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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Plaintiff,

vs.

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

Defendants/Third-Party Defendants,

VALIANT IDAHO, LLC, an Idaho limited liability company,

Third Party Plaintiff/Cross-Claimant/Respondent,

vs.

VP, INCORPORATED, an Idaho limited liability company,

Defendant/Cross-Defendant/ Appellant.

Supreme Court No. 44585

Bonner County Case No. CV-2009-1810

APPELLANT'S REPLY BRIEF

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

---

The Honorable Barbara A. Buchanan Presiding

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I. ARGUMENT

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

1. The district court erred in granting foreclosure of property using the translated legal description

Valiant contends on appeal the district court did not "unfairly" grant summary judgment to VP because: (1) Valiant requested only partial summary judgment in its first motion for summary judgment, which did not encompass the legal description of the foreclosed property, and (2) the trial court cured any error it committed when it entered the "JV Reconsider Order".

In support of its argument that Valiant only requested partial summary judgment when it moved for summary judgment, Valiant admits neither its written brief, nor its motion, indicated it only sought partial summary judgment. In fact, Valiant's memorandum informed the parties and the district court it was seeking a full and complete judgment:

> By way of this motion, Valiant seeks a judgment that its Mortgages against POBD's real property located in the County of Bonner, State of Idaho ("POBD Property"), and more particularly described in Exhibit 1 to the Declaration of Jeff R. Sykes in Support of [Valiant's] Motion for Summary Judgment Against … VP, Incorporated ("Sykes Dec."), are senior in right and priority to any interest claimed by … VP, Incorporated ("VP") … in the POBD Property. The POBD Property and all improvements thereon are collectively referred to herein as the 'Idaho Club Property.
>
> R Vol. XIV, p. 1727.

Despite this specific language, Valiant claims a statement made at oral argument by Valiant's counsel modified its motion to a partial summary judgment only seeking a ruling on priority. The reason Valiant seeks to characterize its motion as a partial summary judgment is to legitimize the subsequent summary judgment entered by the trial court.

An essential element of a foreclosure action is the real property upon which foreclosure is sought must be legally described. In *Clegg v. Eustace,* 40 Idaho 651, 655-656, 237 P. 438 (1925),

the *Clegg* court cited with approval secondary authority indicating real property covered by a mortgage must be described in the complaint with reasonable certainty and particularity, both in order that it may appear to be within the jurisdiction of the court and that it may be accurately described in the foreclosure decree and identified by the officer making the sale. *Clegg,* 40 Idaho at 656. Relying upon this secondary authority, this Court held the foreclosure complaint was sufficient if the legal description of the real property upon which foreclosure was sought was contained in a copy of a mortgage incorporated as an exhibit to the complaint. *Id.*

If Valiant truly narrowed its motion to exclude the legal description of the real property upon which it sought foreclosure, the holding of *Clegg* would be violated. The legal description is indispensable to the priority determination. The district court would have been unable to grant partial summary judgment declaring only the priority of Valiant's three assigned mortgages. Further, the trial court did not limit its summary judgment decision to a grant of partial summary judgment, holding the real property against which it was granting foreclosure was particularly described in Exhibit 1 to the Declaration of Jeff Sykes. R Vol. XXII, p. 2561, footnote 1. Valiant does not dispute the legal description included with the Sykes declaration was not made upon Syke's personal knowledge and lacked a proper foundation. As a threshold matter, the evidence offered in support or in opposition to a motion for summary judgment must be admissible. *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust*, 147 Idaho 117, 123, 206 P.3d 481, 487 (2009).

Valiant subsequently filed its motion for entry of a final judgment supported by the declaration of C. Dean Shafer. Shafer testified he was the preparer of the converted legal description of the property encumbered by the three mortgages and the redemption deed. Valiant

maintains this motion was appropriate because the summary judgment was only a partial summary judgment. As evidenced by the trial court's decision, it was not a partial summary judgment.

Valiant claims the district court committed no error in deeming Valiant's motion for entry of final judgment to be another summary judgment motion and expresses puzzlement why VP did not oppose this motion as though it were a summary judgment motion (even though the trial court had already granted Valiant a complete summary judgment and Valiant did not cite Rule 56 in its motion nor give any other indication it intended its motion to be a motion for summary judgment). The puzzling issue is not why VP failed to respond as though it was a motion for summary judgment. Instead, the puzzling issue is why the trial court deemed a motion for entry of judgment to be a motion for summary judgment when the trial court had already entered summary judgment in the moving party's favor.

Valiant then argues that even if the district court committed procedural error at this juncture, there was no prejudice to VP because the district court later reversed its grant of summary judgment regarding the legal description, holding the contradiction in Shafer's declarations prevented entry of summary judgment because it created an issue to be resolved at trial. R Vol. XXX, pp. 3529-30. If the story ended there, Valiant would be correct.

