11-15-2017

Valiant Idaho, LLC v. North Idaho Resorts, LLC Appellant's Brief Dckt. 44583

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,

vs.

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 OPENING BRIEF

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

The Honorable Barbara A. Buchanan Presiding

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case arises from a failed golf course development project undertaken by Pend Oreille Bonner Development, Inc. ("POBD") in Sandpoint, Idaho known as "The Idaho Club". March 16, 2016 Trial Tr. p. 582, l. 17 – p. 583, l. 2. On March 9, 2006, NIR entered into a Third Amended and Restated Real Property Purchase and Sale Agreement with Pend Oreille Bonner Investments, LLC ("POBI") regarding the sale of a golf course, a clubhouse and parcels of real property. Vol. III, pp. 423-432. NIR did not record a purchase money mortgage against the real property sold to POBI, but did file a memorandum of sale giving notice of its vendor's lien.[1]

Pend Oreille Bonner Development ("POBD"), a successor to POBI, mortgaged the real property multiple times and ultimately defaulted on some of the mortgages. March Trial Tr. p. 582, l. 17 – p. 583, l. 2. A loan identified as Loan No. P0099 from R.E. Loans, LLC ("RE Loans"), a mortgage identified as Loan No. P0106 from Pensco Trust Co. Custodian FBO Barney Ng ("Pensco") and a loan identified as Loan No. P0107 from Mortgage Fund '08 ("MF08") were extended to POBD. Trial Exhibits 1-3, 15-19, 21-22. Each loan was secured by a recorded mortgage. *Id.* Ultimately, these three loans were assigned to Valiant Idaho, LLC ("Valiant"). Trial Exhibits 75-85.

Valiant Idaho filed a cross-claim and third-party complaint to foreclose its assigned mortgages against co-defendants and third-party defendants, including NIR. R Vol. VI, pp. 739-767. This appeal involves the Court's cost judgment entered against NIR.

[1] NIR's vendor's lien *vis a vis* a bona fide lender was addressed by this Court on another mortgage foreclosure action on a different property parcel in the *Union Bank, N.A. v. N. Idaho Resorts, LLC*, 161 Idaho 583, 388 P.3d 907 (2017) decision.

B. COURSE OF PROCEEDINGS

Given the number of parties involved in the foreclosure proceeding, many of the pleadings are not relevant to this particular appeal. This course of proceedings is abbreviated to address those proceedings which relate to the present appeal.

This action commenced on October 13, 2009 when one of the entities providing golf development services, Genesis Golf Builders, Inc., filed an action breach of contract and to foreclose its mechanics lien, and named multiple other parties who had either filed mechanic liens or mortgages against the real property. R Vol. I, pp. 172-196. Ultimately, NIR was granted a default judgment against Genesis Golf Builders, Inc. and its causes of action against NIR were dismissed with prejudice on November 1, 2013. R. Vol. III, pp. 423-432.

Amongst the numerous defendants listed in the complaint were R.E. Loans, Pensco, and MF08; each of which were identified as claiming an interest in the real property. R Vol. I, pp. 172-196. On April 2, 2011, R.E. Loans filed an answer and affirmative defenses. Vol. II, pp. 245-259.

On August 9, 2010, ACI Northwest, Inc. ("ACI") filed a counterclaim, cross claims, and a third-party complaint. R Vol. II, pp. 204-227. R.E. Loans was named in the cross-complaint. *Id.* On February 4, 2011, R.E. Loans filed a "reply" to a cross-claim made by ACI against it. Vol. II, pp. 245-259.

On September 29, 2011, the trial court stayed any action against RE Loans and MF08 because each had filed bankruptcy. R Vol. II p.275-289. On August 24, 2012, the R.E. Loans stay was lifted. R Vol. II, pp. 325-329. On August 12, 2013, the MF08 stay with respect to MF08 was lifted. Vol. III, pp. 374-377.

Valiant Idaho, LLC entered the litigation on July 21, 2014, when it moved to substitute in the place of RE Loans as the real party in interest. R. Vol. V, pp. 656-666. The basis for Valiant's

substitution was an assignment by RE Loans of its interest to Valiant. *Id.* An order was entered on August 7, 2014, substituting Valiant in place of RE Loans. R Vol. V, pp. 667-669.

