3-23-2018

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

GENESIS GOLF BUILDERS, INC., *etc.*, Plaintiff, vs. **PEND OREILLE BONNER DEVELOPMENT, LLC**; *et al.*, Defendants.	**SUPREME COURT NO. 44585-2016**
VALIANT IDAHO, LLC, an Idaho limited liability company, Cross-Claimant-Respondent, vs. **VP, INCORPORATED,** an Idaho corporation, Cross-Defendant-Appellant.	
AND RELATED ACTIONS.	

RESPONDENT'S BRIEF

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

Honorable Barbara A. Buchanan, District Judge, Presiding

Richard L. Stacey, ISB #6800
stacey@mwsslawyers.com
Lars E. Lundberg, ISB #9993
lundberg@mwsslawyers.com
McConnell Wagner Sykes & Stacey PLLC
827 East Park Boulevard, Suite 201
Boise, Idaho 83712
Telephone: 208.489.0100
Facsimile: 208.489.0110
Attorneys For Respondent Valiant Idaho

Susan P. Weeks, Esq.
sweeks@jvwlaw.net
James, Vernon & Weeks, P.A.
1626 Lincoln Way
Coeur d'Alene, Idaho 83814
Telephone: 208.667.0683
Facsimile: 208.664.1684
Counsel For Appellant VP, Incorporated

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases:

Statutes:

State Rules:

Other Authorities:

I. STATEMENT OF THE CASE

A. Introduction.

VP, Incorporated ("VP") appeals several district court decisions, which were entered in favor of Valiant Idaho, LLC ("Valiant") in Bonner County Case No. CV-2009-1810.

VP raises four general arguments on appeal. First, VP argues that the district court erred in granting summary judgment in favor of Valiant because: VP was not given the opportunity to respond; genuine issues of material fact exist; and VP possesses an equitable servitude and/or prescriptive easements against the foreclosed property. As VP failed to raise any genuine question of fact regarding these claims, VP's first argument should be rejected.

Second, VP argues that the district court's foreclosure decree improperly required occupants of the foreclosed property to vacate the property upon presentment of a certificate of sale from the Bonner County Sheriff. VP's argument is without bases in law or fact and should be rejected because: VP failed to object to the entry of the foreclosure decree; the language from the foreclosure decree at issue on appeal is also found in the mortgage senior to VP's interest; and VP is a party to this case.

Third, VP questions the district court's authority under Idaho Appellate Rule 13(b)(10) to enter a temporary restraining order and an injunction prohibiting VP from discontinuing water services to fire hydrants and residential property owners. As VP has failed to identify any abuse of discretion by the district court, this argument is without bases in fact or law and should be rejected.

Fourth, VP challenges the district court's award of discretionary costs in the amount of $12,174.26.[1] This argument should be rejected because VP has failed to demonstrate that the district court abused its discretion.

B. Relevant Factual And Procedural History.

The underlying case is an exceptionally complex real estate foreclosure and lien priority lawsuit arising out of a failed golf course and residential housing development project located in Sandpoint, Idaho ("The Idaho Club"). Valiant's interest in The Idaho Club arises out of three mortgages that were assigned to it by RE Loans, LLC ("RE Loans" and the "RE Loans Mortgage"), Pensco Trust Co. f/b/o Barney Ng ("Pensco" and the "Pensco Mortgage") and Mortgage Fund '08, LLC ("MF08" and the "MF08 Mortgage") (collectively, "Valiant Mortgages"). R.Vol. XXII, pp. 2562-66. VP's interest in The Idaho Club arises out of quitclaim deeds to 4 parcels and an alleged equitable servitude and prescriptive easements. R.Vol. XXI, p. 2395. The developer of this failed project was Pend Oreille Bonner Development, LLC ("POBD"). R.Vols. XVII, pp. 1913-19; XXV, p. 2960.

The case commenced on October 13, 2009, when Genesis Golf Builders, Inc. filed a lawsuit to foreclose a mechanic's and materialmen's lien. R.Vol. I, pp. 172-96. After two years of motion practice and an almost two-year long bankruptcy stay,[2] litigation resumed among and between the

1 The district court awarded Valiant $15,554.88 in costs against VP: $3,380.62 as costs as a matter of right and $12,174.26 as discretionary costs. R.Vol. XLVIII p. 5841.VP did not appeal the award of costs as a matter of right.

2The first bankruptcy stay was entered on September 29, 2011 and the second bankruptcy stay was lifted on August 12, 2013. R.Vols. II, pp. 275-89; III, pp. 374-77. A bankruptcy stay was in effect during this entire period.

remaining co-defendants and cross-claimants. Ultimately, VP's claims were dismissed with prejudice. *See* R.Vols. II, pp. 275-83, pp. 284-89, pp. 325-20; III, pp. 374-77, pp. 383-85.

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

At the time Valiant purchased the RE Loans Mortgage and Pensco Mortgage, property taxes for tax years 2008—2014 were unpaid and outstanding against the real property securing said loans. R.Vol. XV, pp. 1749, 1764-78. Valiant redeemed real property subject to Bonner County's tax deeds by paying the outstanding property taxes, and in exchange received and recorded a redemption deed.3 R.Vol. XV, pp. 1749, 1764-78.

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

3 JV, LLC, a party to the underlying litigation, redeemed certain property at issue in that appeal. (Case No. 44584-2016). Valiant also did not redeem the four parcels that were quitclaimed to VP from POBD. Valiant redeemed the remainder of The Idaho Club property that was foreclosed in this case.

Extensive motion practice ensued and continued until several months after the trial was completed. Although this case generated several bankers' boxes full of pleadings, only a portion of this procedural history is relevant to the issues appealed by VP ("VP Appeal").

On January 20, 2015, Valiant filed a motion for partial summary judgment ("Partial SJ Motion") against VP and two other defendants. R.Vols. XIV-XVIII, pp. 1720-2075. The Partial SJ Motion sought to establish, *inter alia*, that, as a matter of law, the "RE Loans Mortgage, Pensco Mortgage and MF08 Mortgage are senior in right, title and interest to any interest claimed by VP in the Idaho Club Property." *Id.*, p. 1742. This argument was premised upon the following undisputed facts: (1) the RE Loans Mortgage was recorded March 15, 2007;[4] (2) the Pensco Mortgage was recorded August 6, 2008;[5] (3) the MF08 Mortgage was recorded August 6, 2008;[6] (4) POBD quitclaimed said lots to VP on September 20, 2013;[7] and (5) Valiant was not aware of any other property interest possessed by VP.[8] R.Vol. XIV, pp. 1725-46. The Valiant Mortgages were recorded years before VP acquired its interests in the Idaho Club; therefore, Valiant was entitled to partial summary judgment on the issue of priority. R.Vol. XIV, p. 1742.

On February 4, 2015, VP filed its opposition to the Partial SJ Motion. R.Vol. XXI, p. 2359. VP alleged that the Partial SJ Motion should be denied for three reasons: (1) Parcel 1[9] was not

---

4 *See* R.Vol. XVII, pp. 1915, 1962-93.

5 *See* R.Vol. XVII, pp. 1917, 2001–30.

6 *See* R.Vol. XVII, pp. 1918, 2039-69.

7 *See* R.Vol. XIV, pp. 1736, 1742.

8 *See* R.Vol. XIV, p. 1742.

9 This parcel is formally identified as "Lot 2, Block 17 of the replat of Golden Tee Estates and Golden Tee Estates 1st Addition" and includes the sewer lagoon and other sewer infrastructure. It is referred to the in the judgment and decree of foreclosure as Parcel 1.

encumbered by the MF08 Mortgage (*i.e.*, Loan No. PO107); (2) VP had prescriptive easement rights stemming from its infrastructure for the prescriptive period; and (3) VP had an equitable servitude upon the lots where its sewer lagoon, water systems and pumping stations are located. *Id.*, pp. 2368-70. VP did not submit an affidavit in support of its conclusory argument that Parcel 1 was not subject to the MF08 Mortgage. *Id.* VP also failed to identify the requisite elements to prove that it held prescriptive easements or an equitable servitude. *Id.* Further, VP failed to explain how the testimony and evidence that it submitted created a question of fact regarding its claimed prescriptive easements and/or equitable servitude. *Id.*

The hearing for the Partial SJ Motion was held March 18, 2015. R.Vol. XXII, p. 2495. At the start of the hearing, Valiant specifically clarified that it was only seeking a partial summary judgment as to the priority of the Valiant Mortgages vis-á-vis the priority of any interest asserted by VP and the other defendants. 03.18.15 Hr'g Tr., p. 12, ll. 6-25, p. 13, l. 1. Valiant did not yet seek summary judgment on the description of the property subject to the Valiant Mortgages. *Id.*

On April 14, 2015, the district court entered its Memorandum Decision & Order Granting Valiant Idaho LLC's Motion For Summary Judgment Against JV, LLC, North Idaho Resorts, LLC and VP, Incorporated ("Partial SJ Order"). R.Vol. XXII, p. 2560. The district court ruled that "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." *Id.*, p. 2574.

On April 29, 2015, VP filed a Motion For Reconsideration and Clarification ("1st Motion to Reconsider") without a notice of hearing or supporting memorandum. R.Vol. XXII, p. 2596.

On May 20, 2015—as counsel for Valiant advised it would do during the hearing on the Partial SJ Motion—Valiant filed its Motion For Entry of Final Judgment and supporting documents ("Motion For Final Judgment"). *Id.*, pp. 2600-11; R.Vol. XXIII, pp. 2612-748. The memorandum in support of the Motion For Final Judgment began as follows:

> By way of the [Partial SJ Order] this Court has determined the validity, enforceability and priority of Valiant's mortgages (*i.e.*, the 2007 RE Loans Mortgage, the Pensco Mortgage and the MF08 Mortgage [collectively "Mortgages"]) against the real property described in those Mortgages against JV, NIR and VP . . . ***Valiant now respectfully requests this Court to determine the real property encumbered by the Mortgages and Redemption Deed*** . . . and enter a final judgment allowing foreclosure and sale of the encumbered property.

R.Vol. XXII, pp. 2607-08 (emphasis added). Although the Motion For Final Judgment was filed pursuant to Rule 54 of the Idaho Rules of Civil Procedure, it was filed and served more than 28 days in advance of the hearing; thus, VP was given ample time to respond thereto. R.Vol. XXIV, p. 2795. The Motion For Final Judgment was supported by the Declaration of C. Dean Shafer ("Shafer Declaration"). VP did not file ***any*** opposition to the Motion For Final Judgment or dispute the accuracy of the Shafer Declaration. *Id.* However, at the hearing on the Motion for Final Judgment, VP argued that the motion was unfairly prejudicial.

On June 16, 2015, the day before the hearing on the Motion For Final Judgment, VP filed a Renewed Motion For Reconsideration and Clarification ("2nd Motion to Reconsider") and supporting memorandum. *Id.*, pp. 2781, 2783. The 2nd Motion to Reconsider ignored the Motion For Final Judgment and argued that Valiant did not provide sufficient foundation to foreclose upon the real property described in the Valiant SJ Motion. *Id.*, p. 2785. It further argued that Valiant did not assert priority over VP's alleged prescriptive easements and equitable servitude

in the Valiant SJ Motion. The 2nd Motion to Reconsider was not supported by any additional testimony or evidence. *Id.*

On June 23, 2015, the district court entered its Memorandum Decision and Order Granting Motion For Entry of Final Judgment ("Final Judgment Order"). The district court held,

> VP failed to file any briefs or affidavits in opposition to Valiant's motion for entry of final judgment, as required by Rule 7(b)(3)(B) and (E). If the defendants wanted to dispute the legal description set forth in the Declaration of C. Dean Shafer, the proper mechanism was to file an opposing affidavit setting forth facts to the contrary. Having failed to do so, the Declaration of C. Dean Shafer stands on the record uncontroverted as to the issue of the proper legal description.

R.Vol. XXIV, p. 2796.

On July 6, 2015, Valiant filed its memorandum in opposition to the 2nd Motion to Reconsider. Valiant pointed out that its Motion For Final Judgment and supporting documents laid the foundation for the legal description of the property that Valiant sought to foreclose. *Id.*, pp. 2808-09. Valiant explained that its allegations seeking to foreclose ***any interest claimed by VP*** were broad enough to include VP's alleged prescriptive easements and equitable servitude. *Id.*, p. 2816.

On July 21, 2015, the district court entered its Memorandum Decision and Order Re: (1) JV, LLC; North Idaho Resorts, LLC; and VP, Incorporated's Motions to Reconsider; (2) Valiant's Request For Entry of Proposed Final Judgment and Decree of Foreclosure and Sale ("2nd Reconsider Order"). *Id.*, p. 2856. The district court held,

> To date, ***Mr. Shafer's testimony*** in the Shafer Declaration establishing which properties Valiant has priority and seeks to foreclose ***still remains uncontroverted.*** This Court has not received any opposing affidavit specifically controverting the legal description put into evidence by the Shafer Declaration.

