5-19-2017

MFG Financial, Inc. v. Vigos Respondent's Brief Dckt. 44718

Docket No. 44718

IN THE SUPREME COURT OF THE STATE OF IDAHO

MFG FINANCIAL, INC., an Arizona corporation,
Plaintiff ~ Respondent,

v.

JUSTIN VIGOS, an individual,
Defendant ~ Appellant.

RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District Court
for Ada County, State of Idaho

The Honorable Gerald F. Schroeder, District Judge Presiding

ATTORNEYS FOR APPELLANT

Ryan A. Ballard, ISB No. 9017
Ballard Law, PLLC
Post Office Box 38
Rexburg, Idaho 83440
Telephone: (208) 359-5532
Facsimile: (208) 485-8528

Barkley B. Smith, ISB No. 9193
Barkley Smith Law, PLLC
910 Main St. Suite 358C
Boise, Idaho 83702
Telephone: (314) 322-7639
Facsimile: (208) 429-8233

ATTORNEYS FOR RESPONDENT

Stanley J. Tharp, ISB No. 3883
Eberle, Berlin, Kading, Turnbow
& McKlveen, Chartered
Post Office Box 1368
Boise, Idaho 83701
Telephone: (208) 344-8535
Facsimile: (208) 344-8542

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A. NATURE OF THE CASE

Appellant Justin Vigos (hereinafter "Vigos") appeals from the district court's reversal of the magistrate court's Grant of Vigos' motion for summary judgment against MFG Financial, Inc. (hereinafter "MFG").

On September 16, 2015, MFG filed a Verified Complaint against Vigos for breach of a written contract for the sale and financing of a vehicle. (R., Vol. 1, p. 9). On October 6, 2015, Vigos filed his Answer to MFG's Complaint. (R., Vol. 1, p. 14).

On January 28, 2016, Vigos filed a motion for summary judgment alleging that: 1) MFG did not have standing to bring the above-entitled action, 2) MFG could not establish the contract underlying its claim because the contract is hearsay, and 3) MFG's claim was barred by the statute of limitations. (R., Vol. 1, p. 42-47). On March 7, 2016, the magistrate court granted Vigos' motion for summary judgment ruling that MFG did not have standing to bring the action and that the contract was inadmissible. (Tr., Vol. 1, p. 56, ll. 17-19). On April 25, 2016, MFG filed a Notice of Appeal to the District Court of the Fourth Judicial District, County of Ada, State of Idaho. (R., Vol. 1, p. 374). On November 17, 2016, the district court issued its Opinion on Appeal, which reversed the magistrate court's award of summary judgment in favor of Vigos and against MFG. (R., Vol. 1, p. 385). On December 19, 2016, Vigos filed a Notice of Appeal to this Court. (R., Vol. 1, p. 399). On January 4, 2017, and January 10, 2017, respectively, MFG filed its Notice of Cross-Appeal and Amended Notice of Cross-Appeal. (R., Vol. 1, pp. 402, 408).

Vigos argues that MFG does not have standing to bring the underlying action. This argument is simply not supported by the record in this case. The record in this case, including Vigos' judicial admissions, fully sets forth MFG's interest in the Contract and ability to maintain a cause of action for breach of contract against Vigos. In the litigation before the magistrate court, Vigos admitted all of the operative terms in the Contract, and admitted that the Contract was assigned from Karl Malone Toyota to Courtesy Auto Credit. Vigos also admitted he did not enter any other contracts with Karl Malone Toyota on the date in question. All reasonable inferences in the record pointed to Vigos being a party to the Contract underlying MFG's claim.

Moreover, MFG offered the testimony of two separate witnesses who swore under oath that MFG holds all right, title, and interest in Vigos' written contract, dated February 21, 2007, for the sale and financing of a 2000 Nissan Sentra (the "Contract"), together with the right to collect all principal, interest or other proceeds of any kind due and owing with respect to the Contract.

The only possible issue remaining regarding MFG's cause of action is whether Vigos is a party to the Contract, and all reasonable inferences in the record indicate he is. Summary judgment in favor of Vigos and against MFG was therefore improper. For these reasons, MFG respectfully requests that this Court affirm the district court's reversal of the magistrate court's grant of summary judgment in favor of Vigos.

B. COURSE OF PROCEEDINGS

On September 16, 2015, MFG filed its Complaint against Vigos alleging breach of a written contract for the sale and financing of a vehicle. (R., Vol. 1, p. 9). The Complaint against

Vigos alleged that Vigos breached the contract and was liable for Ten Thousand Nine Hundred and Thirteen Dollars and Five Cents ($10,913.05) in principal and interest owed under the contract. (R., Vol. 1, p. 12). On October 6, 2016, Vigos filed his Answer. (R., Vol. 1, p. 14).

On January 28, 2016, Vigos filed his motion for summary judgment against MFG. (R., Vol. 1, p. 19). In support of his motion for summary judgment, Vigos filed a supporting brief, an Affidavit of Justin Vigos, and an Affidavit of Barkley B. Smith. (R., Vol. 1, pp. 22, 36, 40).

On February 1, 2016, MFG filed its motion for summary judgment, as well as a Memorandum in Support, an Affidavit of Mark Gasser, an Affidavit of Jay Jeffs, and an Affidavit of Bradley D. VandenDries. (R., Vol. 1, pp. 50, 53, 64, 97, 124).

On February 12, 2016, MFG filed its Response to Vigos' motion for summary judgment, and an Affidavit of Mark Gasser In Opposition to Vigos' motion for summary judgment. (R., Vol. 1, pp. 127, 137).

On February 16, 2016, Vigos filed his Opposition to MFG's motion for summary judgment. (R., Vol. 1, p. 143). On February 22, 2016, MFG filed its Reply In Support of its motion for summary judgment. (R., Vol. 1, p. 218).

On February 18, 2016, MFG filed a motion for continuance and supporting memorandum, as well as an Affidavit of Bradley D. VandenDries. (R., Vol. 1, pp. 156, 159, 196). MFG's motion for continuance sought to continue the hearing on the motions for summary judgment until MFG could depose Vigos on March 11, 2016. (R., Vol. 1, p. 196). On February 23, 2016, Vigos filed his opposition to MFG's motion to continue, as well as a supporting Affidavit of Barkley B. Smith. (R., Vol. 1, pp. 230, 234).