On August 21, 2014, Valiant filed a Counterclaim, Cross-Claim and Third-Party Complaint for Judicial Foreclosure ("Valiant's Complaint for Judicial Foreclosure"). R. Vol. VI, pp. 739-767. Valiant's Complaint for Judicial Foreclosure contained seven (7) causes of action. *Id.* The first three were causes of action for breach of contract against POBD for breach of the loan agreements POBD had entered into with RE Loans, Pensco, and MF08. *Id.* The next three were causes of action for judicial foreclosure of mortgages granted to RE Loans, Pensco, and MF08 related to the loan agreements. *Id.* The seventh and final cause of action was for judicial foreclosure of a redemption deed for real property taxes paid by Valiant to Bonner County. *Id.*

Each cause of action for judicial foreclosure asked for a determination of the rights of all parties pursuant to Idaho Code § 45-1302. Valiant's prayer for relief requested the following:

- Judgment for each breach of contract;
- Judgment that each mortgage assigned to Valiant, and the redemption deed, be declared a valid and existing lien on the property for the amount prayed for;
- A declaration that the interests of the Defendants are inferior to the mortgages and redemption deed;
- A declaration of the priority of Valiant's and each Defendant's interest in the property, as well as the amounts secured by each interest;
- Foreclosure of the mortgages and redemption deed, with declaration that the title, claim, interest or demand of Defendants in and to said Idaho Club Property, and every part thereof, saving and excepting the right of redemption, if any, be foreclosed;
- Sale of the property, with all its appurtenances, rights, privilege and easements;
- Application of the proceeds of sale in a specific order;
- Entry of a deficiency judgment;
- An award of costs and attorney fees; and
- Such other and further relief as deemed just and proper.

R. Vol. VI, pp. 755-758.

On September 19, 2014, NIR answered Valiant's Complaint. R. Vol. VII, pp. 860-873. NIR's answer admitted it claimed an interest in the real property encumbered by Valiant's mortgages. *Id.* at p. 864.

On October 6, 2014, VP, Incorporated ("VP") filed a motion pursuant to I.R.C.P. 15 to dismiss Valiant's Complaint for Judicial Foreclosure because Valiant had not received leave of court to file the amended pleading, and because it was filed on behalf of two parties (MF08 and Pensco) for whom Valiant was not substituted as the real party in interest. R. Vol. VIII, pp. 959-962. Not only had R.E. Loans previously filed an answer to the complaint, it had litigated against other parties, including seeking summary judgment against ACI (Vol. III, pp. 438-450; Vol. IV, pp. 451-487) and R. C. Worst & Company, Inc. (Vol. IV, pp. 488-550).

Thereafter, on November 5, 2014, Valiant filed a motion for leave to amend its answer to allege a counterclaim, cross-claim, and serve a third-party complaint. R Vol. VIII, pp. 977-981. On November 19, 2014, the district court granted Valiant leave *nunc pro tunc* to file and serve its third-party complaint, and an order granting Valiant leave to amend its answer and allege cross-claims, thereby validating the previously filed third party complaint, counterclaims and cross claim. R Vol. X, pp. 1160-1167. That same day the court entered an order denying VP's motion to dismiss Valiant's Complaint for Judicial Foreclosure. R Vol. X, pp. 1174-1177. Also on that same day the district court entered orders substituting Valiant as the real party in interest for Pensco and MF08. R Vol. X, pp. 1168-1173.

On January 20, 2015, Valiant filed a motion for summary judgment "that the mortgages assigned to Valiant by R.E. Loans, LLC, Pensco Trust Co. and Mortgage Fund '08 LLC are senior and superior to any and all interest claimed by [JV, NIR, and VP] in and to" the subject real property. R Vol. XIV, p. 1722. NIR opposed Valiant's motion for summary judgment claiming a

vendor's lien in the subject real property with priority over Valiant's mortgages. R Vol. XXI, pp. 2360-2368.

On April 14, 2015, the district court entered its memorandum decision and order granting Valiant's motion for summary judgment. R Vol. XXII, pp. 2560-2578. The district court concluded that NIR's interest in a vendor's lien was subordinated to the 2007 RE Loans Mortgage by virtue of a March 14, 2007, Subordination Agreement. R Vol. XXII, p. 2573. That order declared Valiant's interest in it mortgages and redemption deeds were "senior to any right, title and interest in the Idaho Club Property to any claim to the Idaho Club Property by" NIR. R Vol. XXII, p. 2576.

On June 16, 2015, NIR filed a motion for reconsideration and clarification of the district court's summary judgment memorandum decision and order. R Vol. XXII, pp. 2596-2597. NIR asked the district court to reconsider its decision against NIR because NIR presented sufficient evidence to raise genuine issues of material fact regarding whether RE Loans had actual knowledge of NIR's vendor's lien and the mistake in the legal description attached to NIR's partial release, and whether Valiant's predecessor's in interest were good faith encumbrancers. R Vol. XXIV, pp. 2786-2788.

