1-26-2018

Valiant Idaho, LLC v. VP Incorporated Appellant's Brief Dckt. 44585

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/Third-Party Defendants,

VALIANT IDAHO, LLC, an Idaho limited liability company,

Third Party Plaintiff/Cross-Claimant/Respondent,

vs.

VP, INCORPORATED, an Idaho limited liability company,

Defendant/Cross-Defendant/ Appellant.

Supreme Court No. 44585

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 in Sandpoint, Idaho known as the "Idaho Club" undertaken by Pend Oreille Bonner Development, LLC. ("POBD"). March 16, 2016 Trial Tr. p. 582, l. 17 – p. 583, l. 2. POBD took out several loans to finance the development and subsequently defaulted on them, failed to pay mechanics and materialmen for their services, and failed to pay Bonner County for real property taxes. At this juncture, the present case involves a suit by Valiant Idaho, LLC ("Valiant) to collect on certain promissory notes, to foreclose the mortgages securing those notes, and to foreclosure a redemption deed obtained by Valiant from Bonner County for some past due real property taxes it paid on some of the parcels.

B. COURSE OF PROCEEDINGS

The record in this matter is voluminous. Given the number of parties involved in the foreclosure proceedings, many of the pleadings are not relevant to this appeal. This course of proceedings is abbreviated to address those aspects which relate to VP Incorporated's present appeal.

This suit commenced on October 13, 2009 when Genesis Golf, an entity which provided golf development services, filed an action alleging breach of contract against POBD, and sought to foreclose its mechanic lien. R Vol. I, pp. 172-196. Genesis Golf named multiple other parties whom had filed mechanic liens or mortgages against the real property. *Id.* Amongst the numerous defendants listed in the complaint were R.E. Loans, LLC ("REL"), Pensco Trust Co. custodian for the benefit of Barney Ng ("Pensco"), Mortgage Fund '08, LLC ("MF08"), and VP, Incorporated ("VP").

Paragraph 40 of the Complaint indicated "Defendant VP may also claim an interest in the Property in relation to the JV Mortgage. Defendant VP's interest in the Property or some portion thereof, may be junior and subservient to Plaintiff's interest in the Property." R Vol. I, p. 178.

ACI Northwest, Inc. ("ACI") filed an answer, counterclaims, cross-claims and third-party complaint on August 9, 2010. R Vol. II, pp. 204-227. ACI added Panhandle State Bank as a third-party defendant. *Id.*

On May 24, 2010, Pensco filed a special appearance. R Vol. II, pp. 201-203. MF08 filed a special appearance on October 5, 2010. R Vol. II, pp. 228-232.

REL filed an appearance on October 14, 2010. R Vol. II, pp. 233-236. REL filed a "reply" to ACI's cross-claim on February 4, 2011. R Vol. II, pp. 237-243. REL filed an answer to Genesis Golf's complaint on April 21, 2011. R Vol. II, pp. 245-259. In its answer, REL admitted it had assigned its interest, or a portion thereof, to Wells Fargo Foothill pursuant to the Collateral Assignment of Mortgage and Loan Documents recorded on July 31, 2007. *Id,* at ¶ 38.

On September 29, 2011, the district court entered a stay order due to a bankruptcy filed by REL. Vol. II, pp. 275-283. On September 29, 2011, the district court also entered a stay order due to a bankruptcy filed by MF08. R Vol. II, pp.284-289.

On January 23, 2012, Wells Fargo moved to dismiss the suit filed by Genesis Golf with prejudice for failure to appear after withdrawal of its attorney. R Vol. II, pp. 298-301. This motion was granted on March 16, 2012. R Vol. II, pp. 312-316.

On June 28, 2012, REL requested to lift its bankruptcy stay. R Vol. II, pp. 317-324. An order granting the request was entered August 24, 2012. R Vol. II, pp. 325-329. On June 26, 2013, REL moved with supporting pleadings to lift the MF08's bankruptcy stay. R Vol. III, pp. 336-361. An order granting the motion was entered August 12, 2013. R V. III, pp. 374-377.

Thereafter, several parties sought and obtained default judgments against Genesis Golf. R Vol. III, pp. 362-365, 378-433.

On April 29, 2014, REL moved for summary judgment against ACI. R Vol. III, pp. 438-450; Vol IV, pp. 451-487. Findings on REL's motion against ACI were entered July 21, 2014. R Vol. V, pp. 647-652. A judgment declaring REL's mortgage lien superior to ACI's lien was entered July 21, 2014. R Vol. V, pp. 674-652.[1]

REL also moved for summary judgment against cross-claimant R. C. Worst & Company, Inc. R Vol. IV, pp. 488-550; Vol. V, pp. 551-635. On June 2, 2014, an order was entered dismissing R.C. Worst & Company's claims, counterclaims and cross claims pursuant to an oral offer of resolution advanced to the trial court on May 28, 2014. R Vol. V, p.

On July 21, 2014, a motion and supporting pleadings were filed to substitute Valiant Idaho, LLC ("Valiant") in place of REL as the real party in interest. R Vol. V, pp. 656-666. An order substituting Valiant in place of REL was entered August 7, 2014. R Vol. V, pp. 667-669.

On August 18, 2014, a motion to substitute Valiant as the real party in interest in place of Wells Fargo Capital Finance, LLC was filed with supporting pleadings. R Vol. V, p. 670-673; Vol. VI, pp. 674-738. An order granting this motion was entered September 12, 2014. R Vol. VI, pp. 781-783.

Although REL had previously answered and filed cross-claims against ACI and R.C. Worst, and litigated those claims, on August 19, 2014, without leave of the district court, Valiant (as assignee to REL) filed a counterclaim, cross-claim and third-party complaint for judicial foreclosure. R Vol. VI, pp. 739-767. Valiant alleged it was informed and believed, and on that basis, alleged that the named cross-defendants claimed an interest in the property described in

[1] Although REL had assigned its interest in the mortgage to Wells Fargo Foothills, LLC, it does not appear ACI challenged REL's standing to seek a declaration that REL had superior lien rights to ACI.

Exhibit "A" to the complaint, and indicated the real property described therein, and all improvements thereon, would be referred to "as the Idaho Club Property." *Id.* at p. 746, ¶ 33. VP was named as a cross-defendant.

Valiant alleged breach of contract on the REL loan and alleged its damages were not less than $708,000.00, plus additional interest, unpaid loan fees and late fees accruing under the REL loan documents. *Id.* Valiant alleged it was entitled to judgment foreclosing the REL mortgage and adjudicating the mortgage to be superior to and prior in right, title and interest to any right, title or interest claimed by all defendants. *Id* at ¶ 72. Valiant alleged the "...judgment should, pursuant to Idaho Code § 45-1302, specify the respective priority(ies) of Valiant's and each Defendant's claims of right, title and interest in and to the Idaho Club Property, and adjudicate the outstanding amounts secured by of the same." The complaint did not seek a quiet title against VP. R Vol. VI, pp. 739-767. Valiant also alleged causes of action on the Pensco loan and the MF08 loan although it had not been substituted as the real party in interest for either of these parties.

On October 3, 2014, VP accepted service of Valiant's counterclaim, cross-claim and third-party complaint. R Vol. VII, pp. 908-910. On October 6, 2014, VP filed a motion to dismiss the counterclaim, cross-claim and third-party complaint advanced by REL because it had been filed without seeking leave of the district court as required by Rule 15, I.R.C.P., and because it advanced claims for Pensco and MF08, parties for whom Valiant had not been substituted. R Vol. VII, pp. 959-962.

On October 6, 2014, Valiant filed its motion with supporting pleadings for Valiant to substitute as the real party in interest for MF08 and Pensco. R. Vol. VIII, pp. 928-952. On November 5, 2014, Valiant filed its motion for leave to file an amended answer to allege a

counterclaim and cross-claim, and to serve its third-party complaint, together with its opposition memorandum to VP's motion to dismiss. R Vol. VIII, pp. 977-995. VP filed its reply November 14, 2014. R Vol. X, pp. 1156-1159. On November 19, 2014, the district court issued its order granting Valiant leave to serve its third-party complaint. R Vol. X, pp. 1156-1159. The district court also entered an order granting Valiant leave to amend its answer to allege a counterclaim and cross-claim and deemed the prior pleading filed August 19, 2014, served as the amended pleading and deemed it filed as of August 19, 2014 (i.e. *nunc pro tunc*). R Vol. X, pp. 1160-1163.[2] On November 19, 2014, the district court entered its order denying VP's motion to dismiss. R Vol. X, pp. 1174-1177.

On November 19, 2014, the district court entered two other orders, one substituting Valiant as the real party in interest in place of Pensco, and the other substituting Valiant in place of MF08. R Vol. X, pp. 1168-1173.

On November 19, 2014, POBD stipulated to entry of judgment against it. R Vol. X, pp. 1178-1199. POBD stipulated that it owed certain balances on the REL debt, the Pensco debt, and the MF08 debt. *Id.* It also stipulated that Valiant had paid property taxes. *Id.*

On November 20, 2014, one day after granting Valiant leave to file its amended answer, cross-claims and third-party complaint, the trial court issued its Order Setting Trial and Pretrial Order which scheduled trial for August 24, 2015. R Vol. X, pp. 1270-1275.

[2] It was improper for the district court to back date the filing. The power to amend *nunc pro tunc* is "a limited one, and may be used only where necessary to correct a clear mistake and prevent injustice. It does not imply the ability to alter the substance of that which actually transpired or to backdate events to serve some other purpose." *United States v. Sumner*, 226 F. 3d 1005, 1009–10 (9th Cir. 2000) (internal quotation marks and citations omitted); *see also Singh v. Mukasey*, 533 F.3d 1103, 1110 (9th Cir. 2008) (quoting *Transamerica Ins. Co. v. South*, 975 F.2d 321, 325 (7th Cir. 1992) (holding that "a *nunc pro tunc* order is typically used to correct clerical or ministerial errors," but as a general rule does not enable the court to make "substantive changes affecting parties' rights"). However, since no statute of limitations was affected by the error, it was harmless with respect to VP.

On December 1, 2014, VP requested an extension of time to plead to the cross-claim against it. R Vl. XI, pp. 1377-1378. The district court granted the motion. R. Vol. XI, p. 1379-1381. On December 11, 2014, VP answered the cross-claim filed against it. R. Vol. XII, pp. 1533-1540.

On January 20, 2015, Valiant moved for summary judgment against JV, LLC; North Idaho Resorts, LLC ("NIR"), and VP. R Vol. XIV, 1720-1724. Valiant filed a memorandum in support of the summary judgment. R Vol. XIV pp. 1725-1746. Valiant also filed the supporting Declaration of Jeff Sykes (R Vol. XIV, p. 1747 – R Vol. XVI, p. 1911) and the Affidavit of Charles Reeves (R Vol. XVII, p. 1912 – XVIII, p. 2069).

On February 4, 2015, VP and NIR filed their joint memorandum in opposition to the summary judgment. R Vol. XXI, pp. 2359-2371. VP also requested the court take judicial notice of a memorandum filed by REL in Bonner County Case No. CV-2011-0135, *Union Bank v. Pend Oreille Bonner Development, LLC et al.*[3] R Vol. XXI, pp. 2372 – 2391. The Affidavit of Richard Villelli was also filed in opposition to the motion. R Vol. XXI, pp. 2392-2451.

Valiant filed its reply memorandum on March 11, 2015. R Vol. XXII, pp. 2547-2559. On April 14, 2015, the district court entered its Memorandum Decision & Order Granting Valiant's Motion for Summary Judgment against VP, North Idaho Resorts, LLC and JV, LLC. R Vol. XXII, p. 2560-2578.

On April 28, 2015, JV filed its Motion to Alter, Amend and to Reconsider the Court's Memorandum Decision and Order Filed 04/14/2015 and Request for Oral Argument Time/Date for a Hearing; Not Yet to be Set. R Vol. XXII, p. 2579-2595. On April 29, 2015, VP filed a motion for reconsideration and clarification. R Vol. XXII, pp. 2596-2597. VP filed a renewed

[3] This district case was the subject of an appeal decided by this Court in *Union Bank, N.A. v. North Idaho Resorts, LLC*, 161 Idaho 583, 388 P.3d 907 (2017).

motion for reconsideration and clarification on June 16, 2015, and a supporting memorandum. R Vol. XXIV, pp. 2781-2798. On July 6, 2015, Valiant filed an opposition to the motion. R Vol. XXIV, pp. 2804-2819. On July 6, 2015, VP filed its reply in support of its motion. R Vol. XXIV, pp. 2820-2836.

