ‘prospective judgment,’ and can be modified under Rule 60(b)(5), if it is susceptible to the legal or equitable rights of the parties as they evolve due to changes in law or circumstance.” *Meyers v. Hansen*, 148 Idaho 283, 290, 221 P.3d 81, 88 (Idaho 2009); see also *Rudd*, 105 Idaho at 119, 666 P.2d at 646. (holding judgment’s prospective features, such as being liened, were subject to Rule 60(b)(5)). Here, the judgment was recorded as a lien. See *R.* at Vol. 1, p. 76 (“judgments have been recorded”). Additionally, Cummings’ status as a prevailing party was susceptible to change, as was his award of costs and fees. The district court found that Cummings was *not* a prevailing party, *Tr.*, Vol. 1, 32:10-18. Therefore, the district court’s continued application of Cummings’ costs and fees judgment would be inequitable.

25 Even if Rule 60(b) was not the appropriate vehicle, any error was harmless. See I.R.C.P. 61 The district court had ample authority to make the change under I.R.C.P. 54. A “final judgment” resolves all claims for relief, and that finality is not impacted by costs and fees. I.R.C.P. 54(a). Obviously then, the district court’s award to *Northern Title* of its pre-appeal costs and fees, see *R.*, Vol. 1, p. 61 did not add finality to the case. Nor did the case become more “final” upon the

The district court's granting of Northern Title's request for Rule 60(b) relief was supported by the law. The Court ordered that Cummings' Judgment be reversed. With his only Judgment void, Cummings' status as a prevailing party changed, making his judgment for costs and fees inequitable.

ii. Northern Title's request for Rule 60(b) relief was timely.

"Whether a motion under Rule 60(b) is timely is an issue of fact for the district court." *Davis v. Parrish*, 131 Idaho 595, 597, 961 P.2d 1198, 1200 (1998).

Northern Title's request for Rule 60(b) relief was timely. Cummings argued that Northern Title was too late because "this matter is completed." *R.*, Vol. 1, p. 73. The district court aptly reasoned, however, that "IRCP 60(b) is a post-judgment rule designed to be filed and decided after the case is completed." *R.*, Vol. 1, p. 76; see also I.R.C.P. 60(b). In contrast, Cummings gives no basis for accusing Northern Title of "tardiness." See *Appellant's Brief*, 10.

First, the district court expressly found that Northern Title's request was timely. See *R.*, Vol.1, p. 76 ("[t]he motion is not untimely"). The district court entered its *Amended Final Judgment on Costs and Fees as Between Cummings and Northern Title* on January 6, 2015. *Id.* at

district court's later vacating of Cummings' Judgment. See *R.*, Vol. 1, pp. 76-77. Rather, finality was fixed on entry of this Court's Opinion. The district court had denied "**all of Cummings's claims against Northern Title except one,**" *Cummings I*, 157 Idaho at 353, 336 P.3d at 286, and the case became final when that one claim was reversed. See *Hummer*, 132 Idaho at 833, 979 P.2d at 1191. ("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"). Because the district court's award to Northern Title of its costs and fees did not add finality to the case, the same did not deprive the district court of its already existent jurisdiction to correct its prior orders of costs and fees. Where the district court was authorized under I.R.C.P. 54 to vacate Cummings' prior costs and fees, any error in reliance on post-judgment relief, I.R.C.P. 60(b), was harmless.

pp. 63-64. The district court made some corrections, *id.* at pp. 65-68, and on January 27, 2015 entered its *Third Amended Final Judgment on Costs and Fees as Between Cummings and Northern Title*. See *R.*, Vol. 1, pp. 67-68.²⁶ Northern Title's request for Rule 60(b) relief was brought *less* than thirty (30) days after the first of the above judgments, and within nine (9) days after the last corrective judgment. *Id.* at 69-70.²⁷ Therefore, Northern Title was timely.

The district court did not err in finding that Northern Title's motion for Rule 60(b) relief was timely. Rule 60(b) relief is designed for "post-judgment" relief and Northern Title filed its motion a mere nine (9) days after the final judgment.

²⁶ "Courts are obligated to ensure their own subject matter jurisdiction and must raise the issue *sua sponte* if necessary," *In Re City of Shelley*, 151 Idaho 289, 295, 255 P.3d 1175, 180 (Idaho 2001), even "before all other questions, which includes the district court's subject matter jurisdiction." *Steve v. Wolfe*, 343 P.3d 497, 502 (2015, Op. No. 18). The district court's award of Northern Title's costs on appeal was purely "ministerial" in nature. See *Hummer*, 132 Idaho at 833, 979 P.2d at 1191. Yet in the district court's *Third Amended Judgments as to Fees and Costs Between Cummings and Northern Title*, which simply accomplishes the ministerial act of adding Northern Title's costs and fees on appeal, the district court also revoked and declared that its prior final judgments relating to Northern Title's pre-appeal costs and fees were null and void. See *R.*, Vol. 1, pp. 67-68. The affect was a baseless toll on Cummings' time to appeal, which would otherwise be late. See I.A.R. 14. Cummings has not assigned error to the district court for voiding Northern Title's prior judgments for costs and fees, and thus to the extent necessary the Court would need to address the issue, *sua sponte*.