On July 21, 2015, the district court entered a memorandum decision and order on NIR's motion to reconsider and held that NIR's vendor's lien was not valid and without force and effect because NIR was collaterally estopped from relitigating Judge Griffin's *Union Bank* decision in the present case. R Vol. XXIV, pp. 2871-2873.

A bifurcated 4-day court trial in which Valiant, Idaho, JV LLC and VP, Incorporated participated was conducted January 28-29, and March 16-17, 2016, to determine whether the RE Loans and Pensco loans were satisfied. R Vol. XXXVII, pp. 4589-4590. The district court

determined that neither loan had been fully satisfied and Valiant was entitled to judgment against POBD for POBD's default on each of the three loans. R Vol. XXXVII, p. 4617. A final judgment and a separate decree of foreclosure were entered by the district court on July 20, 2016. R Vol. XLIV, p. 5317 – Vol. XLV, p. 5502.

On July 6, 2016, Valiant filed a memorandum of costs and attorney fees. R Vol XLI, pp. 5019-5057. NIR filed an opposition to Valiant's memorandum of costs and attorney fees on July 20, 2016. R Vol. XLV, pp. 5503-5520. On August 22, 2016, the district court entered a memorandum decision and order awarding costs and attorney fees to Valiant. R Vol. XLVIII, pp. 5829-5843. In this decision, the district court awarded $32,464.70 as discretionary costs, finding the litigation was complex and broad in scope. *Id.* at 5839. The court assessed twenty-five percent (25%) of the costs against NIR. *Id.* at 5841-42. On August 22, 2016, the district court entered a Judgement Re: Costs and Attorney Fees, including a judgment against NIR in the amount of $10,369.93

NIR appealed the award of costs against it to Valiant on September 9, 2016. R Vol. IL, p. 5941.

C. STATEMENT OF FACTS

On March 9, 2006, NIR entered into a Third Amended and Restated Real Property Purchase and Sale Agreement with Pend Oreille Bonner Investments, LLC ("POBI") regarding the sale of a golf course, a clubhouse and parcels of real property. Vol. III, pp. 423-432. POBD mortgaged the acquired property and defaulted on its mortgages. R Vol. XXII, p. 2561.

Valiant as the assignee of the various mortgage interests filed a Counterclaim, Cross-Claim and Third-Party Complaint for Judicial Foreclosure to foreclose POBD's interest in the encumbered real property. R Vol. VI, pp. 739-767. Valiant moved for summary judgment that its

three assigned mortgages had priority to any interest claimed by NIR and others. R Vol. XIV, p. 1722. Valiant claimed that NIR's alleged vendor's lien interest in the real property was junior to its mortgages as had been adjudicated by Judge Griffin in Bonner County Case No. CV 2011-135, *Union Bank, N.A., v. Pend Oreille Bonner Development, LLC, et al.* R Vol. XIV, p. 1741. Valiant argued that Judge Griffin's decision in the *Union Bank* case acted as collateral estoppel/issue preclusion and was binding in the present.

NIR opposed the summary judgment claiming a vendor's lien on the property with priority over Valiant's mortgages. R Vol. XXI, pp. 2360-2368. NIR submitted that Judge Griffin's decision in the *Union Bank* case did not have a preclusive effect in the present case because NIR had appealed the decision. *Id.* at p. 2367. Relying on Judge Griffin's decision, Judge Buchanan granted summary judgment against NIR. R Vol. XIV, pp. 2871-2873.

Ultimately a bifurcated 4-day court trial was held on January 28-29, and March 16-17, 2016, between Valiant, JV and VP to determine a single issue: whether the RE Loans and Pensco loans had been satisfied. R Vol. XXXVII, pp. 4589-4590. The district court determined that neither loan had been fully satisfied and Valiant was entitled to judgment against POBD for POBD's default on each of the three loans. R Vol. XXXVII, p. 4617. A final judgment and a separate decree of foreclosure were entered by the district court on July 20, 2016. R Vol. XLIV, p. 5317 – Vol. XLV, p. 5502.

On July 6, 2016, Valiant filed a memorandum of costs and attorney fees. R Vol XLI, pp. 5019-5057. NIR filed an opposition to Valiant's memorandum of costs and attorney fees on July 20, 2016. R Vol. XLV, pp. 5503-5520. On August 22, 2016, the district court entered a memorandum decision order awarding costs and attorney fees to Valiant, with a portion of costs, including discretionary costs, awarded against NIR. R Vol. XLVIII, pp. 5829-5843.

NIR appealed the judgment and decree of foreclosure entered by the district court, as well as the award of costs to Valiant against NIR on September 9, 2016. R Vol. IL, p. 5941.