On May 20, 2015, Valiant moved for entry of final judgment, together with a supporting memorandum and a declaration of Jeff Sykes and C. Dean Shafer in support of the motion for entry of final judgment. R Vol. XXII, p. 2600 – Vol. XXIII, p. 2748. On June 23, 2015, the district court entered a Memorandum Decision and Order Granting Motion for Entry of Final Judgment. R Vol. XXIV, pp. 2791-2798. VP objected to the proposed final judgment. R Vol. XXIV, pp. 2844-2846.

On July 21, 2015, the district court issued its memorandum decision and order on the motion to reconsider on JV, NIR and VP's Motions to Reconsider and Valiant's Request for Entry of a proposed Final Judgment and Decree of Foreclosure and Sale. R. Vol. XXIV, p. 2856-2877.

On July 22, 2015, Valiant presented a motion for an order of sale on the real property, supported by the Declarations of C. Dean Shafer and Charles W. Reeves. R Vol. XXV, pp. 2880-2966. On August 4, 2015, VP objected to the motion for the order of sale as proposed by Valiant, and supported the objection with the Declaration of Richard Villelli. R Vol. XXV, p. 2981 – Vol. XXVI, p. 3074. On August 5, 2015, the district court entered its Decree of Foreclosure and a separate Judgment. R. Vol. XXVI, pp. 3075 – 3087.

VP filed a second motion to reconsider the judgment combined with a motion to alter and amend the judgment on August 19, 2015. R Vol. XXVII, p. 3114-3115. A supporting memorandum and supporting affidavit of counsel were also filed on August 19, 2017. R Vol. XXVII pp. 3116-3239. Valiant filed an opposition to VP and NIR's motion to reconsider, alter

and amend on October 1, 2015. R Vol. XXXI, pp. 3721-3726. An errata correction to VP's counsel's declaration was filed October 22, 2015. R Vol. XXXIII, pp. 3988-3989. On October 22, 2015, VP filed a reply memorandum in support of its motion. R Vol. XXXIII, pp. 3982-3985.

Valiant filed a motion to strike inadmissible evidence supporting VP's motion to reconsider on October 9, 2015. R. Vol. XXXI, pp. 3733-3736. A memorandum in support of the motion to strike was also filed October 9, 2015. R Vol. XXXI, p. 3737-3745. On October 22, 2015, VP filed a motion for enlargement of time to file its response. R Vol. XXXIII, pp. 3986-3987. On October 22, 2015, VP filed its opposition to Valiant's motion to strike.

On August 19, 2015, Valiant filed a motion to amend the decree of foreclosure. R Vol. XXVII, pp. 3240-3243. The motion was supported by Valiant's memorandum. R Vol. XXVII, pp. 3244-3248. Valiant also filed a Motion to Alter, Amend and/or Reconsider the Order of Sale of Real Property. R Vol. XXVII, p. 3249-3252. The motion was supported by a memorandum, as well as the Declaration of Chad M. Nicholson, Charles W. Reeves, and C. Dean Shafer. R Vol. XXVIII, pp3523-3328.

VP filed a joint memorandum in opposition to Valiant's motion to amend the decree of foreclosure and to alter, amend and/or reconsider the order of sale supported by the declaration of Richard Villelli (including an errata correction). R Vol. XXIX, p. 3413 – 3498.

A hearing on the motion to reconsider and alter or amend filed by JV was held September 2, 2015. Motions Tr. pp. 185-216. At the hearing, the Court chose only to consider and rule upon JV's motion. Motions Tr. p. 188, ll. 7-24. The Court granted JV's motion. *Id.*

On September 3, 2015, the Court issued an Order Setting Trial and Pretrial Order, which scheduled the matter for a court trial on January 25, 2016. R Vol. XXX, pp. 3521-3526.

On September 4, 2015, the district court issued a Memorandum Decision and Order Granting in Part Reconsideration of the July 21, 2015 Memorandum Decision & Order. R. Vol. XXX, pp. 3527 – 3532. R Vol. XXX, p. 3530. An order vacating the decree of foreclosure and another order vacating the judgment were executed August 5, 2015, but not filed until September 17, 2015. R Vol. XXX, pp. 3549-3554.

On September 25, 2015, Valiant filed a pleading designated a Third Motion for Summary Judgment. R Vol. XXXI, p. 3623-3626. On the same date, it filed a supporting memorandum and the Declaration of Barney Ng in support of the Third Motion. R. Vol. XXXI, pp. 3627-3720.

On October 13, 2015, VP filed a memorandum in opposition to the third motion for summary judgment. R Vol. XXXII, pp. 3810-3822. A declaration of VP's counsel was filed October 13, 2015, in opposition to Valiant's third motion for summary judgment. R Vol. XXXII, pp. 3791-3809. The Declaration of Richard Villelli was also filed on October 14, 2015 in opposition to the third motion for summary judgment. R Vol. XXXII, p. 3828 – 3863. VP also requested the district court take judicial notice of a declaration previously made by Barney Ng in a separate judicial matter in California related to the loans made by REL in Idaho in opposition to the third motion for summary judgment. R Vol. XXXII, p. 3823-3827. An errata correction to the declaration of VP's counsel was filed October 22, 2015. R Vol. XXXIII, pp. 3988-3989.

Valiant filed its reply memorandum in support of its third motion for summary judgment on October 21, 2015. R Vol. XXXIII, p. 3924-3939. On October 20, 2015, Valiant filed the rebuttal declaration of Barney Ng in support of its October 13, 2015 motion for summary judgment which attempted to explain some of the statements made by Ng in the California litigation. R Vol. XXXIII, p. 3906-3910. Valiant also filed a rebuttal declaration from Chad Nicholson on October

20, 2015. R Vol. XXXIII pp. 3914-3923. VP moved to strike the rebuttals declarations of Ng and Nicholson on October 22, 2015. R Vol. XXXIII, pp. 3995-3999.

On October 16, 2015, Valiant filed a motion to strike the memoranda and declarations and affidavits of VP, which incorporated the supporting declaration of Chad Nicholson. R Vol. XXXII, pp. 3864-3878. VP opposed the motion to strike on October 16, 2015. R Vol. XXXII, pp. 3879-3883. On October 20, 2015, Valiant filed a motion to shorten time to have its motion to strike inadmissible evidence heard. R Vol. XXXIII, p. 3911-3913. On October 20, 2015, Valiant also filed the Declaration of Chad Nicholson in support of its motion to strike. R Vol. XXXIII, p. 3914-3923. Valiant filed its memorandum in support of its motion to strike on October 21, 2015.R Vol. XXXIII, pp. 3962-3971.

Valiant filed a second motion to strike inadmissible evidence and a supporting memorandum on October 20, 2015. R Vol. XXXIII, pp. 3940-3952. VP opposed the motion by memorandum filed October 22, 2015. R Vol. XXXIII, pp. 3991-3994.

The district court heard Valiant's and VP's motions on October 23, 2015. Motions Tr. pp. 217-313. A Memorandum Decision & Order re: Motions Heard on October 23, 2015 was filed October 30, 2015. R Vol. XXXIII, pp. 4000-4019.

The district court issued an amended notice of trial on October 21, 2015, moving the trial from January 25, 2016 to January 28, 2016. R Vol. XXXIII, pp. 3953-3954.

On December 15, 2015, Valiant filed a motion in limine seeking to limit VP's evidence. R Vol. XXXIV, pp. 4032-4033. A supporting memorandum was filed the same date. R Vol. XXXIV, pp. 4036 – XXXV 4050. The Declaration of Richard L. Stacey was filed in support of Valiant's motions in limine. R Vol. XXXV, pp. 4057-4204. VP responded to the motion in limine on December 22, 2015. R Vol. XXXV, pp. 4221-4232. Valiant filed its reply on December 28,

2015. R Vol. XXXV, pp. 4243-4252. Valiant also filed the Declaration of Chad Nicholson on December 28, 2015 in support of its motion in limine. R Vol. XXXV, pp. 4258-4265.

The Court issued its Order re: Valiant Idaho LLC's Motion in Limine on December 29, 2015. R Vol. XXXV, pp. 4266-4268.

Trial proceeded on the matter. The first two days of trial occurred January 28, 2016, and January 29, 2016. Tr. Vol. I, p. 7 and Tr. Vol. II, p. 279. The third and fourth days of trial occurred on March 16, 2016, and March 17, 2016. Tr. Vol. III, pp. 555 and 775.

The district court entered its judgment on June 22, 2016. R Vol. XXXVII, p. 4619 – Vol. XL, p. 4909. A separate Decree of Foreclosure was entered June 22, 2016. R. Vol. XL, p. 4910 - XLI, p. 4940.

On June 22, 2016, Valiant filed a Motion for an Order of Sale of Real Property supported by a memorandum. R Vol. XLI, pp. 4985-5014. VP opposed the order of sale. R Vol. XLI, p. 5015-5018. On July 14, 2016, the Court entered its Order re: Order of Sale of Real Property. R Vol. XLIII, pp. 5270-5273.

On July 6, 2016, the district court held a hearing on the form of the judgment and decree of foreclosure which were entered because they omitted JV's priority and the property description of the property encumbered by JV's lien. R Vol. XLIII, pp. 526-5265. An order vacating the judgment was entered July 14, 2016. R Vol. XLIII, pp. 5266-5267. An order vacating the Decree of Foreclosure was also entered on July 14, 2016. R Vol. XLIII, pp. 5268-5270.

On July 18, 2016, the trial court entered an order requiring all parties to submit to it proposed judgments and decrees no later than July 15, 2016, which included the legal description of the properties encumbered by JV in the legal description.[4] *Id.* On July 18, 2016, the district

[4] The dates set forth in this paragraph do not contain an error.

court entered its Order re: Proposed Judgment and Proposed Decree of Foreclosure indicating it intended to adopt the proposed Judgement and Proposed Decree of Foreclosure submitted by Valiant. R Vol. XLIII, pp. 5303-5305. On July 20, 2016, the district court entered its Decree of Foreclosure. R Vol. XLIV pp. 5317-5412. On July 20, 2016, the district court also entered its Judgment. R Vol. XLV pp. 5413-5502.

Valiant filed its Memorandum of costs and attorney fees on July 6, 2016, together with a supporting declaration. R Vol. XLI, p. 5019 – XLII, p. 5263. On July 20, 2016, VP filed its opposition to Valiant's memorandum of costs and attorney fees. Vol. XLV, pp. 5503-5520. On August 10, 2016, VP filed the Declaration of Richard Stacey in response to VP and JV's objections to costs and attorney fees. R Vol. XLVI pp. 5591-5672. Valiant also filed a memorandum in response to VP's objection to costs and attorney fees. R Vol. XLVII, pp. 5746-5769. The trial court entered its Memorandum Decision Order Awarding Costs and Attorney's Fees to Valiant Idaho, LLC on August 22, 2016. R Vol. XLVIII, pp. 5829-5843. A judgment re: Costs and Attorneys' Fees was entered August 22, 2016. R Vol. XLVIII, pp. 5844-5846.

On August 3, 2016, VP moved for a new trial on the limited issue of Valiant's belated claims arising at trial that it was entitled to an award of damages for operating losses and damages from an alleged oil spill. R Vol. XLV pp. 5542-5545. The motion was supported by a memorandum and affidavit of counsel. R Vol. XLV p. 5546-5552. Valiant filed an opposition to the motion on August 10, 2016. R Vol. XLVI pp. 5577-5583. The opposition was supported by the Declaration of Jeff Sykes. R Vol. XLVII, pp. 5714-5727. VP filed its reply memorandum on August 15, 2016. R Vol. XLVII, pp. 5787-5792. The district court entered its Memorandum Decision Order Denying VP's motion for new trial on August 25, 2016. R Vol. XLVIII, pp. 5906-5919.