Id., p. 2869 (emphasis added.) The district court further explained this requirement in a footnote:

> The Court again notes that the Shafer Declaration was filed on May 20, 2015. The Court has held two hearings and has issued two memorandum decisions since then. In the decision issued on June 23, 2015, the Court stated:
>
> > ***'If the defendants wanted to dispute the legal description set forth in the Declaration of C. Dean Shafer, the proper mechanism was to file an opposing affidavit setting forth facts to the contrary.*** Having failed to do so, the Declaration of C. Dean Shafer stands on the record uncontroverted as to the issue of the proper legal description.'
>
> Still, ***to date, no opposing affidavit has been filed.***

Id. (internal citation omitted) (emphasis added). The district court also held that VP's claims regarding prescriptive easements and an equitable servitude did not survive summary judgment because VP failed to allege them as affirmative defenses in answering the Third-Party Complaint or in opposition to the Partial SJ Motion. *Id.*, pp. 2873-74.

On July 30, 2015 another party, JV, LLC ("JV"), filed a motion to reconsider ("JV Motion to Reconsider") the district court's 2nd Reconsider Order. R.Vol. XXV, p. 2967.

On August 19, 2015, VP filed North Idaho Resorts, LLC and VP, Inc.'s Motion to Reconsider and Motion to Alter and Amend Judgment ("3rd Motion to Reconsider"). R.Vol. XXVII, p. 3114. The 3rd Motion to Reconsider argued that VP's alleged prescriptive easements and equitable servitude survived summary judgment because its opposition to the Partial SJ Motion raised genuine questions of fact for trial. *Id.*, p. 3128-31. The 3rd Motion to Reconsider did not challenge any aspect of the Final Judgment Order or include any additional testimony. *Id.*, pp. 3116-32.

On July 21, 2015, Valiant filed a Motion For Order of Sale of Real Property ("Motion For Order of Sale") seeking to have certain lots/parcels encumbered by the Valiant Mortgages sold

together at the foreclosure sale and asking the court to determine the order in which said lots/parcels should be sold. R.Vol. XXV, p. 2880. The district court ruled from the bench granting said motion in part. The district court did not enter a memorandum decision and/or order.

On August 18, 2015, Valiant filed a Motion to Alter, Amend, and/or Reconsider the Order of Sale of Real Property wherein it sought to alter the order of sale as determined by the district court ("Valiant Motion to Alter"). R.Vol. XXVII, p. 3249. No hearing was held, and the district court did not rule on this motion because it was nullified by another order.

Although said motions were nullified by another decision, VP contended that the Declaration of C. Dean Shafer filed in support of the Valiant Motion to Alter ("Modified Shafer Declaration") created questions of fact as to which real property was encumbered by the Valiant Mortgages. The Modified Shafer Declaration clarified that while all real property described in the Shafer Declaration was encumbered by one or more of the Valiant Mortgages, 31 of those lots/parcels were encumbered only by the RE Loans Mortgage. R.Vol. XXVIII, pp. 3302-3305. Moreover, because Parcel 1 was one of those 31 lots/parcels, the Modified Shafer Declaration was consistent with VP's position that Parcel 1 was not subject to the MF08 Mortgage. *Id.*, p. 3306. VP did not dispute the accuracy of the Modified Shafer Declaration. R.Vol. XXIX, pp. 3413-3487.

On September 2, 2015, the district court held a hearing on the JV Motion to Reconsider. 09.02.15 Hr'g Tr., p. 185. During the hearing, VP argued that differences between the Shafer Declaration and the Modified Shafer Declaration created genuine questions of fact for trial. *Id.*, p. 190, ll. 20-25; p. 191, ll. 1-25; p. 192, ll. 1-10.

On September 4, 2015, the district court entered its Memorandum Decision and Order Granting in Part Reconsideration of the July 21, 2015 Memorandum Decision and Order ("JV Reconsider Order"). R.Vol. XXX, p. 3527. The district court found that "there is a genuine issue of material fact as to the legal description based upon Mr. Shafer's altered opinion . . . The defendants are cautioned that if they will be disputing the accuracy of Mr. Shafer's legal description, they must comply fully with expert disclosure requirements . . ." *Id.*

The JV Reconsider Order nullified the district court's prior decisions respecting the description of the real property subject to Valiant's Mortgages; accordingly, on September 25, 2015, Valiant filed its Third Motion For Summary Judgment ("3rd SJ Motion"). *Id.*, p. 3623. The 3rd SJ Motion was filed and served in accordance with Rule 56(c) of the Idaho Rules of Civil Procedure. R.Vol. XXXIII, p. 4002. In its 3rd SJ Motion, Valiant sought, *inter alia*, summary judgment as to the real property subject to the Valiant Mortgages and argued that the Modified Shafer Declaration merely clarified prior testimony and remained uncontroverted. R.Vol. XXXI, pp. 3648-55.

On October 13, 2015, VP filed its opposition to the 3rd SJ Motion. R.Vol. XXXII, p. 3810. VP argued that this Court's decision in *Capstar Radio Operating, Co. v. Lawrence*, 153 Idaho 411, 283 P.3d 728 (2012) ("*Capstar IV*"), precluded summary judgment due to the alleged conflicts in Mr. Shafer's testimony. *Id.*, pp. 3820-21. Crucially, however, VP ignored the district court's guidance by failing to file an affidavit or declaration contesting any aspect of Mr. Shafer's testimony. *See* R.Vols. XXIV, pp. 2796, 2869, and XXX, p. 3527 (The district court advised VP three separate times to adhere to the proper procedure when challenging Shafer's declaration.).

The hearings on VP's 3rd Motion to Reconsider and Valiant's 3rd SJ Motion were held consecutively on October 23, 2015. The district court entered its Memorandum Decision & Order Re: Motions Heard on October 23, 2015 ("3rd SJ and Reconsider Order") on October 30, 2015. R.Vol. XXXIII, p. 4000. The court denied the 3rd Motion to Reconsider because VP failed to raise a genuine issue of material fact with respect to its claims that it possessed an equitable servitude and prescriptive easements. *Id.*, pp. 4007-13. The court granted the 3rd SJ Motion with respect to the real property subject to the Valiant Mortgages because Mr. Shafer's testimony remained uncontroverted. *Id.*, pp. 4014-17. VP appeals each of these determinations.

The only substantive issue that survived summary judgment and required trial was whether POBD had paid off the loans secured by Valiant's Mortgages. After a four-day bench trial, the, the district court entered its Memorandum Decision & Order Re: Trial Held on January 28 and 29, and March 16 and 17, 2016 in favor of Valiant. R.Vol. XXXVII, p. 4589. VP does not appeal the district court's holding that Valiant's Mortgages were not satisfied.

On June 22, 2016, Valiant filed its Motion For an Order of Sale of Real Property seeking to combine and sell certain foreclosed parcels together as singular parcels and requesting a determination as to the order in which the foreclosed property would be sold. R.Vol. XLI, pp. 4997-5014. The district court granted the motion on July 14, 2016 and entered its Order Re: Sale of Real Property. R.Vol. XLIII, p. 5270. The Order Re: Sale of Real Property ordered, *inter alia*, that three of the parcels were to be combined and sold together as one parcel ("Parcel 2")[10] because they were not suitable for separate use and enjoyment. *Id.*, p. 5272.

---

10 These three parcels are three of the four parcels/lots (along with Parcel 1) that POBD quitclaimed to VP on September 30, 2013. R.Vol. XXI, p. 2395. They were combined into Parcel 2 in the judgment and

On July 20, 2016, the district court entered its judgment ("Judgment") awarding Valiant damages against POBD in the amount of $21,485,212.26, *i.e.*, the unpaid amounts secured by Valiant's Mortgages. R.Vol. XLV, pp. 5413-16. The Judgment further declared that Valiant's Mortgages were prior in right, title and interest to any interest claimed by VP. *Id.* On August 22, 2016, Valiant was awarded attorneys' fees and certain costs against POBD in the amount of $731,275.48 ("Attorneys' Fees Judgment"). R.Vol. XLVIII, pp. 5844-46. Valiant was also awarded $15,554.88 in costs against VP, $12,174.26 of which were discretionary costs. *Id.* VP has appealed the award of discretionary costs. *Id.*

On July 20, 2016, the district court also entered its decree of foreclosure ("Foreclosure Decree") ordering the sale of the 156 parcels[11] of real property ("Foreclosed Property") secured by the Valiant Mortgages to satisfy the Judgment. R.Vol. XLIV, pp. 5317-412. Section 2(aa) ("Subsection (aa)") of the Foreclosure Decree included the following language taken from the Valiant Mortgages:

> Pursuant to the Valiant Mortgages, should POBD or its successors or assigns be in possession of or occupy any portion of the Idaho Club Property or improvements thereon at the time of the foreclosure sale, and should said occupant fail to deliver possession of said Parcel(s) to Valiant, said occupant shall immediately become the tenant of the purchaser at such sale, which tenancy shall be a tenancy from day-to-day, terminable at the will of the landlord, at a rental per day based upon the value of the Parcel and improvements, such rental to be due daily to the purchaser.

Compare R.Vol. XLIV, p. 5329 and R.Vol. XVII, p. 1974. VP was provided a copy of the Foreclosure Decree prior to its entry and did not object to its language including Subsection (aa).

---

decree of foreclosure.

11 Originally, the property at issue included 186 parcels (as described in the Modified Shafer Declaration); however, certain parcels were consolidated resulting in the 156 parcels sold at the foreclosure sale. R.Vol. XLI, pp. 5000-01

However, on appeal, VP challenges the propriety of this language.

VP did not post a supersedeas bond or other security to prevent Valiant from executing upon the Judgment. As such, the sheriff's sale of the Foreclosed Property took place on November 7, 2016. Valiant purchased 155 of the parcels by credit bid. R.Vols. LXII-LXVI, pp. 7747-8227. The parcels Valiant purchased included Parcel 1 and Parcel 2. R.Vol. LXII, pp. 7747-53. A third party also purchased one parcel. R.Vol. LXVI, pp. 8172-74.

After purchasing Parcel 1 and Parcel 2 (collectively, "Water/Sewer Parcels"), Valiant presented the certificates of sale to VP and requested an inspection of the improvements and infrastructure affixed to these Parcels as they were under VP's operation and control. R.Vol. LXIX, pp. 8539-47. VP responded that it was unaware of anything in the Foreclosure Decree entitling Valiant to an inspection but otherwise ignored this request. *Id.*, p. 8548. In response, Valiant sent two letters to VP, demanding that VP vacate the premises in accordance with the Foreclosure Decree or Valiant would seek a writ of assistance from the court. *Id.*, pp. 8549-68.

On February 8, 2017, Valiant filed its Motion to Enforce Judgment Under I.A.R. 13(b)(10) and 13(b)(13) ("Motion For Writ of Assistance"). R.Vol. LXVII, p. 8268. The Motion For Writ of Assistance sought a writ of ejectment and/or assistance ejecting VP from the Water/Sewer Parcels in accordance with Section 2(y) and Subsection (aa) of the Foreclosure Decree; the district court's authority under I.A.R. 13(b)(10); and/or for the enforcement of the judgment or any other order. *Id.*, pp. 8272-75. These rules were applicable to VP because it was a party to the action under which the Judgment was entered. *Id.* Nonetheless, VP opposed the Motion For Writ of Assistance asserting that Valiant had to bring a separate action to evict VP from the properties

regardless of whether VP was a party to the Judgment and subject to the district court's orders. R.Vol. LXX, pp. 8748-51.

On March 6, 2017, the district court entered its Memorandum Decision & Order Granting Valiant Idaho, LLC's Motion to Enforce Judgment and Writ of Assistance (collectively, "Writ of Assistance"). R.Vol. LXXXV, pp. 9341-65. The Writ of Assistance ordered the sheriff to eject and remove VP from using, holding or detaining all fixtures, appurtenances and improvements associated therewith. *Id.*, p. 9363. VP does not appeal the district court's entry of the Writ of Assistance.

On March 7, 2017, VP filed its Motion For Order Allowing Use and Access of Parcels 1 and 2 and Application of Stay of Enforcement of Order Granting Valiant Idaho, LLC's Motion to Enforce Judgment ("Motion to Allow VP Access"). *Id.*, p. 9386. The Motion to Allow VP Access sought an order staying enforcement of the Writ of Assistance to allow VP limited use and access to the Water/Sewer Parcels for the limited purpose of maintaining water and sewer services pending the outcome of this appeal. *Id.*, pp. 9389-90. VP claimed that unless the Motion to Allow VP Access was granted, "nearly two hundred (200) residents, as well as the patrons and employees of the golf course, will be without water and sewer services, including fire protection. If VP is not allowed to continue to operate the sewer systems, there is also a threat of environmental contamination from lagoon overflow." *Id.* VP's president further testified that VP must be allowed to continue providing sewer and water services or: (1) the sewer lagoon located on Parcel 1 would likely overflow and contaminate tributaries of Lake Pend Oreille; and (2) VP would be

required to disconnect 82 homes from the water system, which would leave those residents without water and sewer and cause raw sewage to back up into their homes. *Id.*, pp. 9396-97.