On February 8 and 11, 2016, MFG's counsel inquired with Vigos' counsel about available deposition dates. (R., Vol. 1, p. 160). No deposition dates prior to the summary judgment hearing were provided by Vigos' counsel, and on February 12, 2016, Plaintiff filed a Notice of Taking Deposition Duces Tecum of Justin Vigos, scheduling the deposition for February 25, 2016 at 9:00 a.m. (R., Vol. 1, p. 140). Upon request from Vigos' counsel, Vigos' deposition was rescheduled to March 11, 2016 at 9:00 a.m. (R., Vol. 1, p. 153).

On February 16, 2016, MFG filed a Notice of Taking Deposition of Niki Betzold Vigos, Vigos' wife, which scheduled Mrs. Vigos' deposition for February 25, 2016 at 1:00 p.m. (R., Vol. 1, p. 150). On February 22, 2016, Mrs. Vigos filed a motion to quash the subpoena requiring her attendance at the deposition on February 25, 2016 at 1:00 p.m. (R., Vol. 1, p. 206). At the hearing on Mrs. Vigos' motion to quash, the magistrate court moved the time of Mrs. Vigos' deposition to 4:00 p.m. on February 25, 2016, and ruled that Mrs. Vigos must attend the deposition. (Tr., Vol. 1, p. 18, ll. 8-12). The magistrate court also stated that MFG's motion for continuance would be taken up at the pretrial conference scheduled for March 1, 2016. (Tr., Vol. 1, p. 20, ll. 9-11). Mrs. Vigos failed to appear at her deposition. (R., Vol. 1, p. 292).

On February 26, 2016, MFG filed a motion for contempt, supported by an Affidavit of Bradley D. VandenDries, in regards to Mrs. Vigos' failure to appear at her deposition. (R., Vol. 1, pp. 287, 291). Also on February 26, 2016, MFG filed an Affidavit of Scott Cowley in Opposition to Vigos' Motion for Summary Judgment. (R., Vol. 1, p. 299).

On March 1, 2016, MFG and its counsel, as well as counsel for Vigos, appeared for the pre-trial settlement conference and summary judgment hearing. (Tr., Vol. 1, p. 23, ll. 19-22).

However, the magistrate court set the hearing over to March 7, 2016, due to Vigos' failure to appear. (Tr., Vol. 1, p. 32, ll. 13-18). Also on March 1, 2016, MFG filed a renewed motion to continue the summary judgment hearing, as well as a motion to continue the trial and supporting memorandum, expressing MFG's need to depose Vigos and/or Mrs. Vigos prior to the summary judgment hearing. (R., Vol. 1, pp. 310, 314, 320).

On March 7, 2016, all parties and counsel appeared for the settlement conference and summary judgment hearing. The magistrate court declined to hear argument on MFG's motion to continue the summary judgment hearing, or its motion to continue the trial. (Tr., Vol. 1, p. 37, ll. 13-16). The magistrate court heard oral argument on Vigos' motion for summary judgment, but did not invite argument on MFG's motion for summary judgment. (Tr., Vol. 1, pp. 37-59). At the beginning of the hearing, the magistrate court noted that it believed the case could be decided on the issues of standing and admissibility of the contract underlying MFG's claims, and would not reach the statute of limitations defense. (Tr., Vol. 1, p. 37, ll. 23-25 – p. 38, ll. 1-5). At the conclusion of the hearing, the magistrate granted Vigos' motion for summary judgment, ruling that MFG did not have standing to bring the above-entitled action, and that the contract underlying its claims was not admissible. (Tr., Vol. 1, p. 56, ll. 1-19). The magistrate further declined to permit MFG to depose Vigos on March 11, 2016 as scheduled, and stated it would not consider a motion for reconsideration. (Tr., Vol. 1, p. 57, ll. 12-25, p. 58, ll. 1-3).

On March 16, 2016, the magistrate court filed an Order Granting Vigos' Motion for Summary Judgment, and a Judgment dismissing MFG's complaint with prejudice. (R., Vol. 1, pp. 342, 345).

On March 29, 2016, Vigos filed a Memorandum of Attorney Fees and Costs, as well as the supporting Affidavit of Ryan A. Ballard and Barkley B. Smith, requesting $16,113.50 in attorney fees and costs. (R., Vol. 1, pp. 347, 352, 357). On April 11, 2016, MFG filed its Motion to Disallow and Objection to Vigos' Memorandum of Attorney Fees and Costs. (R., Vol. 1, p. 362).

On April 13, 2016, the magistrate court heard MFG's motion for contempt. At the conclusion of the hearing, the magistrate took MFG's motion for contempt under advisement. (Tr., Vol. 1, p. 78, ll. 8-10). The magistrate further gave Vigos an opportunity to submit a responsive brief to MFG's objection to Vigos' Memorandum of Attorney Fees and Costs, which Vigos filed on April 21, 2016. (Tr., Vol. 1, p. 81, ll. 3-4). Finally, on May 25, 2016, the magistrate court entered a Memorandum Decision for Attorney Fees. (R., Vol. 1, p. 380). That decision did not state whether Mrs. Vigos was in contempt for failure to attend her deposition, but did award MFG $100.00 pursuant to Idaho Code § 9-708. (R., Vol. 1, p. 381). The decision also awarded Vigos the full $16,113.50 he claimed in attorney fees and costs, but did not specify a rule or statute as a basis for Vigos' award of attorney fees. (R., Vol. 1, p. 381).

On April 25, 2016, MFG filed its Notice of Appeal to the district court. (R., Vol. 1, p. 374). On November 17, 2016, the district court issued its Opinion on Appeal, which reversed the magistrate court's award of summary judgment in favor of Vigos and against MFG. (R., Vol. 1, p. 385). On December 19, 2016, Vigos filed a Notice of Appeal to this Court. (R., Vol. 1, p. 399). On January 4, 2017, and January 10, 2017, respectively, MFG filed its Notice of Cross-Appeal and Amended Notice of Cross-Appeal. (R., Vol. 1, pp. 402, 408).

C. STATEMENT OF THE FACTS

1. Vigos admits that on February 21, 2007, Vigos entered into a written contract with Karl Malone Toyota, a car dealership, to purchase a 2000 Nissan Sentra (the "Contract"). (R., Vol. 1, pp. 40-41).

2. Vigos never identified any other contracts he entered into with Karl Malone Toyota, MFG, or other parties related to the Contract. (R., Vol. 1, pp. 105, 109).

