2-8-2018

Valiant Idaho, LLC v. JV L.L.C. Respondent's Brief Dckt. 44584

IN THE SUPREME COURT OF THE STATE OF IDAHO

GENESIS GOLF BUILDERS, INC., *etc.,* Plaintiff, vs. **PEND OREILLE BONNER DEVELOPMENT, LLC**; *et al*., Defendants.	**SUPREME COURT NO. 44584-2016**
VALIANT IDAHO, LLC, an Idaho limited liability company, Cross-Claimant-Respondent, vs. **JV L.L.C.,** an Idaho limited liability company, Cross-Defendant-Appellant.	
AND RELATED ACTIONS.	

RESPONDENT'S BRIEF

Appeal From The District Court Of The First Judicial District In And For The County Of Bonner | Case No. CV-2009-1810

Honorable Barbara A. Buchanan, District Judge, Presiding

Richard L. Stacey, ISB #6800
stacey@mwsslawyers.com
McConnell Wagner Sykes & Stacey PLLC
827 East Park Boulevard, Suite 201
Boise, Idaho 83712
Telephone: 208.489.0100
Facsimile: 208.489.0110
Attorneys For Respondent Valiant Idaho

John A. Finney, Esq.
johnfinney@finneylaw.net
Finney Finney & Finney, P.A.
120 East Lake Street, Suite 317
Sandpoint, Idaho 83864
Telephone: 208.263.7712
Facsimile: 208.263.8211
Counsel For Appellant JV L.L.C.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases:

Statutes:

State Rules:

State Rules (cont'd):

Treatises:

I.
STATEMENT OF THE CASE

A. Introduction.

JV L.L.C. ("JV") apparently appeals several district court decisions in favor of Valiant Idaho, LLC ("Valiant") in Bonner County Case No. CV-2009-1810. JV challenges the district court's determination that *Hardy v. McGill*, 137 Idaho 280, 47 P.3d 1250 (2002), is unambiguous precedent governing the priority of amounts paid to redeem real property from a tax deed vis-á-vis the priority of amounts secured by mortgages that were recorded prior to the issuance of the tax deed. JV contends that the facts of the case at bar are distinguishable, such that *Hardy v. McGill* does not apply. JV's contention is frivolous; it is without any bases in fact or law; and it should be rejected.

JV also challenges the district court's award of discretionary costs and costs as a matter of right in the amount of $15,554.88, and its award of sanctions in the amount of $5,724.00. As JV has failed to point to any abuse of discretion by the district court in awarding these amounts to Valiant, these arguments should also be rejected.

B. Relevant Factual And Procedural History.

The underlying case is an exceptionally complex real estate foreclosure and lien priority lawsuit arising out of a failed golf course and residential housing development project located in Sandpoint, Idaho (commonly known as "The Idaho Club"). Valiant's interests in The Idaho Club arise out of three mortgages that were assigned to it by RE Loans, LLC ("RE Loans") (*i.e.*, "RE Loans Mortgage"), Pensco Trust Co. f/b/o Barney Ng ("Pensco") (*i.e.*, "Pensco Mortgage")

and Mortgage Fund '08, LLC ("MF08") (*i.e.*, "MF08 Mortgage") (collectively, "Valiant Mortgages"). R.Vol. XXII, pp. 2562-66. JV's interest in The Idaho Club arises out of a mortgage ("JV Mortgage") it recorded against certain of The Idaho Club property that JV sold to the developer. *Id*., pp. 2566-68. The developer of this failed project was Pend Oreille Bonner Development, LLC ("POBD"). R.Vol. XVII, pp. 1913-19; R.Vol. XXV, p. 2960.

The case commenced on October 13, 2009, when Genesis Golf Builders, Inc. filed its lawsuit to foreclose a mechanic's and materialmen's lien. R.Vol. I, pp. 172-96. After two years of motion practice and an almost two-year long bankruptcy stay,[1] litigation resumed and the plaintiff's claims were dismissed with prejudice. *See* R.Vol. II, pp. 275-83; pp. 284-89; pp. 325-20; R.Vol. III, pp. 374-77; pp. 383-85.

On June 13, 2014, while this litigation was ongoing, RE Loans sold and/or assigned to Valiant its promissory note, loan documents, and the RE Loans Mortgage. R.Vol. XV, pp. 1749, 1779-82. On June 20, 2014, Pensco sold and/or assigned to Valiant its promissory note, loan documents and the Pensco Mortgage. *Id*., pp. 1750, 1783-84. On July 10, 2014, MF08 sold and/or assigned to Valiant its promissory note, loan documents and the MF08 Mortgage. *Id*., pp. 1750, 1785-87.

1 The first bankruptcy stay was entered on September 29, 2011 and the second bankruptcy stay was lifted on August 12, 2013. R.Vol. II, pp. 275-89; R.Vol. III, pp. 374-77. As such, a bankruptcy stay was in effect during this entire period.

At the time Valiant purchased the RE Loans Mortgage and Pensco Mortgage, property taxes for tax years 2008, 2009, 2010, 2011, 2012, 2013 and 2014 were unpaid and still outstanding against the real property securing said loans. R.Vol. XV, pp. 1749, 1764-78. Moreover, Bonner County had already levied upon said real property and issued tax deeds for it in favor of the County. *Id*. On July 2, 2014, prior to a tax sale by Bonner County, JV redeemed a portion of The Idaho Club golf course by payment in the amount of $140,999.86. Trial Ex. L. In exchange for this payment, JV received a Redemption Deed from Bonner County that was recorded in the Bonner County Recorder's Office on July 7, 2014 ("JV Redemption Deed").[2] *Id*. Although the JV Redemption Deed was submitted into evidence at trial, it was not submitted into evidence prior to the motion for summary judgment or motions to reconsider from which JV appeals. On the same date the JV Redemption Deed was recorded, and still prior to a tax sale by Bonner County, Valiant redeemed the remainder of the real property subject to Bonner County's tax deeds. Valiant paid $1,665,855.14 to redeem. R.Vol. XV, pp. 1749, 1764-78. In exchange for this payment Valiant received a Redemption Deed from Bonner County that was recorded in the Bonner County Recorder's Office on July 8, 2014 ("Valiant Redemption Deed").[3] *Id*.

2 JV's Redemption Deed was subsequently re-recorded on August 22, 2014 to correct an erroneous legal description.

3 Valiant's Redemption Deed was subsequently re-recorded on August 22, 2014 to correct an erroneous legal description.

After the assignment of the Valiant Mortgages and redemption of the real property subject to the tax deeds, the primary focus of this case became the foreclosure of the Valiant Mortgages. Valiant substituted on behalf of RE Loans, Pensco and MF08 and filed its Counterclaim, Cross-Claim, and Third-Party Complaint For Judicial Foreclosure ("Valiant Cross-Claim"). R.Vol. V, pp. 670-73; R.Vol. X, pp. 1168-73; R.Vol. VI, pp. 739-67.

Extensive motion practice ensued thereafter and continued until several months after the trial was completed. However, only a very small part of this motion practice is relevant to the JV Appeal.

On January 20, 2015, Valiant filed a motion for summary judgment and supporting documents ("Valiant SJ Motion") against JV and two other defendants. R.Vol. XIV, pp. 1720-75. The Valiant SJ Motion sought to establish, *inter alia*, that there is no issue of material fact such that "any rights retained by JV in the Idaho Club Property pursuant to the JV Mortgage are junior in right, title and interest to Valiant's interest in the Idaho Club Property" by virtue of the Valiant Mortgages and the Valiant Redemption Deed. R.Vol. XIV, pp. 1739-40. This argument was premised upon the following undisputed facts: (1) the Valiant Mortgages were recorded in the Bonner County Recorder's Office on March 15, 2007,[4] August 6, 2008 at 1:37 p.m.,[5] and August 6, 2008 at 3:37 p.m.;[6] (2) the JV Mortgage was recorded in the Bonner County Recorder's Office on October 24, 1995;[7] and (3) JV subsequently recorded subordination agreements in the

4 *See* R.Vol. XVII, pp. 1915, 1962-93.
5 *See* R.Vol. XVII, pp. 1917, 2001–30.
6 *See* R.Vol. XVII, pp. 1918, 2039-69.
7 *See* R.Vol. XV, pp. 1750, 1788-97.