On March 17, 2017, pursuant to the Writ of Assistance, the Bonner County Sheriff's Department ejected VP from any and all ***sewer*** facilities located on the Water/Sewer Parcels. R.Vol. LXXXVII, pp. 9662-64. However, Valiant did not eject VP from any of the water facilities. *Id.*, p. 9664. Indeed, Valiant specifically reserved its right to eject VP from the water facilities until certain construction was completed. *Id.*

On April 11, 2017, after obtaining an extension to respond to the Motion to Allow VP Access and noticing said motion for hearing, Valiant filed its response thereto. *Id.*, pp. 9455-655. Valiant explained that it had already undertaken operation of the sewer system. *Id.*, pp. 9669-70. Moreover, the managing member of Valiant testified that ***Valiant had not and would not eject VP from the water facilities*** until it had drilled its own wells and constructed any infrastructure necessary to ensure VP's ejectment would not cause an interruption in essential water services. R.Vol. LXXXVI, pp. 9463-65. For all intents and purposes this testimony constituted a covenant not to further execute on the Writ of Assistance until said construction was completed.

Notwithstanding the foregoing, VP shut off water services to The Idaho Club and at least 40 third-party homeowners residing within it on April 12, 2017. R.Vol. LXXXVII, pp. 9699-702. VP shut off water services even though: (1) it knew that Valiant had covenanted not to further execute on its Writ of Assistance;[12] (2) the district court had not yet heard or ruled on the Motion

12 The Declaration of William Haberman was sent to opposing counsel by FedEx overnight mail on April 10, 2017 and served on counsel for VP on April 11, 2017. R.Vol. LXXXVII, p. 9467.

to Allow VP Access;[13] and (3) its president had testified under oath that shutting off water services would result in sewage contaminating Lake Pend Oreille tributaries and backing up into homes.[14]

Valiant filed a Motion For a Temporary Restraining Order and Preliminary Injunction Against VP, Incorporated ("TRO Motion") the following day. *Id.*, p. 9683. Said motion sought to require VP to continue providing water services until Valiant had drilled its own wells and could provide water services on its own. *Id.*, p. 9694. The district court immediately granted the TRO and set a hearing on the motion for a preliminary injunction. *Id.*, pp. 9707-10.

On April 13, 2017, VP filed its Motion to Dissolve Temporary Restraining Order. R.Vol. LXXXIII, p. 9714. On April 17, 2017, VP filed its reply memorandum in support of its Motion to Allow VP Access. *Id.*, p. 9745. VP ignored Valiant's covenant to delay ejectment and contended that it had no choice but to comply with the Writ of Assistance by vacating the infrastructure located on Valiant's property and turning off water services to anyone connected to the same. *Id.*, pp. 9752-53. This argument was nonsensical and demonstrated that VP's decision to shut off water services was an act of gamesmanship in an attempt to enflame Sandpoint residents and pressure the district court to rule in its favor.

On April 28, 2017, the district court entered its Order Granting Injunction ("Injunction"). R.Vol. LXXXIX, p. 9871. The Injunction required VP to continue providing water services to all real property serviced thereby until Valiant has drilled its wells and constructed infrastructure necessary to provide water services without use of the VP Wells. *Id.*, pp. 9875-77. The Injunction

---

13 The hearing on the Motion to Allow VP Access was set for April 19, 2017 at 2:00 p.m. PDST. R.Vol. LXXXV, p. 9416.

14 R.Vol. LXXXV, pp. 9396-97.

was not one-sided; indeed, it further required Valiant to continue providing sewer services to all real property serviced thereby until VP has constructed infrastructure necessary to provide sewer services to a neighboring development without use of Valiant's sewer lagoon and associated infrastructure. *Id.*, pp. 9874-75. The Injunction remains in effect as of the filing of this brief. VP appeals the district court's entry of the TRO and Injunction.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

There are no additional issues presented on this appeal.

III. ATTORNEYS' FEES ON APPEAL

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

> Section 12-121 allows an award of attorney fees to a prevailing party where the action was pursued, defended, or brought frivolously, unreasonably, or without foundation. Such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the district court incorrectly applied well-established law. Further, attorney fees on appeal have been awarded under Section 12-121 when appellants failed to add any new analysis or authority to the issues raised below that were resolved by a district court's well-reasoned authority.

161 Idaho 281, 289, 385 P.3d 459, 467 (2016) (internal quotations and citations omitted). This Court awarded attorneys' fees on appeal under Idaho Code § 12-121 because the appeal was merely an invitation "to second-guess the district court's well-reasoned opinion." *Id.* Similarly here, VP merely invites this Court to second-guess the district court's well-reasoned decisions. In sum, in the event that Valiant prevails on appeal, Valiant requests attorneys' fees on appeal

under Idaho Code § 12-121 because the VP Appeal was brought frivolously, unreasonably and without foundation.

IV. ARGUMENT

A. Standard Of Review.

There are three separate standards of review at issue in this case. First, the standard of review for the appeal of an order granting summary judgment is as follows:

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

Curlee v. Kootenai Cty. Fire & Rescue, 148 Idaho 391, 394, 224 P.3d 458, 461 (2008) (internal citations omitted). However, on issues that are not to be tried before a jury, such as those raised by VP herein, this Court may draw probable inferences arising from the undisputed facts. *Losee v. Idaho Co.*, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009). Only conflicting facts must be viewed in favor of the non-moving party. *Id.* Summary judgment is proper unless "reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented." *Id.* The non-moving party's case must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *Pena v. Minidoka County*, 133 Idaho 222, 224, 984 P.2d 710, 712 (1999). The moving party is entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *Venable v. Internet Auto Rent & Sales, Inc.*, 156 Idaho 574, 581, 329 P.3d 356,

363 (2014). This Court may only consider material contained in affidavits and depositions that is based on personal knowledge and otherwise admissible at trial. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87-88, 996 P.2d 303, 306-07 (2000).

Second, VP challenges the Foreclosure Decree by arguing that it addresses a non-justiciable issue. Justiciability is a jurisdictional issue, which is "a question[] of law, over which this Court exercises free review." *Tucker v. State*, 2017 Ida. LEXIS 115, *3, 394 P.3d 54, 60 (2017).

Third, an injunction, a temporary restraining, and an award of discretionary costs are all reviewed for abuse of discretion. *Miller v. Bd. of Tr.*, 132 Idaho 244, 245–46, 970 P.2d 512, 513–14 (1998), *cert. denied*, 526 U.S. 1159, 144 L. Ed. 2d 216, 119 S. Ct. 2050 (1999); *Fish v. Smith*, 131 Idaho 492, 493, 960 P.2d 175, 176 (1998); *Beech v. United States Fidelity & Guar. Co.*, 54 Idaho 255, 260, 30 P.2d 1079, 1081 (1934). In reviewing whether a district court abused its discretion, this Court applies the following three-part test:

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

Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho 307, 313, 109 P.3d 161, 167 (2005), *overruled on other grounds by Farber v. Idaho State Insurance Fund*, 152 Idaho 495, 497, 272 P.3d 467, 469 (2012).

B. The District Court Correctly Determined That The Valiant Mortgages Are Prior In Right, Title And Interest To Any Interest Alleged By VP.

VP asserts that the district court erred in granting summary judgment because genuine questions of fact existed with respect to the following issues: (1) whether the Valiant Mortgages

encumbered the Foreclosed Property; (2) whether VP had senior prescriptive easement rights; and (3) whether VP had a senior equitable servitude. Appellant's Brief, p. 29. The district court correctly determined that VP did not create any genuine question of fact; accordingly, VP's arguments should be rejected.

1. There Are No Questions of Fact As To Whether the Foreclosed Property is Encumbered by the Valiant Mortgages.

VP argues that questions of fact exist as to whether the Valiant Mortgages encumbered the Foreclosed Property. VP contends that questions of fact exist because: (1) summary judgment was granted before VP had the opportunity to respond; and (2) Mr. Shafer's initial declaration contradicted his Modified Declaration. VP's arguments misrepresent the district court's decisions and ignore the fact that VP failed to submit an iota of evidence to dispute Shafer's testimony. VP's arguments are without bases in fact or law and should be rejected.

a. Summary Judgment Was Not Granted Unfairly.

A great deal of Appellant's Brief mischaracterizes the district court's decisions to make it appear as if the grant of summary judgment was unfairly prejudicial to VP. However, the district court was not unfair to VP in any way. Regardless of whatever procedural miscues VP alleges with respect to district court's entry of the Partial SJ Order and the Final Judgment Order, these alleged miscues were cured when the district court entered the JV Reconsider Order nullifying the prior decisions. Accordingly, VP's argument that the grant of summary judgment was unfairly prejudicial is without factual or legal bases and should be rejected.

VP contends that the Partial SJ Order was not a partial summary judgment at all. Instead, VP argues that it granted Valiant summary judgment against VP on all claims. Although the

language of the Motion For Partial SJ could have been more precise, counsel for Valiant made it very clear to all parties that Valiant was only seeking partial summary judgment. At the start of the hearing on the Partial SJ Motion, Valiant clarified that "what we've done here is we're moving for summary judgment and it's really a partial summary judgment as to priority. . . to say that those three mortgages that Valiant has assumed are prior in right, title or interest and . . . once we get through that, we'll present the [c]ourt with the property that's actually encumbered described by the mortgages." 03.18.15 Hr'g Tr., p. 12, ll. 6-23. Thus, the court and all parties present at the hearing, including VP, were notified that Valiant was not seeking summary judgment with respect to the real property encumbered by the Valiant Mortgages. *Id.*, p. 9, ll. 12-16; p. 12, ll. 6-23. Valiant intended to obtain this determination by a subsequent motion. *Id.*

Assuming arguendo that VP believed that the Partial SJ Motion sought summary judgment on all claims, VP still failed to respond with any testimony or evidence to refute the legal description set forth by Valiant. VP merely argued, without explanation or analysis, that Valiant's legal description differed from the legal descriptions attached to the Valiant Mortgages and that Parcel 1 was not encumbered by the MF08 Mortgage. R.Vol. XXI, pp. 2368-69. Because the hearing on the Partial SJ Motion was postponed, VP had more than 40 days to respond, to supplement its response, and/or to request additional time to respond to Valiant's motion.[15] Thus, despite the fact that VP had ample time to submit testimony or other evidence challenging Valiant's legal description, it failed to do so.

---

15 The Partial SJ Motion was served by U.S. Mail on January 16, 2015. R.Vol. XIV, p. 1723. Valiant agreed to postpone the hearing until March 18, 2015 because another party requested additional time to conduct discovery. *See* R.Vols. XX, p. 2331; XXII, p. 2493.

After entry of the Partial SJ Order, Valiant filed its Motion For Final Judgment. R.Vol. XXII, p. 2600. In accordance with Valiant's statements at the hearing for the Partial SJ Motion, the Motion For Final Judgment sought "entry of a final judgment establishing the real property encumbered by the [Valiant Mortgages]." *Id.*, p. 2602. The memorandum in support of the Motion For Final Judgment specifically asked the district court to "***determine the real property encumbered by the Mortgages and Redemption Deed*** . . . and enter a final judgment allowing foreclosure and sale of the encumbered property." *Id.*, p. 2608 (emphasis added). The Motion For Final Judgment was accompanied by the Shafer Declaration (Valiant's title expert) identifying each lot/parcel of real property encumbered by the Valiant Mortgages. R.Vol. XXIII, p. 2629-30. Moreover, the memorandum stated: "As set forth in the Shafer Dec., the legal description attached as Exhibit 5 identifies each parcel of property encumbered by the [Valiant] Mortgages and Redemption Deed . . . ***The described property should be deemed the real property encumbered by the [Valiant] Mortgages and ordered to be foreclosed and sold.***" R.Vol. XXII, p. 2609 (emphasis added). Thus, it was clear that Valiant was seeking to identify and determine the real property subject to the Valiant Mortgages.