On August 2, 2016, JV filed a motion to alter, amend and reconsider the Judgment and Decree of Foreclosure. R Vol. XLV, pp. 5521-5539. On August 3, 2016, the trial court entered its order denying JV's request for oral argument. R Vol. XLV pp. 5540-5541. On August 3, 2016, VP also moved for a motion to alter, amend and reconsider the Decree of Foreclosure and Judgment, together with a supporting memorandum submitted August 3, 2016, which was not filed by the Clerk of Court until August 4, 2016. R Vol. XLVI pp. 5553-5574. As with JV, the district court denied oral argument on the motion. R Vol. XLVI p. 5575-5576. Valiant filed an opposition to VP's and JV's motions to alter, amend and reconsider on August 10, 2016. R Vol. XLVI pp. 5584-5590; Vol. XLVI pp. 5673-5681. The district court entered its memorandum decision denying VP's and JV's motions to alter, amend and reconsider on August 16, 2017. R Vol. XLVII p. 5793- XLVIII p. 5814.

On August 10, 2016, Valiant moved for sanctions against JV, VP and NIR for filing their motions for reconsideration in the matter. R Vol. XLVII, pp. 5682-5684. The motion was supported by the declaration of Richard Stacey. R Vol. XLVII, pp. 5685-5713. A supporting memorandum was filed August 11, 2016. R Vol. XLVII, pp. 5770-5786. On August 24, 2016, VP and NIR filed their memorandum in opposition to Valiant's motion for sanctions. R Vol. XLVIII, pp. 5886-5919. The Declaration of Daniel M. Keyes was filed in support of the opposition. R Vol. XLVIII, pp. 5886-5919. On August 29, 2016, the district court entered its Memorandum Decision Order denying the motion for sanctions. R Vol. XLVIII, pp. 5925-2940.

On September 21, 2014, the clerk issued a writ of execution on the judgment. R Vol. LII, p. 6318- LIII, p. 6506. The sheriff's service on the writ of execution, notice of levy under the writ and notice of sheriff's sale were all filed on September 21, 2016. R Vol. LIII, pp. 6507-6561. On October 5, 2016, Valiant filed the application and declaration of Richard L. Stacey for writ of

execution. R Vol. LIV, pp. 6608-6610. A Writ of Execution was filed October 5, 2016. Vol. LIV, pp. 6611 – LVI, p. 6803. An application for a writ of execution against VP was filed October 6, 2016. R Vol. LVI, pp. 6820-6827.

On September 9, 2016, NIR appealed. R Vol. XLIX, p. 5941 – LI, p. 6136. On September 20, 2016, JV appealed. R Vol. LI, pp. 6137 - p. LII, p. 6312. On October 6, 2016, VP appealed. R Vol. LVI, pp. 6828 – LVII, p. 7030. On May 25, 2017, VP filed an amended notice of appeal. R Vol. LXXIX, pp. 9931-9946.

On September 21, 2016, Valiant filed a motion for relief from the fourteen-day automatic stay, supported by the declaration of Richard Stacey. R Vol. LIV, pp. 6566-6577. On September 23, 2016, the district court denied Valiant oral argument on its motion. R Vol. LIV, pp. 6578-5680. VP and NIR filed a memorandum in opposition to motion for relief from automatic stay on September 28, 2016. R Vol. LIV, pp. 6597 – 6602. Valiant filed its reply on September 29, 2016. R Vol. LIV, pp. 6603-6607. The trial court granted Valiant's motion for relief from the automatic stay on October 7, 2016. R Vol. LIX, pp. 7230-7237.

On December 22, 2016, the Bonner County Sheriff filed a Notice of Levy Under Writ of Execution, Notice of Sheriff's Sale and Sheriff's Certificates of Sale. R Vol. LXII, p. 7657 – LXVI p. 8227. The Bonner County Sheriff filed several Sheriff's Certificates of Sale. R Vol. LXII, p. 7747 – LXV, p. 9445.

On February 8, 2017, Valiant filed a motion to enforce the district court's judgment under IAR 13(b)(10) and 13(b)(13), together with a supporting memorandum and declaration of counsel. R Vol. LXVII, p. 8268- Vol. LXX, p. 8708. VP filed its opposition to Valiant's motion to enforce the judgment on February 27, 2017, together with the supporting declaration of Richard Villelli and Daniel Keyes. R Vol. LXX, p. 8746- LXXI, p. 8821. Valiant filed its reply memorandum on

February 22, 2017, and a declaration by its counsel in rebuttal. R Vol. LXXI, p. 8827- Vol. LXXV, p. 9340. The Court entered its Memorandum Decision and Order granting Valiant's motion to enforce the judgment on March 6, 2017. R Vol. LXXV, pp. 9341-9360. The district court also issued a Writ of Assistance. R Vol. LXXV pp. 9361-9386.

On March 20, 2017, Valiant filed its motion to clarify the Court's memorandum decision and order granting its motion to enforce the judgment against VP, together with a supporting memorandum and notice of hearing. R Vol. LXXV, pp. 9399-9412. VP filed its response on March 29, 2017. R Vol. LXXV, pp. 9424-9435. Valiant filed its reply on April 3, 2017. R Vol. LXXV, pp. 9436-9445. The trial court issued its memorandum decision on the motion to clarify on April 27, 2017. R Vol. LXXIX, pp. 9861-9870.

On March 7, 2017, VP filed its motion for an order allowing the continued use and access to Parcels 1 and 2 of the judgment to allow VP to continue to provide water and sewer services to its customers, and an application pursuant to I.A.R. 13 for stay of the enforcement of the writ of assistance pending appeal, with no request for oral argument. R Vol. LXXV, pp. 9388- 9398. On March 27, 2017, the district court issued an Order Requesting Response Brief from Valiant Idaho, LLC with respect to the motion for the stay. R Vol. LXXV, pp. 9413-414. On March 28, 2017, Valiant noticed for hearing VP's motion for the order allowing the use and access to Parcels 1 and 2, and the stay on appeal. R Vol. LXXV, pp. 9415-9417. Valiant also requested an extension to respond to VP's motion for an order allowing use and access to Parcels 1 and 2, and application for stay of enforcement of the judgment. R Vol. LXXV, pp. 9418-9420. On March 28, 2017, the district court granted Valiant's motion for an extension to respond to VP's motion. R Vol. LXXV, p. 9421-9423. On April 11, 2017, Valiant filed its memorandum in opposition VP's motion for access to Parcels 1 and 2, and stay of enforcement of the judgment. R Vol. LXXVII, pp. 9665-

9682. The opposition was supported by the declarations of William Haberman and Steven Cordes. R Vol. LXXVI, pp. 9455-9634. VP filed its reply memorandum in support of its motion for access and stay on appeal on April 17, 2017, together with the declaration of Richard Villelli. R Vol. LXXVIII, pp. 9745-9789.

On April 13, 2017, Valiant filed a motion requesting a post-judgment temporary restraining order and post-judgment preliminary injunction against VP to restrain VP from discontinuing supplying water and sewer service to Valiant and others, except for operation of the sewer lagoon, supported by a memorandum, and the declarations of counsel and William Haberman. R Vol. LXXVII, pp. 9683- Vol. LXVIII, p. 9704. On April 13, 2017, the district court issued a temporary restraining order prohibiting VP from complying with the district court's previously issued writ of assistance. R Vol. LXXVIII, pp. 9707-9710. Thereafter, Valiant filed a notice of deposit of a bond. R Vol. LXXVIII, pp. 9711-9713.

VP moved to dissolve the temporary restraining order on April 17, 2017, together with a supporting memorandum. R Vol. LXXVIII, pp. 9714-9732. Valiant requested an enlargement of time to respond to the VP's motion to dissolve, supported by the declaration of Chad Nicholson. R. Vol. LXXVIII, p. 9733-9741. The Court granted the motion to enlarge. R Vol. LXXVIII, p. 9742-9744. On April 18, 2017, Valiant filed its opposition to the motion to dissolve the temporary restraining order, together with the supporting declarations of Richard Stacey and William Haberman. R Vol. LXXVIII, pp. 9790-9818. The district court entered an order extending the post-judgment temporary restraining order against VP on April 20, 2017. R. Vol. LXXVIII, pp. 9819-9822. On April 26, 2017, the district court denied VP's motion for stay on appeal and issued a post-judgment injunction against VP prohibiting it from complying with the district court's previously issued order to vacate from the foreclosed lots. R Vol. LXXIX, pp. 9853-9860.

C. STATEMENT OF FACTS

The appeal of this matter encompasses various aspects of the above proceedings. The first aspect is the grant of summary judgment against VP. The second aspect is error in the entry of judgment. The third aspect is the district court's issuance of a post-judgment temporary restraining order and injunction. The final aspect is the award of costs against VP. A statement of facts for each of these aspects would be disjointed. Therefore, the relevant facts are included prior to the argument addressing each discrete aspect.

II. ISSUES PRESENTED ON APPEAL

1. Did the district court err in granting a summary judgment against VP and adjudging Valiant took free and clear of any right VP claimed for the right to maintain and operate its water and sewer systems within the foreclosed lots in the Idaho Club?

2. Did the district court err in declaring the rights and relationships of the unknown purchasers at foreclosure when there was no case or controversy before the district court upon which to enter a declaratory judgment on these issues?

3. Did the district court err by granting a post-judgment temporary restraining order followed by a preliminary injunction against VP?

4. Did the district court err in its cost award against VP?

III. ARGUMENT

A. STANDARDS OF REVIEW

Because there is more than one issue on appeal, different standards apply. The relevant standards are as follows:

1. *Summary Judgment*: This Court reiterated its standard of review on a summary judgment brought prior to the change to Rule 56, I.R.C.P, in *Nettleton v. Canyon Outdoor Media, LLC*, ___ Idaho ___, ___ P.3d ___ (Docket No. 44416 released 12/21/17), wherein this Court ruled:

> This Court applies the same standard of review that was used by the trial court in ruling on a motion for summary judgment. *Quemada v. Arizmendez*, 153 Idaho 609, 612, 288 P.3d 826, 829 (2012) (*quoting Vreeken v. Lockwood Eng'g, B. V.*, 148 Idaho 89, 101, 218 P.3d 1150, 1162 (2009)). Summary judgment is proper "if the pleadings, depositions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). "[T]his Court construes disputed facts, and all reasonable inferences that can be drawn from the record, in favor of the non-moving party." *Grabicki v. City of Lewiston*, 154 Idaho 686, 690, 302 P.3d 26, 30 (2013) (internal citation omitted). "The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue." *Nw. Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 838, 41 P.3d 263, 266 (2002) (internal citation omitted). Accordingly, "[t]he moving party is entitled to 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." *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (*citing Celotex v. Catrett*, 477 U.S. 317 (1986)).

2. *Abuse of discretion*: "This Court engages in a three-part inquiry when reviewing for an abuse of discretion: '(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.'" *Samples v. Hanson*, 161 Idaho 179, 182, 384 P.3d 943, 946 (2016).

B. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGEMENT AGAINST VP

1. Statement of Facts

On January 20, 2015, Valiant filed a motion for summary judgment seeking a 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. The supporting memorandum filed by Valiant sought a "judgment that its Mortgages…[were] senior in right and priority to any interest claimed by…VP…in the POBD Property." R Vol. XIV, p. 1727.

The motion was supported by a memorandum. R Vol. XIV, pp. 1725-1744. Valiant's introduction in its memorandum explained it was seeking summary judgment that its mortgages were senior in right and priority to any interest of VP in the POBD Property which it claimed was more particularly described in Exhibit 1 to the declaration of Jeff Sykes. R Vol. XIV, p. 1727. The introduction continued that the POBD Property *and all improvements thereon* were referred to as the "Idaho Club Property". *Id.* Valiant indicated it sought summary judgment pursuant to the fourth, fifth and sixth causes of action in its complaint to foreclose the assigned mortgages of REL, Pensco and MF08, and a judgment that its interest in the foreclosed lot within the Idaho Club Property was superior and senior in right, title and interest to any interest claimed by Claimants in the Idaho Club Property. R Vol. XIV, p. 1732. The memorandum also indicated it sought to foreclose its redemption deed and sought a foreclosure of claimants' interest in the redemption real property (as opposed to the Idaho Club Property previously defined in the memorandum.) *Id.* Nothing in the memorandum indicated Valiant sought a decree of quiet title against VP in the foreclosed lots.

