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# IN THE SUPREME COURT OF THE STATE OF IDAHO

GENESIS GOLF BUILDERS, INC.,  
formerly known as National Golf  
Builders, Inc., a Nevada Corporation,

Plaintiff,

vs.

PEND OREILLE BONNER  
DEVELOPMENT, LLC a Nevada  
Limited liability company; et al,

Defendants, Cross-  
Defendants, Third Party  
Defendants,

---

VALIANT IDAHO, LLC, an Idaho  
limited liability company,

Cross-Claimant, Third Party  
Plaintiff, Respondent,

v.

NORTH IDAHO RESORTS, LLC, an  
Idaho limited liability company,

Cross Defendant, Appellant.

Supreme Court No. 44583  
Bonner County Case No. CV-2009-1810

## APPELLANT'S REPLY BRIEF

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

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The Honorable Barbara A. Buchanan Presiding

---

Susan P. Weeks  
Daniel M. Keyes  
James, Vernon & Weeks, P.A  
1626 Lincoln Way  
Coeur d'Alene, ID 83814

*Attorneys for Cross-Defendant/Appellant*

Richard L. Stacey  
Jeff Sykes  
McConnel Wagner Sykes & Stacey, PLLC  
827 E. Park Blvd., Ste 201  
Boise, ID 83712

*Attorneys for Cross-Claimant/Third Party  
Plaintiff/Respondent*

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## I. ARGUMENT

Defendant North Idaho Resorts, LLC (“NIR”) appealed the district court’s award of discretionary costs and some costs as a matter of right against NIR because the district court failed to comply with the requirements of the Idaho Rules of Civil Procedure and Idaho case law interpreting those rules, and therefore, abused its discretion. NIR’s appeal is based upon the district court’s memorandum decision and order awarding costs, and focuses upon what was and was not said by the district court in making its award against NIR. Respondent Valiant Idaho, LLC (“Valiant”) urges this Court to uphold the district court’s award of costs not because of the reasoning and explanation provided by the district court in support of its decision, but because of the reasoning and explanation it believes the district court could have offered in support of its award.

Review of the district court’s award and comparison with the Idaho Rules of Civil Procedure and Idaho case law reveals that the district court failed to comply with the applicable civil procedure rule and failed to act consistent with the applicable legal standards, and in so doing, abused its discretion.

### A. **NIR FILED A TIMELY OBJECTION TO VALIANT’S COST MEMORANDUM AND VALIANT WAIVED ITS RIGHT TO CONTEST TIMELINESS OF NIR’S OBJECTION TO VALIANT’S COST REQUEST**

The Court should reject Valiant’s contention that NIR waived its right to object to Valiant’s memorandum of costs and fees because Valiant failed to raise this issue below, and in fact waived its right to do so. Additionally, Valiant failed to properly raise this issue as an additional issue on appeal. Moreover, the district court properly recognized NIR’s objection to the cost and fee memorandum despite the captioning of the objection.

Idaho Appellate Rule 15(a) requires that when an issue raised by a respondent does not seek “affirmative relief...by way of reversal, vacation or modification of the judgment or order,” an issue may be “presented by the respondent as an additional issue on appeal under Rule 35(b)(4) without filing a cross-appeal.” IAR 35(b)(4) states if respondent contends that the issues presented on appeal are “insufficient, incomplete, or raise additional issues for review, the respondent may” raise those additional issues “in the same form prescribed in Rule 35(a)(4).”

Regarding issues on appeal, this Court has consistently held that it “will not consider issues that are raised for the first time on appeal.” *Row v. State*, 135 Idaho 573, 580, 21 P.3d 895, 902 (2001); *State v. Fodge*, 121 Idaho 192, 824 P.2d 123 (1992).

Idaho Rule of Civil Procedure 54(d)(6), the applicable rule at the time the costs were requested, required a party to object to a memorandum of costs (including attorney fees) within 14 days of service of the memorandum of costs. “Failure to timely object to the items in the memorandum of costs constitutes a waiver of all objections to the costs claimed.” *Id.* As cited by the Respondent, this Court in some instances has strictly applied the consequence of waiver of an untimely objection. *See Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 475-76, 36 P.3d 218, 227-28 (2001). However, this Court has allowed an enlargement of time for filing a memorandum of costs under Rule 54 when good cause was shown for the untimely filing. *See Estate of Holland v. Metro. Prop. & Cas. Ins. Co.*, 153 Idaho 94, 102-03, 279 P.3d 80, 88-89 (2012); *Wheeler v. McIntyre*, 100 Idaho 286, 289, 596 P.2d 798, 801 (1979).

Regardless, the Idaho Rules of Civil Procedure also require that the courts first consider the interest of justice when confronted with minor deficiencies in court filings.

Rule 1(b) of the Idaho Rules of Civil Procedure requires “These rules should be construed and administered to secure the just, speedy and inexpensive determination of every action and



proceeding.” Rule 8(e) mandates, “[p]leadings must be construed so as to do justice.” Also, Rule 61 requires the courts to disregard errors and defects in the interest of justice when they do not affect any party’s substantial rights:

Unless justice requires otherwise, no error in admitting or excluding evidence, **or any other error by the court or a party**, is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, **the court must disregard all errors and defects that do not affect any party’s substantial rights.**

IRCP 61 (emphasis added). Indeed, “Rule 61 essentially embodies the precept that an appellate court will not grant relief for harmless error. *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 317, 870 P.2d 663, 670 (Ct. App. 1994).

In this case, Valiant never raised the issue below that NIR had failed to timely object to Valiant’s memorandum of costs pursuant to IRCP 54(d)(5). Valiant filed its memorandum of costs on July 6, 2016. R Vol XLI, pp. 5019-5057. An opposition to that memorandum of costs was filed on July 20, 2016, by NIR’s counsel. R Vol. XLV, pp. 5503-5520. Thus, there is no legitimate argument that the July 20, 2016, opposition was not timely. The only question is whether the July 20, 2016, opposition provided adequate it was filed on behalf of NIR despite its caption. It was, and the parties and the district court all treated it that way.