3. Pursuant to the Contract's terms, the principal amount financed by Vigos was $9,021.10. (R., Vol. 1, p. 40). Vigos was obligated to make forty-two (42) consecutive monthly payments in the amount of $353.41, with the initial payment due on April 7, 2007. (R., Vol. 1, p. 10).

4. All of Karl Malone Toyota's rights in the Contract were immediately assigned to Courtesy Auto Credit: "ASSIGNMENT: This Contract and Security Agreement is assigned to Courtesy Auto Credit." (R., Vol. 1, pp. 40-41, 69).

5. By June 2009, Vigos was delinquent on payments required under the terms of the Contract. (R., Vol. 1, p. 41). Courtesy Auto Credit, d/b/a Rally Motor Credit, repossessed the vehicle on June 1, 2011, and sold it for $1,750.00, with $392.53 in sale costs. (R., Vol. 1, pp. 41, 65).

6. The sale revenue, less costs, was applied to the principal amount owing under the Contract, $7,377.57, leaving a deficiency balance of $6,020.10 owed by Vigos. (R., Vol. 1, p. 65).

7. In April, May, and June 2012, Vigos made three $150.00 payments on the amount he owed under the Contract, leaving a $5,570.10 deficiency owing. (R., Vol. 1, pp. 65, 299-300).

8. Courtesy Auto Credit is the same company as Courtesy Finance, Inc. and Rally Motor Credit. (R., Vol. 1, p. 66).

9. On January 10, 2014, Courtesy Finance, Inc., d/b/a Courtesy Auto Credit, d/b/a Rally Motor Credit, sold and assigned all its right, title, and interest in the Contract, together with the right to collect all principal, interest or other proceeds of any kind with respect to the Contract due and owing, to MFG. (R., Vol. 1, pp. 66, 96, 124-124).

Pursuant to its terms, the interest rate under the Contract is 29.95%, and as of September 10, 2015, $5,342.95 in interest had accrued on the principal balance of $5,570.10. (R., Vol. 1, p. 11).

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Is MFG entitled to attorney fees and costs reasonably incurred on appeal pursuant to Idaho Code § 12-120(3) and/or the Contract?

2. Did the magistrate court err in awarding Vigos attorney fees and costs?

3. Did the magistrate court err in declining to hear MFG's Motion to Continue the Summary Judgment hearing and Renewed Motion to Continue the Summary Judgment hearing, as well as MFG's Motion to Continue Trial?

4. Did the district court err in failing to award MFG attorney fees on appeal?

III. ATTORNEY'S FEES ON APPEAL

MFG requests attorney fees on appeal under Idaho Appellate Rule 41, Idaho Code § 12-120, and the Contract. Idaho Code § 12-120(3) provides that in any civil action to recover on a note or contract relating to the purchase or sale of goods, and in any commercial transaction, the prevailing party shall be allowed reasonable attorney fees. Attorney fees are recoverable under that statute in any action to recover on a contract relating to the purchase or sale of goods. *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 690, 682 P.2d 640, 643 (Ct. App. 1984). The subject of the Contract at issue, a 2000 Nissan Sentra, is a "good" within the meaning of Idaho Code § 28-2-725(1). MFG's cause of action also involves a commercial transaction as Vigos entered into a Retail Installment Contract And Security Agreement in order to obtain financing for a vehicle.

Also, the Contract provides: "If you default, you agree to pay our costs for collecting amounts owing, including, without limitation, court costs, attorneys' fees, and fees for repossession, repair, storage and sale of the Property securing this Contract." (Jeffs Aff., Ex. A.)

Reasonable attorney fees incurred by MFG should be awarded against Vigos.

IV. STANDARD OF REVIEW

"For an appeal from the district court sitting in its appellate capacity over a case from the magistrate court, this Court directly reviews the record from the magistrate court, and then affirms or reverses the decision of the district court accordingly." *Erickson v. McKee (In re Estate of McKee)*, 153 Idaho 432, 436, 283 P.3d 749, 753 (2012). The Idaho Supreme Court exercises free review over conclusions of law to determine whether a lower court correctly stated

applicable law and will leave factual issues to the sound discretion of the magistrate court if they are supported by substantial and competent evidence. *Id.*

When reviewing a ruling on a summary judgment motion, Idaho appellate courts apply the same standard that is properly applied by the trial court. *Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 890, 243 P.3d 1069, 1078 (2010). Summary Judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Idaho R. Civ. P. 56(c) (2015). "The burden of establishing the absence of a genuine issue of material fact is on the moving party." *Wesco Autobody Supply*, 149 Idaho at 890, 243 P.3d at 1078. "This burden is onerous because even 'circumstantial' evidence can create a genuine issue of material fact." *Harris v. Dep't of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992).

Idaho courts construe the record in the light most favorable to the party opposing the motion for summary judgment, drawing all reasonable inferences in that party's favor. *Wesco Autobody Supply*, 149 Idaho at 890, 243 P.3d at 1078. "Summary judgment is improper 'if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented.'" *Id.*, quoting *McPheters v. Maile*, 138 Idaho 391, 394, 64 P.3d 317, 320 (2003). Phrased differently, "[i]f the record contains any conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied." *Harris*, 123 Idaho at 298, 847 P.2d at 1159. "When considering evidence presented in support of or opposition to a motion for summary judgment, a court can only consider material which

would be admissible at trial." *Venable v. Internet Auto Rent & Sales, Inc.*, 156 Idaho 574, 580, 329 P.3d 356, 362 (2014), quoting *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 175 P.3d 172 (2007).

"[T]he filing of cross-motions for summary judgment does not transform 'the court, sitting to hear a summary judgment motion, into the trier of fact.'" *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Tr.*, 147 Idaho 117, 123-24, 206 P.3d 481, 487-88 (2009), quoting *Moss v. Mid-Am. Fire & Marine Ins. Co.*, 103 Idaho 298, 302, 647 P.2d 754, 758 (1982). However, when cross-motions for summary judgment are filed and the action will be tried before the court without a jury, the court may draw probable inferences arising from the undisputed evidentiary facts when ruling on the motions. *Banner Life Ins. Co.*, 147 Idaho at 124, 206 P.3d at 488, citing *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982). Conflicting evidentiary facts, however, must still be viewed in favor of the nonmoving party. *Banner Life Ins. Co.*, 147 Idaho at 124, 206 P.3d at 488, citing *Argyle v. Slemaker*, 107 Idaho 668, 670, 691 P.2d 1283, 1285 (Ct. App. 1984).