The declaration of Jeff Sykes, counsel for Valiant, included a legal description in Exhibit 1 with no explanation of its origin. R Vol. XV, p. 1749, ¶ 2. The legal description did not match the legal description attached to the Counterclaim, Cross-claim and Third-Party Complaint filed by Valiant on August 19, 2014. R Vol. VI, pp. 739-767.

Regarding VP, Valiant acknowledged in the memorandum in support of summary judgment that VP in its answer to the cross-claim had specifically denied that Valiant had a superior interest in lots containing water and sewer infrastructure (the lagoon lots and the well lots) and its utility easements. R Vol. XIV pp. 1735-1738. In its argument, Valiant asserted as a relevant fact that a thorough review of the real property records of Bonner County revealed that

VP had no recorded interest in any of the Idaho Club Property which was recorded prior to the REL, Pensco or MF08 mortgage. R Vol. XIV, p. 1742. No declaration or other evidence was submitted by Valiant which supported its claim that a thorough review of the Bonner County records was made, who made it, what records were allegedly reviewed, when the review occurred, or how the conclusion was reached that VP had no recorded interest in the Idaho Club Property. *Id.* Valiant concluded with the argument that VP could establish no basis under which any claim it may have in the Idaho Club Property was senior to Valiant's interests. *Id.*

VP opposed Valiant's motion for summary judgement identifying the following interests with priority over mortgages assigned to Valiant: (1) one of its deeded lots was not encumbered by any of Valiant's mortgages, (2) prescriptive easements throughout the subject property, and (3) equitable interests and servitudes within the subject property. R Vol. XXI, pp. 2359-2371. VP maintained that Valiant did not address these interests. *Id.*[5]

VP also raised the issue that the legal descriptions of the real property for which summary judgment was sought did not match those of the REL, Pensco and MF08 mortgages. R Vol. XXI, pp. 2361, 2364. VP specifically denied that the legal description of the MF08 lien encompassed one of the lots (Lot 2, Block 17 of the replat of Golden Tee Estates and Golden Tee Estates 1st Addition as recorded in Book 8 of Plats, Page 77). R Vol. XXI, p. 2369.

VP supported its opposition with the Declaration of Richard Villelli, which contained testimony in support of VP's claims. R Vol. XXI, pp. 2392-2451. In this declaration, Villelli indicated he was the president of Villelli Enterprises, Inc., which was the managing member of NIR. R Vol. XXI, p. 2393, ¶ 2. Villelli also testified he was the President of VP. *Id.*, ¶ 3.

[5] It is undisputed that DEQ required POBD to deed four (4) lots as part of a Compliance Agreement when POBD failed to comply with licensing requirements. However, these deeds would not have merged VP's easement and equitable servitude interest. *See Wilson v. Linder*, 123 P. 487, 21 Idaho 76 (1912) (holding that merger will not apply when it proves inequitable or to the disadvantage of the person who is honestly seeking to protect his rights).

Villelli introduced as Exhibit "A" the Third Amended and Restated Real Property Purchase and Sale Agreement ("PSA") by which POBD's predecessor acquired the Idaho Club property from NIR on March 9, 2006. R Vol. XXI, p. 2393, ¶ 5. The PSA indicated NIR owned both developed and undeveloped real property in Bonner County, Idaho. R Vol. XXI, p. 2398. The PSA specifically excluded VP's domestic water rights, easements for operation and delivery of domestic water and sewer service including the sewer lagoon and land application. R Vol. XXI, p. 2399. The PSA specified VP owned the domestic water and sanitary sewer systems which currently served and would serve the project. R Vol. XXI, p. 2433b-2433c. It recognized that the system was also currently serving the Hidden Lakes community. *Id.* It committed VP to provide capacity to the project (now known as the Idaho Club). *Id.* A condition precedent to the closing was that VP had to provide POBD with a "will serve" letter to provide water and sewer to the project. R Vol. XXI, p. 2424. The PSA contained a non-merger clause. R Vol. XXI, p. 2433g.

Part of the Rights and Obligations section of the PSA included a section identified as "planning work" and recognized the buyer would be seeking entitlements to the property. R Vol. XXI, pp. 2413-2414. The seller was required to cooperate with the buyer to secure entitlements to develop the property. R Vol. XXI, p. 2417. The entitlements included approval of the extension of VP's water and sewer systems to serve the lands POBD was developing as the Idaho Club. R Vol. XXI, pp. 2413-2414, 2436.

Villelli testified, consistent with the terms of the PSA, that VP entered into a Construction and Operating Agreement on June 13, 2006, which addressed POBD's extension of VP's existing water and sewer systems, much of which had been in place for over 20 years and required VP to operate the systems. R Vol. XXI, p. 2395, ¶ 10. Villelli testified VP operated the systems as agreed. R Vol. XXI, p. 2395, ¶ 11. Villelli also testified the agreement required POBD to grant

easements for the areas where the systems were extended, and required POBD to deed the lots upon which the sewer lagoons and water systems were located. *Id.* Villelli further testified Idaho Department of Environmental Quality later required POBD to deed the four lots upon which the sewer lagoons, water towers and pumping stations were situated in connection with a compliance agreement. *Id.*

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. Regarding the legal description, in a footnote to the decision, the district court indicated the property against which it was granting foreclosure was particularly described in Exhibit 1 to the Declaration of Jeff Sykes. R Vol. XXII, p. 2561, footnote 1. The district court's decision neglected to address the prescriptive easement and equitable servitude interests raised by VP in its opposition and simply compared the recording dates of various recorded interests in the real property to determine priority of those recorded interests, concluding: "VP's only alleged interests were recorded on June 13, 2011, and May 20, 2014 – several years after the 2007 RE Loans Mortgage, Pensco Mortgage and MF08 Mortgage – and are, thus, found to be junior to those Mortgages as a matter of law." R Vol. XXI, p. 2574.

VP filed a motion to reconsider the court's summary judgment memorandum decision and order. R Vol XXIV, pp. 2783-2789. On July 21, 2015, the district court entered its memorandum decision and order on VP's motion to reconsider and again upheld its grant of summary judgment to Valiant, but altered some of its reasoning. R. Vol. XXIV, pp. 2856-2877. Regarding the legal description challenge raised by VP, even though the district court had previously granted a complete summary judgment to Valiant, the district court deemed a subsequent Motion for Entry

of Final Judgment filed by Valiant, and supported by the declaration of a title officer, to constitute an unopposed second motion for summary judgment. *Id.*

The district court upheld its dismissal of VP's claims for prescriptive easements and equitable servitudes because "VP [did not plead] these claims in its pleadings, nor [raise] them in its response to Valiant's motion for summary judgment" and therefore, they "did not survive Valiant's motion for summary judgment." R Vol. XXIV, p. 2874.

On August 4, 2015, VP introduced the Declaration of Richard Villelli in opposition to the order of sale at foreclosure. R Vol. XXVI, pp. 2987-3074. Villelli, President of VP, and the President of Villelli Enterprises, Inc., which was the manager of NIR, testified to the following:

(1) In 1995, VP purchased an existing water system from JV, LLC which serviced lots in the Hidden Lakes subdivision in Bonner County, and was created and installed in 1985. The purchase included all the existing infrastructure, easements, operating permits, a well, and a water reservoir.

(2) In 1995, VP, Inc. purchased an existing sewer system from JV, LLC. At the time of purchase, the sewer system purchase included an existing lagoon, all infrastructure, an assignment of easements, lift stations and operating permits. The sewer system serviced the Hidden Lakes Golf Course, three existing subdivisions, a maintenance facility and an existing club house. *Id.* The sewer system was installed in 1985.

(3) Since the purchase of the water and sewer systems, VP had continuously held all necessary permits to operate the water and sewer system which now also serviced portions of the Idaho Club properties.

(4) In 2000, the water and sewer systems were extended by VP to serve 49 lots in the Golden Tee Estates and Golden Tee Estates First Addition subdivisions.

(5) In 2004, NIR began negotiations with MDG Nevada, Inc., and its affiliate, Pend Oreille Bonner Investments, LLC, regarding the sale of undeveloped real property in Bonner County which surrounded and lay in the general vicinity of the Golden Tee Estates and Golden Tee Estates First Addition subdivisions.

(6) The Third Amended and Restated Real Property and Purchase Agreement (PSA) excluded the water and sewer systems. The PSA allowed the developer to expand the sewer and water system to serve the Idaho Club project so long as the developer paid for and constructed any expansion of the sewer and water system at its own expense and transferred ownership of those improvements to VP as called for in both the Conditional Use Permit (CUP) and Planned Unit Development (PUD) submissions to Bonner County. To support this testimony, a copy of the PSA, and a copy of the will serve letter provided to POBD were supplied to the district court.

(7) On June 13, 2006, VP entered into a Construction and Operation Agreement ("COA") with POBD. The subject of the COA was "construction and operation of the sewer and water systems which VP owns..." The Agreement allowed POBD to extend VP's water and sewer systems to serve properties owned by Pend Oreille Bonner Development Holdings, Inc (POBD's predecessor). The agreement required POBD to grant easements for all extensions of VP's system. A copy of this agreement was provided to the district court.

(8) POBD proceeded to submit plats to Bonner County for approval. VP, Inc. was requested to issue a will serve letter in connection with the plats, and subsequently reviewed the plats. All plats contained a "Water and Sewer Service Note" which indicated that all Lots shown on the Plat will receive water and sewer service from VP,

Inc. (PWS No. 1090195.) Each plat also contained a reference to a lienholder's certificate filed by REL agreeing to the subdivisions as shown on the plat recorded in Bonner County as Instrument No. 714036. The plats showed the water and sewer system extension easements on the face of the plats. On July 7, 2005, VP's Director of Operations issued a will serve letter for the Idaho Club. A copy of the will serve letter was supplied to the district court.

(9) After the purchase of the property, POBD relocated the land application area for the sewer system effluent. POBD obtained a permit from the Idaho Department of Environmental Quality (DEQ) for the new land application. The permit number was LA 0000123-02. POBD identified VP as the Responsible Official in the permit. The permit applied only to the land application of effluent and did not replace or modify any of VP's existing permits.

(10) Pursuant to the parties' agreement, POBD began paying Bob Hansen of Water System Management for his services in overseeing the land application of effluent to the golf course. POBD subsequently defaulted on paying Bob Hansen and VP resumed paying for his services.

(11) In 2008 and 2009, VP was contacted by DEQ regarding failure by POBD to comply with the land application permit, and was required to request two emergency extensions.

(12) By letter dated February 14, 2011, DEQ sent a non-compliance letter to Chuck Reeves, manager of POBD, copied to VP. A copy of the non-compliance letter was provided to the district court.

(13) By letter dated April 15, 2011, DEQ issued a Notice of Violation to POBD, which was copied to VP. A copy of the letter and notice of violation issued by DEQ were provided to the district court.

(14) On July 8, 2011, DEQ distributed a consent order with POBD, which was sent to VP. A copy of the consent order was provided to the district court.

(15) On April 3, 2012, DEQ sent a non-compliance letter to POBD, which was copied to VP. A copy of the letter was provided to the district court.

(16) On September 11, 2013, DEQ entered into a Compliance Agreement Schedule with POBD and VP. The terms of the compliance agreement required POBD to deed four lots to VP upon which the wastewater lagoon, water reservoir, well reservoir and booster pumps were situated by September 13, 2013. A copy of this agreement was provided to the district court.

(17) On September 20, 2013, POBD quitclaimed these four lots to VP in compliance with DEQ's requirements. A copy of the recorded deeds was provided to the district court.

(18) Following the recording of the deeds, VP paid all past due real property taxes owed to Bonner County and continued to pay taxes as they came due. These lots were not part of the tax redemption with Bonner County.

(19) Bonner County assessed these parcels as "common area" of the Idaho Club.

(20) Every individual parcel that receives water and sewer service has entered into a service agreement with VP.

R Vol. XXVI, pp. 2987 – 3074.

Following filing of this declaration, on August 19, 2015, VP then filed a second motion to reconsider the summary judgment supported by an additional declaration of counsel. The memorandum reiterated the primary arguments that VP had raised in its previous pleadings regarding prescriptive easements and equitable servitudes and sought a determination on the merits by the district court. R Vol. XXVII, pp. 3116-3132.