Valiant’s opposition to that objection recognized that despite the error in that pleading’s title, it was obvious that the pleading was filed on behalf of both NIR and VP: “VP Inc.’s Opposition to Valiant Idaho’s Memorandum of Costs and Attorney Fees (“VP Objection”) was filed, **presumably on behalf of both VP and NIR.**” R Vol. XLVII, p. 5747. In fact, Valiant’s footnote on that same page removes any doubt whether Valiant recognized it as a filing made by NIR:

Valiant notes that the caption and opening paragraph of the objection filed by James, Vernon & Weeks, PA does not indicate it is filed on behalf of North Idaho

Resorts, LLC (“NIR”) as well as VP, Inc. (“VP”). **However, as the body of the objection advances arguments on behalf of NIR and VP, Valiant assumes that the Court will treat the objection as having been filed on behalf of both NIR and VP.**

R Vol. XLVII, p. 5747 (emphasis added). Valiant failed to object at that time to NIR’s involvement in the July 20, 2016, objection. Instead, Valiant addressed the merits of the objection. The district court followed suit and did not find the error in title of the July 20, 2016, objection to be a waiver of NIR to object to Valiant’s cost memorandum. R Vol. XLVIII, pp. 5829-5843.

Now in opposition to NIR’s appeal Valiant asks the Court to uphold the district court’s award of discretionary costs against NIR because NIR failed to object below. Valiant also asks the Court to strictly construe IRCP 54(d)(5) against NIR the same as this Court has strictly construed the requirements of IRCP 4(b)(2) in the context of extending time for service of process upon a showing of cause. Respondent’s Brief, 10; *compare Harrison v. Bd. Of Prof’l Discipline*, 145 Idaho 179, 183, 177 P.3d 393, 397 (2008) (strictly construing timeliness requirements for service of process). NIR submits that the requirement of “good cause” to extend time for service is not a requirement in construing pleadings to do justice and addressing the merits, rather than the form, of pleadings.

This Court should not consider Valiant’s contention that NIR waived its right to object to Valiant’s award of costs and fees because Valiant failed to raise that issue below. Not only did Valiant fail to raise the issue below, it commented on the captioning error in the title of the July 20, 2016, objection and recognized the substantive arguments objecting to an award of costs to Valiant were presented on behalf of both VP and NIR. Furthermore, Valiant failed to raise this alleged deficiency as an additional issue on appeal. Lastly, a decision by this Court construing the error in the title of the July 20, 2016, objection as NIR’s waiver of its right to object to Valiant’s cost memorandum would exalt form over substance and ignore the interests of justice in

adjudicating the parties' substantial rights on the merits. Therefore, this Court should reject Valiant's argument that NIR waived its right to contest its cost and fee award.

**B. THE DISTRICT COURT'S AWARD OF DISCRETIONARY COSTS AGAINST NIR WAS AN ABUSE OF DISCRETION BECAUSE IT DID NOT COMPLY WITH THE RULES OF CIVIL PROCEDURE AND IS INCONSISTENT WITH APPLICABLE LEGAL STANDARDS**

The district court abused its discretion in awarding Valiant discretionary costs against NIR because the district court's award did not comply with the rules of civil procedure and was inconsistent with applicable legal standards.

The Idaho Rules of Civil Procedure provide the trial court discretion to award discretionary costs "on a showing that the costs were necessary *and* exceptional costs, reasonably incurred, *and* should in the interest of justice be assessed against the adverse party." IRCP 54(d)(1)(D) (emphasis added). The rule lists each of these four characteristics (necessary, exceptional, reasonably incurred, and should in the interest of justice be assessed against the adverse party) in the conjunctive, meaning a cost must satisfy each characteristic:

The prevailing party making a claim for discretionary costs has the burden "to make an adequate initial showing that these costs were necessary and exceptional and reasonably incurred, and should in the interests of justice be assessed against the adverse party." *Auto. Club Ins. Co. v. Jackson*, 124 Idaho 874, 880, 865 P.2d 965, 971 (1993); *Westfall v. Caterpillar, Inc.*, 120 Idaho 918, 926, 821 P.2d 973, 981 (1991); *Fuller v. Wolters*, 119 Idaho 415, 425, 807 P.2d 633, 643 (1991). Only after the prevailing party successfully meets its burden, the trial court "must make express findings as to why the item of discretionary cost should or should not be allowed," after an objection by an opposing party. IRCP 54(d)(1)(D).

“This Court exercises free review of the district court's compliance with the rules of civil procedure in awarding costs and attorney fees.” *Hoagland v. Ada Cty.*, 154 Idaho 900, 913, 303 P.3d 587, 600 (2013); *J.R. Simplot v. Chemetics Int'l*, 130 Idaho 255, 257, 939 P.2d 574, 576 (1997). This Court reviews an award of discretionary costs under the abuse of discretion standard and employs the following three-step inquiry to determine if the trial court abused its discretion in awarding discretionary costs: “(1) whether the trial court correctly perceived the issue as discretionary; (2) whether the trial court acted within the boundaries of its discretion and consistent with the applicable legal standards; and (3) whether the trial court reached its determination through an exercise of reason.” *Richard J. & Esther E. Wooley Tr. v. DeBest Plumbing, Inc.*, 133 Idaho 180, 186, 983 P.2d 834, 840 (1999).

The district court's award of discretionary costs in this case not only failed to comply with the Idaho Rules of Civil Procedure, but also was an abuse of discretion because the district court failed to recognize its decision was one of discretion and then made an award inconsistent with applicable legal standards.

**1. The District Court Abused its Discretion in Awarding Discretionary Costs without Acknowledging its Award was Discretionary**

The district court's award of discretionary costs against NIR was an abuse of discretion because the court never acknowledged it was an issue of discretion. If a trial court fails to correctly perceive the issue of awarding discretionary costs as discretionary, it has abused its discretion. *Richard J. & Esther E. Wooley Tr. v. DeBest Plumbing, Inc.*, 133 Idaho at 186, 983 P.2d at 840. The fact that the district court used the word “authorizes” once and the word “should” as it repeatedly recited the general standard set forth in IRCP 54(d)(1)(D), as well as the term “discretionary cost” repeatedly, does not evidence that the court perceived its award of discretionary costs was in fact discretionary.