Bonner County Recorder's Office on March 15, 2007[8] and August 6, 2008[9] expressly subordinating the JV Mortgage to the Valiant Mortgages. The Valiant SJ Motion further sought an adjudication – pursuant to *Hardy v. McGill*, 137 Idaho 280, 286, 47 P.3d 1250, 1256 (2012) – that the amounts Valiant paid to redeem The Idaho Club property should be added to the amounts owed by POBD pursuant to the underlying loan agreement and secured by the first priority RE Loans Mortgage. R.Vol. XIV, pp. 1742-43.

On February 15, 2015, JV filed an opposition to the Valiant SJ Motion. R.Vol. XIX, p. 2076. Although it is difficult to decipher exactly what JV was attempting to argue with respect to the JV Redemption Deed, it did not assert that said Deed had priority over the Valiant Mortgages based upon any of the arguments set forth in Appellant's Brief ("JV Appeal"). R.Vol. XIX, pp. 2099-2100. JV subsequently amended its opposition on February 27, 2015. R.Vol. XXII, p. 2505. The supplemental memorandum did not mention the JV Redemption Deed. *Id*.

On April 14, 2015, the district court entered its Memorandum Decision & Order Granting Valiant Idaho LLC's Motion For Summary Judgment Against JV, LLC, North Idaho Resorts, LLC and VP, Incorporated ("SJ Decision & Order"). *Id*., p. 2560. The district court ruled that "it is undisputed that any rights retained by JV in the Idaho Club Property pursuant to the JV Mortgage are junior in right, title, and interest to Valiant's interest in the Idaho Club Property." *Id*., p. 2572.

8 *See* R.Vol. XV, pp. 1751, 1804-16.

9 *See* R.Vol. XV, pp. 1751, 1817–31.

JV has not appealed this determination. The district court further held that "Valiant is entitled to include the amount paid to Bonner County to redeem the property with the amount due under the 2007 RE Loans Note and that amount is entitled to the priority date of the 2007 RE Loans Mortgage (*i.e.*, March 15, 2007)." *Id*., p. 2575.

On April 28, 2015, JV filed its Motion to Alter, Amend and to Reconsider the Court's Memorandum Decision and Order Filed 4/14/2015 and Request For Oral Argument Time/Date For a Hearing; Not Yet to Be Set ("JV's 1st Motion to Reconsider"). R.Vol. XXII, p. 2579. This motion did not mention JV's Redemption Deed or any of the associated arguments raised in the JV Appeal. *Id*. On July 21, 2015, the district court entered its Memorandum Decision and Order ("Denial of 1st Motion to Reconsider") rejecting, *inter alia*, all arguments raised in JV's 1st Motion to Reconsider. R.Vol. XXIV, p. 2856. The Denial of the 1st Motion to Reconsider reiterated that *Hardy v. McGill* was controlling precedent and held that the payor of back taxes to redeem property from a tax deed is entitled to enforce this indebtedness as part of the underlying contract and the amount paid is entitled to the same priority as the mortgage securing the amounts owed pursuant to said contract. *Id*., pp. 2574-75.

On July 30, 2015, JV filed its Motion to Alter, Amend, and Reconsider the Court's Memorandum Decision and Order Re: JV L.L.C.'s Motions to Reconsider, and JV L.L.C.'s Motion For Partial Summary Judgment For Affirmative Relief Concerning JV, L.L.C.'s Redemption Deed and as to Valiant's Redemption Deed; and Request For Hearing ("JV's 2nd Motion to Reconsider"). R.Vol. XXV, p. 2967. This motion raised for the first time a version of the argument referred to in

the JV Appeal as the "title theory" argument. *Id*., pp. 2967-80. However, JV did not raise or otherwise assert any version of its "lien theory" argument. *Id*. JV's "lien theory" argument was raised for the first time in the JV Appeal.

On August 26, 2015, JV filed its third motion to alter, amend, and set aside the district court's prior rulings. R.Vol. XXVII, p. 3386. This motion did not make any arguments relevant to this appeal. *Id*.

On September 4, 2015, the district court entered its Memorandum Decision & Order Granting in Part Reconsideration of the July 21, 2015 Memorandum Decision & Order ("Denial of 2nd Motion to Reconsider"). R.Vol. XXX, p. 3527. Although the district court reconsidered a portion of its prior decisions on two discrete issues that are unrelated to this appeal, the court reaffirmed its prior decisions with respect to the JV Redemption Deed. *Id*., p. 3530. JV apparently appeals the SJ Decision & Order and the Denial of the 2nd Motion to Reconsider.

On July 20, 2016, after a bifurcated four-day bench trial, Valiant was awarded a judgment ("Judgment") against POBD in the amount of $21,485,212.26. R.Vol. XLV, pp. 5413-16. The Judgment further declared that the Valiant Mortgages were prior in right, title and interest to the JV Mortgage and the JV Redemption Deed. *Id*. On August 22, 2016, Valiant was awarded attorneys' fees and certain costs against POBD in the amount of $731,275.48 ("Attorneys' Fees Judgment"). Valiant was also awarded certain other costs against JV totaling $15,554.88, which JV has appealed. R.Vol. XLVIII, pp. 5844-46.

On July 20, 2016, the district court also entered the Decree of Foreclosure ordering the sale of one hundred fifty-six (156) parcels of real property ("Foreclosed Property") secured by the Valiant Mortgages to satisfy the Judgment. R.Vol. XLIV, pp. 5317-12. The Bonner County Sheriff noticed the sale of the Foreclosed Property to occur on November 7, 2016. R.Vol. LXIII, p. 7715. On October 14, 2016, the Sheriff sent letters notifying all interested parties of the sale and posted/published the notice of sale in accordance with Idaho Code § 11-302. R.Vol. LX, pp. 7392-93.

On November 2, 2016, only three business days prior to the sheriff's sale, JV filed a Motion and Application For Stay Upon Posting a Cash Deposit and a Third Party Claim seeking to further postpone the sale. R.Vols. LIX and LX, pp. 7341-57. Valiant filed its Motion Contesting JV, LLC's Third Party Claim and Opposition to JV, LLC's Motion to Stay Execution with supporting documents the following day. R.Vol. LX, pp. 7361-72. Valiant also filed a Motion For Sanctions against JV and its counsel. *Id*., pp. 7375-76. The district court held an emergency hearing on November 4, 2016 and verbally dismissed JV's motion and third-party claim with respect to the Foreclosed Property. R.Vol. LX, p. 7402. On November 14, 2016, the district court entered its Memorandum Decision & Order Granting Valiant Idaho, LLC's Motion For Sanctions, ruling that JV's attempt to postpone the sheriff's sale at the last minute was: "(1) . . . presented for [] improper purposes, such as to harass, cause unnecessary delay, or needlessly increase the costs of litigation; [and] (2) the claims, defenses, and other legal contentions therein are not warranted by

existing law. . . ." *Id*., pp. 7408-09. Valiant was subsequently awarded a judgment for said sanctions in the amount of $5,724.00, which JV has appealed. R.Vol. LX, p. 7462.