VP contends that the Final Judgment Order was unfairly prejudicial because: (1) VP allegedly did not understand that the real property subject to the Valiant Mortgages was at issue; (2) the district court did not provide adequate notice that it was going to treat the Motion For Final Judgment as a dispositive motion; and (3) due to the lack of notice, VP allegedly did not have sufficient time to respond. Regardless of whether the motion cited Rule 56(c), the district court did not unfairly prejudice VP. As set forth hereinabove, the Motion For Final Judgment clearly

sought a determination of the real property subject to the Valiant Mortgages as described in the Shafer Declaration. *Id.* Moreover, the Motion For Final Judgment was served 28 days prior to the noticed hearing date, which allowed VP ample time to respond, *i.e.*, 21 days. R.Vol. XXIV, pp. 2794-95. During the hearing, VP briefly asserted that the Motion For Final Judgment was unfair. 06.17.15 Hr'g Tr., p. 79, l. 18-p. 81, l. 15. However, VP did not file an objection or otherwise object in any meaningful way. *Id.*

The district court granted the Motion For Final Judgment citing VP's failure to support its argument with even an iota of evidence. R.Vol. XXIV, p. 2795-96. The court further stated that if VP intended to challenge Mr. Shafer's testimony, "the proper mechanism is to file an opposing affidavit setting forth facts to the contrary." *Id.*, p. 2796. In sum, VP was not unfairly prejudiced by the Final Judgment Order because it did not attempt to dispute the legal description submitted by Valiant, despite having ample time to do so.

The inaccuracy of VP's argument that it was unfairly prejudiced is further evidenced by a review of the circumstances surrounding the hearing on the Motion for Final Judgment. The day before the hearing, VP filed its 2nd Motion for Reconsideration asking the district court to reconsider the Partial SJ Order. *Id.*, p. 2781. VP's decision to focus on the past, *i.e.*, the Partial SJ Order, instead of the imminent hearing on the Motion for Final Judgment is puzzling, especially because its arguments were refuted by Valiant's Motion For Final Judgment, which had already been filed. Although VP again argued that Parcel 1 was not encumbered by the MF08 Mortgage, it did not submit an affidavit or cite to any evidence to support its position. *Id.*, pp. 2788-89.

Moreover, VP did not address the legal descriptions attached to the Modified Shafer Declaration in any way. *Id.*

In denying VP's 2nd Motion For Reconsideration, the district court pointed out that VP was asking it to reconsider the wrong order. R.Vol. XXIV, pp. 2867-69. The district court further reiterated that VP had failed to follow the proper mechanism by which to dispute Shafer's testimony. *Id.*, p. 2869. The court advised that arguments raised at oral argument "are not evidence, and in the absence of an opposing affidavit setting forth specific facts showing that there is a genuine issue for trial, this [c]ourt upholds its earlier decision granting Valiant's [Motion For Final Judgment] . . ." *Id.*, 2868-69. Because VP did not submit testimony or other evidence to dispute the Shafer Declaration, the 2nd Reconsider Order was not unfairly prejudicial to VP.

The foregoing paragraphs establish that the district court did not unfairly prejudice VP. VP failed to submit any evidence to dispute the Shafer Declaration despite having multiple opportunities to do so. Nonetheless, even if this Court concludes that the aforementioned orders were somehow unfair, VP still did not suffer any prejudice because any alleged unfairness was cured. At the hearing on the JV Motion to Reconsider, VP convinced the district court that differences between the Shafer Declaration and the Modified Shafer Declaration created questions of fact for trial. 09.02.15 Hr'g Tr., p. 190, l. 20-p. 192, l. 10. Accordingly, the district court entered the JV Reconsider Order and ruled that "there is a genuine issue of material fact as to the legal description based upon Mr. Shafer's altered opinion." R.Vol. XXX, pp. 3529-30. The JV Reconsider Order reversed the Partial SJ Order, the Final Judgment Order, and the 2nd Reconsider

Order, at least to the extent that they determined there were no questions of fact as to the parcels subject to the Valiant Mortgages; thus, VP was not unfairly prejudiced by these decisions. *Id.*

Furthermore, VP was not unfairly prejudiced by any orders that were entered after the JV Reconsider Order. Less than a month after said order was entered, Valiant filed the Third SJ Motion. R.Vol. XXX, p. 3623. This motion sought summary judgment "establishing that there is no genuine issue of material fact ***as to the real property subject to the [Valiant Mortgages***]." *Id.*, p. 3624 (emphasis added). Valiant argued, *inter alia*, that while there may be differences between the Shafer Declaration and the Modified Shafer Declaration, the latter merely clarified the former, and the Modified Shafer Declaration remained uncontroverted by VP. R.Vol. XXXI, pp. 3648-55. VP had ample time to respond to the Third SJ Motion because it was timely served 28 days prior to the hearing. R.Vol. XXXIII, p. 4002. Moreover, it unambiguously sought ***summary judgment*** with respect to the real property that was subject to the Valiant Mortgages.[16]

In light of the district court's prior admonishments, it was clear that, to defeat summary judgment, VP needed to submit a declaration or affidavit explaining any alleged inaccuracy in the Modified Shafer Declaration. VP was made aware of this requirement in the district court's June 23, July 21, and September 4, 2015 decisions. R.Vols. XXIV, pp. 2796-97, 2869; XXX, p. 3527. Once again, VP ***did not*** file an affidavit or declarant testimony disputing Mr. Shafer's testimony. R.Vol. XXXIII, p. 4002. Accordingly, the district court granted summary judgment on this issue holding that the Modified Shafer Declaration remained uncontroverted by VP. *Id.*, pp. 4014-17.

---

16 VP argues for the first time on appeal that the Third SJ Motion is not a motion for summary judgment but a motion to reconsider the JV Reconsider Order. However, its title is immaterial. If VP is correct, it was given even more time to respond than it was entitled to receive pursuant to Rule 11.2(b) of the Idaho Rules of Civil Procedure (*i.e.*, 21 days instead of 7 days).

VP failed to raise any genuine question of fact, despite numerous opportunities to do so; therefore, its argument that the Third SJ Order was unfairly prejudicial is without bases in fact or law and should be rejected.

b. The Modified Shafer Declaration Does Not Create a Question of Fact For Trial.

VP maintains that the Modified Shafer Declaration created a genuine question of fact and, therefore, the Third SJ Order constitutes reversible error. VP asserts that, according to *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 283 P.3d 728 (2012), any inconsistency in pretrial testimony creates a question of fact precluding summary judgment. This argument mischaracterizes the *Capstar IV* holding and Mr. Shafer's testimony. As such, it is without bases in fact or law and should be rejected.

Capstar IV involved a dispute over whether the respondents ("Capstar") held an easement over the appellants' ("Lawrences") property. *Id.* at 414, 283 P.3d at 731. Capstar had prevailed on a motion for summary judgment alleging, among other things, that it possessed an easement by implication across the Lawrences' property. *Id.* On appeal, the Lawrences asserted that the trial court erred in granting summary judgment because genuine issues of fact existed. *Id.* This Court reversed the trial court's grant of summary judgment, not because of internal inconsistencies in the testimony, but because certain testimony created questions of fact when viewed in a light most favorable to the non-moving party. *Id.* at 416–19, 283 P.3d at 733–36.

One of the elements Capstar had to prove to establish an easement by implication was "apparent and continuous use" of the alleged easement. *Id.* at 416, 283 P.3d at 733. Capstar's predecessor-in-interest ("Funk") submitted an affidavit testifying that "we continuously utilized

the existing road . . . to access our property . . . without interference." *Id.* at 418, 283 P.3d at 735. However, during his deposition Funk testified that "the uses of the property were huckleberry picking and shooting and that ***this occurred on an infrequent basis*** . . ." *Id.* (emphasis added). Funk's testimony obviously created a question of fact for trial, but not because it is inconsistent with prior testimony. It created a question of fact because, when viewed in a light most favorable to the Lawrences, it was unclear whether Funk's use of the roadway satisfied the element of "apparent and continuous" use. *Id.*

Similarly, the Lawrences' predecessor-in-interest ("Rook") first testified that the access road was "visible and in use" by Funk at the time his company purchased the parcel. *Id.* Rook later testified that he did not recall the circumstances surrounding the execution of his affidavit but that he did not have personal knowledge as to whether Funk ever used the roadway to access the property. *Id.* at 418–19, 283 P.3d at 735–36. Again, Rook's subsequent testimony did not create a question of fact because it was inconsistent with prior testimony; rather, it created a question of fact as to whether Funk's use of the roadway was "apparent and continuous" when viewed in a light most favorable to the non-moving party. *Id.* at 419, 283 P.3d at 736.

Contrary to VP's contention, *Capstar IV* does not hold that any clarification of pretrial testimony creates a genuine question of fact for trial. It merely applies the long-standing principle that, on summary judgment, "facts must be viewed in a light most favorable to the non-moving party." *Curlee v. Kootenai Cty. Fire & Rescue*, 148 Idaho 391, 394, 224 P.3d 458, 461 (2008). Regardless of whether Funk's and Rook's pre-trial testimony included inconsistencies, portions of

their testimony created questions of fact when viewed in a light most favorable to the non-moving party.

Mr. Shafer's testimony does not create a question of fact when viewed in a light most favorable to VP. Mr. Shafer testified in his initial declaration that the legal description attached thereto as Exhibit 5 "accurately describes the real property described in the Valiant [Mortgages], subtracting the parcels released from the Valiant [Mortgages], and which Valiant is entitled to foreclose." R.Vol. XXIII, p. 2630. Although VP argued in its briefing that Parcel 1 was not encumbered by the MF08 Mortgage, it did not submit any opposing testimony or evidence "setting forth specific facts showing there is a genuine issue for trial." I.R.C.P. Rule 56(c). Moreover, VP did not allege that Parcel 1 was not encumbered by Valiant's other mortgages, *i.e.*, the Pensco Mortgage and the RE Loans Mortgage. Thus, assuming for argument's sake, but in no way conceding, that VP's argument was sufficient by itself to raise a question of fact, it could at most raise a question of fact as to whether Parcel 1 was subject to the MF08 Mortgage.

Mr. Shafer next submitted a declaration in support of the Motion For Order of Sale ("Order of Sale Declaration"). R.Vol. XXV, p. 2926. This declaration defined the legal description attached as Exhibit 5 to the Shafer Declaration as "the Idaho Club's Legal Description." *Id.*, p. 2927. The Order of Sale Declaration identified 186 lots/parcels that were included within The Idaho Club's Legal Description, the tax parcel identification numbers, and legal description of each lot/parcel. *Id.*, p. 2927-28. Although VP opposed Valiant's proposed order of sale, VP did not dispute the accuracy of the Order of Sale Declaration. *Id.*, pp. 2981-86.

At the time the Shafer Declaration and Order of Sale Declaration were filed, counsel for Valiant mistakenly believed that all three of the Valiant Mortgages encumbered all 186 lots/parcels included within The Idaho Club's Legal Description. R.Vol. XXVIII, p. 3305. Because the district court ordered that Parcel 1 and Parcel 2 would be sold last, counsel, out of an abundance of caution, asked Mr. Shafer to verify that Parcels 1 and 2 were subject to all of the Valiant Mortgages.[17] *Id.* After Mr. Shafer reviewed the legal descriptions of each mortgage for a second time, Valiant filed the Modified Shafer Declaration to clarify that the Pensco and MF08 Mortgages did not encumber 31 of the lots/parcels, including Parcel 1. *Id.*, pp. 3305-06. Although VP opposed Valiant's motion, it did not file an opposing affidavit or any other evidence contradicting the Modified Shafer Declaration. R.Vol. XXIX, pp. 3413-23.

It is worth emphasizing that the Modified Shafer Declaration did not contradict the initial Shafer Declaration; rather, it provided clarity as to exactly which Valiant Mortgages encumbered each parcel. R.Vol. XXIII, p. 2630. *Compare* R.Vol. XXIII, p. 2630 and R.Vol. XXVIII, pp. 3305-06. The Modified Shafer Declaration was also consistent with VP's contention that Parcel 1 was not subject to the MF08 Mortgage. However, even if the Shafer declarations are deemed inconsistent, they do not create a genuine question of fact. VP did not submit any opposing affidavit or other evidence disputing Mr. Shafer's testimony that the lots/parcels identified in the Shafer declarations were subject to the Valiant Mortgages. Moreover, VP did not submit an opposing affidavit or other evidence disputing Mr. Shafer's testimony identifying the lots/parcels

17 Valiant could not credit bid and purchase Parcel 1 and/or Parcel 2 at a foreclosure sale unless the amounts so bid were secured by an unsatisfied Valiant Mortgage encumbering said property. Because Parcel 1 and 2 were to be sold last, Valiant wanted to verify which of the Valiant Mortgages encumbered said parcels; particularly since VP had repeatedly argued that Parcel 1 was not subject to the MF08 Mortgage.

that were subject to each mortgage. Mr. Shafer's acknowledgment that 31 lots were not subject to the Pensco and MF08 Mortgages is more favorable to VP than his prior testimony. As such, the Modified Shafer Declaration governs because it remains uncontroverted.