When this Court reviews a trial court's award of discretionary costs to determine whether the trial court perceived the issues as one of discretion, this Court finds unequivocal statements of the trial court acknowledging their discretion dispositive. For instance, a trial court's statement "[t]he decision to grant or refuse permission to amend is left to the sound discretion of the court...." acts as evidence that the trial court correctly perceived its discretion. *DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 755, 331 P.3d 491, 497 (2014). A district court's statement it has "broad discretion in determining whether or not to grant or deny a motion for new trial" in its order denying that motion also evidences that court correctly perceived the issue as one of discretion. *Griff, Inc. v. Curry Bean Co.*, 138 Idaho 315, 322, 63 P.3d 441, 448 (2003). Indeed, this first step in the analysis of abuse of discretion is overcome when the trial court makes specific acknowledgement that it is exercising its discretion: "In its ruling denying Fish discretionary costs, the trial court specifically acknowledged that it was exercising its discretion in reviewing Fish's request for discretionary costs." *Fish v. Smith*, 131 Idaho 492, 493, 960 P.2d 175, 176 (1998).

In this case, the district court never communicated any recognition that the discretionary award of costs it awarded was actually a matter of discretion, nor that it intended to act within the outer boundaries of that discretion. To the contrary, the district court only acknowledged that Rule 54(d)(1)(D) authorizes the award of discretionary costs "on a showing that the costs were **necessary and exceptional costs, reasonable incurred, and should in the interest of justice be assessed against the adverse party.**" R Vol. Vol. XLVIII, pp. 5838-5839 (emphasis in the original).

The trial court's award of discretionary costs focused on the necessity of the costs and only mentioned discretion when using the term "discretionary costs." Respondents point out that the district court used the word "should" as evidence that the court recognized the issue as one of

discretion, yet each of the district court's six (6) uses of the word "should" was only used when reciting and paraphrasing the language of IRCP 54(d)(1)(D): "should in the interest of justice be assessed against the adverse party." For instance, the court stated "The Court finds that the scope and complexity of this litigation resulted in necessary and exceptional costs which Valiant *should* be awarded in the interests of justice." R Vol. XLVIII, p. 5839 (emphasis added). However, the district court's repeated use of the phrasing of IRCP 54(d)(1)(D) does not evidence that it correctly perceived the issues of awarding discretionary costs as one of discretion and the district court never made such an acknowledgement.

The clear message that resonates from the district court's memorandum decision and order, after recognizing the repetition of the Rule 54(d)(1)(D) language in a conclusory fashion, is that the court awarded Valiant discretionary costs because they were necessary and otherwise unprovided for as costs as a matter of right:

The Court finds that the scope and complexity of this litigation resulted in necessary and exceptional costs which Valiant should be awarded in the interests of justice, **because these are costs which Valiant had to expend to fully litigate this matter but which are not contemplated by the Idaho Rules of Civil procedure as a matter of right.**"

R Vol. XLVIII, pp. 5839-40 (emphasis added). The district court made no express statement that it perceived the issue as one of discretion and its overarching reasoning for the award of discretionary costs also fails to evidence it correctly perceived the issue as one of discretion. Thus, it was an abuse of the district court's discretion to award Valiant discretionary costs against NIR.

**2. The District Court Abused its Discretion in Awarding Discretionary Costs because it Made the Award without Valiant Requiring Valiant make the Prerequisite Showing Required by the Rules of Civil Procedure**

The district court abused its discretion when it awarded Valiant discretionary costs because Valiant failed to make the necessary prerequisite showing that the costs it claimed were exceptional

and should in the interests of justice be awarded against NIR. “This Court exercises free review of the district court's compliance with the rules of civil procedure in awarding costs and attorney fees.” *Hoagland*, 154 Idaho at 913, 303 P.3d at 600; *J.R. Simplot*, 130 Idaho at 257, 939 P.2d at 576. Idaho Rule of Civil Procedure 54(d)(1)(D) requires the prevailing party claiming discretionary costs to first make a showing that each of the discretionary costs was 1) necessary, 2) exceptional, 3) reasonably incurred, **and** 4) should in the interest of justice be assessed against the adverse party. “The burden is on the prevailing party to make an adequate initial showing that these costs were necessary and exceptional and reasonably incurred, and should in the interests of justice be assessed against the adverse party.” *Jackson*, 124 Idaho at 880, 865 P.2d 965 at 971; *Westfall*, 120 Idaho at 926, 821 P.2d at 981; *Fuller*, 119 Idaho at 425, 807 P.2d at 643. Thus, according to the plain language of the rule, if the movant doesn't make the requisite showing, the award should not be made. The district court failed to comply with Rule 54(d)(1)(D) because it awarded Valiant discretionary costs without Valiant making the necessary initial showing.

Valiant's response memorandum misstates the initial burden it bore as the prevailing party requesting discretionary costs: “NIR asserts that the district court abused its discretion by failing to make any showing the costs were exceptional and should, in the interest of justice, be assessed against NIR.” Respondent's Brief, 12. In that statement Valiant fails to acknowledge that it had the initial burden of showing the costs were 1) necessary, 2) exceptional, 3) reasonably incurred, **and** 4) should in the interest of justice be assessed against the adverse party. Valiant completely failed to meet that burden. Thus, it was error for the district court to make the award as well as an abuse of discretion.

Review of Valiant's memorandum of costs and attorneys' fees and its memorandum in opposition to NIR's objection reveals that Valiant failed to make its required initial showing that

the discretionary costs were both exceptional and should be assessed against NIR in the interests of justice.

a. Legal Standard of an “Exceptional Cost”

Idaho Rule of Civil Procedure 54(d)(1)(D) does not define what it means for a cost to be “exceptional.” However, the Idaho cases addressing this concept have developed two ways of defining an exceptional cost. The first, is that a cost is exceptional if it arises in a case that is itself exceptional and the second is if the cost is uncommon for the type of case.