On October 23, 2015, the district court entered a memorandum decision and order on VP's second motion to reconsider, and for the first time in more than nine (9) months since VP first raised claims of prescriptive easements and equitable servitudes, addressed those substantive issues. The district court denied the motion finding VP failed to present sufficient evidence to establish a genuine issue of material fact. R Vol. XXXIII, pp. 4010-4013.

The district court issued a Decree of Foreclosure following its entry of final judgment. Clause 5 of the Decree of Foreclosure provided:

> 5. In accordance with the Valiant Mortgages, each Parcel of Idaho Club Property that is sold at the foreclosure sale shall include the property rights appurtenant to, located on or under, and existing in conjunction with said Parcel, including, but not limited to:
>
> a. All easements, rights-of-way, water rights of every kind and nature (including, but not limited to, claims, decrees, applications, permits, licenses, storage rights, ditches and ditch rights, riparian and littoral rights), rights to timber to be cut, minerals and mineral rights, rights of use or occupancy, privileges, franchises, tenements, appendages, hereditaments and appurtenances and all other rights thereunto belonging or in any way appertaining to said Parcel, either at law or in equity, in possession or in expectancy;
> b. All fixtures, structures, buildings and improvements of every kind and description located on or under said Parcel, including, but not limited to, all... utilities...
>
> R Vol. XLIV, p. 5321.

2. Introduction

The district court's holding that VP failed to present genuine issues of material fact in opposition to Valiant's motion for summary judgment was erroneous. Even were this Court to determine that Valiant's motion for summary judgment sufficiently raised the issue of quiet title, VP's opposition presented material facts that should have prevented the entry of summary judgment in favor of Valiant. The two Villelli declarations sufficiently raised genuine issues of material fact whether VP had prescriptive easement rights that arose before the mortgages encumbered the subject property, and whether VP had equitable servitudes that could not be foreclosed.

To oppose and defeat a motion for summary judgment "affidavits or other proof must be presented to the court to set forth the specific facts showing that there is a genuine issue existing for trial." *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 833, 801 P.2d 37, 40 (1990); I.R.C.P. 56(e). Before that burden is placed upon the opposing party the movant must first challenge an element of the non-movant's defense or affirmative defense. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994).

In this case, Valiant's motion for summary judgment simply contended that a thorough review of the real property records of Bonner County revealed VP had no recorded interest in any of the Idaho Club Property which was recorded prior to Valiant's assigned mortgages. However, this bald statement was unsupported by any evidence of who allegedly made these reviews, or what items they allegedly reviewed at Bonner County, or when this review was allegedly made. Valiant only submitted the uncertified copies of the four infrastructure lots DEQ required POBD to convey to VP which were recorded after the REL, Pensco, and MF08 mortgages, as support of its claims that VP's interest was inferior to Valiant's. R Vol. XIV, pp. 1735-1738.

As noted in the statement of facts, VP initially submitted the declaration of Richard Villelli in opposition to Valiant's motion. VP subsequently submitted another declaration of Richard Villelli which expanded upon the information contained in the first declaration regarding VP's infrastructure. Despite having both of these declarations before it, the district court denied VP's second motion to reconsider, finding they provided insufficient evidence of any material fact.

On appeal, VP contends the district court erred because the declarations, and the materials submitted with them, presented genuine issues of material fact with respect to the following issues, each of which should have prevented the district court from entering summary judgment in favor of Valiant: (1) whether Valiant's summary judgment legal description was encumbered by the mortgages it was foreclosing; (2) whether VP had senior prescriptive easement rights; and (3) whether VP had senior equitable servitudes.

3. The district court erred in granting foreclosure of property using a different legal description than contained in the foreclosed mortgages

The legal descriptions of 23 items (154 parcels in total) of real property Valiant claimed were encumbered by the mortgages it sought to foreclose were presented at summary judgment as an exhibit to the Declaration of Jeff R. Sykes. R. Vol. XV, pp. 1747-1763. No foundation or testimony was presented to the district court at summary judgment which explained how the substituted Sykes legal descriptions were derived.[6] The Sykes legal description did not match the legal descriptions contained in the REL mortgage (R Vol. XVII, pp. 1962-1993); the Pensco mortgage (R Vol. XVII, pp. 2001-2030); and the MF08 mortgage (R Vol. XVIII, pp. 2039-2069.) For instance, the Sykes legal description identified Lot 2, Block 17 of the Replat of Golden Tee Estates and Golden Tee Estates 1st Addition as part of the "Parcel 4" legal description. R Vol. XV,

[6] The Sykes declaration does not contain any statement of affirmation that the declarant, Jeff Sykes, has any personal knowledge of the converted legal descriptions.

p. 1758. Yet this lot was not included in the legal descriptions of any either the Pensco mortgage or the MF'08 mortgage. R Vol. XVII, p. 2022; R Vol. XVIII, p. 2061.

VP maintained in summary judgment that the trial court could not declare seniority and foreclose against the requested real property when the legal descriptions upon which foreclosure was sought did not match the legal description of the mortgages unless there was evidence presented of the correlation to the mortgaged property descriptions, or an explanation of how the substituted property legal descriptions were derived. R Vol. XXI, pp. 2361-2365; Tr. p. 44, L. 2 – p. 45, L. 5 (March 18, 2015). Yet, the district court granted summary judgment adopting the Sykes legal descriptions. R Vol. XXII, p. 2561, footnote 1.

Shortly after the trial court granted a complete summary judgment in favor of Valiant declaring foreclosure against the real property described in the Sykes declaration, Valiant submitted its Motion for Entry of Final Judgment pursuant to Rule 54 of the Idaho Rules of Civil Procedure. R Vol. XXII, p. 2602. In support of its motion for entry of final judgment, Valiant filed declarations of Jeff Sykes and Dean Shafer, a title officer. R Vol. XXII, p. 2600 – Vol. XXIII, p. 2748. The Sykes Declaration stated that Valiant purchased a litigation guarantee in aid of its foreclosure action and attached the legal description of the land referred to in the litigation guarantee as an exhibit to the declaration. R Vol. XXIII, p. 2614. The Shafer Declaration stated that Shafer, a title officer, had compared the legal descriptions of real property from the litigation guarantee with the property described in each of the Valiant mortgages and the redemption deed and based upon his expert opinion, the legal descriptions "accurately describes the real property described in the Valiant Encumbrances, subtracting the parcels released from the Valiant Encumbrances, and which Valiant is entitled to foreclose." R Vol. XXIII, p. 2630. The Valiant Encumbrances were defined as the REL, Pensco, and MF08 mortgages. *Id.*

As noted in the course of proceedings section of this brief, VP moved for reconsideration of the district court's adoption of the Sykes legal descriptions. R. Vol. XXIV, pp. 2781-2798. The district court addressed this issue in its memorandum deciding VP's first motion for reconsideration of the grant of summary judgment. The district court concluded the legal description provided by Valiant was sufficient, but not based upon what was submitted at summary judgment.

Rather, the district court relied upon the declaration of Schafer submitted in support of a motion for entry of final judgment *after* the decision of the trial court granting the motion for summary judgment utilizing the converted legal description attached to the Sykes affidavit.

The district court emphasized no party had filed an opposition to the legal description submitted by Valiant in support of its motion for entry of final judgment even though 28 days elapsed between the filing the of the declaration and the hearing seeking entry of final judgment. R Vol. XXIV, p. 2863. The district court justified its use of evidence submitted after the grant of the summary judgment, holding:

> Although Valiant's Motion for Entry of Final Judgment may not have been styled as a "Motion for Summary Judgment," it was effectively a motion for summary judgment on the issue of the legal description, because it was filed 28 days prior to the date fixed for hearing – consistent with Idaho Rule of Civil Procedure 56(c) – and was supported by an affidavit (i.e., the Shafer Declaration) – consistent with Idaho Rule of Civil Procedure 56(e).

R Vol. XXIV, pp. 2868-2869.

The district court's holding misperceives the import of its previous summary judgment ruling. Idaho Code § 45-1302 provides "[i]n any suit brought to foreclose a mortgage... upon real property... the court shall, in addition to granting relief in the foreclosure action, determine the title, estate or interest of all parties thereto in the same manner and to the same extent and effect

as in the action to quiet title." The district court could not previously have granted summary judgment to Valiant without a determination and identification of the foreclosed properties.

Because the district court had already determined the identification of the foreclosed property in its summary judgment decision, it had disposed of that issue. No issue regarding the legal description of the foreclosed property remained for adjudication. Thus, a subsequent grant of summary judgment pursuant to Rule 56 on an issue already adjudicated was error. Failure to comply with procedural rules is a question of law over which this Court exercises free review. *Ernst v. Hemenway & Moser, Co.*, 120 Idaho 941, 944, 821 P.2d 996, 999 (Ct. App. 1991).

It appears the trial court acknowledged that VP's motion to reconsider regarding the legal description had merit. Rather than reversing its ruling though, the district court devised a means to affirm its prior decision based on subsequent evidence submitted after the grant of summary judgment. Nothing in I.R.C.P. 56 allowed such a procedure.

Further, the procedure used by the district court was unfair to VP. Rule 7(b)(1)(B) requires that all motions "state with particularity the grounds for relief sought including the number of the applicable civil rule, if any." Valiant's motion for entry of final judgment did just that, citing to Rule 54. Such a motion after receiving a complete grant of summary judgment on all issues was not unforeseen.

What was unforeseen was the trial court's conversion of the "Motion to Enter Final Judgment" into a summary judgment on an issue it had already adjudicated merely because the hearing occurred 28 days after the filing of the motion. In instances where a trial court decides to treat a submitted motion different from what was presented, when the substantial rights of the opposing party are involved, the trial court is required to provide notice to the parties, so they can appropriately respond.

For instance, and by analogy, when a trial court considers matters outside of the pleadings on a Rule 12(b)(6) motion to dismiss, "the motion shall be treated as one for summary judgment and disposed of as provided in I.R.C.P. 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990). The reason for the requirement is clear. It is intended to allow the opposing party a fair opportunity to respond to the motion.

The same analysis extends to this issue. Although the hearing on the request to enter a final judgment occurred 28 days after Valiant filed its motion for entry of judgment, there was no notice provided to VP that the trial court had decided to deem the motion for entry judgment as a motion for summary judgment on an issue it had already adjudicated. Therefore, VP had no fair notice and opportunity to respond. The district court erred when it treated the motion for entry of final judgment as another motion for summary judgment on a previously adjudicated issue.

Further, subsequent proceedings revealed that the substituted legal description was not sound. In a declaration filed by Shafer on August 19, 2015, Shafer admitted to mistakes in his expert opinion. R Vol. XXVIII, pp. 3301-3328. Shafer originally testified all 186 lots were equally encumbered by the REL mortgage, the Pensco mortgage and the MF08 mortgage. Following the district court's ruling that the VP lots would be sold last because that was most equitable, Shafer filed a declaration in support of Valiant's motion to alter, amend and/or reconsider the order of sale to of the real property (to sell VP's lots first) wherein Shafer claimed his previous declaration was wrong. Shafer then testified that 31 of the lots which he previously testified were encumbered by all three assigned mortgages were only encumbered by the REL mortgage, including a VP lot. *Id.*

VP maintained in opposition to summary judgment that one of the foreclosed lots owned by VP (Lot 2, Block 17 of the Replat of Golden Tee Estates and Golden Tee Estates 1st Addition included as part of the real property described as "Parcel 4") was not covered by the Pensco and MF08 mortgage based upon the face of the mortgages themselves. A review of the face of the Pensco and MF08 mortgages supported this position. Only Shafer's declarations supported Valiant's claim it was encompassed in all three mortgages.

VP's summary judgment position proved to be true. Shafer later admitted he made errors in his initial expert opinion and provided contradictory testimony. This Court has indicated that when a witness provides conflicting testimony that summary judgment is inappropriate. *See Capstar v. Lawrence*, 153 Idaho 411, 283 P.3d 728 (2012) (holding when a witness's affidavit testimony and deposition testimony are contradictory, it created an evidentiary conflict, and summary judgment was inappropriate). Besides being untimely, Shafer's own inconsistent testimony created a question of fact regarding the legal description. VP was prejudiced by the district court's utilization of Shafer's testimony in sustaining its prior grant of summary judgment.