In sum, VP's reliance on *Capstar IV* is misplaced because *Capstar IV* does not stand for the proposition that any change or clarification of pretrial testimony creates a question of fact precluding summary judgment. Moreover, viewing the Shafer Declaration and the Modified Shafer Declaration in a light most favorable to VP does not create a question of fact for trial. Reasonable persons cannot reach differing conclusions or draw conflicting inferences from the evidence presented because, according to both of Shafer's declarations, all of the parcels were encumbered by at least one of Valiant's Mortgages. *Losee v. Idaho Co.*, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009). For these reasons, VP's argument is without bases in fact or law and should be rejected.

2. There Are No Questions Of Fact As To Whether VP Has Prescriptive Easements Or An Equitable Servitude Against The Foreclosed Property.

The district court determined that Valiant was entitled to summary judgment as a matter of law because there was no genuine question of material fact as to whether the Valiant Mortgages were prior in right, title and interest to any and all interest claimed by VP. R.Vol. XXII, p. 2576. VP contends that the district court's grant of summary judgment constitutes reversible error because there are genuine questions of fact as to whether VP has prescriptive easements or an equitable servitude against certain property subject to the Valiant Mortgages. However, VP's arguments are affirmative defenses and it did not submit any evidence to meet its burden of proving that there are questions of fact as to each element of said affirmative defenses. As such, VP's arguments are without bases in fact or law and should be dismissed.

a. VP Does Not Have Prescriptive Easements.

VP maintains that the district court committed reversible error because there were genuine questions of fact as to whether VP possessed a prescriptive easement against an unidentified portion of the Foreclosed Property. However, VP misunderstands the burden shifting framework related to an affirmative defense, which requires VP to cite the elements of a prescriptive easement and submit evidence to establish that there were genuine questions of fact regarding these elements. As VP has utterly failed to meet its burden of proof, its argument is without bases in fact or law and should be rejected.

The Idaho Supreme Court has ruled that once a party seeking summary judgment has established the absence of a genuine issue of material fact, the burden shifts to the nonmoving party. *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009). The nonmoving party must then come forward with evidence by way of affidavit or otherwise that establishes the existence of a material issue of disputed fact. *Id.* Moreover, "a non-moving defendant has the burden of supporting a claimed affirmative defense on a motion for summary judgment."[18] *Id.* at 771, 215 P.3d at 491.

Valiant met its burden of establishing the absence of a genuine issue of material fact as to is priority by submitting *inter alia,* recorded copies of the Valiant Mortgages to establish its priority position. R.Vols. XV-VIII, pp. 1747-2069. Valiant also submitted recorded copies of the quitclaim deeds that VP obtained from POBD many years after the Valiant Mortgages

18 This holding was based in part on the plain language of the former Rule 56(e) that was then in effect. This rule was subsequently modified in 2016—after the district court ruled on Valiant's motions for summary judgment.

were recorded. *Id.* The Partial SJ Motion requested an order of summary judgment determining that the Valiant Mortgages were "senior and superior to ***any and all*** interest claimed by [VP] in and to the subject property." R.Vol. XIV, p. 1722 (emphasis added). Moreover, the supporting memorandum specified that Valiant sought summary judgment that its "Mortgages are senior in right and priority to ***any interest*** claimed by . . . VP." R.Vol. XIV, p. 1727 (emphasis added).

As Valiant submitted undisputed evidence of the priority dates of the Valiant Mortgages, the burden shifted to VP to produce evidence by way of affidavit or otherwise to establish there were genuine questions of fact as to whether VP's alleged interests had priority over the Valiant Mortgages. *Chandler*, 147 Idaho at 769, 215 P.3d at 489. To the extent VP sought to establish that it had a prescriptive easement, VP bore the burden of demonstrating that there were questions of fact with respect to each element of this affirmative defense. *Id.* at 771, 215 P.3d at 491. VP completely failed to satisfy its burden of proof. VP filed a memorandum and a declaration of Richard Villelli ("Villelli SJ Declaration") in opposition to the Partial SJ Motion. R.Vol. XXI, pp. 2359, 2392. The memorandum included a conclusory claim that VP possessed a prescriptive easement "stemming from its infrastructure for the prescriptive period." *Id.* at 2369. However, VP did not identify the real property that it alleged was subject to its prescriptive easement. *Id.* Moreover, said memorandum did not identify the elements VP had to prove in order to establish a prescriptive easement, nor did it identify testimony or evidence creating questions of fact regarding said elements. Indeed, it failed to even cite to the Villelli SJ Declaration. *Id.* at 2369.

VP's 1st Motion to Reconsider could not create a genuine issue of material fact because it was filed without a supporting memorandum and it was not noticed for a hearing. R.Vol. XXII,

pp. 2596-99. VP's 2nd Motion to Reconsider incorrectly alleged that it was Valiant's burden to refute VP's affirmative defense, and it did not include any new facts or caselaw. R.Vol. XXIV, pp. 2788-89. This motion ignored that VP bore the burden of proof and failed to identify testimony or evidence allegedly establishing a prescriptive easement. *Chandler*, 147 Idaho at 769, 215 P.3d at 489. As such, the 2nd Motion to Reconsider did not create a genuine issue of material fact.

VP's 3rd Motion to Reconsider did not contain new facts or caselaw regarding its alleged prescriptive easement. R.Vol. XXVII, p. 3131. This motion contended only that Mr. Villelli's testimony that "certain of these [prescriptive] easements have existed in excess of 20 years" was sufficient to raise a question of fact as to whether VP possessed prescriptive easements. *Id.* VP did not cite to any other testimony or evidence. *Id.* The 3rd Motion to Reconsider misstated Mr. Villelli's testimony and was woefully insufficient to create a question of fact as to whether VP possessed prescriptive easements.

To establish that there are questions of fact as to whether VP possessed prescriptive easements, VP had to introduce facts meeting each element of a prescriptive easement when viewed in a light most favorable to VP. *Chandler*, 147 Idaho at 771, 215 P.3d at 491. A party cannot establish the existence of a prescriptive easement without showing that its use of the subject property was "(1) open and notorious; (2) continuous and interrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement; and (5) for the statutory period." *Beckstead v. Price*, 146 Idaho 57, 62, 190 P.3d 876, 881 (2007). Moreover, "a prescriptive right cannot be obtained if the use of the servient estate is

by permission of the landowner." *Id.* Thus, VP had to introduce facts tending to prove each of the foregoing elements.

Mr. Villelli testified that much of the water and sewer system "infrastructure has been in place for over 20 years," but, this is the only testimony cited by VP in its opposition to the Partial SJ Motion. R.Vol. XXI, p. 2395. This testimony, by itself, cannot create a question of fact with respect to each element of a prescriptive easement. For example, said testimony did not establish that VP was the owner of any infrastructure for the prescriptive period. Moreover, the Villelli SJ Declaration indicated that VP could not have acquired a prescriptive easement. Specifically, Mr. Villelli testified that a *Construction and Operating Agreement*, which was not attached as an exhibit, "required [POBD] to extend portions of the existing water and sewer utility infrastructure, required [POBD] to transfer easements for the completed infrastructure and title to those lots upon which the sewer lagoons and water systems were located, and ***required VP to operate the system***." *Id.* (emphasis added.) Mr. Villelli further testified that "VP operated the system ***as required***." *Id.* (emphasis added.) As such, any alleged occupation of POBD property arising out of VP's operation and use of the water and sewer infrastructure was clearly permissive and pursuant to an agreement between VP and the property owner. Thus, VP could not have acquired a prescriptive easement because its use was not adverse. *Beckstead*, 146 Idaho at 62, 190 P.3d at 881.

On appeal, VP directs this Court to multiple pages of alleged undisputed facts set forth in extraneous declarations and documents. Appellant's Brief, pp. 18-29. However, VP did not cite to any of this testimony or evidence when it filed its opposition to the Partial SJ Motion or its 1st, 2nd or 3rd Motions to Reconsider. R.Vol. XXVII, p. 3131. Instead, VP relied solely upon its prior

briefing, which the court had already rejected, and one sentence of Mr. Villelli's testimony. *Id.* This situation is analogous to this Court's holding in *Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67, 205 P.3d 1203 (2009). Like the appellants in *Armstrong*, VP "specifically declined to respond to the motion with any substantive argument, instead relying solely on prior briefing that the court had already rejected. Appellants had the opportunity at that point to raise additional theories . . . [but] they failed to do so at their own peril." *Id.* at 72. Moreover, it is the longstanding rule of this Court that it "will not consider issues that are raised for the first time on appeal." *Parsons v. Mut. of Enumclaw Ins. Co.*, 143 Idaho 743, 746, 152 P.3d 614, 617 (2007). Thus, VP's references to extraneous documents and information for the first time on appeal cannot create questions of fact. *Id.*

A nonmoving party must present more than mere conclusory allegations to defeat summary judgment. *Stafford v. Weaver*, 136 Idaho 223, 225, 31 P.3d 245, 247 (2001); *Goodman v. Lothrop*, 143 Idaho 622, 627, 151 P.3d 818, 823 (2007) (holding that conclusory allegations unsupported by specific facts are insufficient to raise a genuine question of material fact precluding summary judgment). As VP submitted only conclusory allegations in support of its alleged prescriptive easement, VP's argument that there are questions of fact as to whether it possesses prescriptive easements is without bases in fact or law and should be rejected.

b. <u>VP Does Not Possess An Equitable Servitude</u>.

VP maintains that the district court committed reversible error because there were genuine questions of fact as to whether VP possessed an equitable servitude against an unidentified portion of the Foreclosed Property. However, like its prescriptive easement claims, VP misunderstands

the burden shifting framework related to an affirmative defense and failed to cite the elements of an equitable servitude or submit evidence to establish that there were genuine questions of fact regarding those elements. Moreover, an equitable servitude is not applicable to the facts of this case. Therefore, due to VP's failure to meet its burden of proof and because it could not possess an equitable servitude, its argument is without bases in fact or law and should be rejected.

Again, Valiant met its burden of establishing the absence of a genuine issue of material fact. R.Vols. XV-VIII, pp. 1747-2069. Thus, the burden shifted to VP produce evidence by way of affidavit or otherwise to establish that there were genuine questions of fact. *Chandler*, 147 Idaho at 769, 215 P.3d at 489. To the extent that VP sought to demonstrate that it had an equitable servitude, it was incumbent upon VP to establish that there were questions of fact with respect to each element of this affirmative defense. *Id.* at 771, 215 P.3d at 491.

VP failed to meet its burden of proof as to its equitable servitude claim. VP filed a memorandum and the Villelli SJ Declaration in opposition to the Partial SJ Motion. R.Vol. XXI, pp. 2359, 2392. The memorandum included a conclusory allegation that VP possessed an equitable servitude "upon the lots upon which its lagoons, water system and pumping stations . . . aris[ing] from the CO Agreement." *Id.*, pp. 2369-70. VP did not identify the lots/parcels upon which it contends said equitable servitude is located. *Id.* Although the memorandum also cited to a case in which this Court upheld the existence of an equitable servitude, it did not explain how an equitable servitude was applicable to the facts of this case, it did not identify the elements of a equitable servitude, nor did it identify testimony or evidence creating questions of fact regarding said elements. *Id.* at 2369-70. Moreover, it did not even cite to the Villelli SJ Declaration. *Id.*

Instead, VP argued that Valiant had the burden of proving that it did not have knowledge of an agreement that was not in the record. *Id.*, p. 2370. VP misunderstands the burden shifting framework with respect to its affirmative defenses. *Chandler*, 147 Idaho at 771, 215 P.3d at 491. Thus, VP's opposition to the Partial SJ Motion did not create a genuine question of fact as to whether it possessed an equitable servitude.

VP's 1st Motion to Reconsider could not create a question of fact because it was not supported by a memorandum or noticed for hearing. R.Vol. XXII, pp. 2596-99.

VP's 2nd Motion to Reconsider did not allege any new facts or caselaw, alleging instead that it was Valiant's burden to refute VP's alleged equitable servitude on summary judgment. R.Vol. XXIV, pp. 2788-89. This motion ignored that VP bore the burden of proof and failed to identify any testimony or evidence allegedly establishing an equitable servitude. *Chandler*, 147 Idaho at 769, 215 P.3d at 481. As such, VP's 2nd Motion to Reconsider did not create a question of fact.

VP's 3rd Motion to Reconsider did not cite to caselaw, it did not explain how an equitable servitude was applicable, it did not explain the elements of an equitable servitude, it did not explain how the facts it submitted created questions of fact with respect to said elements, nor did it cite to any affidavits. R.Vol. XXVII, p. 3131. The 3rd Motion to Reconsider contended that, when viewed in a light most favorable to VP, reasonable inferences should be drawn to determine that there was a question of fact as to whether Valiant's Mortgages were subject to VP's equitable servitude, *i.e.*, whether the water and sewer infrastructure was included in the sale to POBD and whether Valiant's predecessor-in-interest had knowledge of this before making its loans. *Id.*, p.