Looking first to the exceptional cost because the case itself is exceptional, “This Court has always construed the requirement that a cost be ‘exceptional’ under I.R.C.P. 54(d)(1)(D) to include those costs incurred because the nature of the case was itself exceptional.” *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005). This Court has recently clarified this standard and better defined what analysis a district court must engage in and what explanation a district court must provide if it determines a case is exceptional, making all resultant costs exceptional:

Over the years, this Court and the Court of Appeals have been inconsistent with handling discretionary costs. *Compare, e.g., Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005) (holding expert witness fees can be exceptional), *and In re Univ. Place/Idaho Water Ctr. Project*, 146 Idaho 527, 545, 199 P.3d 102, 121 (2008) (upholding award of discretionary costs on the district court's finding discretionary costs were equitable and just), *and Puckett v. Verska*, 144 Idaho 161, 169, 158 P.3d 937, 945 (2007) (permitting discretionary cost for expert witness in medical malpractice case based on the long course of litigation), *with, e.g., Nightengale v. Timmel*, 151 Idaho 347, 354, 256 P.3d 755, 762 (2011) (holding that case was not exceptional merely because an expert was necessary), *and City of McCall v. Seubert*, 142 Idaho 580, 588–89, 130 P.3d 1118, 1126–27 (2006) (holding intervenor costs were not exceptional but were “routine costs associated with modern litigation overhead”), *and Fish v. Smith*, 131 Idaho 492, 493–94, 960 P.2d 175, 176–77 (1998) (finding hiring of expert for accident reconstruction was routine). We therefore clarify that numerous complaints, depositions, and expert testimony does not render a case in and of itself exceptional. Rather, **courts should assess the context and nature of a case as a whole along with multiple circumstances. See *Nightengale*, 151 Idaho at 354, 256 P.3d at**



**762. The mere fact numerous experts were retained or numerous amendments were filed does not standing alone render a case exceptional. Particular standards a court should consider include, but are not limited to, whether there was unnecessary duplication of work, whether there was an unnecessary waste of time, the frivolity of issues presented, and creation of unnecessary costs that could have been easily avoided. Most importantly, however, a court should explain why the circumstances of a case render it exceptional.**

*Hoagland*, 154 Idaho at 914, 303 P.3d at 601 (bold and underline emphasis added). Therefore, for costs to be exceptional because the case itself is exception, the district court must explain why the circumstances of the case render it exceptional.

The second way a cost is determined to be “exceptional” is if it uncommon in the particular type of case. For instance, costs for copy, travel and expert witness fees in a personal injury case are not “exceptional” because they “are considered ordinary” in that type of case. *Alcorn*, 141 Idaho at 314, 109 P.3d at 168. Under the same standard, “routine costs associated with modern litigation overhead” are not exceptional costs. *Inama v. Brewer*, 132 Idaho 377, 384, 973 P.2d 148, 155 (1999). For the same reason this Court has rejected an award of discretionary costs for expert witness fees in a medical-malpractice case because it is a cost that is ordinary in both proving and defending such a claim. *Nightengale v. Timmel*, 151 Idaho 347, 354–55, 256 P.3d 755, 762–63 (2011). Thus, the standard in Idaho is settled that a cost is not exceptional unless it is 1) the result of a case that is itself exceptional, or 2) uncommon in the particular type of case.

b. Valiant Failed to Make a Showing that its Claimed Discretionary Costs Were Exceptional

Valiant’s Memorandum of Costs and Attorneys’ Fees never attempted to show that the discretionary costs it claimed against NIR were either exceptional or should in the interests of justice be assessed against NIR. R Vol. XLI, pp. 5052-5055. Instead, that memorandum simply labeled the costs as exceptional and stated they should be awarded in the interests of justice. No reasoning was provided for either classification. Valiant never made a showing that the case itself

was exceptional, nor that the costs were uncommon for this type of action. To the contrary, Valiant simply argued that these costs were necessary, not otherwise provided as costs as a matter of right, and therefore, should be awarded. R Vol. XLI, pp. 5052-5053.<sup>1</sup>

In Valiant's reply to NIR's objection to an award of discretionary costs it clarified its position on why the claimed costs were "exceptional":

As discussed, NIR and VP's defense of this lawsuit was frivolous. As such, all of the discretionary costs for which Valiant seeks recovery in the Valiant foreclosure action (other than the litigation guarantee) should be deemed exceptional. It is the exceptional case in which a party acts frivolously. Therefore, once the Court finds that NIR and VP defended this case frivolously, it follows that all the costs incurred because of those frivolous defenses are exceptional and recoverable as discretionary costs.

R Vol. XLVII, p. 5767. As set forth above, the showing Valiant made to the district court was that the costs were exceptional because the case itself was exceptional *due to the frivolous claims made by each defendant*. However, the district court squarely rejected this position: "this Court does not believe that JV, NIR, or VP defended this action frivolously, unreasonably, or without foundation."

R Vol. XLVIII, p. 5837. Therefore, Valiant never made the prerequisite showing that its discretionary costs were exceptional, making the district court's award of discretionary costs an abuse of discretion and out of compliance with Rule 54(d)(1)(D).

c. Legal Standard when an Award should be Assessed in the Interests of Justice

This Court has provided guidance on what analysis should take place when determining whether discretionary costs should be awarded against an adverse party as follows:

**In determining whether an award of attorney fees is in the interest of justice, a court should consider the overall conduct of the lawsuit and balance that conduct against the American Rule, which presumes that each party is**

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<sup>1</sup> The argument presented by Valiant in the last paragraph of page 5052 and continued on the top of page 5052 is almost identical to the language found in pages 5839-5840 of the district court's decision. R Vol. XLVIII, pp. 5839-5840.

**responsible for their own attorney fees and costs.** See *Caldwell v. Idaho Youth Ranch*, 132 Idaho 120, 127, 968 P.2d 215, 222 (1998). Factors to consider include but are not limited to the merits of the lawsuit and whether or not it was pursued frivolously, see I.R.C.P. 11; the relationship of the costs incurred to the final disposition of the proceeding, and the value added to the proceeding by the costs incurred, see *Great Plains Equip., Inc. v. Nw. Pipeline Corp.*, 136 Idaho 466, 475, 36 P.3d 218, 227 (2001); the necessity of the proceedings to the final resolution of the lawsuit; and the behavior of the parties, and whether they needlessly ran up costs and fees. Justice is not dependent upon one's wealth or ability to pay costs; as such, this is one factor that should not be considered in this analysis.