4. The district court erred in holding there was no genuine issue of material fact regarding VP's prescriptive easement claims and equitable servitude claims

Valiant's request for summary judgment against VP was supported by its conclusory claim that a record search of Bonner County records indicated VP had no recorded interests in the property upon which it requested foreclosure recorded prior to the assigned mortgages it sought to foreclose. Valiant presented no evidence that a record search had been conducted. [7]

[7] In fact, in a later motion brought by Valiant requesting a post-judgment temporary restraining order and post-judgment injunction against VP to prevent it from discontinuing utility services to the foreclosed lots, Valiant introduced plats recorded prior to the REL mortgage in Bonner County, which showed a plat recorded December 5, 2000 (R Vol. LXXVIII, p. 9807) and several other plats recorded October 6, 2006 which contained a water service note identifying VP as the water and sewer purveyor as initially testified to by Villelli (R Vol. LXXVIII, pp. 9808-9812).

As set forth in the Statement of Facts, it was undisputed at summary judgment that the PSA between NIR and POBD's predecessor specifically excluded "domestic water rights which were retained by sewer and water company V.P. Inc. including easements for operation and delivery of said domestic water and sewer service including sewer lagoon and land application." R Vol. XXI, p. 2399. There was no dispute that the water and sewer systems were going concerns that was serving other real properties at the time POBD's predecessor acquired title to the Idaho Club, including part of the project property and a community known as Hidden Lakes. It was undisputed that much of the system had been in place for over 20 years at the time of execution of the PSA.

There was no dispute the PSA required VP to provide capacity to the Idaho Club project. It was undisputed that the PSA required VP to operate the water and sewer system within the Idaho Club development. There was no dispute VP did so, and had a water and sewer service agreement with each individual parcel that received water and sewer service.

There was no dispute the PSA required POBD cooperate with POBD's predecessor in gaining development approval with Bonner County. It was undisputed that VP provided Bonner County a "will serve" letter committing VP to serve water and sewer to the Idaho Club to gain approval from Bonner County for the Idaho Club project in connection with plat approval requests. No dispute existed that VP reviewed the proposed plats when issuing the will serve letters, and each of those proposed plats included a "Water and Sewer Service Note" on the face of the proposed plat that indicated all lots shown on the plat would receive water and sewer service from VP, Inc.'s systems and recitations to its public water system license number. There is no dispute the proposed plats also contained a lienholder's certificate where REL agreed to the proposed plat.

There was no dispute that VP subsequently entered into a Construction and Operation Agreement whereby POBD was allowed to extend VP's water and sewer system to serve the Idaho

Club, and VP accepted the responsibility for operation. It was undisputed that VP operated the water and sewer systems as agreed. No dispute existed that it was agreed that VP owned the infrastructure extensions of its water and sewer systems, and POBD was to grant VP easements for its placement of extensions within the project. There was no dispute that VP was the Responsible Official on the sewer effluent treatment permit.

It was undisputed that DEQ took enforcement action related to the Idaho Club development. There was no dispute as a result of that enforcement action that POBD was required to deed four lots that contained water and sewer infrastructure to VP, as opposed to granting easements.

The district court deemed the above facts insufficient to establish a genuine issue of material fact adequate to preclude summary judgment against VP's claims that it had senior prescriptive easements and equitable servitudes not subject to foreclosure. The district court specifically held Villelli's testimony that much of VP's utility infrastructure had been in place for over 20 years at the time NIR entered into the PSA was "a conclusory statement that [was] unsupported by evidence." R. Vol. XXXIII, p. 4013. The district court also concluded that because VP was not a party to the PSA, it "does not create any legal rights in VP and does not create a genuine issue of fact as to VP's prescriptive easements/equitable servitude claims." R Vol. XXXIII, p. 4013.

In *Fragnella v. Petrovich*, 153 Idaho 266, 281 P.3d 103, 108 (2012), this Court held:

> The admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold matter to be addressed before applying the liberal construction and reasonable inferences rule to determine whether the evidence creates a genuine issue of material fact for trial. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 13, 175 P.3d 172, 175 (2007) (citing *Carnell v. Barker Mgmt., Inc.*, 137 Idaho 322, 327, 48 P.3d 651, 656 (2002)). "This Court applies an abuse of discretion standard when reviewing a trial court's determination of the admissibility of testimony offered in connection with a motion

> for summary judgment." *Id.* at 15, 175 P.3d at 177 (citing *McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC*, 144 Idaho 219, 221, 159 P.3d 856, 858 (2007)). "A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason." *O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008) (citing *West Wood Invs., Inc. v. Acord*, 141 Idaho 75, 82, 106 P.3d 401, 408 (2005)).

The 2015 version of Idaho Rule of Civil Procedure 56(e) required that opposing affidavits must be made on personal knowledge, and set forth such facts as would be admissible in evidence, and affirmatively show that the affiant was competent to testify to the matters stated in the affidavit. This requirement is not satisfied by an affidavit that is conclusory, based on hearsay and not supported by personal knowledge. *State v. Shama Resources Ltd. Partnership*, 127 Idaho 67, 271, 899 P.2d 977, 981 (1995).

The requirement of underlying evidence to support a finding that the witness has personal knowledge is often referred to as "foundation." Foundation is defined as "evidence or testimony that establishes the admissibility of other evidence." *Black's Law Dictionary* 727 (Bryan A. Gardner ed., 9th ed., West 2009).

Villelli's affidavit presented proper foundation for the testimony that much of VP's water and sewer infrastructure had been in place 20 years at the time POBD's predecessor purchase from NIR in 2005. Villelli was the president of VP and had personal knowledge of its systems and operations. VP owned and operated the water and sewer systems since VP purchased the water and sewer systems in 1995. Villelli had personal knowledge regarding ownership and operation of the water and sewer systems. Villelli's testimony was not conclusory and was supported by proper foundation.

However, even if the statement that the infrastructure had been in place 20 years was deemed conclusory, there certainly was adequate foundation from which the trial court should

have concluded that Villelli had personal knowledge to testify that VP's water and sewer infrastructure had been in place for 10 years at the time of the PSA. Thus, the trial court abused its discretion in rejecting Villelli's testimony.

The district court's other basis for rejecting Villelli's testimony also constituted reversible error. The district court held since VP was not a party to the PSA, the PSA did not create any legal rights in VP, and therefore there could be no genuine issue of fact as to VP's easements and servitude claims. The district court abused its discretion when it rejected Villelli's testimony on this basis.

The trial court appears to have ruled that VP was not a third-party beneficiary to the PSA, and therefore it could not enforce the PSA. This is a legal determination rather than a ruling upon admissibility of evidence. VP did not seek to enforce the terms of the PSA. Instead, the PSA was introduced as foundation and corroboration for Villelli's testimony that VP and POBD's predecessor reached certain agreements regarding extension and ownership of VP's infrastructure within the Idaho Club project, and to establish that POBD was transferred no rights in the existing water and sewer systems at the time the PSA was executed.

VP set forth sufficient facts that the infrastructure that existed at the time the PSA was executed, including the wastewater lagoon, was not sold to POBD's predecessor. Since it was not sold to POBD's predecessor, POBD could not have mortgaged it. Thus, it was error to grant summary judgment to Valiant that it had a superior right to any of VP's infrastructure existing at the time of the sale.

Further, VP claimed it had prescriptive easements for the existing infrastructure which lay within the land purchased by POBD's successor. As established by the PSA, VP did not own the real property sold to POBD's successor. Also within the PSA was information which indicated

VP had infrastructure within the property sold to POBD's predecessor. Even if Villelli's testimony that the infrastructure was in place since 1985 were discounted for lack of foundation, the evidence that it was in place when VP purchased the systems in 1995 until the date of the execution of the PSA does not lack foundation. At the time of the 2006 sale to POBD's predecessor, the existing infrastructure had been in place for at least a ten-year period. This period was sufficient to raise an issue of fact whether VP was entitled to a prescriptive easement for the existing infrastructure.[8]

Besides its claim to a superior interest in the existing infrastructure, VP claimed it had equitable servitudes for its existing infrastructure and the infrastructure which POBD extended within the Idaho Club project, and there was a question of fact whether Valiant took subject to those equitable servitudes. The undisputed facts submitted by VP in opposition to summary judgment were akin to those in *Middlekauff v. Lake Cascade, Inc.*, 103 Idaho 832, 654 P.2d 1385 (1982) (*Middlekauff I*) and *Middlekauff v. Lake Cascade, Inc.*, 110 Idaho 909, 913, 719 P.2d 1169, 1173 (1986) (*Middlekauff II*).

In those cases, Plaintiffs were owners of real property located in the Lake Cascade area. Plaintiffs purchased property from Lake Cascade, Inc. ("LCI"), a wholly owned subsidiary corporation of Bric of America, Inc. ("BA"). *Middlekauff II*, 110 Idaho at 911, 719 P.2d at 1171. When plaintiffs purchased the land from LCI it "orally represented that the property adjacent to their newly purchased property would be used and would remain as a common area for a boat basin, landing strip and other recreational activities." *Id.* The property and facilities were used as such until 1977. *Id.*

[8] "In 2006, Idaho Code section 5-203 was amended to extend the statutory time period from five years to twenty years. However, the twenty-year time period does not apply to an easement by prescription acquired prior to the amendment. *Capstar Radio Operating Co. v. Lawrence,* 153 Idaho 411, 283 p.3d 728, footnote 2 (2012).

BA and LCI subsequently filed for Chapter XI bankruptcy and sold some of the property to third party buyers. *Id.* Plaintiffs "filed suit in district court alleging that the parcel of land in question had not been kept as a common area as represented and requested that the court enter its judgment declaring that the real property be utilized exclusively for the common use purposes that were enumerated in the complaint." *Id.* at 912, 719 P.2d at 1172.

In *Middlekauff I*, this Court held that the alleged promise that the parcel of land would remain a common area was "neither a lien nor an encumbrance" and, on remand, the district court determined (1) the plaintiffs had an enforceable property interest against LCI, and (2) that interest was enforceable against the third-party buyers because those buyers took the property with notice of the oral representation, preventing the third-party buyers from being bona fide purchasers. *Id.* at 913, 719 P.2d at 1173.

In *Middlekauff II*, LCI and BA argued the oral representations of LCI and its agents could not create an enforceable interest in the common area. *Id.* This Court, citing to the New Mexico case of *Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.*, 83 N.M. 558, 494 P.2d 971 (1972), rejected the argument stating, "the plat is not the only means by which a right can be created" and "oral representations could do so as well." *Middlekauff II*, 110 Idaho at 913, 719 P.2d at 1173. "Obviously, to create such rights in the mentioned fashion does not require an instrument in writing signed by the party to be charged." *Id.* (quoting *Ute Park II*, 494 P.2d at 973). "Ute Park stands for the proposition that under certain circumstances a writing is not required to establish a legally enforceable interest and any number of factors, if found by the trial court to be sufficient, may justify a finding that the plaintiffs have an interest in the land." *Id.* at 914, 719 P.2d at 1174.

In *West Wood Invs. v. Acord*, 141 Idaho 75, 83, 106 P.3d 401, 409 (2005), decided after *Middlekauff I* and *Middlekauff II*, this Court held:

> "Equitable servitudes are distinguished from covenants running with the land in that the latter should be of record, and a buyer takes with constructive knowledge, if not actual knowledge, of the existence of such recorded covenants and is thereby bound to the covenants."

In other words, equitable servitudes do not have the same writing or recording requirements as restrictive covenants. As this Court in *West Wood* explained:

> The question [of enforceability] does not depend on whether the covenant runs with the land . . . **if there was a mere agreement and no covenant [running with the land], this court would enforce it against the party purchasing with notice of it**; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from who (sic) he purchased. 898 P.2d at 379-80 (quoting *Tulk v. Moxhay* (1948), 2 Ph. 774 (41 Eng. Rep. 1143)) (emphasis added in quotation). Equitable interests may arise because of the actions of the parties, such as oral representations. *Middlekauff v. Lake Cascade, Inc.*, 110 Idaho 909, 913, 719 P.2d 1169, 1173 (1986) (*Middlekauff II*). In *Middlekauff v. Lake Cascade, Inc.*, 103 Idaho 832, 654 P.2d 1385 (1982) (*Middlekauff I*), this court established the test relevant to determining if a promise regarding the use of land runs against a successor in interest of the original promisor: 1) whether or not the party claiming the enforceable interest actually has an interest against the original promisor; and 2) if such right exists, whether it is enforceable against the subsequent purchaser. *Middlekauff I*, 103 Idaho at 834-35, 654 P.2d at 1387-88.