JV did not post a supersedeas bond or other security to prevent Valiant from executing upon the Judgment. As such, the sheriff's sale of the Foreclosed Property took place as scheduled on November 7, 2016. One parcel was purchased by a third party for $70,000.00; the proceeds of which were paid to Valiant to reduce the Judgment amounts. R.Vol. LXVI, pp. 8172-74. The remaining one hundred fifty-five (155) parcels were purchased by Valiant after credit bidding a portion of the Judgment amounts. R.Vols. LXII - LXVI, pp. 7747-8227. The parcels purchased by Valiant include the five parcels described on the JV Redemption Deed ("Five Parcels"). JV does not dispute that these lots are subject to the Valiant Mortgages. The JV Appeal only challenges the priority of the Valiant Mortgages with respect to the Five Parcels.

Valiant did not credit bid the entire Judgment at the sale. Valiant is still owed $165,000.00 pursuant to the Judgment.

II.
ADDITIONAL ISSUES PRESENTED ON APPEAL

There are no additional issues presented on this appeal.

/ / / /

/ / / /

/ / / /

/ / / /

III.
ATTORNEYS' FEES ON APPEAL

Valiant requests attorneys' fees on appeal under Idaho Code § 12-121 and the corresponding procedural mechanism, Idaho Appellate Rule 41, because the JV Appeal was brought frivolously, unreasonably and without foundation. In *Elliott v. Murdock*, this Court explained as follows:

> Section 12-121 allows an award of attorney fees to a prevailing party where "the action was pursued, defended, or brought frivolously, unreasonably, or without foundation." *Idaho Military Historical Soc'y, Inc. v. Maslen*, 156 Idaho 624, 633, 329 P.3d 1072, 1081 (2014). "Such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the district court incorrectly applied well-established law." *Snider v. Arnold*, 153 Idaho 641, 645-646, 289 P.3d 43, 47-48 (2012). Further, attorney fees on appeal have been awarded under Section 12-121 when appellants "failed to add any new analysis or authority to the issues raised below that were resolved by a district court's well-reasoned authority." *Wagner v. Wagner*, 160 Idaho 294, 302, 371 P.3d 807, 815 (2016).

161 Idaho 281, 289, 385 P.3d 459, 467 (2016) (quoting *Frantz v. Hawley Troxell Ennis & Hawley, LLP*, 161 Idaho 60, 66, 383 P.3d 1230, 1236 (2016)). This Court continued, awarding attorney fees on appeal under Idaho Code § 12-121 because the appeal was merely an invitation "to second-guess the district court's well-reasoned opinion." *Id.* Similarly here, JV merely invites this Court to second-guess the district court's well-reasoned opinion. Moreover, JV's "title theory" is without any bases in fact or law and has already been rejected by this Court; and JV's "lien theory" is without any bases in fact or law and it was unreasonable for JV to raise this theory for the first time on appeal. In sum, in the event that Valiant prevails on appeal,

Valiant requests attorneys' fees on appeal under Idaho Code § 12-121 because the JV Appeal was brought frivolously, unreasonably and without foundation.

IV.
ARGUMENT

A. Standard Of Review.

There are two separate standards of review at issue in this case. According to Appellant's Brief, the issues on appeal are as follows:

1. Did the district court err by not subrogating JV to Bonner County's right, title, claim and interest regarding the delinquent property taxes and the Tax Deed, based upon the Tax Deed, the redemption by JV and Redemption Deed in favor or JV?

2. Did the district court err in awarding costs to Valiant against JV?

3. Did the district court err in awarding sanctions to Valiant against JV and Gary Finney?

The first issue respecting the priority of the JV Redemption Deed is not an appealable issue; at least not as it is framed by JV. JV did not bring any claims to foreclose the JV Redemption Deed in this case. R.Vol. VII, pp. 784-806. As such, the district court could not subrogate JV to any interests that Bonner County acquired by virtue of its tax deed because it was never asked to do so. That said, the district court did grant the Valiant SJ Motion against JV based upon its determination that: (1) the Valiant Mortgages are prior in right, title and interest to any interest possessed by JV pursuant to the JV Mortgage; and (2) the amounts Valiant paid Bonner County to

redeem the mortgaged property are included as part of the underlying debt owed by POBD and secured by the first-priority RE Loans Mortgage. R.Vol. XXII, pp. 2572, 2574-75. The district court further denied JV's 2nd Motion to Reconsider, which argued that the grant of summary judgment was improper because the JV Redemption Deed has priority over the Valiant Mortgages and the Valiant Redemption Deed. R.Vol. XXX, pp. 3527-30. JV's 2nd Motion to Reconsider raised certain "title theory" arguments set forth in the JV Appeal. R.Vol. XXV, pp. 2967-80. However, said motion did not raise any of the "lien theory" arguments set forth in the JV Appeal. To the extent this Court deems that JV intended to appeal these district court determinations, the standard of review is as follows:

> This Court reviews an appeal from an order of summary judgment *de novo*, and this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment. When ruling on a motion for summary judgment, disputed facts are construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. (Citations omitted.)

Curlee v. Kootenai Cty. Fire & Rescue, 148 Idaho 391, 394, 224 P.3d 458, 461 (2008) (internal citations omitted). Although the facts should be construed in a light most favorable to the non-moving party, the non-moving party's case must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *Pena v. Minidoka County*, 133 Idaho 222, 224, 984 P.2d 710, 712 (1999). This Court has stated:

> [T]he moving party is entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial.

Venable v. Internet Auto Rent & Sales, Inc., 156 Idaho 574, 581, 329 P.3d 356, 363 (2014) (quoting *Thomson v. City of Lewiston*, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002)).

> The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Tuttle v. Sudenga Indus., Inc.*, 125 Idaho 145, 150, 868 P.2d 473, 478 (1994). The Court considers only that material contained in affidavits and depositions which is based on personal knowledge and which would be admissible at trial. *Harris v. State, Dep't of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992). Summary judgment is appropriate where a non-moving party fails to make a showing sufficient to establish the existence of an element essential to its case when it bears the burden of proof. *Id*.

Samuel v. Hepworth, Nungester & Lezamiz, Inc., 134 Idaho 84, 87-88, 996 P.2d 303, 306-07 (2000). On issues that will not be tried before a jury, a court ruling on summary judgment motions may draw probable inferences arising from the undisputed facts. *Losee v. Idaho Co*., 148 Idaho 219, 222, 220 P.3d 575, 578 (2009). Only conflicting facts must be viewed in favor of the non-moving party. *Id*. Summary judgment is proper unless "reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented." *Id*.

The standard of review for the second and third issues on appeal by JV differ from the standard of review for the first. This Court has long held that the grant or denial of discretionary costs is committed to the sound discretion of the trial court and will only be reviewed by an appellate court for an abuse of that discretion. *Fish v. Smith*, 131 Idaho 492, 493, 960 P.2d 175,

176 (1998). In reviewing whether a district court abused its discretion in awarding discretionary costs, the appellate court reviews:

> (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 applicable legal standards; and (3) whether the trial court reached its decision through an exercise of reason.

Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho 307, 313, 109 P.3d 161, 167 (2005), *overruled on other grounds by Farber v. Idaho State Insurance Fund*, 152 Idaho 495, 497, 272 P.3d 467, 469 (2012). This is the same standard of review for an award of sanctions. "Statutory attorney fee awards, as well as an award of sanctions under Rule 11, are subject to an abuse of discretion standard of review." *Urrutia v. Harrison*, 156 Idaho 677, 680, 330 P.3d 1035, 1038 (2014).

B. <u>JV Cannot Be Subrogated To The Rights Of Bonner County Because This Issue Was Raised For The First Time On Appeal</u>.