*Hoagland*, 154 Idaho at 915–16, 303 P.3d at 602–03 (emphasis added). Indeed, this Court has also instructed that the beginning point of analysis is “the presumption that it is in the interest of justice for each party to pay their own costs unless the overall conduct of the lawsuit indicates otherwise.” *Id.*

d. Valiant Failed to Make a Showing that its Claimed Discretionary Costs Should be Assessed Against NIR in the Interests of Justice

With respect to a showing of why any of the discretionary costs should be assessed against NIR in the interests of justice, Valiant never attempted to make that showing. Neither its memorandum of costs and fees, nor its opposition to NIR’s objection addresses why the interests of justice would have the discretionary costs assessed against NIR rather than borne by Valiant as prescribed by the American Rule. Because IRCP 54(d)(1)(D) requires the prevailing party to first make a showing satisfying the elements of the rule (i.e. that the costs are exceptional and should in the interests of justice be assessed by the adverse party) before an award of discretionary costs is made, and Valiant failed to make that showing, the district court’s award of discretionary costs did not comply with the rules of civil procedure in awarding discretionary costs. This failure to comply with the Rule was also an abuse of discretion because the award is inconsistent with applicable legal standards.

**3. The District Court Abused its Discretion in Awarding Discretionary Costs because it Failed to make Express Findings that the Discretionary Costs Were Exceptional as Defined by Idaho Law.**

The district court's award of discretionary costs against NIR was an abuse of discretion because the district court failed to ever explain why the costs were exceptional. To act within its discretion in making an award of discretionary costs the court "must make express findings as to why the item of discretionary cost should or should not be allowed." IRCP 54(d)(1)(D). "Express findings as to the general character of requested costs and whether such costs are necessary, reasonable, exceptional, and in the interests of justice is sufficient to comply with this requirement." *Alcorn*, 141 Idaho at 314, 109 P.3d at 168.

As set forth above in Section B.2.a. and incorporated herein by reference, a cost can be exceptional for one of two reasons: first, because it results from a case that is itself exception, or 2) because it is uncommon in an action of this type. If a trial court makes the determination that the case itself is exceptional, it is incumbent on the trial court to "explain *why* the circumstances of a case render it exceptional." *Hoagland*, 154 Idaho at 914, 303 P.3d at 601 (emphasis in original).

In this case, the memorandum decision and order awarding discretionary costs against NIR is completely devoid of any finding by the district court that the case itself was exceptional, much less any explanation of why the circumstances of this case render it exceptional. Similarly, the district court's opinion contains no express findings that any of the awarded discretionary costs are exceptional because they are uncommon in a commercial mortgage foreclosure action. To rehabilitate the district court's opinion, Valiant presents the Court with various reasons it believes this case was exceptional. However, this Court's review is limited to the decision of the district court rendered in its memorandum decision and order.

The district court's decision contains no such findings or explanations. Each of the district court's uses of the term "exceptional" is completely conclusory. For example, the district court's treatment of an award of discretionary costs for witness fees provides no meaningful findings or explanation as to the exceptional nature of the fees: "The witness fees Valiant paid in excess of the \$20.00 per day were necessary and exceptional, reasonably incurred, and should in the interest of justice be assessed against the defendants." R Vol. XLVIII, p. 5840. The statement begs the question "Why?" Why are these fees "exceptional?" The district court provides no accompanying findings or explanation.

Review of each of the itemized discretionary costs (i.e. items 1 through 5 on pages 5840-5841) leaves the same question unanswered: "Why are these costs exceptional?" Idaho case law does not define a cost as exceptional just because the district court says it is. An exceptional cost is either 1) one that arises from a case that is itself exceptional, or 2) a cost that is uncommon in that particular type of case. Judge Buchanan failed to make either determination with respect to any of the discretionary costs it awarded against NIR. In fact, Judge Buchanan failed to make any express findings that the costs were exceptional, other than conclusory statements that simply parroted the IRCP 54(d)(1)(D) language. Therefore, the district court abused its discretion by awarding discretionary costs without ever making findings, with explanation, that any of these costs are exceptional as defined by Idaho law.

**4. The District Court Abused its Discretion in Awarding Discretionary Costs because it Failed to Make Express Findings that the Discretionary Costs should be Awarded Against NIR in the Interests of Justice.**

The district court abused its discretion because it failed to find that discretionary costs should be awarded against NIR in the interests of justice. As set forth above, Valiant makes considerable effort to set forth each of the findings the district court could have made to support a

conclusion that this case is exceptional in nature. However, the district court made none of those findings and never concluded that this case was exceptional. Curiously, Valiant never addresses the requirement that the court also determine that the costs should be awarded against NIR in the interests of justice.

In addition to the required finding that discretionary costs be necessary, exceptional, and reasonably incurred, the trial court must also find that the costs “should in the interest of justice be assessed against the adverse party.” IRCP 54(d)(1)(D). This Court has provided guidance to the trial courts in what facts should be considered when determining if a discretionary cost should be assessed against a party in the interests of justice:

**In determining whether an award of attorney fees is in the interest of justice, a court should consider the overall conduct of the lawsuit and balance that conduct against the American Rule, which presumes that each party is responsible for their own attorney fees and costs. See *Caldwell v. Idaho Youth Ranch*, 132 Idaho 120, 127, 968 P.2d 215, 222 (1998). Factors to consider include but are not limited to the merits of the lawsuit and whether or not it was pursued frivolously, see I.R.C.P. 11; the relationship of the costs incurred to the final disposition of the proceeding, and the value added to the proceeding by the costs incurred, see *Great Plains Equip., Inc. v. Nw. Pipeline Corp.*, 136 Idaho 466, 475, 36 P.3d 218, 227 (2001); the necessity of the proceedings to the final resolution of the lawsuit; and the behavior of the parties, and whether they needlessly ran up costs and fees. Justice is not dependent upon one's wealth or ability to pay costs; as such, this is one factor that should not be considered in this analysis.**

*Hoagland*, 154 Idaho at 915–16, 303 P.3d at 602–03 (emphasis added). This Court also instructed that the beginning point of analysis is “the presumption that it is in the interest of justice for each party to pay their own costs unless the overall conduct of the lawsuit indicates otherwise.” *Id.* Despite the *Hoagland* case being complicated, this Court held “the district court failed to demonstrate that an award of discretionary costs was in the interest of justice, or if so, why?” *Id.*