Id. at 83-84 (emphasis in original).

Equitable servitudes do not require horizontal privity between the parties for the servitude to be enforceable against successors in interest. *St. Clair v. Krueger*, 115 Idaho 702, 705 n.1, 769 P.2d 579, 582 (1989).

Thus, to survive summary judgment, VP had the burden of showing there was a material question of fact whether VP had an interest against POBD in the areas where its infrastructure was installed within the foreclosed lots in the Idaho Club, and whether that interest was enforceable against the REL mortgage, the Pensco mortgage and the MF08 mortgage. The facts submitted in the statement of facts above were sufficient to create a genuine issue material issue of fact with regard to both elements, thus precluding the grant of summary judgment.

Regarding the first element, VP was required to introduce evidence VP had an interest in the locations within the Idaho Club where its infrastructure was located. As in *Middlekauff I* and *Middlekauff II*, VP submitted undisputed evidence that POBD's predecessor, and POBD itself, promised if VP would allow it to extend VP's water and sewer infrastructure throughout the Idaho Club project, and operate the water and sewer systems within the project, that POBD would subsequently grant VP easements upon completion of the project.

Turning to the second element, VP was required to introduce evidence from which the district court could reasonably draw the inference that REL, Pensco Trust fbo Barney Ng and MF08 had notice of VP's interest in the real property. As noted in the statement of facts, undisputed evidence was submitted that Barney Ng, who was managed the loans for REL, Pensco Trust and MF08, requested and was provided the final third amended and restated PSA, as well as the second version of the PSA, prior to granting the REL mortgage (which was also prior to the subsequent Pensco and MF08 mortgages). It was also undisputed that REL signed off on the proposed plats, each of which included the provisions that VP would be the supplier of water and sewer services for the platted areas.

VP presented sufficient evidence as set forth in the statement of facts for the district court to reasonably draw the inference that there were genuine issues of material fact regarding the first and second elements necessary for imposition of an equitable servitude with respect to the water and sewer systems.

Finally, since REL, Pensco and MF08 had notice of the agreement, the last step is to determine if their notice is attributable to Valiant. Valiant was assigned REL, Pensco and MF08 the promissory notes and mortgages which are the foundation of its foreclosure. An assignee generally acquires no greater right than was possessed by the assignor, and is subject to all defenses

and claims that the debtor had against the assignor. *JBM, LLC v. Cintorino*, 159 Idaho 772, 776, 367 P.3d 167 (2016).

C. THE DISTRICT COURT ERRED IN DECLARING THE RIGHTS AND RELATIONSHIPS OF FUTURE PURCHASERS FOLLOWING FORECLOSURE WITHOUT A PENDING CASE OR CONTROVERSY

1. Statement of Facts

The district court's judgment included no decree regarding the rights of future purchasers following the sheriff's sale. R Vol. XLV, pp. 5413-5502. However, the district court's decree of foreclosure at section C(2)(aa) provided with respect to Valiant's assigned mortgages only, should POBD or its successors or assigns be in possession or occupy any portion of the Idaho Club Property or improvements thereon at the time of the foreclosure sale, and should the occupant fail to deliver possession of the parcel to Valiant, the occupant would immediately become the tenant of the purchaser at such sale, which tenancy would be a tenancy from day-to-day, terminable at the will of the landlord, and at a rental per day based upon the value of the parcel and improvement, such rental to be due daily to the purchaser at foreclosure. R Vol. XLIV, p. 5329.

Valiant purchased several parcels of property at the sheriff's sale, including those identified as Parcel 1 and Parcel 2 which contained a portion of VP's water and sewer system infrastructure. R Vol. LXII, pp. 7747-7766, 7750-7794. On December 9, 2016, Valiant's counsel sent a letter notifying VP's counsel Valiant had purchased Parcel 1 and Parcel 2, presenting the sheriff's certificates of sale, informing VP that a rental fee of $866.09 *per diem* was accruing until VP delivered the parcels to Valiant, and requesting access for inspection to any improvements constructed on the parcel. R Vol. LXXV, pp. 9342-9343. On December 30, 2016, Valiant sent VP's counsel a Notice of Eviction and a demand for past due rent and disgorgement of any

hookup/tap fees and all amounts VP had collected for providing sanitary sewer and water services since November 7, 2016. R Vol. LXXV, p. 9344. VP did not meet Valiant's demands. *Id.*

On February 8, 2017, Valiant filed a motion to enforce the district court's judgment under IAR 13(b)(10) and 13(b)(13), together with a supporting memorandum and declaration of counsel, seeking to evict VP from those lots identified at the Sheriff's sale as Parcel 1 and Parcel 2 for failure to pay it rent as required by the decree of foreclosure. R Vol. LXVII, p. 8268- Vol. LXX, p. 8708. The district court observed that clause [C(2)] y required anyone in possession after the foreclosure sale to surrender possession of the parcel upon production of the certificate of sale or a duly authenticated copy of it. R Vol. LXXV, p. 9346.

The district court held Valiant was properly seeking a writ of assistance as the purchaser at foreclosure directing the Sheriff to eject and remove VP from using, holding or detaining the property. R Vol. LXXV, pp. 9348-93949. The district court concluded it had the discretionary power to issue such a writ. *Id.*

2. The district court erred in declaring the rights of future purchasers without an existing case or controversy before it

Before addressing the propriety of the district court's issuance of a writ of assistance, the fundamental issue must be addressed whether the district court erred as a matter of law in adjudicating the rights of future purchasers following foreclosure. Pursuant to I.C. § 45-1302, the district court had the power to foreclose the mortgages, and to determine the title, estate or interest of all parties named in the suit. The district court did not have the power pursuant to this statute to declare the future rights of the unknown purchasers following foreclosure. In so doing, the

district court issued a declaratory judgment of the rights of parties not before it, and violated the requirement that it make no determination unless it had before it an actual case or controversy.[9]

To determine a case, a court must have before it a justiciable controversy. In *Davidson v. Wright*, 143 Idaho 616, 151 P.3d 812, (2006), this Court held:

> "A prerequisite to a declaratory judgment action is an actual or justiciable controversy." *Weldon v. Bonner County Tax Coalition*, 124 Idaho 31, 36, 855 P.2d 868, 873 (1993). The doctrine of justiciability can be divided into several subcategories, including that of standing and ripeness. *Id.* Ripeness is that part of justiciability that "asks whether there is any need for court action at the present time." *Gibbons v. Cenarrusa*, 140 Idaho 316, 317, 92 P.3d 1063, 1064 (2002). This Court has described a justiciable controversy as one that is distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot.... The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests.... It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *Weldon*, 124 Idaho at 36, 855 P.2d at 873 (quoting *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)).

At the time the district court entered its decree, there were no future purchasers before it, and the identification of any such person was speculative. There was also no actual controversy between the unknown future purchasers and any potential holdover tenant. Thus, the matter was not ripe for the decree entered by the trial court regarding the rights and relationships of future purchasers, and the court exceeded its authority in its decree of foreclosure.

This limitation on the district court is even recognized in other statutes relative to foreclosure. Idaho Code section 6-407 empowers a court during the foreclosure of a mortgage to issue an injunction to restrain a party in possession from doing certain acts that injure the property, or to issue an injunction after an execution sale but before a conveyance. After the conveyance to the foreclosure purchaser, this statute recognizes the power of the court ceases. The trial court

[9] In fact, the only reason Valiant was able to bring its motion for enforcement as a future purchaser was because it was already a party to the foreclosure. Had any other person purchased, they would not even have been a party to the suit.

erred as a matter of law when it included provisions in its decree of foreclosure that addressed the potential rights and remedies of future purchasers following the foreclosure sale.

D. THE DISTRICT COURT ERRED IN GRANTING AGAINST VP A POST-JUDGMENT TEMPORARY RESTRAINING ORDER FOLLOWED BY AN INJUNCTION

1. Statement of Facts

As set forth in the Course of Proceedings, on February 8, 2017, Valiant filed a motion to enforce the district court's judgment under I.A.R. 13(b)(10) and I.A.R. 13(b)(13), together with a supporting memorandum and declaration of counsel, seeking to evict VP from those lots identified at the Sheriff's sale as Parcel 1 and Parcel 2 for failure to pay it rent as required by the decree of foreclosure. R Vol. LXVII, p. 8268- Vol. LXX, p. 8708. Thereafter, on March 6, 2017, the district court issued its memorandum decision and order. In the conclusion and order section of the decision, the district court held:

> ...IT IS HEREBY ORDERED THAT:
>
> 1. Valiant is entitled to the immediate possession of all 154 parcels of the Idaho Club Property purchase by Valiant at the Sheriff's Sale. **VP is ordered to immediately vacate any and every part of all 154 parcels.** A writ of assistance shall be entered in accordance with this Memorandum Decision.... (emphasis added).
>
> R Vol. LXXV, p. 9358

In its Memorandum Decision and Order the district court also awarded damages against VP for daily rent in an amount to be determined for its occupation after foreclosure for Parcel 1 and Parcel 2 from the date of sale until Valiant entered into possession of both parcels. R Vol. LXXV, p. 9358.

Immediately upon receipt of the above decision and order, on March 7, 2017, VP filed a motion for an order allowing it continued access and use of Parcels 1 and 2 of the judgment so VP

could maintain the water and sewer services to its customers, including those within the Idaho Club project (which included any of the 154 foreclosed lots which had residences upon them), and an application pursuant to I.A.R. 13 for stay of the enforcement of the writ of assistance pending appeal. R Vol. LXXV, pp. 9388- 9398.

To avoid any delay on the ruling, VP did not request oral argument. *Id.* Twenty-one days later, on March 27, 2017, the district court issued an Order Requesting Response Brief from Valiant Idaho, LLC with respect to the motion for the stay. R Vol. LXXV, pp. 9413-414. On March 28, 2017, Valiant noticed for hearing VP's motion for the order allowing VP the use and access to Parcels 1 and 2, and a stay on appeal. R Vol. LXXV, pp. 9415-9417. Valiant also requested an extension to respond to VP's motion for an order allowing use and access to Parcels 1 and 2, and application for stay of enforcement of the judgment. R Vol. LXXV, pp. 9418-9420. On March 28, 2017, the district court granted Valiant's motion for an extension to respond to VP's motion. R Vol. LXXV, p. 9421-9423.

On April 11, 2017, Valiant filed its memorandum in opposition to VP's motion for access to Parcels 1 and 2, and stay of enforcement of the judgment contending:

> VP's Stay Motion seeks an order from this Court allowing it to continue accessing and using properties and infrastructure now owned by Valiant, and staying enforcement of the Writ of Assistance entered by this Court on March 6, 2017 ("Writ of Assistance) until after the appeal to the Idaho Supreme Court has concluded. The Stay Motion is without any basis in fact or law, and it attempts to circumvent the codified means of staying enforcement of judgments and obtaining preliminary injunctions. As such, the Stay Motion should be denied.

R Vol. LXXVII, p. 9666. Later in the same memorandum, Valiant claimed it had not ejected VP from Parcel 2 or the associated Water System Infrastructure but reserved its right to do so at a later date. R Vol. LXXVII, p. 9668. This position was completely contrary to the order of ejectment it sought and obtained from the district court discussed above, and the subsequent writ of assistance

it presented to the district court, and which was issued by the district court, whereby the sheriff was directed to "[e]ject and remove each and every person or entity, including but not limited to VP, from using, holding or detain the Valiant Parcels and all fixtures, appurtenances and improvements associated therewith, without delay, **including Parcel 1, Parcel 2 and the Sewer/Water System, or any part thereof...**". LXXVII, pp. 9637.