II. ISSUES PRESENTED ON APPEAL

1. Did the district court abuse its discretion by awarding discretionary costs against NIR without finding that the costs were exceptional and should be awarded against NIR in the interests of justice.
2. Did the district court err in its award against NIR of costs as a matter of right?

III. ARGUMENT

A. STANDARD OF REVIEW

This Court's standard of review of an award of discretionary costs has been set forth by the Court as follows:

> The grant or denial of discretionary costs is "committed to the sound discretion of the district court," and will only be reviewed by an appellate court for an abuse of that discretion. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 857, 920 P.2d 67, 73 (1996), *cert. denied,* 520 U.S. 1115, 117 S.Ct. 1245, 137 L.Ed.2d 327 (1997). In considering whether the trial court abused its discretion in ruling on a request for discretionary costs, we make a three-step inquiry: "(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." *Id.*

Fish v. Smith, 131 Idaho 492, 493, 960 P.2d 175, 176 (1998).

B. THE DISTRICT COURT'S AWARD OF DISCRETIONARY COSTS AGAINST NIR WAS AN ABUSE OF DISCRETION

The district court abused its discretion in awarding Valiant discretionary costs because the district court never recognized its discretion, never affirmed that it was acting within the bounds of its discretion, never applied the applicable legal standards, and did not reach its determination through an exercise of reason. Therefore, the district court's award of discretionary costs should be set aside.

Idaho Rule of Civil Procedure 54(d) allows the trial court to award a prevailing party costs of an action.[2] The rules of civil procedure categorize costs in two groups: costs as a matter of right, and discretionary costs. IRCP 54(d)(1)(C) and (D). Costs as a matter of right are specifically enumerated and limited to those enumerated. IRCP 54(d)(1)(C). Discretionary costs are those "[a]dditional items of cost not enumerated in, or in an amount in excess of [costs as a matter of right]." IRCP 54(d)(1)(D). Discretionary costs "may be allowed 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 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." *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 is 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 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). A review of the trial court's

[2] Appellant NIR makes no challenge on appeal to the district court's prevailing party determination.

memorandum decision and order awarding discretionary costs against NIR reveals that the award was an abuse of discretion.

1. The District Court did not Perceive its Award of Discretionary Costs as a Matter of Discretion

The district court's decision never affirmed or mentioned that it was exercising its discretion in awarding Valiant discretionary costs. Indeed, the district court's only use of the term "discretionary" was in the context of the term "discretionary costs" as used in IRCP 54(d)(1)(D). R Vol. XLVIII, pp. 5838-5842. Thus, the district court failed to perceive the issue as one of discretion.

2. The District Court did not Act within the Boundaries of its Discretion or Consistent with Applicable Legal Standards

The district court did not act within the boundaries of its discretion because it awarded discretionary costs despite Valiant's failure to make a showing that the costs were exceptional and should in the interest of justice be assessed against NIR. The district court's award is also inconsistent with Idaho's case law.

Rule 54(d)(1)(D) limits the court's ability to award discretionary costs to instances where the movant or requesting party makes 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). Idaho Rule of Civil Procedure 54(d)(1)(D) does not define what it means for a cost to be "exceptional."

This Court has held the trial court "may evaluate whether costs are exceptional within the context of the nature of the case." *Nightengale v. Timmel*, 151 Idaho 347, 354, 256 P.3d 755, 762 (2011). Idaho case law has developed a consistent definition of an exceptional cost: An exceptional cost is one that is uncommon in the particular type of case, or that arises from a case

that itself is exceptional. The second standard, or the "exceptional case standard," was set forth in *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005), as follows: "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."

The first standard, uncommon costs in a particular type of case, has been upheld by this Court on numerous occasions. For instance, this Court has held "[c]ertain cases, such as personal injury, [sic] cases generally involve copy, travel and expert witness fees such that these costs are considered ordinary rather than "exceptional" under I.R.C.P. 54(d)(1)(D)." *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005).

The standard that an exceptional cost must be uncommon for the type of case was upheld by this Court in the *Fish v. Smith* case as follows:

> Fish contends that the trial court abused its discretion because it failed to define "exceptional." In fact, by its reasoning in ruling that the requested costs were not exceptional, the trial court did give meaning to this word. The trial court pointed out that "expert witnesses—medical; neuropsychological; accident reconstruction; vocational; and so forth—routinely testify in serious personal injury actions," and that "[t]he vast majority of litigated personal injury cases ... routinely require an assessment of the accident and the alleged injuries by various sorts of doctors of medicine, accident reconstructionists, vocational experts and so on." The trial court concluded: "This is the very 'nature' of these sorts of cases. Similarly, travel and lodging expenses for expert witnesses and attorneys and photocopy expenses are not exceptional but, on the contrary, are common 'in a case of this nature.'" This demonstrates the trial court's understanding of the meaning of "exceptional" as contained in I.R.C.P. 54(d)(1)(D).