In this case, the district court never engaged in the analysis this Court mandated in the *Hoagland* case. The memorandum decision and order granting discretionary costs never addresses why the interests of justice would require an award of discretionary costs against NIR. Instead, the language of Rule 54(d)(1)(D) is simply copied and pasted into conclusory statements that “[certain discretionary costs claimed by Valiant] were necessary and exceptional, reasonably incurred, and should in the interest of justice be assessed against the defendants.” R Vol. XLVIII, pp. 5839-5841. The only time the district court even approaches addressing the interests of justice in its discretionary costs award, it fails to specify which of the defendants ought to bear the costs associated with the questionable activity being described. For example, the district court reasoned that at several of the hearings in Sandpoint, Idaho “counsel for one or more of the defendants presented oral arguments not supported by any legal authority or raised issues and claims that had already been determined on summary judgment” and therefore, the court awarded travel costs to Valiant. R Vol. XLVIII, p. 5840. If the court intended to determine that certain behavior of the parties needlessly ran up costs and fees, the court should have specified what party, what behavior, and what associated costs and fees were needlessly created or run up. Instead, the court made a vague characterization and held each defendant responsible for a whole category of fees (e.g. travel costs). If for example only one of the three defendants engaged in such activity, it makes no sense that each should be penalized with an award of discretionary costs. Yet Valiant represents to this Court “the district court’s determination was based at least in part upon the conduct of NIR.” Respondent’s Brief, 16. However, the district court’s memorandum decision awarding the discretionary costs provides no support for this contention.

Valiant also claims without any support that the district court’s award was based upon “unnecessary waste of time” and/or “unnecessary costs that could have been easily avoided” and

attributable to NIR. *Id.* at 17. Again, there is no support for this contention in the district court's award. The same vague overgeneralization was made by the district court with respect to outsourced photocopy expenses, in-house photocopy expenses, postage expenses, courier costs, telephone expenses, and cost of computer-assisted research. R Vol. XLVIII, p. 5841. The district court simply failed to make any findings or provide any explanation why the interests of justice would require an award of discretionary costs to be made against NIR, rather than against the other defendants, or simply not at all. Therefore, the district court abused its discretion in awarding discretionary costs against NIR.

**C. THE COURT SHOULD REJECT VALIANT'S CONTENTION THAT THE DISCRETIONARY COSTS ARE EXCEPTIONAL DUE TO THE COMPLEXITY OF THE CASE WHEN VALIANT NEVER MADE THAT ARGUMENT BELOW AND THE DISTRICT COURT NEVER MADE SUCH FINDING**

In effect conceding NIR's position that none of the discretionary costs awarded against NIR are inherently exceptional in a commercial foreclosure action, Valiant now asks the Court to uphold the district court's award of discretionary costs because the foreclosure action itself was exceptional. Respondent's Brief, 15. Indeed, Valiant makes considerable effort to set forth each of the findings the district court *could have made* to support a conclusion that this case is exceptional in nature. However, the district court made none of those findings and never concluded that this case was exceptional in nature. More importantly, Valiant never argued below the action as a whole was exceptional because of its complexity, and therefore, this Court should decline to consider that argument on appeal.

This Court has held "Appellate court review is 'limited to the evidence, theories and arguments that were presented ... below.'" *Obenchain v. McAlvain Const., Inc.*, 143 Idaho 56, 57, 137 P.3d 443, 444 (2006) *citing State v. Vierra*, 125 Idaho 465, 469, 872 P.2d 728, 731 (Idaho



App.1994). Thus, when an argument is raised for the first time on appeal it will not be considered by this Court. *Id.*

Valiant never argued below that its foreclosure action was exceptional simply because of the complexity of the action. While it is true that Valiant did claim “the sheer size, scope and complexity” of the foreclosure action resulted in necessary and exceptional expenses, it never argued that the sheer size, scope and complexity of the case made the case itself exceptional, such that all of its costs are exceptional. R Vol. XLI, p. 5052. To the contrary, the only argument expressly made by Valiant below for why its costs are exceptional is because of the frivolous actions of the defendants. R Vol. XLVII, p. 5767. Before that express argument was made, Valiant simply contended that the discretionary costs should be awarded because they were necessary and not otherwise provided as costs as a matter of right. R Vol. XLI, pp. 5052-5053. Valiant’s argument based on frivolity was squarely rejected by the district court. R Vol. XLVIII, p. 5837. Because Valiant never argued below that the scope and complexity of its foreclosure action made the case itself exceptional, this Court should decline to consider the same argument on appeal.

Even if this Court does consider Valiant’s argument that its costs were exceptional because of the complexity of the foreclosure action, the Court should reject that argument because it is unsupported by the district court’s award of discretionary costs. Section B.3. above addresses the district court’s failure to make any express findings that the complexity of the foreclosure action rendered the entire action exceptional pursuant to IRCP 54(d)(1)(D). Therefore, even if Valiant believes the complexity of the case rendered it exceptional, the district court did not make the same determination. The district court’s reasoning for awarding the discretionary costs is apparent in its decision:

The Court finds that the scope and complexity of this litigation resulted in necessary and exceptional costs which Valiant should be awarded in the interests of justice,

**because these are costs which Valiant had to expend to fully litigate this matter but which are not contemplated by the Idaho Rules of Civil procedure as a matter of right.”**

R Vol. XLVIII, pp. 5839-40 (emphasis added). The district court never found that the foreclosure action was exceptional. Thus, this Court should reject Valiant’s argument that the discretionary costs it was awarded were exceptional by virtue of the nature of the action because the district court never made any such finding.

Valiant’s attempt to convince this Court that the underlying case was so complex it was exceptional is not only irrelevant because the district court never reached such conclusion, but it is also simply inaccurate and unsupported by law.

There are no recorded Idaho opinions that NIR is aware of that state a complex case is always exceptional for purposes of a discretionary costs award. To the contrary, this Court has held that it is an abuse of discretion to award discretionary costs without first stating why the circumstances of a case render it exceptional:

In *Hoagland*, this Court set forth factors a district court should consider when determining whether costs are exceptional: “whether there was unnecessary duplication of work, whether there was an unnecessary waste of time, the frivolity of issues presented, and creation of unnecessary cost that could have been easily avoided. **Most importantly, however, a court should explain why the circumstances of a case render it exceptional.**”

*Easterling v. Kendall*, 159 Idaho 902, 367 P.3d 1214, 1229 (2016), *reh'g denied* (Mar. 31, 2016) *citing Hoagland v. Ada Cnty.*, 154 Idaho 900, 914, 303 P.3d 587, 601 (2013) (emphasis added).