In applying these standards to the facts and circumstances of this case, the Court should find, as a matter of law, that Vigos was not entitled to summary judgment and affirm the district court's decision reversing the magistrate court's grant of summary judgment in favor of Vigos and against MFG.

V. ARGUMENT

MFG submits the district court correctly reversed the magistrate court's grant of summary judgment in favor of Vigos and against MFG. MFG also submits that the magistrate

court incorrectly awarded Vigos attorney fees against MFG. MFG further submits that the case should be remanded for the magistrate court to proceed to trial. It is respectfully submitted that this Court should affirm the district court's finding that Vigos was not entitled to summary judgment.[1]

The record in this case does not establish that Vigos was entitled to an award of summary judgment against MFG, and it was error for the magistrate court to grant Vigos' motion for summary judgment. The district court was correct to reverse the magistrate court's decision granting Vigos' motion for summary judgment because Vigos "never established the absence of a genuine issue of material fact regarding MFG's contractual allegations sufficient to grant his motion for summary judgment." (R., Vol. 1, p. 392). This Court should affirm the decision of the district court.

The underlying facts of this case demonstrate that MFG holds all rights to enforce the Contract against Vigos. Vigos admitted all of the operative terms in the Contract, and that the Contract was assigned from Karl Malone Toyota to Courtesy Auto Credit. Vigos also admitted he did not enter any other contracts with Karl Malone Toyota on the date in question. All reasonable inferences in the record point to Vigos being a party to the Contract underlying MFG's claim, and the record demonstrates a clear chain-of-title from Karl Malone Toyota to MFG.

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[1] At the outset, MFG notes that Vigos' Brief begins with numerous unsupported factual assertions not present in the Record, and MFG objects to such assertions.

On appeal, Vigos asserts that MFG must establish every element of its breach of contract claim at summary judgment. This is not correct. "In order to survive a motion for summary judgment the plaintiff need not prove that an issue will be decided in its favor at trial; rather, it must simply show that there is a triable issue." *Johnson v. McPhee*, 147 Idaho 455, 459, 210 P.3d 563, 567 (Ct. App. 2009), citing *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 524, 808 P.2d 851, 861 (1991).

MFG must also clarify that the record in this case does not demonstrate any ruling on MFG's motion for summary judgment by the magistrate court. Likewise, MFG did not appeal any denial of its motion for summary judgment by the magistrate court to the district court.

A. VIGOS ADMITTED ALL OPERATIVE TERMS IN THE CONTRACT

On appeal, Vigos discusses admissibility of the Contract at length, arguing the Contract was not admissible evidence and therefore MFG could not have established the existence of a contract in the magistrate court. This argument ignores Vigos' admissions in the record before this Court. Vigos has admitted the following facts regarding the MFG's contractual allegations:

1. On February 21, 2007;
2. Vigos entered into a contract with Karl Malone Toyota;
3. For the sale of a 2000 Nissan Sentra;
4. The amount financed by Vigos was $9,021.10;
5. The contract was immediately assigned to Courtesy Auto Credit;
6. Vigos made payments on the contract until June 1, 2009;
7. The 2000 Nissan Sentra was repossessed on June 1, 2011.

(R., Vol. 1, pp. 40-41). Vigos is bound by these judicial admissions.

"A judicial admission is a statement made by a party or attorney, in the course of judicial proceedings, for the purpose, or with the effect, of dispensing with the need for proof by the opposing party of some fact." *Grain Growers Membership & Ins. Tr. v. Liquidator for the Univ. Life Ins. Co.*, 144 Idaho 751, 759, 171 P.3d 242, 250 (2007), quoting *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 765, 86 P.3d 475, 479 (2004). "A judicial admission is a deliberate, clear, unequivocal statement of a party about a concrete fact within the party's peculiar knowledge, not a matter of law . . . [and] not opinion." *Grain Growers*, 144 Idaho at 759, 171 P.3d at 250, quoting 29A Am. Jur. 2d, Evidence § 770 (1994). "Generally, judicial admissions remove the admitted facts from the field of controversy." *Strouse v. K-Tek, Inc.*, 129 Idaho 616, 618, 930 P.2d 1361, 1363 (Ct. App. 1997). "The party making a judicial admission is bound by the statement and may not controvert the statement on trial or appeal." *Id.*, at 619, 930 P.2d at 1364.

Despite Vigos' admissions to MFG's contractual allegations, and despite the fact that the Contract even lists Vigos' name, Vigos argues that MFG did not conclusively prove Vigos was a party to the Contract, and that the Contract would not be admissible until MFG proved Vigos was a party to the Contract.[2] (Tr., Vol. 1, p. 38, ll. 11-25, p. 39, ll. 1-8.) Vigos' argument

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[2] MFG was not able to depose Vigos and question him about the contract directly. Vigos lives in Ada County, Idaho, but works in North Dakota. MFG's counsel repeatedly inquired with counsel for Vigos as to when Vigos would be in Boise, Idaho prior to the summary judgment hearing, and thus available for a deposition. (R., Vol. 1, pp. 160-161, 191-195). The only response given was that Vigos would not be available for a deposition until after the summary judgment hearing. *Id.* MFG raised these issues directly before the magistrate court, asking to continue the summary judgment hearing and trial, until after MFG could depose Vigos. However, the magistrate court declined to hear argument on MFG's motions to continue. (Tr., Vol. 1, p. 37, ll. 12-16.)

inherently admits that a factual question remains whether he was a party to the Contract, but this important factual issue was lost on the magistrate court. Vigos also argues that the Contract is hearsay, and that MFG has not argued to the contrary. This is not correct. (R., Vol. 1, pp. 131-132).

If Vigos is a party to the Contract, the Contract is a statement by a party-opponent and is specifically excepted from the hearsay rule. Idaho Rule of Evidence 801(d)(2), "Admission by party-opponent," provides that a statement is not hearsay if:

> The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by a party to make a statement concerning the subject, or (D) a statement by a party's agent or servant concerning a matter within the scope of the agency or employment of the servant or agent, made during the existence of the relationship....