On April 28, 2017, the district court entered its Order Granting Injunction against VP prohibiting compliance with the above order. R Vol. LXXIX, pp. 9871-9878. The Court found that VP's wells were necessary for the operation of the Idaho Club's water system. *Id.* at p. 9873. VP was ordered to continue providing water service to the Idaho Club, including the foreclosed lots until such time as Valiant drilled its own groundwater wells and constructed necessary infrastructure to isolate the 154 lots it acquired at foreclosure. R Vol. LXXIX, p. 9874-9875. VP was ordered to continue operation of its sewer system serving those lots outside the 154 foreclosed lots, even if it involved use of infrastructure on the 154 foreclosed lots, until such time as it could isolate its sewer system from the foreclosed lots (if that is even possible). Valiant was granted the right to operate the sewer system within the foreclosed lots. *Id.* Additionally, the district court ordered that Valiant was entitled to collect all sewer fees owed VP pursuant to VP's customer service agreements, including customers who were served by the sewer system outside the foreclosed lots. *Id.*

2. The district court erred in issuing a post-judgment temporary restraining order against VP followed by an injunction

In compliance with the Court's order requiring VP to vacate its use of the infrastructure within the 154 foreclosed lots, VP ceased its use of the water infrastructure within the 154 foreclosed lots which caused a portion of the Idaho Club to no longer have water service, including Valiant. VP's compliance introduced an ironic twist to the litigation.

Valiant immediately filed a motion for issuance of a post-judgment temporary restraining order and post-judgment preliminary injunction against VP pursuant to Rule 65, I.R.C.P. R Vol. LXXVII, pp. 9683-9685. Despite its position in the motion to eject VP from the foreclosed lots, Valiant now claimed the trial court should issue a temporary restraining order and preliminary injunction "...requiring VP to restore water services and prohibiting VP from thereafter interfering with or terminating water service to the owners and residents of the properties located within *The Idaho Club* development project, including Valiant, until such time as Valiant begins providing water service for *The Idaho Club*." R Vol. LXXVII, p. 9684. Valiant claimed it would suffer irreparable harm because its real property would no longer have any protection against a fire hazard; raw sewage might back-up into any structures constructed on Valiant's property; without water to maintain it, the real property value would likely be diminished; and, Valiant would be unable to further develop, market or sell its real property. *Id.*

Valiant claimed "VP's illegal conduct" of complying with the district court's decree of foreclosure and subsequent enforcement order was causing immediate and irreparable harm to Valiant. R LXXVII, p. 9690. To support its request for as temporary restraining order and preliminary injunction, Valiant relied upon the following facts:

- VP owned the source wells that provided water and fire protection services to all lots and homes within the development (R Vol. LXXVII, p. 9688);
- An affidavit of a property owner indicating he received notice on March 30, 2017, from VP notifying him compliance with the Court's order would result in termination of his water service, and that the water service was actually terminated April 12, 2017 (R Vol. LXXVII, pp. 9699-9700);

- A declaration by William Haberman, the Manager of Valiant, that VP unilaterally and without notice to Valiant shut-off water services to much of the real property located within the Idaho Club, including to the Valiant lots, which prevented Valiant from taking further steps to develop, market and sell the Valiant Lots (R Vol. LXXVII, p. 9704, ¶¶ 4-5);
- VP had no service contracts with Valiant, but VP had permit obligations pursuant to permits issued by DEQ and plats duly recorded with the Bonner County Recorder's Office to provide water services to the Idaho Club (R Vol. LXXVIII, p. 9795);
- Idaho Code §§ 50-1326 through 50-1329 places sanitary restrictions upon every residential subdivision plat prohibiting construction of any building until the developer complied with the act (R Vol. LXXVIII, pp. 9795-9796);
- Before the plats comprising the Idaho Club could be recorded, the developer was required to certify that all lots in the plat would be eligible to receive water service from an existing water system, and the existing water distribution system had agreed in writing to serve all the lots in the subdivision (R Vol. LXXVIII, pp. 9795-9756);
- VP provided a "will serve" letter to the Idaho Club developer (R Vol. LXXVIII, p. 9796);
- VP reviewed the planned unit development application to Bonner County which stated, "VP is the water and sewer provider and "will serve" the property as it is developed" (R Vol. LXXVIII, p. 9796-9797);
- VP reviewed the preliminary plat applications which included identical language (R Vol. LXXVIII, p. 9797);
- VP entered in a Construction and Operating Agreement with POBD in June 2006 whereby VP agreed to provide water [and sewer] services to the Idaho Club, which included fire protection services (R Vol. LXXVIII, p. 9797);

- All of the plats comprising the Idaho Club (Golden Tee Phase One, Golden Tee Phase Two, Golden Tee – 2nd Addition, Golden Tee – 3rd Addition, Golden Tee – 4th Addition, Golden Tee – 5th Addition, Golden Tee – 6th Addition, Golden Tee – 7th Addition, and Golden Tee – 8th Addition) included a "Water and Sewer Service Note" advising that "all Lots shown on the Plat will receive water and sewer service from VP, Inc. (PWS No. 1090195) (R Vol. LXXVIII, p. 9797; pp. 9802-9814);
- Each of the lenders relied upon this representation in agreeing to loan monies to POBD for construction of the development (R Vol. LXXVIII, p. 9797); and
- Individuals who purchased lots in the Idaho Club relied upon the representation that VP would provide water and sewer services (R Vol. LXXVIII, p. 9798).

If these facts sound familiar, they should. Most of them are the exact same facts submitted by VP in opposition to Valiant's motion for summary judgment on VP's easement and equitable servitude claims.

Despite receiving a decree from the court that VP's easement and equitable servitude claims were eliminated, and VP had no further right to utilize them to deliver water and sewer service, Valiant took a contrary position in seeking a post-judgment temporary restraining order and preliminary injunction. Valiant argued this same evidence justified issuance of a post-judgment "preliminary injunction" from the district court requiring VP to continue to utilize its infrastructure to provide water service, but only until Valiant could drill wells to provide an alternative source of water to its 154 foreclosed lots.

The inconsistency of Valiant's position highlights the district court's error at summary judgment. If the same facts presented in the post-trial motion justified issuance of a temporary

restraining order and injunction, they certainly were sufficient to prevent entry of summary judgment on VP's prescriptive easement and equitable servitude claims.

The district court's injunction order indicated, "Valiant's Motion for Preliminary Injunction is GRANTED in accordance with the Order Granting Injunction herein. *Id.* Yet, rather than Rule 65, the district court recited to I.A.R. 13(b)(10) and 13(b)(13) as the basis for the injunction.

In determining the scope of the stay allowed by I.A.R. 13, the orders that are stayed must be identified. The district court issued a judgment which eliminated VP's interest in its easements and its equitable servitudes. It subsequently entered an order requiring VP to stop using its infrastructure within the 154 foreclosed lots, including Parcel 2, followed by a writ of assistance ejecting VP from the 154 foreclosed lots.

Idaho Appellate Rule 13(b)(10) allowed the district court to make any order pending appeal regarding the use, preservation or possession of any property during the appeal which was the subject of the action. Idaho Appellate Rule 13(b)(13) allowed the district court to take any action or enter any order required for the enforcement of any judgment or order already entered in the matter.

Although the district court identified I.A.R. 13(b)(13) as one of the rules upon which it relied, its injunction order contains no provision regarding the enforcement of its judgment or order. It did the opposite. The district court partially stayed its previous order ejecting VP from the foreclosed lots.

Pursuant to I.A.R. 13(b)(10), the district court had the power to allow VP the use and possession of Parcel 2 and the related water infrastructure within the 154 parcels during the

pendency of the appeal. The effect of the district court's order allowed such use, which was proper under I.A.R. 13(b)(10).

However, the district court's injunction then exceeded the scope of I.A.R. 13(b)(10). It ordered VP provide Valiant water service without any contractual basis to do so. Valiant had no customer service agreement with VP. It also required such service to continue until Valiant drilled its own wells, which time frame was not tied to the pendency of the appeal. Neither of these provisions of the district court's injunction were proper under I.A.R. 13(b)(10) because these requirements were unrelated to the use, preservation or possession of property which was the subject of the action during the pendency of the appeal.

Similarly, the district court did not have the power to order that Valiant could collect all sewer fees owed VP pursuant to its customer service contracts. This requirement was unrelated to the use or possession of the property during the pendency of the appeal.

It is clear the district court was struggling to fashion an equitable and practical solution to a problem created when the district court granted foreclosure of VP's easements and equitable servitudes within the foreclosed lots and ordered VP to cease using its infrastructure to supply water and sewer services. However, the district court exceeded its authority when it did so.

E. THE DISTRICT COURT'S GRANT OF COSTS AGAINST VP WAS AN ABUSE OF DISCRETION

Another appeal is pending before this Court in the case of *Valiant Idaho, LLC vs. North Idaho Resorts, LLC*, Docket No. 44583, which fully addresses this issue. Due to page imitations on the opening brief in this appeal, VP hereby joins in North Idaho Resorts, LLC's opening brief as though set forth in full herein. However, to comply with the requirement that this brief contain authority and legal argument, VP makes the following summary of the argument in which it joins.

Idaho Rule of Civil Procedure 54(d) allows the trial court to award a prevailing party costs of an action.[10] The rules of civil procedure categorize costs in two groups: costs as a matter of right, and discretionary costs. I.R.C.P. 54(d)(1)(C) and (D). Costs as a matter of right are specifically enumerated and limited to those enumerated. I.R.C.P. 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]." I.R.C.P. 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." I.R.C.P. 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 its burden, the trial court "must make express findings as to why the item of discretionary cost should or should not be allowed," after an objection by an opposing party. I.R.C.P. 54(d)(1)(D).

A review of the trial court's memorandum decision and order awarding discretionary costs against VP 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 I.R.C.P.

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

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

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." I.R.C.P. 54(d)(1)(D). The district court did not act within the boundaries of its discretion when it awarded Valiant discretionary costs despite its failure to make a showing that the costs were exceptional and should in the interest of justice be assessed against VP. In fact, these factors were not assessed by the district court, which awarded costs merely because they were incurred, as demonstrated from the district court's decision, wherein it held:

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

R Vol. XLVIII, pp. 5839-40. (Emphasis added.)

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."

Costs consistent with the type of case being litigated are not exceptional. 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). *See also Fish v. Smith*, 131 Idaho 492, 493–94, 960 P.2d 175, 176–77 (1998) (holding expert witnesses in personal injury cases were not exception and were common); *Inama v. Brewer*, 132 Idaho 377, 384, 973 P.2d 148, 155 (1999), (holding costs of a common nature to the type of case being litigated were not exceptional); *Nightengale v. Timmel*, 151 Idaho 347, 354–55, 256 P.3d 755, 762–63 (2011) (holding expert medical testimony is common in a malpractice case).

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. Thus, the inquiry is whether the discretionary costs requested by Valiant were exceptional costs.

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

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 VP as opposed to any of the other parties to the action, such as POBD. Initially Valiant simply concluded its requested discretionary costs were necessary and exceptional without providing any reason why the costs were "exceptional." R Vol. XLI, pp. 5052 - 5055.

In reply to VP'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 VP 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. Valiant failed to present any other argument why these costs were uncommon or exceptional.

Besides failing to show these costs were exceptional, 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 VP. Valiant never set forth any reasons why justice would require VP be taxed with an award of discretionary costs, other than its argument that VP acted frivolously. R Vol. XLI, pp. 5052-55; R Vol. XLVII, p. 5767. As noted above, the district court disagreed with Valiant that VP acted frivolously.

The trial court failed to determine a basis for finding any of the costs 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 I.R.C.P. 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.

Turning to the specific 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 commonplace in all types of foreclosure actions, including mortgage foreclosure actions, and especially when the commercial mortgages encumber multiple parcels of real property.

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.

Also, the district court's apportionment of the discretionary costs lacked rhyme or reason. 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.* No costs were apportioned against the defaulting party, POBD. 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 VP's assigned percentage of the cost of a litigation guarantee that was obtained before VP had even appeared in the case. If VP 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 VP a percentage 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 VP a percentage of the ordinary and mundane litigation costs incurred by Valiant in this case.

IV. CONCLUSION

Based upon the foregoing argument, the summary judgment against VP on its easement rights and equitable servitudes should be reversed and remanded. The discretionary costs awarded against VP should be vacated. The injunction allowing Valiant to collect sewer service fees under VP's customer service contracts should be vacated. The injunction requiring VP to provide Valiant water services absent a customer service agreement should be vacated.

Respectfully submitted this 24th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2018, I caused to be served a true and correct copy of the foregoing instrument by the method indicated below, and addressed to the following:

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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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