As set forth hereinabove, JV asserts that this Court should determine that JV possesses fee title ownership to the property described in the JV Redemption Deed because it is subrogated to the same rights and interests that Bonner County possessed *via* its tax deed. This is an inappropriate basis for an appeal because JV never brought any claims to foreclose the JV Redemption Deed before the district court. JV's <u>Answer to Complaint; and JV LLC's Answer to Valiant Idaho, LLC's Counterclaim, Cross-Claim and Third Party Complaint For Judicial Foreclosure; and JV LLC's Cross-Claim; and JV LLC's Third Party Complaint</u> did not include any claim to foreclose the amounts JV paid to redeem. R.Vol. VII, 784-806. It is the longstanding rule of this Court that it

"will not consider issues that are raised for the first time on appeal." *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 746, 152 P.3d 614, 617 (2007). As such, this Court should dismiss the JV Appeal of this issue on said grounds. To the extent this Court construes this issue as an appeal of the district court's determinations regarding the priority of the amounts Valiant paid to redeem, the JV Appeal should be dismissed for the reasons set forth hereinbelow.

C. The Valiant Redemption Deed Was Properly Incorporated Into The Underlying Debt Secured By The RE Loans Mortgage.

The district court ruled that JV expressly subordinated the JV Mortgage to the Valiant Mortgages such that it is undisputed that the Valiant Mortgages were prior in right, title and interest to the JV Mortgage. R.Vol. XXII, p. 2572. Although JV filed two different motions to reconsider this determination, it was not appealed. The district court further held that "Valiant is entitled to include the amount paid to Bonner County to redeem the property with the amount due under the 2007 RE Loans Note" and that said "amount is entitled to the priority date of the 2007 RE Loans Mortgage (*i.e.*, March 15, 2007). As such, the amount paid by Valiant shall be deemed senior to any interest of JV . . ." *Id.*, p. 2575. Similarly, JV is entitled to include the amount it paid to Bonner County to redeem the Five Parcels with the amount due under the JV Mortgage and said amount has the same priority date as the JV Mortgage. As JV subordinated the JV Mortgage to the Valiant Mortgages, the amount JV paid to redeem is also necessarily subordinate to the Valiant Mortgages. R.Vol. XV, pp. 1751, 1804-31.

JV apparently contends that the JV Redemption Deed is senior to the Valiant Mortgages because the JV Redemption Deed either: (1) vests fee title to the Five Parcels in JV (*i.e.*, its

"title theory"); or (2) the Redemption Deed creates a special lien securing the amount ($140,999.86) JV paid to redeem, which has priority over the Valiant Mortgages (*i.e.*, its "lien theory"). Both contentions are without any bases in fact or law and should be rejected.

1. <u>The Valiant Mortgages Have Priority Because the JV Redemption Deed Did Not Convey Fee Title Ownership To The Five Parcels</u>.

Idaho law is clear that the issuance of a redemption deed does not convey a fee title interest in the subject property. This is clear based upon the plain language of Idaho's statutes governing tax redemption as well as the case law interpreting these statutes. Moreover, this issue has already been decided by the Idaho Supreme Court in *Hardy v. McGill*, 137 Idaho 280, 286, 47 P.3d 1250, 1256 (2002), and *Trusty v. Ray*, 73 Idaho 232, 237-38, 249 P.2d 814, 818 (1952). As such, JV's "title theory" arguments are without any basis in fact or law and should be rejected.

a. <u>The JV Redemption Deed Could Not Convey Fee Title Ownership Pursuant to Idaho Code §§ 63-1001, *et seq*</u>.

The relevant Idaho statutes governing tax delinquency and redemption are set forth at Idaho Code §§ 63-1001 through 63-1010. These statutes unambiguously establish that the JV Redemption Deed could not convey fee title ownership to JV.

A brief overview of the statutes governing tax redemption may be helpful to the Court:

Idaho Code § 63-1001 – <u>Effect of a delinquency - Interest rate</u> – establishes that non-payment of real property taxes constitutes a delinquency having the effect of a sale of the subject property to the tax collector who holds it in trust for the county where the property is located.

Idaho Code § 63-1002 – Payment of delinquency - Order - Receipt – allows the taxpayer to pay delinquent taxes on all or a portion of the subject property, provides that the amounts so paid will be applied to the oldest outstanding delinquency first, and requires the tax collector to issue a receipt for any payment so made.

Idaho Code § 63-1003 – Lien and effect of delinquency – provides:

> (1) ***Any delinquency on real property taxes*** in accordance with the provisions of this title ***shall constitute a perpetual lien in favor of the county*** for all property taxes, late charges and interest on the property described ***and shall entitle the county to a tax deed for such property*** in the manner provided for in this title. . .

(Emphasis added.) A tax delinquency constitutes a lien against the delinquent property until such time as the county issues a tax deed to itself for the subject property.

Idaho Code § 63-1004 – Payment of delinquency on segregated property – states, in relevant part:

> (1) The record owner or owners or any party in interest of a segregated portion of the property ***covered by a delinquency may release the lien for property taxes***, by paying to the tax collector the amount of property taxes due along with late charges, interest and costs, if any, on that particular piece of property . . .
>
> (2) The record owner or owners or any party in interest of a segregated portion of property ***covered by a tax deed may redeem that property*** at the time and in the manner provided in section 63-1007 . . .

(Emphasis added). This statute distinguishes between the process for releasing a lien for delinquent property taxes (prior to the issuance of a tax deed) and the process for redemption from a tax deed (after the tax deed has been issued).

Idaho Code § 63-1005 – Pending issue of tax deed - General provisions - Notice – explains the process that must be followed by the county prior to the issuance of a tax deed. This includes the notice requirements and the requirement that the county must wait for three (3) years after the date of the first delinquency before the tax deed can be issued. Thus, a tax lien exists against all real property subject to a delinquency for at least three (3) years before a tax deed can be issued and recorded as a matter of record.

Idaho Code § 63-1006 – Hearing and issuance of tax deed – requires the opportunity for a hearing prior to the issuance of a tax deed and identifies items that must be included in the tax deed, including the names of the "former owners" of the subject property.

Idaho Code § 63-1007 – Redemption-Expiration of right – provides:

> (1) ***After issuance of a tax deed***, real property may be redeemed only by the record owner or owners, or party in interest, up to the time the county commissioners have entered into a contract of sale or the property has been transferred by county deed. In order to redeem real property, the record owner or owners, or a party in interest shall pay any delinquency . . .
>
> (2) Should such payments be made, a redemption deed shall be issued by the county tax collector into the name of the redemptioner and ***the rights, title and interest acquired by the county shall cease and terminate***; provided however, that such right of redemption shall expire fourteen (14) months from the date of the issuance of a tax deed to

> the county, in the event the county commissioners have not extinguished the right of redemption by contract of sale or transfer by county during said redemption period. . .

(Emphasis added.) Thus, real property that is subject to a tax deed may be redeemed any time before the county sells the property to a third party, and the redemption terminates all right, title and interest that had been acquired by the county.

Idaho Code § 63 – 1008 – Effect of tax deed as evidence – establishes that the issuance of a tax deed will constitute *prima facie* evidence of the propriety of the process leading up to its issuance.

Idaho Code § 63-1009 – Effect of a tax deed as a conveyance – states:

> ***The deed conveys to the grantee the absolute title to the land described therein, free of all encumbrances*** except mortgages of record to the holders of which notice has not been sent as provided in section 63-1005, Idaho Code, any lien for property taxes which may have attached subsequent to the assessment and any lien for special assessments.

(Emphasis added.) Accordingly, a tax deed is not a lien but a conveyance, which conveys fee title ownership of the property to the county subject only to the rights of redemption set forth in Idaho Code § 63-1004(2).