There can be no doubt that "out-of-court statements by parties to litigation are not hearsay." *Jolley v. Clay*, 103 Idaho 171, 175, 646 P.2d 413, 417 (1982). Additionally, the terms contained in the Contract have independent legal significance, and as such those documents are not hearsay. "[W]ords with legal significance, such as words of contract, are considered verbal acts and are not hearsay." *McKelvey v. Hamilton*, 211 P.3d 390, 396 (UT. App. 2009); *see also Frink v. State*, 597 P.2d 154, 162 (Alaska 1979). "It is well-settled that in a suit for breach of contract, the contract allegedly breached is not hearsay and is thus admissible into evidence." *Island Directory Co. v. Iva's Kinimaka Enters.*, 10 Haw. App. 15, 21, 859 P.2d 935, 939 (1993), citing 2 C. McCORMICK, McCORMICK ON EVIDENCE, § 249 at 101 (4th ed. 1992). The admission of a contract to prove the operative fact of that contract's existence cannot be the subject of a

valid hearsay objection. *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 540 (5th Cir. 1994). As the district court stated, "[a] contract to which Vigos was a party would not be hearsay." (R., Vol. 1, p. 393).

Additionally, the Contract falls within the business records exception to hearsay. The Contract is a record made and "kept in the course of a regularly conducted business activity." "[T]he scope of the business record exception is broad." *Christensen v. Rice*, 114 Idaho 929, 933, 763 P.2d 302, 306 (Ct. App. 1988). "Records need not be authenticated by the person who actually made them; all that is necessary is that the record be authenticated by a person who has custody of the record as a regular part of his or her work, or has supervision of its creation." *Id.*, citing 32 C.J.S. Evidence § 682(3) (1964). In the magistrate court, MFG submitted the Affidavit of Jay Jeffs who testified concerning the source of the Contract and its assignment to the entity Mr. Jeffs works for. (R., Vol. 1, pp. 64-65). Vigos never sought to depose Mr. Jeffs concerning his knowledge of the Contract, and Vigos did not explain why Mr. Jeffs cannot testify regarding the Contract.

At summary judgment, the burden was on Vigos, as the moving party, to prove the absence of a material fact issue regarding the Contract. *Franklin Bldg. Supply Co. v. Hymas*, 157 Idaho 632, 339 P.3d 357 (2014). Vigos did not offer any evidence regarding the Contract. Rather, he admitted he was a party to a contract with all of the terms alleged by MFG, and

specifically raised the question of whether he was a party to that contract.[3] Because Vigos never established the absence of a genuine issue of material fact regarding MFG's contractual allegations, the evidentiary burden never shifted to MFG to prove that a genuine issue of fact existed. *Id.* Even though the evidentiary burden never shifted to MFG, MFG came forward with significant evidence to support its claim.

All inferences should have been drawn in favor of MFG as the non-moving party—but were not. On this basis alone, the magistrate court's grant of summary judgment in favor of Vigos and against MFG was in error. The magistrate court shifted the burden of proving the absence of a genuine issue of material fact from Vigos to MFG. This runs contrary to the well-established summary judgment standard above, as the burden of proving the absence of a genuine issue of material fact rested with Vigos as the moving party. A review of the record does not reveal any finding by the magistrate court that there were no genuine issues of material fact in this case.

At the summary judgment hearing, the magistrate court never stated there were no genuine issues of material fact whether Vigos was a party to the Contract, or that Vigos was entitled to judgment as a matter of law on MFG's claim. Rather, the magistrate court focused on admissibility of the Contract, stating:

> But I know, based upon what documents I have in front of me, that there's real question about what the contract was that Mr. Vigos signed. I don't think it's clear in the records. You don't have anybody from Karl Malone, or Mr. Vigos, saying he signed this

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[3] MFG also notes that if Vigos believed the Contract was inadmissible, the appropriate action would have been a motion to strike the Contract from the magistrate court's record. Vigos never moved to strike the Contract. Moreover, Vigos specifically offered the Contract as evidence in the magistrate court. (R., Vol. 1, pp. 22, 33-34).

particular contract.

So, I do not believe it is admissible at this point.

(Tr., Vol. 1, p. 55, ll. 20-25, p. 56, ll. 1-2.) The magistrate court's grant of summary judgment in favor of Vigos and against MFG, based on the Contract being inadmissible, was premised on an incorrect evidentiary standard. The magistrate court applied the following standard of admissibility for summary judgment proceedings:

> The whole Motion for Summary Judgment is based on admissibility, and whether the evidence you're presenting at this time, in the Motion for Summary Judgment, is admissible. That's the standard for whether or not I take it into consideration. If it's not admissible at this stage, at summary judgment, it's not good enough for summary judgment.

(Tr., Vol. 1, p. 52, ll. 10-16). However, the authorities and Idaho case law are to the contrary. Idaho courts evaluate summary judgment motions by evidence which would be "**admissible at trial.**" *Venable v. Internet Auto Rent & Sales, Inc.*, 156 Idaho 574, 580, 329 P.3d 356, 362 (2014); *Montgomery v. Montgomery (In re Estate of Montgomery)*, 147 Idaho 1, 6, 205 P.3d 650, 655 (2009); *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 175 P.3d 172 (2007); *Harris v. Dep't of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992); *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 869, 452 P.2d 362, 366 (1969); *Sammis v. MagneTek, Inc.*, 130 Idaho 342, 350, 941 P.2d 314, 322 (1997).

If a proponent of evidence shows that the evidence can be introduced at trial, that evidence is properly considered by the court when deciding a motion for summary judgment. For illustration, in *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003), the Ninth Circuit considered the admissibility of a diary at summary judgment. In opposing the defendant bank's

motion for summary judgment, the plaintiff relied on portions of the diary. *Id.* The defendant argued that the diary was inadmissible hearsay, and thus could not be used to create a genuine issue of material fact. *Id.* The Ninth Circuit stated that it did not need to decide whether the diary itself was admissible, as it would be sufficient if the contents of the diary were admissible at trial, even if the diary itself was inadmissible. *Id.* The Court then found that the contents of the diary could be admitted into evidence at trial in a variety of ways. *Fraser*, 342 F.3d at 1037. The Court concluded that because the diary's contents could be presented in an admissible form at trial, it was properly considered for purposes of summary judgment. *Id.*

At the summary judgment hearing in this case, MFG's counsel specifically explained how the Contract would be admissible at trial: "[A]t the trial of this, Your Honor,...I only need to ask [Vigos], is this your signature? Did you have any other contracts...did you enter into any other contracts?" (Tr., Vol. 1, p. 52, ll. 17-22). In response, the Magistrate Court stated: "Okay, But we're not talking about the trial. We're talking about right now, and we're talking about the arguments right now." (Tr., Vol. 1, p. 52, ll. 21-25). The magistrate court did not find that the Contract would be inadmissible at trial, and Vigos never argued the Contract would not be admissible at trial. Rather, Vigos' counsel specifically stated: "You know, perhaps we'll say that's [Vigos'] signature on [the Contract], but we haven't gotten into whether that's his signature on it or not." (Tr., Vol. 1, p. 48, ll. 20-22).