3130. VP did not ask the district court to reconsider its decision on any other bases. *Id.* The 3rd Motion to Reconsider misstated Mr. Villelli's testimony and it was woefully insufficient to create a question of fact as to whether VP possessed an equitable servitude.

To establish that there were questions of fact as to whether VP possessed an equitable servitude, VP was required to first set forth the elements of an equitable servitude. VP then had to explain why there are questions of fact with respect to each element. *Goodman*, 143 Idaho at 627, 151 P.3d at 823 (holding that conclusory assertions cannot raise an issue of material fact).

Black's Law Dictionary defines an equitable servitude as "building restrictions and restrictions on the use of land which may be enforced in equity." Black's Law Dictionary 539 (6th ed., West 1990). This definition is consistent with Idaho caselaw.

The Idaho Supreme Court has upheld the existence of equitable servitudes to enforce restrictive covenants. *See Thomas v. Campbell*, 107 Idaho 398, 690 P.2d 333 (1984); *Middlekauff v. Lake Cascade*, Inc., 110 Idaho 909, 719 P.2d 1169 (1986); and *West Wood Invs. v. Acord*, 141 Idaho 75, 106 P.3d 401 (2005). In each of these cases, this Court upheld the existence of an equitable servitude in favor of affected property owners because said property owners either purchased or sold a portion of their respective property in reliance upon the seller's/buyer's promise restricting the use of its land. However, this caselaw is inapplicable to the facts of this case. This Court has held:

> [T]he 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.

West Wood Invs., 141 Idaho at 84, 106 P.3d at 410 (emphasis added). This rule is clear that equitable servitudes are only applicable where a successor-in-interest breaches a promise regarding the use of land. *Id.* There is no evidence that Valiant sought to refute a promise POBD made to property owners regarding the use of or building restrictions upon the Foreclosed Property. There is not even a restriction on the building or use of land at issue in this case. Instead, VP asks this Court to find that there are questions of fact as to whether VP possessed an equitable servitude based on express easements that POBD allegedly promised but failed to grant. Appellant's Brief, pp. 39-43. As counsel for VP is well aware, "an express easement, being an interest in real property, may only be created by a written instrument . . . between the owner of the dominant estate and the owner of the servient estate." *Capstar Radio Operating Co. v. Lawrence*, 143 Idaho 704, 707, 152 P.3d 575, 578 (2007) ("*Capstar I*").[19] VP seeks to circumvent the written instrument requirement by using the doctrine of equitable servitudes, which is not even applicable to the facts of this case. VP cannot meet its burden of proof with respect to this affirmative defense.

VP has not raised a genuine question of fact as to whether it has an enforceable interest against POBD. VP asserts that POBD failed to grant an express easement against certain real property. R.Vol. XXI, p. 2395. This promise was allegedly set forth in a construction and operating agreement. *Id.* However, VP did not provide a copy of this agreement to the district court. *Id.*, pp. 2369-70; R.Vol. XXVII, pp. 3130-31. Because an express easement must be in writing, it necessarily follows that an agreement to grant an express easement also must be in

19 Counsel for VP, Susan Weeks, argued on behalf of Capstar in said case.

writing. *Capstar I*, 143 Idaho at 707, 152 P.3d at 578; I.C. § 9-503. As there is no written agreement in the record, VP cannot meet its burden of proof with respect to this element.

Further, VP has failed to raise a genuine question of fact as to whether POBD's promise to grant an express easement is enforceable against Valiant. "Whether a successor in interest takes the interest subject to the equitable servitude is a question of notice." *West Wood Invs.*, 141 Idaho at 85, 106 P.3d at 411. VP asserts that "undisputed evidence was submitted that Barney Ng . . . requested and was provided the final third amended and restated PSA, as well as the second version of the PSA, prior to granting the [RE Loans Mortgage]." Appellant's Brief, p. 42. This assertion misrepresents Mr. Villelli's testimony. Mr. Villelli testified only that "RE Loans requested and ***I provided*** a copy of the ***Second*** Restated Purchase and Sale Agreement. ***I understood*** R.E. Loans had a copy of the ***Third*** Restated Purchase and Sale Agreement." R.Vol. XXI, p. 2394 (emphasis added). Again, this is the only testimony cited by VP to establish the existence of a question of fact. R.Vol. XXVII, p. 3130. Contrary, to VP's misrepresentations, Mr. Villelli merely testified that he "***provided***" a copy of the "***Second*** Restated Purchase and Sale Agreement," which was not attached to his declaration or otherwise submitted into the record. R.Vol. XXI, p. 2394. He did not testify to whom he provided said agreement, nor did he testify concerning any alleged provisions in said agreement. *Id.* The Second Restated Purchase and Sale Agreement could not have created a question of fact because it was not submitted into the record. *Id.* Moreover, Mr. Villelli did not testify that he provided a copy of the "Third Restated Purchase and Sale Agreement" to RE Loans or anyone else. *Id.* To the contrary, he merely testified that "***he understood***" that RE Loans had a copy of it. *Id.* Thus, Mr. Villelli did not have personal

knowledge as to whether RE Loans had a copy of the Third Restated Purchase and Sale Agreement, and his testimony cannot possibly create a question of fact regarding RE Loans' knowledge of its contents.

On appeal, VP directs this Court to multiple pages of allegedly undisputed facts set forth in extraneous declarations and documents. Appellant's Brief, pp. 18-29. However, VP did not cite to any of this testimony or evidence when it filed its opposition to the Partial SJ Motion or its 1st, 2nd or 3rd Motions to Reconsider. R.Vol. XXVII, p. 3131. Instead, VP relied solely upon its prior briefing, which the court had already rejected, and one sentence of Mr. Villelli's testimony. *Id.* VP relied upon its prior briefing without providing any additional information or argument at its own peril. *Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67, 72, 205 P.3d 1203, 1208. Moreover, Idaho's appellate courts "will not consider issues that are raised for the first time on appeal." *Parsons*, 143 Idaho at 746, 152 P.3d at 617. Thus, VP's references to extraneous documents and information for the first time on appeal cannot create questions of fact. *Id.*

A nonmoving party must present more than mere conclusory allegations to defeat summary judgment. *Stafford*, 136 Idaho at 225, 31 P.3d at 247. VP submitted only conclusory allegations in support of its alleged equitable servitude; therefore, VP's argument that a question of fact exists as to whether it has an equitable servitude is without bases in fact or law and should be rejected.

C. <u>The District Court's Foreclosure Decree Was Not Erroneous</u>.

In the July 20, 2016 Foreclosure Decree, the district court directed the sale of the encumbered property and the application of the sale proceeds. R.Vol. XLIV, pp. 5317–30. The

last paragraph of the Foreclosure Decree, Subsection (aa), applied to the Foreclosed Property that was occupied by VP. *Id.*, p. 5329. Subsection (aa), in its entirety, is as follows:

> aa. Pursuant to the Valiant Mortgages, should POBD or its successors or assigns be in possession of or occupy any portion of the Idaho Club Property or improvements thereon at the time of the foreclosure sale, and should said occupant fail to deliver possession of said Parcel(s) to Valiant, said occupant shall immediately become the tenant of the purchaser at such sale, which tenancy shall be a tenancy from day-to-day, terminable at the will of the landlord, at a rental per day based upon the value of the Parcel and improvement, such rental to be due daily to the purchaser.

Id. The language of Subsection (aa) was not drafted *sua sponte*; rather, the Valiant Mortgages included language nearly identical thereto. R.Vol. VI, p. 691.[20] Further, Valiant provided the Foreclosure Decree to VP before it was entered by the district court, and VP did not object to the language therein. (*See* Attachment A.)

On appeal, VP challenges the propriety of Subsection (aa) by arguing that it addresses a non-justiciable issue. Appellant's Br. at 45. Specifically, VP argues that there was "no actual controversy" and Subsection (aa) declared rights of "unknown future purchasers" vis-à-vis "any potential holdover tenant." *Id.* This Court should reject VP's argument for three reasons.

First, this Court need not address this issue because VP has not stated what, if any, relief it seeks with regard to its challenge of Subsection (aa), nor has VP presented an argument that a substantial right has been implicated. *Bach v. Bagley*, 148 Idaho 784, 793, 229 P.3d 1146, 1155 (2010) ("Although Bach makes passing mention to the 8.5-acre parcel in his brief, he . . . makes

---

20 The following provision, in pertinent part, was included in the original mortgage:

> In the event that there be a judicial sale hereunder and if at the time of such sale Mortgagor, or their heirs or assigns, be occupying the Premises and Improvements or any part thereof so sold, each and all shall immediately become the tenant of the purchaser at such sale which tenancy shall be a tenancy from day to day, terminable at the will of either tenant or landlord, at a rental per day based upon the value of the Premises and Improvements, such rental to be due daily to the purchaser.

no argument as to what, if any, relief he seeks with regard to that property. Therefore, we do not address it."); *Cedillo v. Farmers*, 2017 Ida. LEXIS 314 at *22, 408 P.3d 886, 893 (2017) (Burdick, C.J. dissenting) ("[W]hen an appellant fails to present argument that a substantial right was implicated she waives the issue."). VP does not even request that this Court strike Subsection (aa) from the Foreclosure Decree.[21] For the foregoing reason, this Court need not address VP's argument.

Second, VP's assertion that Subsection (aa) addresses a non-justiciable issue is a red herring. VP asserts that Subsection (aa) impermissibly determines the rights of hypothetical purchasers; however, the rights of hypothetical purchasers are irrelevant. The relevant inquiry is whether Subsection (aa) was proper **as applied to VP**[22], which it was, according to *Pro Indiviso v. Mid-Mile Holding Trust* and Idaho Code § 45-1302. 131 Idaho 741, 963 P.2d 1178 (1998). In *Pro Indiviso*, this Court affirmed a district court's authority to eject an occupant of land in favor of the owner via a writ of assistance. *Id.* at 746, 963 P.2d at 1183. Moreover, this Court held that a quiet title action was not a prerequisite to ejectment. *Id.* Similarly, Idaho Code § 45-1302 provides that, in a foreclosure action, a "court shall, in addition to granting relief in the foreclosure action, determine the title, estate or **interest of all parties thereto**." I.C. § 45-1302

21 Upon the foreclosure sale, Valiant obtained all right, title, and interest in the property. *Acker v. Mader*, 94 Idaho 94, 96, 481 P.2d 605, 607 (1971). The only interest retained by VP was a one-year right of redemption. *Id.*; I.C. § 11-402. However, because the one-year right of redemption has expired, absolute title is vested in Valiant. *Steinour v. Oakley State Bank*, 45 Idaho 472, 480, 262 P. 1052, 1055 (1928). It stands to reason that because Valiant now possesses absolute title, the Foreclosure Decree and any language therein is irrelevant.

22 Crucially, VP does not challenge the propriety of Subsection (aa) as it applies to VP vis-à-vis Valiant. VP's challenge to Subsection (aa) relies on the rights of hypothetical purchasers. However, VP does not have standing to assert the rights of another party, especially a hypothetical party. *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990).

(emphasis added). VP is a party to the foreclosure action and Subsection (aa) determines VP's **interest** as an occupant of the disputed property; therefore, Subsection (aa) is proper as applied to VP. This point is illustrated by *Eastern Idaho Loan & Trust Co. v. Blomberg*, wherein this Court affirmed the following language of a decree of foreclosure: "the purchaser or purchasers of said mortgaged premises at such sale [shall] be let into possession thereof, and any person who . . . has come into possession . . . [must] deliver possession thereof to such purchaser." 62 Idaho 497, 504, 113 P.2d 406, 409 (1941). This Court affirmed the decree's effect as to the party that occupied the property at issue. *Id.* at 506, 113 P.2d at 410. As illustrated by *Eastern Idaho Loan & Trust*, although a decree may mention hypothetical purchasers, its effect is on the occupants of the property and, as long as it conforms with the applicable statute, it will be enforceable. *Id.* Here, the Foreclosure Decree is enforceable because it conforms with Idaho Code § 11-310, which provides that a purchaser acquires all right, title, interest and claim to the property. I.C. § 11-310.

Third, VP is incorrect in claiming that "no actual controversy" exists. An actual controversy "must be definite and concrete, touching the legal relations of the parties having adverse legal interests." *Davidson v. Wright*, 143 Idaho 616, 620, 151 P.3d 812, 816 (2006) (quoting *Weldon v. Bonner Cnty Tax Coal.*, 124 Idaho 31, 36, 855 P.2d 868, 873 (1993)). Here, VP's interest in the property touches the legal relations of the parties because, at the time of the Foreclosure Decree, VP occupied the disputed property upon which Valiant was foreclosing. *Id.*

For the foregoing reasons, VP's argument relating to the propriety of Subsection (aa) is without bases in fact or law and should be rejected.