Valiant’s contention that a multi-party foreclosure action of nearly 200 acres of real property encumbered by multiple mortgages is so complex that any associated cost would be exceptional has no legal support. In the *Easterling* case this Court held that a discretionary cost award of nearly fifty thousand dollars for expert witness fees was an abuse of discretion because the district court failed to “provide an explanation” for why the expert witness fees were

exceptional. *Id.* The fact that *Easterling* case was complex (a medical malpractice case involving both complex injury and complex treatment) and expert witness fees were necessary was simply not enough. In that case, the district court found “Easterling failed to timely identify a retained causation expert and provided misleading information about the treating physicians' opinions on causation, and those decisions exacerbated costs incurred by Kendall.” *Id.* However, the award was still an abuse of discretion because the district court “failed to provide an explanation for how Easterling's discovery decisions made Kendall's expert witness fees exceptional.” *Id.* According to this Court, what the district court failed to explain in that case was “how Easterling's discovery decisions transformed normal costs of malpractice defense—expert witness fees and expenses—into exceptional ones.” *Id.*

The same shortcoming in the *Easterling* case is present in this case: there has been no explanation how the actions of NIR have transformed the normal costs into exceptional ones.

The district court's award of discretionary costs for a litigation guarantee is the perfect example of the district court's abuse of discretion. Valiant contends, without providing any authority, that a litigation guarantee is an exceptional cost in a mortgage foreclosure action. Recent statements by this Court would indicate otherwise. *Sims v. ACI Northwest, Inc.*, 157 Idaho 906, 342 P.3d 618, 627 (2015) (J. Jones, J., concurring) (obtaining a litigation guarantee prior to commencing foreclosure action is doing due diligence); *Sims v. Jacobson*, 157 Idaho 980, 342 P.3d 907, 914 (2015) (obtaining a litigation guarantee is a simple step to avoid confusion about interests in the property). The district court's memorandum decision and order never explained how the actions of NIR (or any other defendant) necessitated the litigation guarantee, much less transformed that normal cost into an exceptional one. The record clearly shows the cost for the litigation guarantee was incurred no later than July 18, 2014. R Vol. XLIII, p. 5257. Valiant's

foreclosure action was not filed until August 21, 2014. R Vol. VI, pp. 739-767. NIR did not answer that action until September 19, 2014. R Vol. VII, pp. 860-873. Thus, there is no logical explanation how Valiant's actions could have necessitated the expense of obtaining a litigation guarantee. The district court's award fails to provide any explanation, nor can Valiant. The same is true of every other discretionary cost awarded against NIR. The district court never "explain[ed] why the circumstances of [this] case render it exceptional" or what actions of NIR transformed normal costs into exceptional ones. Therefore, the district court abused its discretion in awarding discretionary costs against NIR.

**D. THE DISTRICT COURT ABUSED ITS DISCRETION BY AWARDING CERTAIN COSTS AS A MATTER OF RIGHT AGAINST NIR**

Idaho Rule of Civil Procedure 54(d)(A) provides "costs are allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the Court." "The award of costs as a matter of right...is subject to the trial court's discretion." *Great Plains Equip., Inc.*, 136 Idaho at 474, 36 P.3d at 226. When reviewing a court's discretionary award this Court engages in the following analysis:

(1) whether the trial court correctly perceived the issue as discretionary; (2) whether the trial court acted within the boundaries of its discretion and consistent with the applicable legal standards; and (3) whether the trial court reached its determination through an exercise of reason.

*Zimmerman v. Volkswagen of Am., Inc.*, 128 Idaho 851, 857, 920 P.2d 67, 73 (1996).

NIR has challenged the district court's award of certain costs as a matter of right against NIR because the award against NIR was not reached through an exercise of reason. The district court awarded costs as a matter of right in the total amount of \$9,014.99 to Valiant against NIR, VP, and JV collectively. R Vol. XLVIII, p. 5838. The district court then apportioned that award

between the parties, assessing one-quarter of the award against NIR because “NIR participated in pre- and post-trial motion practice, but not in the court trial.” R Vol. XLVIII, p. 5841.

NIR contends that certain of the costs of a matter of right for which NIR was partially assessed have nothing to do with NIR and should have been excluded from the amount from which NIR would be responsible. For instance, the Court awarded a total amount of \$86.00 for court filing fees, despite the fee for filing a third party complaint only being \$14.00. R Vol. XLVIII, p. 5838; R Vol. XLIII, p. 5122; *compare* Appendix A of IRCP, fee category K.3.

The court also assessed 25% of certain costs against NIR even though those costs were incurred after NIR was no longer an active party in the action. For instance, the district court awarded 25% of the total \$8,250,19 awarded for depositions taken although NIR did not participating in the depositions of Charles Reeves, Annette Brule, Richard Lynskey, Casey Linscott, or Barney Ng. R. Vol. XLIII, pp. 5220-5225. The district court also included in its award of deposition costs the deposition cost for deposing Charles Reeves in a different action, which could not have been a cost as a matter of right *in this action*. R Vol. XLVIII, p. 5838; *compare* R Vol. XLIII, p. 5126. This is even more puzzling because the district court at least acknowledged Idaho Rule of Civil Procedure 54 cannot be interpreted “as authorizing an award to Valiant in this case of the fees and costs it incurred in the other Idaho Club Lawsuits.” R Vol. XLVIII, p. 5831. These awards against NIR evidence a failure by the district court to exercise reason in its award of costs as a matter of right against NIR.

Lastly, the district court awarded trial witness fees, fees for certified copies of trial exhibits, and costs of preparing trial exhibits against NIR, despite the fact that NIR did not participate in trial. R Vol. XLVIII, p. 5838; *compare* XLVIII, p. 5841 (recognizing NIR did not participate in

trial). These awards also evidence the trial court's failure to exercise reason in its award of costs as a matter of right against NIR.