Fish v. Smith, 131 Idaho 492, 493–94, 960 P.2d 175, 176–77 (1998).

This Court upheld a similar trial court ruling in *Inama v. Brewer*, 132 Idaho 377, 384, 973 P.2d 148, 155 (1999), where the basis of the denial of the discretionary costs award was the common nature of the costs requested for the type of case at issue:

> The trial court stated that "[s]ix-figure cases involving substantial discovery, substantial copying charges, and expert witnesses who charge more than $500.00 no longer are unusual or extraordinary. For the most part the claimed discretionary costs were routine costs associated with modern litigation overhead." The trial court's express finding that the discretionary costs were reasonable and necessary but not exceptional after identifying the general nature of the discretionary costs satisfied the requirement that it make express findings.

Inama v. Brewer, 132 Idaho 377, 384, 973 P.2d 148, 155 (1999).

This Court has held that a district court abused its discretion in awarding expert witness fees in a medical malpractice action simply because the expert testimony was necessary to the nature of the case:

> Here, the only reason given by the district court to award expert witness fees as a discretionary cost is that the case required experts on the vascular system to travel and testify. Expert witness testimony is required in every malpractice case, I.C. § 6–1012, **thus the district court seems to have concluded that the expert witness fees were exceptional simply due to the case being one for medical malpractice.** Absent other findings, there is no basis for every expert witness' testimony to be considered "exceptional" simply because it requires specialized knowledge. *Fish v. Smith*, 131 Idaho 492, 493–94, 960 P.2d 175, 176–77 (1998) (not an abuse of discretion to find that the cost of hiring experts on accident reconstruction and medical diagnosis is routine and not exceptional in personal injury cases). **That specialized knowledge and expert testimony is exactly the type of "ordinary" cost of both proving and defending a medical-malpractice claim.** The fact that "[t]hese physicians were required to understand the local standard of health care practice and to have knowledge and understanding of causation as it related to damages" does not provide any basis as to why the costs are "exceptional" for a medical malpractice case. Because the district court did not provide sufficient findings under Rule 54(d)(1)(D) for why these costs are exceptional we find that it abused its discretion. The award of $10,730 in expert witness fees for Dr. Moorhead, $8625 for Dr. Huang, and $829 for Dr. Barros–Bailey is vacated.

Nightengale v. Timmel, 151 Idaho 347, 354–55, 256 P.3d 755, 762–63 (2011) (emphasis added).

Eighteen (18) years ago Justice Silak, in a dissenting opinion, challenged a district court's award of discretionary costs for attorney air travel to out-of-state depositions because of the common nature of the costs of air travel in modern litigation:

> I am especially troubled by the district court's award of airfare to DeBest. An attorney might be required to travel to attend a deposition in almost any case. Considering the lengthy nature of civil litigation and the mobility of post-modern society, attorneys are often required to purchase plane tickets to attend out-of-state depositions. If a party is entitled to travel expenses of such an ordinary and mundane nature, it is difficult to say what could not be awarded as an "exceptional" discretionary cost.

Richard J. & Esther E. Wooley Tr. v. DeBest Plumbing, Inc., 133 Idaho 180, 188, 983 P.2d 834, 842 (1999) (Silak, J. & Trout, C.J., dissenting). With the continued proliferation of air travel in the last two decades it is puzzling for airfare and travel costs to be characterized as exceptional for purposes of an award of discretionary costs awarded by a trial court.

According to Idaho's case law on the issue, if an expense is ordinary and common to the type of action before the trial court, it is an abuse of discretion to make a discretionary cost award for that cost.

i. Valiant Failed to Carry its Burden to Show Exceptional Costs and Justice in Awarding Those Costs Against NIR

In this case, there was no evidence presented to the district court that any of the discretionary costs requested by Valiant were exceptional or uncommon in a commercial foreclosure action of this magnitude. Valiant also failed to address why justice would require the discretionary costs be taxed against NIR as opposed to any of the other parties to the action, such as POBD. Initially Valiant simply alleged its requested discretionary costs were necessary and exceptional without providing any reason why the costs were "exceptional." R Vol. XLI, pp. 5052-5055. Valiant never alleged that any of its claimed discretionary costs were exceptional or that its

case was exceptional. *Id.* The nearest Valiant approached to arguing that the costs were exceptional was to claim that the litigation in this case was complex. R Vol. XLI, pp. 5052-5055. However, Valiant provided no support for its contention that complexity of an action renders all its associated costs exceptional and uncommon. In fact, as this Court acknowledged in *Fish,* some cases are complex from the very nature of the case, and such complexity is expected.