D. The District Court Did Not Err By Granting The TRO Followed By The Injunction.

At the outset, it is important to correct VP's mischaracterization of the facts. Contrary to VP's recitation, Valiant maintained a consistent position throughout the post-judgment proceedings. Valiant's goals were twofold. First, Valiant sought to immediately eject VP from the sewer facilities because said facilities could be operated without constructing additional infrastructure or affecting the homeowners serviced thereby. R. Vols. LXVII, p. 8268, LXXXVII, pp. 9662–64, 9669–70. Second, Valiant sought to obtain the right to eject VP from the water facilities; however, Valiant repeatedly noted that it would not exercise its right to eject VP until certain infrastructure improvements were completed enabling Valiant to operate the water facilities without the use of VP's wells and without affecting the homeowners serviced thereby. R. Vols. LXXXV, p. 9683; LXXXVI, pp. 9463–65. Valiant adhered to these two goals throughout the proceedings.

After purchasing the Water/Sewer Parcels, Valiant requested an inspection of the improvements and infrastructure affixed to those parcels. R.Vol. LXIX, pp. 8539–47. VP ignored Valiant's request for inspection, and Valiant filed a Motion For Writ of Assistance, which was granted. R.Vol. LXXV 9341–65. VP sought a stay of the writ by filing a Motion to Allow VP Access, which Valiant opposed, arguing that a stay was unnecessary because Valiant had already assumed operation of the sewer facilities. R.Vols. LXXV, pp. 9386; LXXVI, pp. 9463–65. Moreover, Valiant emphasized that it would not eject VP from the water facilities until the necessary infrastructure work was completed, ensuring that water services would not be interrupted when the operation was transitioned from VP to Valiant. *Id.* Notwithstanding Valiant's

promise to delay the ejectment of VP from the water facilities, VP turned off the water to residences within The Idaho Club. R.Vol. LXXVII, pp. 9699–702. By terminating water services, VP risked significant damage to the property, which it's president acknowledged. R. Vol. LXXXV, pp. 9396–97. R.Vol. LXXXV, pp. 9396–97. To prevent damage to the property, Valiant filed the TRO Motion wherein it reiterated that VP would not be ejected from the water facilities until certain construction work was completed. *Id.* at 9683. The district court recognized the significant hazard caused by VP's termination of water services and granted the TRO. *Id.* at 9707–10. Thereafter, VP filed a Motion to Dissolve the TRO, arguing that it had no choice but to comply with the Writ of Assistance by vacating the water facilities., but the district court granted the Injunction requiring VP to continue to provide water services until the construction of necessary infrastructure was complete. R.Vol. LXXIX, p. 9871.

On appeal, VP raises two arguments: (1) the district court's error in grating summary judgment is demonstrated by Valiant's inconsistent position during the summary judgment proceeding and the TRO/Injunction proceeding; and (2) the district court's reliance on Idaho Appellate Rule 13 was erroneous. This Court should reject VP's arguments for three reasons.

First and foremost, this Court need not address the merits of VP's argument because VP has failed to demonstrate, let alone attempt to demonstrate, that the district court abused its discretion in granting the TRO/Injunction. This Court reviews the issuance of the TRO/Injunction for abuse of discretion. *Hayden Lake Fire Prot. Dist. v. Alcorn,* 141 Idaho 307, 313, 109 P.3d 161, 167 (2005), *overruled on other grounds by Farber v. Idaho State Insurance Fund*, 152 Idaho 495, 497, 272 P.3d 467, 469 (2012). The party claiming that an abuse of discretion occurred bears the

burden of demonstrating that the district court violated at least one part of the three-part test. *Great Plains Equip. v. Northwest Pipeline Corp.*, 136 Idaho 466, 36 P.3d 218 (2001); *Green River Ranches, LLC v. Silva Land Co., LLC*, 162 Idaho 385, __, 397 P.3d 1144, 1151 (2017). In *Green River Ranches*, this Court noted that an appellant's conclusory claim was insufficient to prove that an abuse of discretion had occurred. *Id.* at ___, 397 P.3d at 1151. Specifically, this Court stated: "Silva Dairy has failed to demonstrate, or even attempt to demonstrate, that an abuse of discretion occurred under any part of the test applied by this Court. . . . and its failure to do so is fatal to its argument." *Id.* Here, VP claims that the issuance of the TRO/Injunction was erroneous, but VP fails to demonstrate that a violation of any part of the three-part test occurred. As was the case in *Green River Ranches*, VP's failure to demonstrate a violation of any part of the three-part abuse-of-discretion test is fatal to its argument. Therefore, this Court should affirm the TRO/Injunction.

Second, VP's argument ignores an important distinction between the order for summary judgment and the orders granting the TRO/Injunction. In granting summary judgment against VP's easement claims, the district court limited its analysis to the material facts to which the parties cited. R.Vol. XIV, p. 1725–46. Whether VP entered into an agreement with POBD to provide water and sewer services was immaterial to the district court's summary judgment analysis because the issue on summary judgment was the priority of Valiant's Mortgages vis-à-vis VP. If the service agreement was capable of granting VP an ownership interest in the Foreclosed Property, VP surely would have raised this fact in its opposition to the Partial SJ Motion or in support of the 1st, 2nd or 3rd Motions to Reconsider. Thereafter, the district court appropriately shifted its focus in ruling on Valiant's motion for the TRO/Injunction. VP's agreement to provide

water and sewer services to the disputed property was material to the TRO/Injunction analysis because it refuted VP's claim that it could shut off water services without repercussion. In short, the district court did not err by granting the TRO and Injunction based, in part, on VP's agreement to provide water and sewer services.

Third, VP's argument—that the district court erred by relying on Idaho Appellate Rule 13—is contrary to the plain language of Idaho Appellate Rule 13 and is not supported by authority. Specifically, VP argues that: (1) the injunction "exceeded the scope of I.A.R 13(b)(10)" because there was no contractual basis to require VP to provide water services to Valiant; and (2) "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." Appellant's Br. at 53. VP's arguments are not supported by Idaho Appellate Rule 13, which provides as follows, in pertinent part:

> In civil actions, unless prohibited by order of the Supreme Court, the district court shall have the power and authority to rule upon the following motions and to take the following actions during the pendency on an appeal;
>
> . . .
>
> (10) Make any order regarding the use, preservation or possession of any property which is the subject of the action on appeal.
>
> . . .
>
> (13) Take any action or enter any order required for the enforcement of any judgment or order.

I.A.R. 13(b)(10), (13). VP's first argument is without merit because Valiant did not seek to receive said services. Valiant sought to retain fire protection services to the Foreclosed Property, which is adjacent to residences, and to ensure that homes and Lake Pend Oreille tributaries were not contaminated by raw sewage. Moreover, the district court's TRO and Injunction were clearly supported by Idaho Appellate Rule 13(b)(10) because both orders related to the use and

preservation of the disputed property, *i.e.*, VP's termination of the water services risked significant damage to the property. VP's second argument is defeated by this Court's holding in *Acker v. Mader* and Idaho Code § 11-407. 94 Idaho 94, 96 481 P.2d 605, 607 (1971). In *Acker*, this Court held that a purchaser at a foreclosure sale was entitled to receive from the occupant the value of the use and occupation thereof, and, at the time of foreclosure sale, the purchasing party "obtained all of the right, title and interest of the [occupants] in the property." *Id.* Therefore, as the purchaser of the property, Valiant was entitled to the sewer fees.

For the foregoing reasons, VP's arguments relating to the propriety of the TRO/Injunction are incorrect. Valiant respectfully requests that this Court affirm the TRO/Injunction.

E. <u>The District Court's Award Of Discretionary Costs Was Not An Abuse Of Discretion</u>.

Justice Jones's concurring remarks in *Nield v. Pocatello Health Services* apply to VP's appeal of the award of discretionary costs. That is, "[t]he fact is this [issue] is nothing more than a matter of common sense and basic legal reasoning. . . . [S]ometimes the law gets lost in theories, over-analysis, and hyperbole and never sees the forest through the trees." 156 Idaho 802, 819, 332 P.3d 714, 731 (2014) (Jones, J., concurring). Throughout its cost-related argument, VP loses the forest in the trees. VP criticizes the district court's diction and claims that its analysis lacked depth. However, when the district court's decision is viewed holistically, it is clear that the award was not erroneous. Indeed, the district court recognized its discretion, applied the applicable law, and authored a well-reasoned decision. Of course, page length is not dispositive, but it stands to reason that three pages of well-reasoned analysis is sufficient to justify an award of $12,174.26 in discretionary costs. As an aside, VP has not disputed the district court's award of $3,380.62 as

costs as a matter of right. Accordingly, even if VP challenges the award in its reply brief, this Court should not consider the issue. *See Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010).

The district court did not abuse its discretion when it awarded Valiant $12,174.26 in discretionary costs.[23] VP bears the burden of establishing that the award was an abuse of discretion. *Hayden Lake*, 141 Idaho at 313, 109 P.3d at 167. To establish an abuse of discretion, VP must demonstrate that the district court violated at least one part of the three-part abuse-of-discretion test. *Id.* VP has failed to do so; therefore, this Court should affirm the district court's award of discretionary costs.

VP begins its argument by referring this Court to a brief filed by co-appellant, North Idaho Resorts, LLC ("NIR"). Appellant's Br. at 53. In doing so, VP attempts to subvert the page limit imposed by this Court, which is forbidden. *State v. Abdullah*, 158 Idaho 386, 522, 348 P.3d 1, 137 n.58 (2015) ("The incorporation of arguments by reference in an appellate brief is forbidden."). Accordingly, this Court's analysis should be limited to the arguments set forth in VP's brief.

1. The District Court Perceived Its Award as a Matter of Discretion.

VP asserts that the district court did not perceive its award of discretionary costs as a matter of discretion. VP's argument is meritless because the language that the district court utilized in its Memorandum Awarding Costs demonstrates that it recognized its award was discretionary. The district court ruled that it was "***authorized***" to award certain discretionary costs under the

23 As previously mentioned, the district court awarded Valiant $15,554.88 in costs against VP: $3,380.62 as costs as a matter of right and $12,174.26 as discretionary costs ($32,464.70 x 0.375 = $12,174.26). R.Vol. XLVIII p. 5841.

Idaho Rules of Civil Procedure. R.Vol. XLVIII, pp. 5838–39. Moreover, the district court specifically determined that certain discretionary costs were "necessary and exceptional, reasonably incurred and ***should*** in the interest of justice be awarded against [VP]." *Id.* at 5840–41 (emphasis added). At no time did the district court indicate that it perceived the award of these costs was mandatory. *Id.* To the contrary, Judge Buchanan repeatedly referred to these costs as "***discretionary*** costs" throughout her memorandum. *Id.* at 5838–41. In *Boll v. State Farm Mutual Automobile Insurance Co.*, this Court noted that by setting "out the correct discretionary standard," the district court demonstrated that it perceived the issue as discretionary. 140 Idaho 334, 344, 92 P.3d 1081, 1091 (2004). Similarly here, the district court demonstrated that it perceived the issue as discretionary by quoting, in pertinent part, the correct discretionary standard, *i.e.*, Idaho Rule of Civil Procedure 54(d)(1)(D). R.Vol. XLVIII, p. 5838. For these reasons, VP's contention that the district court did not perceive this issue as a matter of discretion should be rejected.

2. The District Court Acted Within the Boundaries of Its Discretion and Consistent with Legal Standards.

a. The District Court Acted Within the Boundaries of Its Discretion.

A trial court abuses its discretion if it exceeds the limits of its discretion or acts in a manner inconsistent with applicable Idaho law. *Hayden Lake*, 141 Idaho at 313, 109 P.3d at 167. In *Richard J. Esther E. Wooley Trust v. Debest Plumbing*, this Court held that the district court acted within the boundaries of its discretion because the district court's order "state[d] its authority for awarding the fees under I.R.C.P. 54(d)(1)(D)." 133 Idaho 180, 187, 983 P.2d 834, 841 (1999). Similarly here, the district court stated its authority for awarding fees under Rule 54(d)(1)(D). R.Vol. XLVIII, p. 5838. Additionally, the district court's express findings conformed with the

requirements of Rule 54(d)(1)(D). Therefore, VP's argument that the district court did not act within the boundaries of its discretion is unavailing.

b. The District Court Acted Consistent With Applicable Legal Standards.

In reviewing a district court's grant of discretionary costs, "the key issue is whether the record indicates express findings by the district court as to whether a cost was necessary, reasonable, exceptional and should be awarded in the interests of justice." *Hayden Lake*, 141 Idaho at 314, 109 P.3d at 168. However, a district court "does not have to engage in a lengthy discussion of these factors." *Id.* Indeed, "[e]xpress findings as to the general character of requested costs and whether such costs" meet the requirements of Rule 54(d)(1)(D) "is sufficient to comply with this requirement. . . . Thus, the district court need not evaluate the requested costs item by item." *Puckett v. Verska*, 144 Idaho 161, 170, 158 P.3d 937, 946 (2007) (internal quotations omitted). Moreover, the Idaho Supreme Court "has always construed the requirement that a cost be 'exceptional' . . . to include those costs incurred because the nature of the case was itself exceptional." *Hayden Lake*, 141 Idaho at 314, 109 P.3d at 168. The determination of whether a particular case is "exceptional" must be made by "assess[ing] the context and nature of a case as a whole along with multiple circumstances" such as "the long course of litigation and [the] complexity of [the] case." *Hoagland v. Ada Cnty*, 154 Idaho 900, 914, 303 P.3d 587, 601 (2013); *Puckett*, 144 Idaho at 169, 158 P.3d at 945.