Even the trial court's decision to apportion the cost award against NIR by a factor of 0.25 lacks reason because there was never any explanation how that factor was decided. It appears to be completely arbitrary, especially considering each cost award could have been analyzed and compared to the actions and conduct of each of the defendants and apportionment made on a more granular scale to adequately reflect responsibility for each cost. Yet, the district court simply determined that each defendant would bear the costs, but NIR's responsibility would be reduced by an arbitrary percentage. The district court abused its discretion in awarding costs as a matter of right against NIR when those costs had no relationship to NIR's involvement, or lack thereof, in the action at the times the costs were incurred.

Valiant contends that NIR's challenge to these certain costs as a matter of right should be rejected by the Court because NIR did not "cite to any case law, statute, treatise or other legal authority to support its position." Respondent's Brief, 21. However, NIR cited to the Rule itself, provided the Court with the standard of review for discretionary awards of costs (which is derived from case law) and argued that it was an abuse of discretion to assess costs against a party what was not an active participant in the case when the costs were incurred. NIR did identify pertinent factual bases for its argument, although without direct citation to the record. Accordingly, this Court should reject Valiant's invitation to ignore NIR's substantive issue and argument, simply because it was not accompanied with extensive secondary legal authority and multiple citations to the record. The pertinent facts and principles are simple and clear: NIR was assessed costs for portions of the actions in which it did not have any involvement. The district court acknowledged the same, and even made an arbitrary apportionment to attempt to reflect that limited involvement.

However, the arbitrary nature of the apportionment and the fact that it still assessed NIR with portions of costs incurred when NIR had no involvement in the case, evidences a failure by the district court to make the award based on an exercise of reason. Therefore, the district court abused its discretion.

**E. VALIANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES**

Valiant is not entitled to attorney fees on appeal because this appeal is not frivolous, unreasonable, or without foundation. Pursuant to I.C. § 12-121 an award of attorney fees is subject to the Court's discretion. *Coward v. Hadley*, 150 Idaho 282, 289-90, 246 P.3d 391, 398-99 (2010). That statute only allows for an award of attorney fees to a prevailing party when the appeal "was brought or defended frivolously, unreasonably, or without foundation." *Thomas v. Madsen*, 142 Idaho 635, 640, 132 P.3d 392, 397 (2006).

NIR's appeal has not been brought frivolously, unreasonably, or without foundation. NIR has presented this Court with ample authority setting for the standards pertinent to the issues raised, cited the Court to the relevant portions of the record supporting the issues raised and argument presented, and presented good faith argument, supported by applicable legal standards, why the district court's award of discretionary costs and certain costs as a matter of right against NIR was an abuse of discretion and not in compliance with the rules of civil procedure.

Citing to the *Lower Payette Ditch Company v. Harvey*, 152 Idaho 291, 271 P.3d 689 (2012) case, Valiant contends that NIR's appeal is frivolous because it "lacks any reasoned argument and merely asks this Court to second-guess the district court's exercise of discretion" and its arguments are "undermined by relevant case law." Respondent's Brief, 24. NIR respectfully disagrees with Valiant's assessment. Each of NIR's memoranda provides the court with reasoned argument,

supported by relevant case law, setting forth why the district court failed to comply with the rules of civil procedure and abused its discretion.

Valiant also contends that NIR's sole purpose in its appeal "is merely an attempt to prolong this litigation." Respondent's Brief, 25. Valiant contends that the miniscule award of costs appealed by NIR compared to the overall value of the subject property precludes any meritorious appeal by NIR. Of course, Valiant provides the Court with no authority for this proposition, and NIR is unaware of any. Valiant instead cites to this Court's decision in *Wechsler v. Wechsler*, 162 Idaho 900, 407 P.3d 214, 232 (2017), where the Court awarded attorney fees against the appellant because her arguments "were not well grounded in fact or warranted by existing law" and whose "appeal amount[ed] to nothing more than continued delay and evasive action." Neither characterization is true in this case.

NIR admits it does not understand Valiant's claim that this appeal causes "NIR's Vendor's Lien [to] continue[] to encumber the real property it describes." Respondent's Brief, 25. NIR never raised the district court's treatment and disposition of NIR's vendor's lien claim as an issue on appeal, so it is unclear how Valiant characterizes this appeal of a costs award as an attempt to "hamstring Valiant." Nevertheless, unlike the appellants in the *Harvey* and *Wechsler* cases, NIR has not made this appeal frivolously, unreasonably, or without foundation.

Lastly, Valiant contends that NIR's appeal is unreasonable because it failed to timely object to Valiant's memorandum of costs. As set forth above in Section A., NIR did timely object to Valiant's memorandum of costs and fees and Valiant even admitted the same below. R Vol. XLVII, p. 5747 *esp.* n. 1. This Court should simply reject Valiant's claim for attorney fees against NIR because NIR's appeal was not brought frivolously, unreasonably, or without foundation.

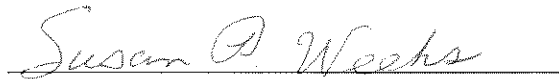


## II. CONCLUSION

Based upon the foregoing argument, the trial court's award of discretionary costs and costs as a matter of rights against NIR should be reversed.

Respectfully submitted this 31<sup>st</sup> day of January, 2018.

JAMES, VERNON & WEEKS, P.A.

A handwritten signature in cursive script, reading "Susan P. Weeks", is written over a horizontal line.

SUSAN P. WEEKS  
Attorneys for Appellant NIR

CERTIFICATE OF SERVICE

I hereby certify that on the 31<sup>st</sup> day of January, 2018, I caused to be served a true and correct copy of the foregoing instrument by the method indicated below, and addressed to the following:

Richard L. Stacey  
Jeff Sykes  
McCONNEL WAGNER SYKES &  
STACEY PLLC  
755 W Front Street, Suite 200  
Boise, ID 83702

U.S. MAIL  
 FACSIMILE  
 EMAIL

*Christine Elmose*

The undersigned does hereby certify that the electronic brief is in compliance with all the requirements set out in I.A.R. 34.1, and that an electronic copy was served on the court and each party at the following email addresses:

Clerk of the Supreme Court  
Richard L. Stacey  
Jeff Sykes

sctbriefs@idcourts.net  
stacey@mwsslawyers.com  
sykes@mwsslawyers.com

*Susan P. Weeks*