In reply to NIR's objection to Valiant's requested discretionary costs, Valiant admitted that the only reason it believed the discretionary costs it requested were exceptional was because it believed NIR acted frivolously throughout the action, making the action itself 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. The trial court rejected Valiant's argument that NIR, VP and JV had defended their positions frivolously. R Vol. XLVII, pp. 5835-5837. No appeal was made from the trial court's finding. Valiant failed to present any other argument why these costs were uncommon or exceptional.

Turning to the specific costs, Valiant requested an award for its litigation guarantee dost. Valiant completely failed to show that this cost was exceptional in a mortgage foreclosure action, and in the interest of justice should be assessed against NIR. Indeed, Valiant acknowledged that the cost for a litigation guarantee has no relationship to the "frivolous" actions of the defendants. R Vol. XLVII, p. 5767. Litigation guarantees are a common expense for a judicial foreclosure. As such, it should not have been awarded as an exceptional cost.

Valiant also failed to meet its burden to establish that any of its other requested discretionary costs should in the interest of justice be assessed against NIR. Valiant never set forth any reasons why justice would require NIR be taxed with an award of discretionary costs, other than its argument that NIR acted frivolously. R Vol. XLI, pp. 5052-55; R Vol. XLVII, p. 5767. As noted above, the district court disagreed with Valiant that NIR acted frivolously.

In fact, many of the costs were incurred after summary judgment was granted against NIR. NIR did not participate at trial because summary judgment had already been granted against it. Thus, the witness fees, exhibit costs, electronic discovery costs, in-house photocopying expenses, out-sourced photocopy expenses and travel expenses for counsel unrelated to NIR's summary judgment would not relate to NIR and should not have been awarded against it.

Even if such costs were incurred while NIR was still a party, the trial court failed to determine a basis for finding they were exceptional. In *Easterling v. Kendall,* 159 Idaho 901, 367 P.3d 1214, 1229 (2015), this Court reiterated "[i]n *Hoagland* [*v. Ada County,* 154 Idaho 900, 303 P.3d 587 (2013)], 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.' *Id.* (emphasis in original)."

The district court did not act within the boundaries of its discretion when it awarded discretionary costs to Valiant. Valiant made no showing under IRCP 54(d)(1)(D) that the discretionary costs it sought were exceptional and in the interest of justice should be assessed against NIR. More importantly, the district court made no finding why it considered the discretionary costs requested by Valiant to be exceptional costs.

ii. The District Court Did Not Act Within the Boundaries of its Discretion or Consistent with Applicable Legal Standards

The district court also abused its discretion by awarding discretionary costs inconsistent with the applicable legal standards. The district court's stated rationale for awarding the discretionary costs highlights the inconsistency of the award with Idaho law. Simply put, the district court awarded Valiant discretionary costs because they were not available as costs as a matter of right and were costs necessarily incurred by Valiant:

> 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. The district court's reasoning is incongruent: the discretionary costs were necessary litigation costs, but not compensable as costs as a matter of right. Therefore, they can be awarded as discretionary costs.

This is the same abuse of discretion recognized in the *Nightengale v. Timmel*, 151 Idaho 347, 354–55, 256 P.3d 755, 762–63 (2011), where this Court held that the necessity of a cost does not equate to its exceptional nature. Indeed, the district court's reasoning fails to recognize the applicable legal standards for an award of discretionary costs because it never makes any findings that any of the costs are uncommon in a commercial mortgage foreclosure action.

Looking to the discretionary costs awarded by the district court, it is apparent that the costs, while perhaps necessary and reasonably incurred, are all common in a commercial foreclosure action. Addressing the litigation guarantee first, there was no showing made, nor facts to support a conclusion, that the cost of a litigation guarantee in this commercial foreclosure action was

uncommon. Recently in a special concurring opinion, Justice Jim Jones mentioned that obtaining a litigation guarantee in aid of commercial foreclosure is common and an exercise of due diligence:

> ACI did due diligence by obtaining a litigation guaranty prior to commencing its foreclosure action and naming as parties those who were listed in the litigation guaranty. The result here is harsh from ACI's standpoint but it may have some recourse through its litigation guaranty.