Finally, Idaho Code § 63-1010 – Collection of delinquency on real, personal and operating property – provides:

> In all cases where real property has been or may hereafter be sold for delinquency and a deed has been issued to the county therefor, and redemption has been made in the manner provided in 63-1007, Idaho Code, the county tax collector, must issue a deed to the redemptioner; and ***upon the giving of such deed, such tax deed***

> ***so issued to the county*** and the delinquency and tax sale upon which the same is based and all delinquencies and sales for prior year delinquencies ***shall become null and void, and all right, title, and interest acquired by the county, under and by virtue of such tax deed, or tax sales, or delinquencies, shall cease and terminate***.

(Emphasis added.) A redemption deed does not convey any right, title, interest or lien to the redeemer. To the contrary, it simply renders the tax deed null and void and terminates all right, title and interest that the county acquired by virtue of the tax deed. If the Idaho Legislature had intended for a redemption deed to create a lien or convey ownership to a redeemer, it would have expressly stated that it creates a lien or conveys ownership in this statute.

Based upon the foregoing statutes, there is absolutely no bases for JV's "title theory" arguments. The JV Redemption Deed did not convey any right, title or interest to JV. It merely terminated Bonner County's ownership of said parcels and nullified the tax deed. Upon issuance of the JV Redemption Deed, the Five Parcels were returned to the *status quo* prior to the tax delinquency. As such, the JV Mortgage and the amounts JV paid to redeem remained subordinate to the Valiant Mortgages. The JV Redemption Deed did not convey ownership of the Five Parcels to JV.

b. <u>The JV Redemption Deed Could Not Convey Fee Title Ownership of the Property Pursuant to the Case Law Interpreting Idaho Code §§ 63-1001, *et seq*.</u>

JV argues that the plain language of Idaho's tax redemption statutes should be ignored in favor of its self-serving interpretation. However, JV's "title theory" arguments are not an issue of

first impression for this Court. These arguments were already considered and rejected in *Hardy v. McGill*, *supra*. As such, JV's "title theory" should be rejected.

The issues considered in *Hardy v. McGill* specifically included the following question: "Did the deed from the tax assessor's office convey the County's ownership interests to the Appellants and forfeit any ownership of [Respondents']?" *Id*. at 284, 47 P.3d at 1254. Moreover, the Court began the "Discussion" section of its opinion by reiterating: "The Appellants argue that ***the redemption deed issued by the County conveyed title*** to the Turf Club property and that [Respondents'] ownership interest was forfeited upon the conveyance." *Id*. at 285, 47 P.3d at 1255 (emphasis added). Thus, it cannot be reasonably disputed that the Idaho Supreme Court has already considered JV's argument.

After considering the "title theory" argument raised by the appellant in *Hardy v. McGill*, this Court soundly rejected the notion that a redemption deed does anything other than terminate all right, title and interest that the county acquired by virtue of its tax deed:

> Idaho law makes it ***clear*** that the redemption deed is not a tax deed given by the county upon a sale to a purchaser; it is a deed issued to a redemptioner in consideration of the payment of delinquent taxes. *Trusty v. Ray*, 73 Idaho 232, 238 (1952). A redemption deed simply cancels and terminates all rights of the county in and to the land acquired by virtue of the treasurer's tax deed.
>
> ***The delinquent taxes paid by the Appellants became part of the indebtedness protected by the Appellants' and Hardy's contract of sale***. *Id*. (citing *Eaton McCarty*, 34 Idaho 747, (1921); *Gillette v. Oberholtzer*, 45 Idaho 571 (1928); *Union Cent. Life Ins. Co. v. Nielson*, 62 Idaho 483 (1941)).

Id. at 286, 47 P.3d at 1256 (emphasis added). Thus, JV's Redemption Deed did not grant JV any right, title, lien or other interest in and to the Five Parcels. The amounts JV paid to redeem were incorporated into the indebtedness secured by the JV Mortgage. Although the contract of sale at issue in *Hardy v. McGill* was not secured by a mortgage, the delinquent tax payment still became part of the indebtedness owed pursuant thereto.

This Court has held that the result is the same where a mortgage secures payment of the underlying contract. *Trusty v. Ray*, 73 Idaho 232, 237-38, 249 P.2d 814, 817 (1952). The Court considered the effect of a redemption deed under nearly identical redemption statutes then in effect. After reviewing said statutes, the Court reached a holding that is nearly identical to its holding fifty years later in *Hardy v. McGill*:

> The redemption deed was not a tax deed given by the county upon a sale to a purchaser. It was a purported deed issued to an alleged redemptioner in consideration of the payment of delinquent taxes . . . If properly executed in favor of a qualified redemptioner, such a redemption deed . . . would merely cancel and terminate all rights of the county in and to the land acquired by virtue of the treasurer's tax deed.
>
> The mortgage provides for reimbursement to mortgagee for the payment of any taxes. ***The delinquent taxes paid by respondent became part of the indebtedness secured by the lien of respondent's mortgage***.

Id. at 238, 249 P.2d at 818 (emphasis added).

Based upon the foregoing cases and authorities, the Idaho Supreme Court has long rejected the "title theory" argument raised by JV. Although a tax deed conveys all right, title and interest to the property described therein to the county issuing said deed, a redemption deed does not transfer a

lien or any other interest in the subject property to a redemptioner. I.C. § 63-1009. To the contrary, upon issuance of a redemption deed, "all right, title and interest acquired by the county, under and by virtue of such tax deed, or tax sales, or delinquencies, shall cease and terminate." I.C. §§ 63-1007, 63-1010. The amounts paid to redeem are incorporated into the indebtedness secured by the mortgage. As such, the "title theory" argument should be rejected.

c. Analyses of Idaho's General Lien Statutes Do Not Change the Holding in *Hardy v. McGill*.

JV contends that *Hardy v. McGill* is distinguishable because it does not include any analysis of Idaho Code § 45-114. JV argues that the Idaho Code sections specifically governing tax redemption and the case law interpreting these statutes should be ignored in favor of Idaho's more general lien statutes. However, the general lien statutes do not alter the effect of the tax redemption statutes or change the holding in *Hardy v. McGill*.

i. The Specific Tax Redemption Statutes Control.

It is fundamental tenet of statutory construction that "the more specific statute or section addressing the issue controls over the statute that is more general. Thus, the more general statute should not be interpreted as encompassing an area already covered by one which is more specific. *Mulder v. Liberty Nw. Ins. Co.*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000) (internal citations omitted). Accordingly, Idaho Code §§ 63-1001, *et seq*., govern the effect of redemptions from tax deeds without reference to the more general statutes set forth in Idaho Code § 45-114. The tax redemption statutes specify that the JV Redemption Deed merely terminated all right,

title and interest of Bonner County by virtue of its tax deed. It did not convey ownership of the Five Parcels to JV. As such, Idaho Code § 45-114 is irrelevant to the holding in *Hardy v. McGill*.

ii. Idaho Code § 45-114 Does Not Apply to the Facts of This Case.

Idaho Code § 45-114 does not apply to tax redemptions regardless of whether the rule that "the more specific statute controls over the statute that is more general" precludes consideration of said statute. Because a tax deed conveys ownership, it is not a lien. As such, a redeemer does not satisfy a prior lien when it redeems, and Idaho Code § 45-114 cannot apply.

Idaho Code § 45-114 – Rights of junior lienor – provides:

> One who has a lien inferior to another, upon the same property, has a right:
>
> (1) To redeem the property in the same manner as its owner might, from the superior lien; and,
>
> (2) To be subrogated to all of the benefits of the superior lien, when necessary for the protection of his interests upon satisfying the claim secured thereby.

Id. This statute only applies to situations where a junior lien claimant pays off a superior lien for the protection of its junior lien. Application of this statute is predicated upon the following four elements: (1) Bonner County must have possessed a lien against the Five Parcels at the time of the redemption; (2) JV's Mortgage must encumber the Five Parcels and be junior to Bonner County's lien; (3) JV must have paid-off Bonner County's senior lien; and (4) subrogation to the position of the senior lien is necessary for the protection of the JV Mortgage. The first and fourth elements are dispositive. Bonner County did not possess a lien against the Five Parcels at the time of

the redemption. Moreover, JV does not need to be subrogated to a superior position to protect its interest in the JV Mortgage.