All reasonable inferences in the record point to Vigos being a party to the Contract. He admitted all of the operative terms of the Contract, and the Contract even lists Vigos' name. In the Court below, Vigos argued the Contract was inadmissible hearsay. (R., Vol. 1, pp. 43-44).

However, if Vigos is a party to the Contract, the Contract is plainly admissible as an admission of a party-opponent pursuant to Idaho Rule of Evidence 801(d)(2). Vigos did not deny this point, but instead argued the Contract "is not an admission of a party opponent because Mr. Vigos has not admitted to signing that document, he has admitted to having a contract, not that one." (R., Vol. 1, p. 144). Again, Vigos raised the question of whether he was a party to the Contract. This genuine issue of material fact precluded the lower court's entry of summary judgment in favor of Vigos and against MFG.

Despite the record before it, the magistrate court ruled that MFG could not prove the existence of a contract in this case: "the Retail Installment Contract and Security Agreement presented by Plaintiff as the operative contract for its breach of contract claim was not admissible and therefore Plaintiff has failed to establish a contract exists." (R., Vol. 1, p. 343). When the existence of a contract is at issue, and the evidence is conflicting or permits more than one inference, the issue should proceed to trial. *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 368, 679 P.2d 640, 645 (1984). Viewing all inferences in the record in the light most favorable to MFG as the non-moving party, the record before the magistrate court indicates that Vigos is a party to the Contract. If Vigos is a party to the Contract, it is admissible, and there is nothing more for MFG to prove at trial regarding its breach of contract claim. Accordingly, the district court's reversal of the magistrate court's grant of summary judgment in favor of Vigos and against MFG, should be affirmed.

The undisputed record before the magistrate court established that Vigos entered into a contract with Karl Malone Toyota containing all of the operative terms alleged by MFG, and that

Vigos did not enter any other contracts with Karl Malone Toyota. Despite these undisputed facts, the magistrate court held that MFG could not prove a contact exists in this case and granted summary judgment in favor of Vigos. The magistrate court's holding was in error, and the district court correctly reversed the magistrate court's grant of summary judgment in favor of Vigos.

B. MFG HOLDS ALL RIGHTS TO ENFORCE THE CONTRACT AGAINST VIGOS.

Vigos also argues that MFG did not prove it had standing in order to bring a cause of action on the Contract at issue against Vigos. Despite extensive evidentiary support for MFG's capacity to bring suit on the Contract, the magistrate court granted summary judgment in favor of Vigos and against MFG, stating: "I think there's real questions on the standing, of how this [contract] got to MFG Financial." (Tr., Vol. 1, p. 56, ll. 15-16.) The magistrate court's holding was in error, as all evidence in the record before the magistrate court demonstrated that MFG is the real party in interest based on the assignment of the contract from Courtesy Title, Inc. to MFG.

Idaho Rule of Civil Procedure 17(a) provides:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, personal representative, guardian, conservator, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in this capacity without joining the party for whose benefit the action is brought; and when a statute of the state of Idaho so provides, an action for the use or benefit of another shall be brought in the name of the state of Idaho. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in

> interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

The Idaho Supreme Court addressed the real party in interest issue many years ago in *Caughey v. George Jensen & Sons*, 74 Idaho 132, 258 P.2d 357 (1953). In that case, the Court found:

> The real party in interest is the one who has a real, actual, material or substantial interest in the subject matter of the action, the primary object being to save a defendant from further suits covering the same demand or subject matter, i.e., the real party in interest is the person who can discharge the claim upon which the suit is brought and control the action brought to enforce it, and who is entitled to the benefits of the action, if successful, and can fully protect the one paying the claim or judgment against subsequent suits covering the same subject matter, by other persons.
>
> Where a plaintiff shows such a title as a judgment upon it being satisfied will protect a defendant from further suits or loss, the object has been satisfied, the action being prosecuted by the real party in interest.

Id. at 135, 258 P.2d at 359. The purpose of the rule was reiterated by the Idaho Supreme Court in *CitiBank v. Carroll*, 148 Idaho 254, 257-58, 220 P.3d 1073, 1076-77 (2009), wherein the Court found: "A real party in interest is 'one who has a real, actual, material, or substantial interest in the subject matter of the action.'" *Id.*

The record in this case reflects that MFG is the real party in interest, as all rights to enforce the contract at issue against Vigos were assigned to MFG. "The general rule is that the right to receive money due or to become due under an existing contract may be assigned...." 6 Am Jur 2d Assignments § 23. "A chose in action arising out of a breach of contract is assignable. Thus, a cause of action based on a negotiable or nonnegotiable instrument, a debt, or the wrongful dishonor of a letter of credit, may be assigned and enforced in actions by the

assignee." 6 Am Jur 2d Assignments § 51.

It is well settled in Idaho that a cause of action may be assigned. *Bonanza Motors, Inc. v. Webb*, 104 Idaho 234, 235-36, 657 P.2d 1102, 1103-04 (Ct. App. 1983). In *Van Berkem v. Mountain Home Development Co.*, 132 Idaho 639, 977 P.2d 901 (Ct. App. 1999), the Court of Appeals found:

> The general rule would seem to be that where a contract is assignable the assignee acquires all the rights of the assignor and takes the contract subject to all of the obligations of the assignor therein stipulated. (Citation omitted.) However, an assignment may not materially change the duty or increase the burden of the obligor.

Id. at 641, 977 P.2d at 903. In *Casady v. Scott*, 40 Idaho 137, 143, 237 P. 415, 421 (1924), the Idaho Supreme Court held: "[T]he law both in England and the United States has gone much further, and it is now the settled interpretation that, whenever a thing in action is assigned, the assignee must sue in his own name." In *McCluskey v. Galland*, 95 Idaho 472, 511 P.2d 289 (1973), the Court found: "an assignee of a valid assignment is the real party in interest to bring an action, and that the assignor is not the real party in interest and has no standing to prosecute an action on the chose in action." *Id.* at 474-75, 511 P.2d at 291-92. "In other words, an assignment is a transfer of all of one's interest in property." *Haag v. Pollack*, 122 Idaho 605, 610, 836 P.2d 551, 556 (Ct. App. 1992).