Sims v. ACI Northwest., Inc., 157 Idaho 906, 342 P.3d 618, 627 (2015) (J. Jones, J., concurring). Indeed, in a related case this Court encouraged the use of a litigation guarantee to ensure proper parties are named in a foreclosure action: "Further, Sims's confusion could have been cleared up had he taken the simple step of obtaining a title report or litigation guaranty from a title company." *Sims v. Jacobson*, 157 Idaho 980, 342 P.3d 907, 914 (2015). The Appellant submits to this Court that litigation guarantees are common place in all types of foreclosure actions, including mortgage foreclosure actions, and especially when the commercial mortgages encumber multiple parcels of real property.

The district court never made any specific finding that the litigation guarantee cost was exceptional or uncommon. To the contrary, the district court only reasoned that the cost of a litigation guarantee was necessary:

> In order to ensure that every person or entity with an interest in the Idaho Club Property was names as a defendant in the Valiant Foreclosure, Valiant obtained and paid for a Litigation Guarantee. This Litigation Guarantee was critical to the foreclosure action.

R Vol. XLVIII, pp. 5840. Necessary and reasonably incurred are not the same standard as "exceptional." To support a finding that the cost of the litigation guarantee was exceptional, the district court was required to find that the cost was uncommon in a commercial mortgage foreclosure action. The district court failed to make that finding and thus, abused its discretion in awarding Valiant the cost of the litigation guarantee as a discretionary cost.

Each of the other discretionary costs awarded by the district court suffers from the same flaw: none are supported by findings that the costs were uncommon in a commercial mortgage foreclosure action. Indeed, each of the "discretionary costs" awarded by the district court can be described as "routine costs associated with modern litigation overhead," rather than exceptional costs. *See City of McCall v. Seubert*, 142 Idaho 580, 589, 130 P.3d 1118, 1127 (2006) (trial court did not abuse discretion in denying claim for discretionary costs when costs were routine).

The district court never made a finding that the costs of travel for Valiant's counsel was uncommon or exceptional, only that the travel costs were necessary and significant. R Vol. XLVIII, p. 5840. As Justice Silak stated almost two decades ago, costs for travel are "ordinary and mundane" and not exceptional. *DeBest Plumbing, Inc.*, 133 Idaho at 88, 983 P.2d at 842 (Silak, J. & Trout, C.J.., dissenting).

Each of the remaining discretionary costs awarded by the district court are also "routine costs associated with modern litigation overhead" and so "ordinary and mundane" that they should not qualify as exceptional or uncommon costs. All litigation includes expenses for copying and scanning pleadings, correspondence, and other case related documents. Every litigation includes costs of propounding and processing discovery. Every litigation includes costs for postage and courier services. Every litigation involves costs for telephone calls and conferences. Litigation with trial witnesses almost always includes costs of witnesses exceeding the meager $20 allowable as a matter of right. While the district court in some instances found that the costs Valiant incurred were necessary, it failed to make any findings that the costs were uncommon for this type of litigation. R Vol. XLVIII, pp. 5840-41. Instead the district court included conclusory "magic words" stating that each category of costs was "necessary and exceptional, reasonably incurred, and should in the interest of justice be assessed against the defendants." R Vol. XLVIII, pp. 5840-

41. Such conclusory "findings" do not satisfy the requirements of IRCP 54(d)(1)(D), nor the case law interpreting and applying that rule.

The district court also completely failed to address how any of the awarded discretionary costs should in the interest of justice be assessed against NIR, as opposed to any of the other defendants in the action. This failure is most evident with the award of costs for the litigation guarantee. The cost of the litigation guarantee was incurred before NIR was even made a party to the action. Indeed, the entire purpose of ordering the litigation guarantee was to determine "every person or entity with an interest in the Idaho Club Property" so each identified party could be "named as a defendant in the Valiant Foreclosure." R Vol. XLVIII, pp. 5840. The only party that had any responsibility and fault for the foreclosure action was POBD, the party who defaulted on its mortgage payments. Surprisingly, the district court never even considered assessing the cost of the litigation guarantee against POBD. It likewise never addressed why NIR should be responsible for such a cost. The same is true for each of the other discretionary costs awarded, the district court never addressed why the interests of justice would require the costs to be awarded against NIR. Therefore, the district court abused its discretion in awarding the discretionary costs against NIR because it never considered whether an award against NIR, or alternatively against one of the other parties, satisfied the interests of justice.

3. The District Court did not Reach its Determination through an Exercise of Reason

The district court abused its discretion in awarding Valiant discretionary costs against NIR because its award was not reached through an exercise of reason. As set forth above, the district court's reason for awarding Valiant discretionary costs was that the costs were necessary and not otherwise compensable as costs as a matter of right. R Vol. XLVIII, pp. 5839-40.