It is undisputed that a "tax delinquency creates a perpetual lien in favor of the county for all unpaid property taxes, late charges and interest on the property described and shall entitle the county to a tax deed for such property in the manner provided for in this title." I.C. § 63-1003. However, Idaho Code § 63-1009 – Effect of tax deed as conveyance – makes it clear that a tax deed is a conveyance and not a lien. A tax deed "***conveys*** to the grantee the ***absolute title*** to the land described therein, ***free and clear of all encumbrances*** . . ." and subject only to the right of redemption set forth in Idaho Code § 63-1007. I.C. § 63-1009 (emphasis added). Moreover, a tax deed must identify "the name and address of the ***former*** record owner or owners." I.C. § 63-1006(6)(a) (emphasis added). The county may thereafter sell or transfer the property to third parties by county deed. I.C. § 63-1007(2). Thus, a tax lien ceases to exist upon issuance of a tax deed. The county owns the property; it no longer possesses a lien. It is axiomatic that one cannot have a lien against their own property. 3 R. Powell, The Law of Real Property § 459 (1990 Rev.) (generally, when one person obtains both a greater and lesser interest in the same property, and no intermediate interest exists in another person, a merger occurs and the lesser interest is extinguished).

After the tax deed has been issued to the county but before the county sells the property to a third party, the former owner or a party in interest may redeem the property by paying the delinquent taxes. I.C. § 63-1007. The redeeming party receives a redemption deed and "***such tax deed . . . and all delinquencies . . . become null and void and all right, title, and interest acquired***

by the county, under and by virtue of such tax deed, or tax sales, or delinquencies . . . ***cease and terminate***." I.C. § 63-1010 (emphasis added). Because the tax deed and all tax delinquencies are thereafter **null and void**, a redemption has the effect of returning the subject property to the *status quo* as if the tax delinquency had never occurred.

Applying the foregoing to the facts of this case, Bonner County initially had a tax lien for the delinquent taxes that POBD did not pay. I.C. § 63-1003. However, the tax lien ceased to exist when a tax deed was issued to Bonner County for the Five Parcels. I.C. § 63-1009. Upon issuance of the tax deed, Bonner County acquired absolute title to the Five Parcels subject only to the rights of redemption set forth in Idaho Code § 63-1007. *Id*. When JV redeemed, the Five Parcels returned to the status in which they were prior to the tax delinquency, and the Valiant Mortgages and the JV Mortgage retained their same priority positions, *i.e.,* Valiant was senior and JV was junior. I.C. § 63-1010.

Idaho Code § 45-114 does not apply to the facts of this case. Bonner County did not have a lien that was superior to the JV Mortgage at the time JV redeemed. Bonner County owned absolute title free of any encumbrances. Moreover, JV did not need to be subrogated to the position of a senior lien to protect the JV Mortgage. The JV Redemption Deed returned the Five Parcels to the *status quo* and the JV Mortgage maintained the same junior priority position that it had prior to the tax delinquency.

iii. *Hardy v. McGill* Bars JV's "Title Theory" Arguments.

JV argues that *Hardy v. McGill* should be ignored because it fails to take into account Idaho Code § 45-114. However, as set forth in the foregoing authorities and analyses, Idaho Code § 45-114 is not applicable to the facts of this case. *Hardy v. McGill* is controlling and bars JV's "title theory" arguments.

d. The JV Redemption Deed Could Not Convey Fee Title Ownership of the Five Parcels Because JV Agreed to Subordinate Amounts it is Owed For Its Tax Payment to Valiant.

Finally, JV agreed that its tax payments are subordinate to the Valiant Mortgages. Trial Ex. B, p. 6. As such, the Redemption Deed could not have conveyed the Five Parcels to JV.

The JV Mortgage states:

> IN THE EVENT the Mortgagor shall fail to make any payments required hereunder, including taxes, assessments, insurance premiums or any other obligation of Mortgagor that may become due on said property described herein . . . Mortgagee may, at its option . . . pay said items, and . . . ***such sum or sums so paid by the Mortgagee shall become part of the principal sum due hereunder***. . .

Id. (emphasis added).

JV agreed that any amounts it paid for delinquent property taxes **shall** be incorporated into the JV Mortgage. Thus, JV also agreed that said tax payments would be junior when it subordinated the JV Mortgage to the Valiant Mortgages. R.Vol. XV, pp. 1751, 1804-31. It is disingenuous for JV to argue that the JV Redemption Deed conveys ownership of the Five Parcels when it agreed to subordinate these amounts. As such, JV's "title theory" arguments should be rejected.

2. The Valiant Mortgages Have Priority Because the JV Redemption Deed Did Not Create a Super-Priority Lien Against the Five Parcels.

Although JV only asserted its "title theory" at the district court level, it now postulates an alternative theory that if the JV Redemption Deed did not convey fee title ownership of the Five Parcels to JV, it created a super-priority lien that subordinates the Valiant Mortgages and any other lien interests that were in effect at the time of its redemption. Appellant's Brief refers to this argument as its "lien theory." As this issue is raised for the first time on appeal, it should not be considered by this Court. *Johannsen v. Utterbeck*, 146 Idaho 423, 429, 196 P.3d 341, 347 (2008). Regardless, JV's "lien theory" is also without any factual or legal bases and should be rejected.

a. JV's Redemption Deed Did Not Create a Lien Pursuant to Idaho Code §§ 63-1001, *et seq.*, and *Hardy v. McGill*.

JV's "lien theory" contends that it is entitled to a super-priority lien that is superior to the Valiant Mortgages because the redemption deed created a first priority lien, or because it is subrogated to a first position lien pursuant to Idaho Code § 45-114. The "lien theory" fails for the same reasons as JV's "title theory."

As already explained, a redemption deed does not create a lien for any of the amounts that a redemptioner pays to redeem. I.C. § 63-1007. To the contrary, a redemption deed "is a deed issued to a redemptioner in consideration of the payment of delinquent taxes. A redemption deed simply cancels and terminates all rights of the county in and to the land acquired by virtue of the treasurer's deed." *Hardy v. McGill*, 137 Idaho at 286, 47 P.3d at 1256.

As set forth hereinabove, Idaho Code § 45-114 does not apply to the facts of this case because Bonner County did not possess a lien superior to the JV Mortgage and because JV did not need to be subrogated to preserve the priority of the JV Mortgage. The JV Redemption Deed did not create a lien, super-priority or otherwise, against the Five Parcels. As such, JV's "lien theory" should be rejected.

D. <u>This Court Should Affirm The District Court's Award Of Costs</u>.

JV asserts that the district court's award of $41,479.69 in costs, which included costs as a matter of right and exceptional costs, was erroneous because "[s]everal of these costs are actually costs which should have [sic] awarded against POBD and added to the secured indebtedness foreclosed against the real property." Appellant's Br. at 23–25. JV lists four reasons in support of its assertion.[10] However, this Court should affirm the district court's award of costs without reaching the merits of JV's assertion because: (1) JV has failed to demonstrate, or even attempt to demonstrate, that the district court's award of costs was an abuse of discretion; and (2) JV has not supported its assertion with cogent argument or authority.

10 JV argues that the district court's award of costs was erroneous because: (1) the costs "associated with the testimony of Barney Ng" should be allocated to the foreclosure of the debt against POBD and the real property security because Mr. Ng was an agent and/or beneficiary of RE, Pensco, and MF '08; (2) it was inequitable to allocate 37.5% of the costs associated with the litigation guarantee to JV because there were numerous defendants; (3) travel expenses should not be awarded against JV because they were not exceptional; and (4) if this Court reverses the district court's judgment, the prevailing party analysis will change, which would affect the award of costs below. *Id.* at 24–25.