The Idaho Supreme Court has very recently elaborated on the effect of an assignment. "[C]hoses in action are generally assignable," and "[a]n assignment of the chose in action transfers to the assignee and divests the assignor of all control and right to the cause of action, and the assignee becomes the real party in interest." *JBM, LLC v. Cintorino*, 159 Idaho 772,

776, 367 P.3d 167, 171 (2016), quoting *Purco Fleet Servs., Inc. v. Idaho State Dep't of Fin.*, 140 Idaho 121, 126, 90 P.3d 346, 351 (2004). "[A]n assignee takes the subject of the assignment with all the rights and remedies possessed by and available to the assignor." *JBM, LLC*, 159 Idaho at 776, 367 P.3d at 171, *Foley v. Grigg*, 144 Idaho 530, 533, 164 P.3d 810, 813. "Once an assignor makes an assignment, he no longer retains control of the subject of the assignment." *Foley*, 144 Idaho at 533, 164 P.3d at 813. Accordingly, in Idaho, once an assignment is made, the real party in interest who has the real, actual, material or substantial interest in the subject matter is the assignee.

Only three parties ever held any interest in the Contract: 1) Karl Malone Toyota, 2) Courtesy Finance, Inc., and 3) MFG. The record reflects a straightforward chain-of-title from Karl Malone Toyota to MFG. MFG's chain of title begins with Karl Malone Toyota. Vigos admits he entered a contract with Karl Malone Toyota on February 21, 2007 for the sale of a 2000 Nissan Sentra. (R., Vol. 1, p. 40). Vigos also admits the contract was immediately assigned to Courtesy Finance, Inc.: "ASSIGNMENT: This Contract and Security Agreement is assigned to Courtesy Auto Credit."[4] (R., Vol. 1, pp. 40-41, 69-70). As discussed above, Vigos is bound by these judicial admissions. Vigos also never identified any other contracts he entered into with Karl Malone Toyota, MFG, or other parties related to the Contract. (R., Vol. 1, pp. 105, 109). It is thus undisputed that Vigos entered a contract with Karl Malone Toyota on February 21, 2007, and that all of Karl Malone Toyota's rights in that contract were immediately

[4] Courtesy Finance, Inc. is the same company as Courtesy Auto Credit and Rally Motor Credit. (R., p. 66).

assigned to Courtesy Finance, Inc. Karl Malone Toyota is not relevant to any issue in this lawsuit.

The only other link in MFG's chain of title is Courtesy Finance, Inc.'s assignment of the Contract to MFG. In the magistrate court, MFG filed an Affidavit of Jay Jeffs, a manager at Courtesy Finance, Inc., who swore under oath that, on January 10, 2014, Courtesy Finance, Inc. sold and assigned all its right, title, and interest in the Contract to MFG. (R., Vol. 1, p. 66). MFG also filed Affidavits of Mark Gasser, the president of MFG, stating that, on January 10, 2014, Courtesy Finance, Inc. sold and assigned all its right, title, and interest in the Contract to MFG. (R., Vol. 1, pp. 124-125); (R., Vol. 1, pp. 137-138).

In summary, Vigos admits he entered a contract with Karl Malone Toyota on February 21, 2007, and further admits all of Karl Malone Toyota's rights in that contract were immediately assigned to Courtesy Finance, Inc. On January 10, 2014, Courtesy Finance, Inc. assigned all its rights in that contract to MFG. The foregoing represents a simple and straightforward chain of title from Karl Malone Toyota to MFG. All evidence and reasonable inferences in the record point to a proper chain-of-title assigning to MFG all rights to enforce the Contract against Vigos.

"In order to survive a motion for summary judgment the plaintiff need not prove that an issue will be decided in its favor at trial; rather, it must simply show that there is a triable issue." *Johnson v. McPhee*, 147 Idaho 455, 459, 210 P.3d 563, 567 (Ct. App. 2009), citing *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 524, 808 P.2d 851, 861 (1991). The record before the magistrate court contained the uncontroverted testimony of two witnesses explaining MFG's

interest in the Contract, and its ability to bring a cause of action on the Contract. Vigos never sought to depose MFG's witnesses, never requested further information concerning MFG's ability to sue on the Contract, and never offered any evidence undermining MFG's ability to sue on the Contract.

The uncontroverted record before the magistrate court demonstrated that MFG has standing to maintain suit on the Contract. As stated above, the only possible issue remaining regarding MFG's cause of action is whether Vigos is a party to the contract, and all reasonable inferences indicate he is. The magistrate court's holding that MFG "failed to prove it is the real party in interest, therefore it does not have standing to bring this action" was in error. This Court should affirm the district court's reversal of the magistrate court's grant of summary judgment in favor of Vigos and against MFG.

C. THE MAGISTRATE COURT INCORRECTLY AWARDED VIGOS ATTORNEY FEES AND COSTS.

In the event that this Court reverses the district court's decision, MFG requests that this Court reverse the magistrate court's award of attorney fees and costs to Vigos. Vigos did not comply with the applicable Idaho Rules of Civil Procedure when requesting attorney fees and costs, and the magistrate court's award of attorney fees was in error. The district court did not discuss this issue as it reversed the magistrate court's award of summary judgment in favor of Vigos.

Vigos did not provide any legal basis in support of his request for attorney fees. (R., Vol. 1, pp. 357-359). His failure to do so was fatal to his request for attorney fees, and it was error for the magistrate court to award Vigos any attorney fees.

Idaho Rule of Civil Procedure 54(e)(5) provides, in part: "the claim for attorney fees as costs shall be supported by an affidavit of the attorney stating the basis and method of computation of the attorney fees claimed." (Emphasis added.) "It is well established that 'a party claiming attorney's fees must assert the specific statute, rule, or case authority for its claim.'" *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 720, 117 P.3d 130, 134 (2005), quoting *MDS Invs., LLC v. State*, 138 Idaho 456, 465, 65 P.3d 197, 206 (2003). "[A] generalized request for an award of attorney fees is not enough." *Crea v. Fmc Corp.*, 135 Idaho 175, 181, 16 P.3d 272, 278 (2000). This Court has held that "it is incumbent on the moving party to assert the grounds upon which it seeks an award of attorney fees. The [trial] judge is not empowered to award fees on a basis not asserted by the moving party." *Id.*, quoting *Bingham v. Montane Res. Assocs.*, 133 Idaho 420, 424, 987 P.2d 1035, 1039 (1999). When a party does not specify the legal basis of its request for attorney fees, such inaction is fatal to the request. *Crea*, 135 Idaho at 181, 16 P.3d at 278.