Perhaps the best example of the lack of reason in the district court's award of discretionary costs is the award for the litigation guarantee and the apportionment ratios chosen by the district court. As set forth above, there is absolutely no reason why NIR should be taxed with the costs of a litigation guarantee. Assuming arguendo that the litigation guarantee is an exceptional cost, there is no reason why any party other than POBD should be taxed with that cost. Thus, the district court did not reach its determination through an act of reason.

Similarly, the district court's apportioning ratios of the discretionary costs lack a reasonable method of determination and was not authorized by Rule 54. Idaho Rule of Civil Procedure 54(d)(1)(B) only allows the trial court to apportion costs awarded between the parties when it finds that a party only partially prevailed:

> Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the final judgment or result of the action in relation to the relief sought by the respective parties. **The trial court may determine that a party to an action prevailed in part and did not prevail in part, and on so finding may apportion the costs between and among the parties in a fair and equitable manner** after considering all of the issues and claims involved in the action and the resulting judgment or judgments obtained.

IRCP 54(d)(1)(B) (emphasis added). The plain language of the rule limits the court's ability to apportion costs between parties to situations where the court determines "a party to an action prevailed in part and did not prevail in part." *Prouse v. Ransom*, 117 Idaho 734, 739, 791 P.2d 1313, 1318 (Ct. App. 1989) (Rule 54(d)(1) gives a trial judge discretionary authority to apportion costs if both parties prevail). The district court in this case never decided there was a party that prevailed in part and did not prevail in part. To the contrary, the district court unequivocally determined that Valiant was the prevailing party in the action. R Vol. XLVIII p. 5831. Thus, the

district court's allocation of costs pursuant to IRCP 54(d)(1)(B) was an abuse of discretion and unsupported by the rules of civil procedure.

The standard by which the district court should have based its award of discretionary costs against the various parties is IRCP 54(d)(1)(D) where an assessment of costs is limited to those that "should in the interest of justice be assessed against the adverse party." As set forth above, the district court completely failed to satisfy this standard in its discretionary costs award.

Rather than addressing what parties in the interest of justice should be taxed with discretionary costs, the district court awarded those costs against NIR, VP, and JV according to a ratio that it created with no explanation. R Vol. XLVIII p. 5841. The ratio appears to account for the fact that NIR was dismissed at summary judgment and participated in the case less than VP and JV, who, according to the ratios given, had an equal involvement in the case. *Id.* The lack of explanation for how these ratios were derived and the lack of equating these ratios to specific acts of the parties and any correlation to any of the specific discretionary costs awarded evidences that this "apportionment" was not created by an exercise of reason and does not satisfy the interests of justice. There is no reason or justice in taxing NIR 25% of the cost of a litigation guarantee that was obtained before NIR had even appeared in the case. If NIR had simply allowed Valiant to take a default judgment against it in this case, that cost would not have been avoided. There is no reason or justice to tax NIR 25% of the travel costs of Valiant, when Valiant chose to engage attorneys in Boise rather than attorneys closer to the subject property and venue of the action. There is no reason or justice in taxing NIR 25% of the ordinary and mundane litigation costs incurred by Valiant in this case.

NIR's actions in this case bear no responsibility for the cost of the litigation guarantee. NIR's actions bear no responsibility for the ordinary and mundane litigation costs that Valiant

incurred in this action. Most importantly, the district court failed to make any reasoned finding that any of these costs were the result of actions of NIR and that justice requires NIR be taxed with these costs. Therefore, the district court abused its discretion in awarding discretionary costs against NIR.

C. THE DISTRICT COURT'S AWARD OF CERTAIN COSTS AS A MATTER OF RIGHT WAS AN ABUSE OF DISCRETION.

Costs as a matter of right are awarded pursuant to I.R.C.P. 54(d)(1)(C). The district court awarded Valiant their entire filing fees as a matter of right. However, the only filing fee that related to NIR was the $14.00 fee for filing Valiant's Third Party Complaint against NIR. As to witness fees, NIR was no longer a party when the depositions of Linscott and Ng were taken. Regarding certified copies for use at trial, NIR did not participate at trial. The same is true regarding charges for reporting and transcribing depositions of trial witnesses. These were taken after summary judgment was granted against NIR. Thus, the trial court's allocation of twenty-five percent of these costs as a matter of right incurred after summary judgement was granted against NIR was an abuse of discretion.

IV. 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 13th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 2016, I caused to be served a true and correct copy of the foregoing instrument by the method indicated below, and addressed to the following:

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Christine Elmore

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

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