As a preliminary matter, JV misstates the amount of costs that were awarded to Valiant. The district court awarded Valiant a total of $41,479.69 in costs as a matter of right and discretionary costs against JV and two other defendants. R.Vol. XLVIII, p. 5841. The district court apportioned these costs among the three defendants with JV being responsible for 0.375 of the costs in the total amount of $15,554.88. *Id*.

This Court should affirm the district court's award of costs because JV has failed to demonstrate, or even attempt to demonstrate, that the district court's award of costs was an abuse of discretion. This Court reviews a district court's award of costs for an abuse of discretion by applying a three-part test[11], and the party claiming that an abuse of discretion occurred bears the burden of demonstrating that the district court violated at least one part of that test. *Great Plains Equip. v. Northwest Pipeline Corp*. 136 Idaho 466 (2001); *Green River Ranches, LLC v. Silva Land Co., LLC*, 162 Idaho 385, — , 397 P.3d 1144, 1151 (2017). In *Green River Ranches*, this Court noted that an appellant's conclusory claim that the respondent's conduct was "inconsistent with I.R.C.P. 15(b)" was insufficient to prove that an abuse of discretion had occurred. *Id.,* 397 P.3d at 1151. Specifically, this Court stated: "Silva Dairy has failed to demonstrate, or even attempt to demonstrate, that an abuse of discretion occurred under any part of the test applied by

11 The three-part test asks: "(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." *Campbell v. Kildew*, 141 Idaho 640, 650, 115 P.3d 731, 740 (quoting *Zimmerman v. Volkswagen of Am., Inc.*, 128 Idaho 851, 857, 920 P.2d 67, 73 (1996)).

this Court. . . . and its failure to do so is fatal to its argument." *Id.* Here, JV claims that the district court's award of costs was erroneous, but JV fails to demonstrate that a violation of any part of the three-part test, let alone set out the three-part test. As was the case in *Green River Ranches*, JV's failure to demonstrate a violation of any part of the three-part abuse-of-discretion test is fatal to its argument. Accordingly, this Court should affirm the district court's award of costs.

Alternatively, this Court should affirm the district court's award of costs because JV has failed to support its assertion with cogent argument or authority. *Bach v. Bagley*, 148 Idaho 784, 229 P.3d 1146 (2010) ("[I]f the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court."). Rule 35(a)(6) of the Idaho Appellate Rules provides that an appellant's argument "shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to authorities, statutes and parts of the transcript and the record relied upon." I.A.R. 35(a)(6). JV's cost-related argument relies entirely upon conclusory claims of inequity, which are mentioned only in passing. Moreover, JV fails to cite to any authority in support of its position. As such, this Court should affirm the district court's award of costs.

Finally, this Court should affirm the district court's award of costs because they were properly awarded in accordance with Idaho law. The district court appropriately exercised its discretion in awarding Valiant costs as a matter of right that were necessary and reasonably incurred in accordance with Rule 54(d)(1)(C) of the Idaho Rules of Civil Procedure. R.Vol. XLVIII, pp. 5837-38. The district court further appropriately exercised its decision in awarding Valiant

discretionary costs that were necessary and exceptional, reasonably incurred, and awarded in the interest of justice per Rule 54(d)(1)(D) of the Idaho Rules of Civil Procedure. *Id*. at pp. 5838-41. The district court specifically analyzed each item of discretionary costs that Valiant was awarded and determined that they should be awarded in the interest of justice based upon the exceptional scope and complexity of this litigation and/or because they were incurred due to JV repeatedly making arguments and raising issues and claims that were not supported by legal authority.[12] *Id*.

The award of costs in favor of Valiant is supported by the decisions of this Court. *See Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005) (exceptional costs necessarily include those costs incurred because the nature of the case was itself exceptional); *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co*., 153 Idaho 716, 291 P.3d 399 (2012) (authorizing an award of discretionary costs where the conduct of one or more parties made the litigation exceptional or caused an exceptional amount of costs to be incurred). For the foregoing reasons, this Court should affirm the district court's award of costs.

E. <u>This Court Should Confirm The District Court's Award Of Sanctions</u>.

This Court should affirm the district court's imposition of sanctions against JV and its attorney, Mr. Gary Finney. The facts relevant to this issue are straightforward. On October 5, 2016, Valiant obtained a Writ of Execution from the Bonner County Sheriff requiring the Sheriff to sell certain property to satisfy Valiant's $21 Million Judgment. R.Vol. LIV, pp. 611-14. The sale was scheduled for November 7, 2016, and notice was sent to all parties.

12 JV filed two motions to reconsider the district court's decision that the Valiant Mortgages had priority over the JV Mortgage after expressly subordinating to it. R.Vol. XXII, pp. 2560-78; R. Vol. XXX, pp. 3527-32.

R.Vol. LX, p. 7403. On November 2, 2016, JV sought to delay the sale by filing, *inter alia*, a motion for stay. R.Vol. LIX, pp. 7311-22. That same day, JV hand delivered the motion for stay to the Bonner County Sheriff. R.Vol. LX, p. 7404. However, JV noticed Valiant by placing the documents in regular U.S. Mail. *Id.* Simply put, JV sought to delay the sale by quickly notifying the Sheriff of the motion for stay while keeping Valiant in the dark. Fortunately, the Bonner County Sheriff contacted Valiant on November 3, 2016, and Valiant requested an expedited hearing to keep the sale on schedule. *Id.*; R.Vol. LX, pp. 7357-72. Valiant also filed a motion for sanctions. *Id.* at 7375-89. Time was of the essence because Valiant had already spent at least $11,684.31 to properly notice the sheriff's sale and, if the sale was delayed, Valiant would have to start from the beginning and spend at least another $11,684.31. R.Vol. LIV, pp. 6574-77. An expedited hearing was held on November 4, 2016, and the district court denied JV's attempt to delay the sale. R.Vol. LX, pp. 7399-400. At the hearing, the district court acknowledged the importance of keeping the sale on schedule, stating "I recognize what Valiant is saying - - it takes weeks and weeks and tons of money to get these sheriff's sales scheduled." 11.04.16 Hr'g Tr., p. 21, ll. 14-17. On November 14, 2016, the district court issued a memorandum decision and order on Valiant's motion for sanctions, wherein it held that sanctions were proper because JV's motion was presented for an improper purpose and was frivolous. R.Vol. LX, pp. 7402-10. Specifically, the district court held that: (1) the motion for stay was untimely; (2) the motion for stay raised the same legal arguments that had "been repeatedly rejected;" and (3) JV's conduct was "an attempt to intentionally mislead the Sheriff into postponing the sale in direct violation" of the

district court's orders. *Id.* at 7407-09. On December 6, 2016, the district court issued a corresponding judgment. R.Vol. LX, pp. 7458-62.

On appeal, JV asserts that the district court's imposition of sanctions was erroneous because "[a]t no time was JV and/or attorney Gary Finney given the opportunity to withdraw or appropriately correct the challenged filing within 21 days. VALIANT failed to comply with I.R.C.P. 11(c)(2)." Appellant's Br. at 26. This Court should affirm the district court's award of sanctions because JV's argument is meritless for three independent reasons.