"An appropriate time for a party claiming fees to provide the necessary statutory and case authority is in the memorandum in support of costs." *Oakes v. Boise Heart Clinic Physicians, PLLC*, 152 Idaho 540, 544, 272 P.3d 512, 516 (2012). "[A] party must specify, in its Idaho R. Civ. P. 54(e)(5) fee request, the code section or contract provision pursuant to which it makes the fee request." *Eighteen Mile Ranch, LLC*, 141 Idaho at 721, 117 P.3d at 135. When a party does

not cite any statute, rule, or case law supporting its request for attorney fees, Idaho courts will not consider that request. *MDS Invs., LLC*, 138 Idaho at 465, 65 P.3d at 206. Additionally, "if a particular statute, rule or contract is not advanced below, it cannot be a basis for upholding an award of attorney fees on appeal." *Bingham*, 133 Idaho at 424, 987 P.2d at 1039.

Vigos' Memorandum of Attorney Fees and Costs did not provide any rule, statute, or case authority in support of his request for attorney fees. Failure to do so was fatal to Vigos' request for attorney fees, and it was error for the magistrate court to award any attorney fees. Vigos argued below that he requested attorney fees in the "prayer for relief" of his Answer to Complaint by specifying I.C. §§ 12-120(1), 12-120(3), 12-121, and I.R.C.P. 54. However, this general request does comply with the Idaho Rules of Civil Procedure or the case law governing awards of attorney fees.

Because Vigos' Memorandum of Attorney Fees and Costs did not provide any rule, statute, or case authority in support of his request for attorney fees, it was error for the magistrate court to award any attorney fees below.

D. THE MAGISTRATE COURT ABUSED ITS DISCRETION IN DECLINING TO GRANT OR HEAR MFG'S MOTIONS TO CONTINUE.

On February 18, 2016, MFG filed a Motion for Continuance, a supporting Memorandum, and an Affidavit of Bradley D. VandenDries. MFG's Motion for Continuance sought to continue the hearing on the parties' Motions for Summary Judgment until MFG could depose Vigos on March 11, 2016—Vigos would not sit for a deposition until after the summary judgment hearing. (R., Vol. 1, p.

196). On March 1, 2016, MFG filed a Renewed Motion to Continue the Summary Judgment hearing and a Motion to Continue Trial on the same basis. (R., Vol. 1, pp. 310, 320).

At the summary judgment hearing on March 7, 2016, the magistrate court declined to hear argument on MFG's Motion to Continue the Summary Judgment hearing, or its Motion to Continue Trial, stating: "So, it's clear,...we're not going to hear anything about requests – well, I'm not going to grant any requests for continuances." (Tr., Vol. 1, p. 37, ll. 14-16.)

"The decision to grant or deny a Rule 56(f) continuance is within the sound discretion of the trial court." *Taylor v. AIA Servs. Corp.*, 151 Idaho 552, 572, 261 P.3d 829, 849 (2011). Likewise, a trial court's decision on a request for continuance or vacation of a trial setting is governed by an abuse of discretion standard. *Cannon Builders v. Rice*, 126 Idaho 616, 621, 888 P.2d 790, 795 (Ct. App. 1995). In reviewing a trial court's abuse of discretion, Idaho appellate courts consider: "(1) whether the court correctly perceived the issue as discretionary; (2) whether the court acted within the outer boundaries of its discretion and consistently with applicable legal standards; and (3) whether it reached its decision by an exercise of reason." *Taylor*, 151 Idaho at 559, 261 P.3d at 836.

A review of the record does not reflect that the magistrate court considered any of those factors in this case. Based on the foregoing, the magistrate court abused its discretion when it declined to grant, or even hear, MFG's Motions to Continue the Summary Judgment hearing and the trial, so that MFG could depose Vigos.

E. THE DISTRICT COURT COMMITTED ERROR IN DETERMINING THE PREVAILING PARTY ON APPEAL.

The district court declined to award attorney fees on appeal from the magistrate court as the district court found neither MFG nor Vigos had fully prevailed on appeal. (R., Vol. 1, p. 397). The

district court based its prevailing party analysis on the false assumption that MFG was appealing the magistrate court's denial of MFG's motion for summary judgment in addition to the magistrate court's grant of summary judgment in favor of Vigos. (R., Vol. 1, pp. 394, 396, 397). However, a review of the record does not reveal any ruling by the magistrate court on MFG's motion for summary judgment. Moreover, MFG did not raise any denial if its motion for summary judgment as an issue on appeal to the district court. (R., Vol. 1, pp. 375, 376). It was error for the district court to base its prevailing party analysis on the false assumption that MFG was appealing the denial of MFG's own motion for summary judgment.

VI. CONCLUSION

For the reasons discussed above, MFG requests that this Court affirm the district court's reversal of the magistrate court's grant of summary judgment in favor of Vigos and against MFG. As explained above, it was error for the magistrate court to dismiss MFG's Complaint against Vigos. This Court should reverse the magistrate court's award of summary judgment in Favor of Vigos and against MFG, and remand this case.

DATED this 19th day of May, 2017.

EBERLE, BERLIN, KADING, TURNBOW
& McKLVEEN, CHARTERED

By: _____
Stanley J. Tharp, of the Firm
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney(s) this 19th day of May, 2017, as indicated below and addressed as follows:

Barkley B. Smith Barkley Smith Law 910 Main St., Suite 358 Boise, ID 83702 *Attorney for Defendant*	[ ] U.S. Mail [ ] Fax (208) 429-8233 [✓] Hand Delivery [✓] Email: barkley@barkleysmithlaw.com
Ryan A. Ballard Ballard Law PLLC 147 N. 2nd St., Suite 3 Rexburg, ID 83440 *Attorney for Defendant*	[✓] U.S. Mail [ ] Fax (208) 485-8528 [ ] Hand Delivery [✓] Email: ryanballardlaw@gmail.com

Stanley J. Tharp