VP does not dispute that the costs were necessary and reasonably incurred. Appellant's Br. at 58. However, VP asserts that Valiant failed to make an initial showing, and the district court failed to find that the costs were exceptional and should, in the interest of justice, be assessed

against VP. Contrary to VP's contention, Valiant made an initial showing and the district court made express findings as to the general character of each item of discretionary cost. Additionally, Valiant and the district court explained why such costs were "necessary and exceptional, reasonably incurred, and should in the interest of justice be assessed against defendants," including VP. R.Vols. XLI, pp. 50502–55; XLVIII, pp. 5839–41.

In Valiant's Memorandum of Costs and Attorneys' Fees ("Costs Memo"), it set forth two bases upon which the district court should award discretionary costs. R.Vol. XLI, pp. 5052–55. First, Valiant argued that the costs were exceptional because they were caused by defendants' unwarranted claims. *Id.*, p. 5052. Second, Valiant argued that the costs were exceptional because of "the sheer size, scope and complexity of this litigation." *Id.* Valiant continued by explaining why each discretionary cost was necessary, exceptional, reasonable and should be awarded in the interest of justice. *Id.*, pp. 5053–54. Moreover, Valiant supported its discretionary cost argument with several exhibits. Therefore, VP's argument is meritless.

VP's assertion that the district court failed to make any findings that the costs were exceptional is also meritless because it ignores the basis of the district court's award—that the case itself was exceptional—which VP acknowledges as a proper basis for an award of discretionary costs. Appellant's Br. at 55; *Hayden Lake*, 141 Idaho at 315, 109 P.3d at 168. The district court held that "the scope and complexity of this litigation resulted in necessary and exceptional costs which Valiant should be awarded in the interest of justice." *Id.*, p. 5838–41. The district court further identified each cost and explained that these items were necessary, exceptional, reasonable, and should be awarded in the interests of justice. *Id.* The district court's memorandum complied

with the requirements of Rule 54(d)(1)(D). *Hayden Lake*, 141 Idaho at 314, 109 P.3d at 168. As such, VP's arguments regarding the district court's award of discretionary costs should be rejected.

The record amply supports the district court's conclusion. The Valiant Foreclosure has been vigorously litigated for approximately seven years and required the district court to adjudicate the priority of the Valiant Mortgages vis-à-vis the recorded interests of 28 other parties with respect to 156 parcels of real property before entering a $21,485,212.26 judgment. *See* R.Vols. I, p. 172; VI, pp. 739–67; XLIV, pp. 5317–5412; XLV, pp. 5413-5502. Due to the immense scope of the case, the parties copied and analyzed approximately 27,000 pages of real property records and other documents produced during discovery. R.Vol. XLVIII, p. 5840. Thus, the length, scope, and complexity of this case justified the district court's award of discretionary costs. *Puckett*, 144 Idaho at 169, 158 P.3d at 945.

Although a court "need not evaluate the requested costs item by item," an analysis of each discretionary cost demonstrates that each was incurred due to the case's exceptional length, scope, and complexity. *Puckett*, 144 Idaho at 170, 158 P.3d at 946. VP specifically takes issue with the district court's award of the litigation guarantee cost. Appellant's Br. a 58. VP relies on *Sims v. ACI Northwest, Inc.* and *Sims v. Jacobsen* for support in arguing that a litigation guarantee is a common cost in a foreclosure action; however, VP misses the point of Valiant's argument and the district court's holding. Appellant's Br. at 58; 157 Idaho 906, 342 P.3d 618 (2015); 157 Idaho 980, 342 P.3d 907 (2015). Neither Valiant nor the district court stated that the litigation guarantee, in the abstract, was an uncommon exceptional cost; rather, the litigation guarantee cost qualifies as a discretionary cost because the case itself was exceptional. This point is illustrated by

comparing the *Sims* cases with the case at hand. The *Sims* cases arose from relatively simple facts: the plaintiff-appellant asserted mechanic liens totaling approximately $500,000.00 against three parcels but failed to comply with the statutory requirements in foreclosing the lien. *Sims v. ACI*, 157 Idaho at 908–09, 342 P.3d at 620–21; *Sims v. Jacobsen*, 157 Idaho at 983, 342 P.3d at 910. The substantive issues were litigated in less than two years. *Id.* Considering the simplicity of the property and parties involved, a litigation guarantee would have been a common and nominal expense in the *Sims* cases. Conversely, this case involves the foreclosure of 200 acres of property divided into 156 parcels, 29 parties who asserted an interest therein, a $21 Million judgment and seven years of litigation. R.Vols. VI, pp. 739–67; XLIV, pp. 5317–5412; XLV, pp. 5413–5502. In order to foreclose upon the Valiant Mortgages, Valiant had to identify the real property that remained unsold or otherwise unreleased from the Valiant Mortgages, as well as every person or entity that had asserted an interest in these unreleased/unsold parcels. The litigation guarantee cost was exceptional because the case itself was exceptional. Accordingly, VP's argument is meritless.

VP's challenge to Valiant's travel costs suffers from the same flaw as its challenge to the litigation guarantee cost; that is, VP misses the point of Valiant's argument and the district court's holding. The travel expenses are not exceptional in the abstract; rather, they are exceptional due to the case itself being exceptional. VP relies on a dissenting opinion from *Debest Plumbing*, wherein Justice Silak reasoned that travel costs are "ordinary and mundane" and not exceptional. 133 Idaho 180, 188, 983 P.2d 834, 842 (1999) (Silak, J. Dissenting). However, in *Debest*, the travel cost at issue appears to be one airline ticket for an attorney to attend a deposition. *Id.* Conversely, Valiant's travel costs were exceptional due to the numerous unsupported motions

filed and argued by VP throughout the seven years of complex litigation. R.Vol. XLVIII, pp. 5839–40. The district court recognized the importance of Valiant attending these hearings in person. *Id.* Not only are the travel costs exceptional due to the case itself being exceptional, but they also could easily have been avoided if VP had not continued to contest the priority of the Valiant Mortgages without any factual or legal bases to do so. *Hoagland v. Ada Cnty*, 154 Idaho at 914, 303 P.3d at 601 (In analyzing whether a case is exceptional, a court should consider, *inter alia*, "whether there was an unnecessary waste of time . . . creation of unnecessary costs that could have been easily avoided.").

VP also asserts that that Valiant failed to prove, and the district court failed to find, that the discretionary costs should be awarded in the interest of justice. Specifically, VP claims that the district court's finding that VP did not act frivolously precludes an award of discretionary costs. VP is incorrect because a finding of frivolousness is not required to award discretionary costs in the interest of justice. Discretionary costs may be awarded in the interest of justice due to, *inter alia*, "the case's length and complexity" and "the behavior of the parties, and whether they needlessly ran up costs and fees." *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 730, 291 P.3d 399, 412 (2012); *Hoagland*, 154 Idaho at 914, 303 P.3d at 601.

As previously mentioned, Valiant stated that its claimed discretionary costs were due to VP's "unwarranted and frivolous claims and defense[s]." R.Vol. XLI, p. 5052. Although the district court did not find that VP acted frivolously, the district court determined that discretionary costs should be awarded in the interest of justice based in part upon VP's unwarranted conduct:

> Although this [c]ourt has found no frivolous conduct on the part of the defendants, at several of those hearings, counsel for one or more defendants presented

> oral arguments not supported by any legal authority or raised issues and claims that had already been decided on summary judgment.
>
> . . . .
>
> [B]ecause Valiant had to defend against multiple motions for reconsideration by the defendants, some of which contained claims unsupported by any legal authority or that had already been determined on summary judgment, the [c]ourt finds certain other costs were also necessary and exceptional and reasonably incurred, and in the interest of justice should be assessed against the defendants.

R.Vol. XLVIII, pp. 5840–41. For the foregoing reasons, the district court acted consistent with applicable legal standards.

c. The District Court Reached Its Determination Through an Exercise of Reason.

In *Hayden Lake*, this Court stated that a "court's description of the circumstances giving rise to a grant or denial of discretionary costs is sufficient to satisfy the court's obligation to exercise reason in its decisions." 141 Idaho at 314, 109 P.3d at 168. Here, the district court evaluated the nature of the case and made express findings that each cost was reasonable, necessary, exceptional, and should be awarded in the interest of justice. R.Vol. XLVIII, p. 5838–41. The district court supported its decision with an analysis of each claimed cost. *Id.* VP's claim that the district court's apportionment of the discretionary costs "lacked rhyme or reason" is refuted by the district court's statement that "[r]ecognizing that NIR participated in pre- and post-trial motion practice, but not in the court trial, this [c]ourt apportions the costs" as follows: NIR—25%; JV—37.5%; and VP—37.5%. *Id.*, p. 5841. Similarly, VP's claim that "[n]o costs were apportioned against the defaulting party, POBD" is contradicted by the district court's holding that "Valiant is awarded attorneys' fees ***and costs*** against POBD in the total amount of

$731,275.48." *Id.* (emphasis added). The foregoing demonstrates that the district court reached its determination through an exercise of reason.

In sum, VP has failed to prove that the district court abused its discretion in awarding Valiant discretionary costs; therefore, Valiant respectfully requests that this Court affirm the district court's award of discretionary costs.

V.
CONCLUSION

VP has failed to establish reversible error with respect to any of the district court decisions VP has appealed. The statutes, authorities and record herein all evidence that: (1) summary was judgment properly granted in favor of Valiant as the Valiant Mortgages are prior in right title and interest to any interest possessed by VP; (2) the language in the foreclosure decree appropriately mirrored language in the Valiant Mortgages essentially restating well settled principles of real property law; (3) I.A.R. 13(b)(10) authorized the district court to enter a temporary restraining order and injunction for the preservation of real property subject to its Judgment; and 4) the district court's well-reasoned award of discretionary costs in the amount of $12,174.26 was not an abuse of discretion. VP's arguments are without any bases in fact or law. As such, VP's appeal should be rejected, and Valiant should be awarded attorneys' fees and costs on appeal.

Respectfully submitted this 23rd day of March 2018.

McCONNELL WAGNER SYKES & STACEY PLLC

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of March 2018, a true and correct copy of the foregoing document was served by the method indicated below upon the following party(ies):

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

Richard L. Stacey

McCONNELL WAGNER SYKES + STACEY PLLC
ATTORNEYS AT LAW

RICHARD L. STACEY
STACEY@MWSSLAWYERS.COM

July 19, 2016

***VIA* FEDERAL EXPRESS**

The Honorable Barbara A. Buchanan
Judge of the First Judicial District
Bonner County Courthouse
215 South First Avenue
Sandpoint, Idaho 83864

Re: *Genesis Golf Builders, Inc. v. Pend Oreille Bonner Development, LLC, et al.*
Valiant Idaho, LLC v. JV, L.L.C., et al.
Bonner County Case No. CV 2009-1810
Our File No. 1547.201

Dear Judge Buchanan:

Consistent with the Court's Order Re: Proposed Judgment and Proposed Decree of Foreclosure entered July 18, 2016, enclosed are the original and three copies of the Judgment ("Judgment"), the original and three copies of the Decree of Foreclosure ("Decree"), and self-addressed, postage prepaid envelopes for service upon counsel.

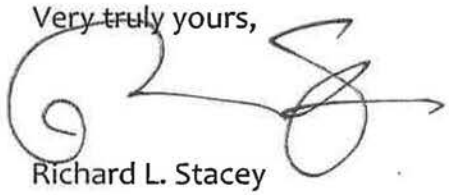
The order of sale was not included within the original Decree of Foreclosure because it was necessary for Valiant Idaho, LLC ("Valiant") to file a motion to obtain said order. However, the Court's Order Re: Order of Sale of Real Property was entered July 14, 2016. As such, the order of sale can be, and was incorporated into the Decree of Foreclosure.

Finally, we have also enclosed checks in the amounts of $45.00 and $49.00 to cover the costs of certifying one copy of the Judgment and one copy of the Decree, respectively.

ATTACHMENT A

Please contact my office if there are questions or concerns with the Judgment and/or the Decree.

Very truly yours,



Richard L. Stacey

RLS/pal
Enclosures
c: Gary A. Finney, Esq. (w.e)
Susan P. Weeks, Esq. (w.e)

I:\1547.201\CORR\Judge BB 160719.doc