First, this Court should affirm the district court's imposition of sanctions because JV has failed to demonstrate, or even attempt to demonstrate, that the district court's decision was an abuse of discretion. This analysis is identical to that which was discussed in Valiant's cost-related argument in Section D of this Respondent's Brief. In short, an award of sanctions is reviewed for an abuse of discretion and the party claiming that an abuse of discretion occurred bears the burden of demonstrating that the district court violated at least one part of that test. *Campbell v. Kildew*, 141 Idaho 640, 649–50, 115 P.3d 731, 739–40 (2005); *Green River Ranches, LLC v. Silva Land Co., LLC*, 162 Idaho 385, — , 397 P.3d 1144, 1151 (2017). As discussed above, conclusory claims and a failure to demonstrate that an abuse of discretion occurred is fatal to an argument. *Green River Ranches, LLC*, 397 P.3d at 1151. Here, JV argues that Valiant failed to comply with Rule 11(c)(2) of the Idaho Rules of Civil Procedure and claims, in conclusory fashion, that the district court abused its discretion. At no point in its sanctions-related argument does JV attempt to demonstrate that the district court violated any part of the abuse-of-discretion test. As was the case in

Green River Ranches, JV's failure to demonstrate a violation of any part of the three-part test is fatal to its argument. *Id.* Accordingly, this Court should affirm the district court's imposition of sanctions.

Second, this Court should affirm the district court's imposition of sanctions because JV's argument is contrary to the plain language of Rule 11(c)(2) Idaho Rules of Civil Procedure. Rule 11(c)(2), in pertinent part, provides as follows: "The motion [for sanctions] . . . must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." I.R.C.P. 11(c)(2) (2016). JV argues that Valiant failed to comply with this rule because "[a]t no time was JV and/or attorney Gary Finney given the opportunity to withdraw or appropriately correct the challenged filing within 21 days." Appellant's Br. at 26. JV misunderstands the rule. Rule 11(c)(2) does not absolutely bar a motion for sanctions within 21 days after the challenged claim is served. Rather, Rule 11(c)(2) bars a motion for sanctions within 21 days after the service of the challenged claim *only if the challenged claim has already been withdrawn or appropriately corrected* during that time. Accordingly, a motion for sanctions may be filed at any time (even within 21 days after service of the challenged claim) if the challenged claim has yet to be withdrawn or corrected. Here, JV filed its motion for stay on November 2, 2016 and Valiant filed its motion for sanctions on November 3, 2016. R.Vol. LX. pp. 7403-04. Valiant was not obligated to wait 21 days before filing its motion for sanctions; however, JV could have thwarted Valiant's motion for sanctions by withdrawing or correcting its motion for stay. JV asserts that it did not have

the opportunity to do so, but this is not true. JV could have withdrawn its motion upon receiving notice of Valiant's motion for sanctions on November 3, 2016. Further, JV could have withdrawn its motion at the hearing on November 4, 2016 but, instead of doing so, JV essentially doubled-down by arguing in support of its motion. In sum, this Court should affirm the district court's imposition of sanctions because Valiant's motion for sanctions did not violate the plain language of Rule 11(c)(2) of the Idaho Rules of Civil Procedure.

Third, this Court should affirm the district court's award of sanctions because Rule 11(c)(2) of the Idaho Rules of Civil Procedure provides that the 21-day window may be altered if "another time" is set by the court. There is no indication that "another time" must be longer than 21 days, and it stands to reason that a court is permitted to shorten the 21-day window for circumstances such as the one at hand, where time is of the essence. Here, the district court constructively set "another time" by holding an expedited hearing on JV's motion. R.Vol. LX, pp. 7399-7400. JV had the opportunity to withdraw or correct its motion before or during the hearing but it failed to do so. Allowing JV to withdraw or correct its motion after the district court had already held a hearing and ruled thereon would result in a waste of judicial resources, which is a harm that sanctions are designed to remedy. *Talbot v. Ames Constr.*, 127 Idaho 648, 653, 904 P.2d 560, 565 (1995) (Holding that sanctions were appropriate because the appeal, *inter alia*, "wasted judicial resources."). For the foregoing reasons, Valiant respectfully requests that this Court affirm the district court's imposition of sanctions.

As an aside, Mr. Gary Finney has not appealed the district court's award of sanctions in his personal capacity; therefore, if this Court reverses the imposition of sanctions against JV, the award of sanctions must nonetheless stand as against Mr. Gary Finney. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 399 (1981) (Holding that if "less than all of the several co-parties appeal from an adverse judgment, a reversal as to the parties appealing does not necessitate or justify a reversal as to the parties not appealing."). Mr. Finney certainly had the right to appeal the sanctions because he was aggrieved by an appealable order; however, he failed to file an appeal in his personal capacity. I.A.R. 4. Moreover, JV's notice of appeal is not a stand-in for Mr. Finney's appeal because it did not name Mr. Finney as an appellant. R.Vol. LXVI, pp. 8235-45. It must be conceded that this argument is similar to the argument that was rejected by this Court in *Smith v. Treasure Valley Seed Co., LLC,* 161 Idaho 107, 383 P.3d 1277 (2016). However, that case was decided 3/2, and the current facts are distinguished from *Smith*. For instance, in *Smith*, Mr. Smith was the only remaining representative of the appellant; thus, if this Court had rejected his attempt to appeal, the appeal would have been dismissed *in toto*. Conversely, a holding that Mr. Finney has not appealed the sanctions in his personal capacity would not result in a complete dismissal of the appeal, nor would it affect the rights of JV. Further, in *Smith*, there was a high degree of privity, *i.e.*, a familial connection, between Mr. Smith, as the attorney, and the appellant, who was his deceased mother. Conversely, here, to counsel's knowledge, the relationship between Mr. Finney and JV is strictly attorney-client. In sum, in the event that this Court reverses the district court's

award of sanctions as it relates to JV, the sanctions should nonetheless stand against Mr. Finney in his personal capacity.

V.
CONCLUSION

JV has failed to establish that the district court erred in holding that "Valiant is entitled to include the amount paid to Bonner County to redeem the property with the amount due under the 2007 RE Loans Note" and that said "amount is entitled to the priority date of the 2007 RE Loans Mortgage (*i.e.*, March 15, 2007). As such, the amount paid by Valiant shall be deemed senior to any interest of JV . . ." R.Vol. XXII, p. 2575. The statutes, authorities and record herein all evidence that: (1) JV's "title theory" asserting that the JV Redemption Deed conveyed absolute title to the Five Parcels is directly contrary to this Court's holding in *Hardy v. McGill*, it is without any bases in fact or law, and it should be rejected; and (2) JV's "lien theory" asserting that its redemption either created or subrogated it to a first position super-priority lien is also inconsistent with *Hardy v. McGill* and without any bases in fact or law. JV's arguments are without merit and should be rejected, and Valiant should be awarded attorneys' fees and costs on appeal.

Respectfully submitted this 8th day of February 2018.

McCONNELL WAGNER SYKES & STACEY PLLC

/s/ *Richard L. Stacey*

By: Richard L. Stacey, Attorneys For
Cross-Claimant/Respondent
Valiant Idaho, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of February 2018, a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

Gary A. Finney, Esq. John A. Finney, Esq. Finney Finney & Finney, P.A. 120 East Lake Street, Suite 317 Sandpoint, Idaho 83864 Telephone: 208.263.7712 Facsimile: 208.263.8211 *Counsel For J.V., LLC*	[✓] U.S. Mail [ ] Hand Delivered [ ] Facsimile [ ] Overnight Mail [✓] Electronic Mail garyfinney@finneylaw.net johnfinney@finneylaw.net
Susan P. Weeks, Esq. James, Vernon & Weeks, PA 1626 Lincoln Way Coeur d'Alene, Idaho 83814 Telephone: 208.667.0683 Facsimile: 208.664.1684 *Counsel For VP Incorporated/North Idaho Resorts*	[✓] U.S. Mail [ ] Hand Delivered [ ] Facsimile [ ] Overnight Mail [✓] Electronic Mail sweeks@jvwlaw.net

/s/ *Richard L. Stacey*
Richard L. Stacey