²⁷ Cummings also baldly alleges that the district court granted Northern Title's request "without any opportunity for Cummings to respond to the substance of the motion." *Appellant's Brief*, 10. The argument is without merit. Cummings had the opportunity to respond, and did respond by filing an *Objection to Northern Title's Rule 60(b) Motion*. See *R.*, Vol. 1, 72. The district court expressly addressed and denied Cummings' objections. *Id.* at 76-77.

III. THE COURT SHOULD AWARD NORTHERN TITLE ITS COSTS AND FEES ON APPEAL: THE CASE IS A COMMERCIAL TRANSACTION AND CUMMINGS' APPEAL IS WITHOUT MERIT.

Under Idaho Appellate Rules, the Court has power to award costs and fees on appeal. See I.A.R. 40(a); see also *id.* at 41. As a matter of law, attorney fees are awarded to the prevailing party if authorized by statute, contract, or rule. See *Capps*, 149 Idaho at 744, 240 P.3d at 590. (citations omitted).

First, the Court should award Northern Title its fees on appeal because this matter falls under the purview of a commercial transaction, see I.C. § 12-120(3), and Cummings admits the same. See *Appellant's Brief*, 18. Alternatively, this Court should award Northern Title its costs and fees on appeal because Cummings' appeal is without merit. See I.C. § 12-123.

As stated by the district court in response to Cummings' arguments below:

OLSEN: So it [Northern Title] presented all of those issues in front of the Supreme Court in a petition for rehearing, and the Court denied that petition. And so that in itself is a direction from the Court –

COURT: How? Couldn't it just as likely be the Supreme Court saying, "We're not going to even address this because our prior opinions in other cases make this **very clear**?"

Tr., Vol. 1, 4:21-5:25. (emphasis added).

Of note in the case of *Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC*, No. 42216 (Sept. 30, 2015), a district court held that despite a reversal it did not have jurisdiction to consider fees and costs on remittitur, and this Court ordered the Administrative District Judge to appoint a new judge. *Id.* Similarly here Cummings has raises arguments regarding clearly established legal standards that are simply contrary to his position.

The Court should award Northern Title its fees and costs on appeal. The underlying case involves a commercial transaction. Furthermore, Cummings' appeal is without merit, arguing over clearly established legal standards.

CONCLUSION

First, the district court clearly had jurisdiction to (1) determine prevailing party status, costs and fees, and (2) entertain a Rule 60(b) motion to vacate Cummings' judgments. This Court had reversed Cummings' one and only judgment, and after that reversal, the district court was empowered to correct its past orders, including the assessment of prevailing party status, costs and fees. See I.R.C.P. 54; see also *Hutchins*, 100 Idaho at 666, 603 P.2d at 1000. (“[a]fter 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”).

Second, in *Cummings I* the Court expressly ordered that Cummings' Judgment “must be reversed,” *Cummings I*, 157 Idaho at 353, 367, 336 P.3d at 286, 300, and “[a] trial court has no authority to enter any judgment or order not in conformity with the order of the appellate court.” *Hummer*, 132 Idaho at 833, 979 P.2d at 1191. Therefore, the district court properly disregarded Cummings' vague request to rummage for an “other theory” for the judgment to stay alive.

Third, because the district court had jurisdiction to correct its orders and enter judgments therewith, the district court clearly had jurisdiction to entertain Northern Title's request for Rule 60(b) relief. In response, Cummings makes bald, vague accusations that Northern Title “failed to meet the burden of good cause for relief,” and that Northern Title was ‘tardy.’ See *Appellant's Brief* 9-10. Nonetheless, there was good cause for relief. Cummings was no longer a prevailing

party, and thus his prior costs and fees lacked any foundation, and were inequitable.

Furthermore, the Judgment that “must be reversed” had not been. Therefore, the district court properly relied on Rule 60(b), “a post-judgment rule designed to be filed and decided after the case is completed.” *R.*, Vol. 1, p. 76.

Finally, the Court should award Northern Title its costs and fees on appeal. Costs are provided as a matter of right, see I.A.R. 41, and the underlying case involved a commercial transaction for which fees are appropriate. See I.C. § 12-120(3). In addition, Cummings’ appeal is without merit, an unnecessary litigation over established standards of law. *Id.* at § 12-123.

Northern Title respectfully requests that the Court deny Cummings’ appeal, and award Northern Title its costs and fees on appeal.

DATED this 28th day of December, 2015.

BEARNSON & CALDWELL, LLC



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of December, 2015, I served a true and correct copy of the above and foregoing **RESPONSE BRIEF OF NORTHERN TITLE COMPANY OF IDAHO, INC.**, to the following person(s) by U.S. Mail and Email:

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