However, Valiant acknowledges it filed a third motion for summary judgment, and despite the above ruling by the district court, it again changed course and accepted Shafer's contradictory declarations and granted the third summary judgment. Valiant contends this was not error because its third motion for summary judgment explained the second Shafer declaration merely clarified the first declaration.

This Court has held when a witness provides contradictory testimony, summary judgment is inappropriate. *See Capstar v. Lawrence*, 153 Idaho 411, 283 P.3d 728 (2012) (*Capstar IV)*

(holding when a witness's affidavit testimony and deposition testimony were contradictory, it created an evidentiary conflict, and summary judgment was inappropriate). Valiant claims this was not a holding in *Capstar IV.*

VP respectfully disagrees with Valiant's narrow reading of the *Capstar IV* holdings. In Capstar IV, this Court held, "[t]here is a fine line between drawing the most probable inferences and weighing the evidence, and this Court holds the belief that the district court should have allowed the case to go to trial in order to weigh the conflicting evidence and test the credibility of the witnesses." As to Rook's contradictory testimony, this Court held:

> This presented the district court with another evidentiary conflict regarding a material fact of whether Funk's prior usage of the access road was apparent and continuous over a number of years **and whether Rook had adequate knowledge to testify to that matter**. See *Baxter v. Craney*, 135 Idaho 166, 172, 16 P.3d 263, 269 (2000) (stating "it is not proper for the trial judge to assess the credibility of an affiant at the summary judgment stage when credibility can be tested in court before the trier of fact."); *Argyle v. Slemaker*, 107 Idaho 668, 670, 691 P.2d 1283, 1285 (Ct.App.1984) (holding that even when the court will serve as trier of fact, credibility determinations "should not be made on summary judgment if credibility can be tested by testimony in court before the trier of fact"). **Yet, here, the lower court seems to have weighed the conflicting evidence and judged the affiants' credibility in making a ruling on summary judgment.**

Capstar IV, 153 Idaho at 735-736 (emphasis added).

The above analysis led this Court to reverse the district court's grant of summary judgment and hold, "[t]he testimony of several material witnesses presented conflicting information and the parties should be cross-examined to determine their credibility." *Capstar IV*, 153 Idaho at 738. Thus, contradictory testimony presented by the same witness regarding a material fact caused this Court concern regarding both the undisputed facts relied upon by the trial court and the credibility of witnesses whose own testimony it deemed contradictory.

Like Funk and Rook, Shafer was a witness regarding a material fact. Shafer is a title officer whose area of expertise relates to researching title plant records, compiling chains of title,

examining the status of title based upon recorded documents and preparing a title report based upon title examination. R Vol. XXII, p. 2600 – Vol. XXIII, p. 2748. Based upon this experience, Shafer provided the trial court with an expert opinion of a converted legal description. Shafer's first declaration expressed the opinion all three mortgages encumbered the same real property, and the converted legal description was the property encumbered by all three assigned mortgages.

Over VP's objection that Shafer's declaration did not lay a proper foundation to show he had the expertise to convert a legal description, the trial court found Shafer's opinion admissible and granted a summary judgment on the motion for entry of judgment, holding each of the three mortgages encumbered the exact same property as described by Shafer in his declaration.

Yet after the trial court issued its decision on the Order of Foreclosure with a different order of sale than proposed by Valiant, another declaration with a different converted legal description was provided by Shafer. Shafer testified at the behest of Valiant's attorneys he re-examined his testimony to "make sure" his previous expert opinion was correct. Shafer then recanted his previous expert opinion and testified the Pensco and MF '08 loans did not encumber all the lots contrary to his previous testimony.

Shafer arrived at a different opinion after examining the exact same documents. It was not a "clarification" as characterized by Valiant. Shafer testified:

> 8. After the hearing on Motion for an Order of Sale of Real Property, I was advised by counsel for Valiant that the Court had ordered that the lots on which the wastewater treatment and sanitary water facilities and infrastructure are located shall be sold last. **Because of the Court's decision, counsel for Valiant asked that I re-examine the Legal Description and the Valiant Encumbrances to verify and make sure that all of the lots/parcels within the Legal Description are encumbered by all of the Valiant Encumbrances, specifically including but not limited to, the lots on which the wastewater treatment and sanitary water facilities are constructed.**

> 9. **I have re-examined the Legal Description and the Valiant Encumbrances and discovered that some of the information that I previously provided counsel for Valiant is incorrect**.

R Vol. XXVIII, p. 3305 (emphasis added).

No explanation was provided how Shafer reviewed the exact same documents and arrived at a different expert opinion. Even the district court had concerns about Shafer's conflicting testimony noting:

> Well, at this point I think – the problem is Mr. Shafer testifying under oath that these – that 31 lots were included in the latter mortgages and then changing his mind. Unfortunate – at that point then we need – we do need to understand what happened and why so that the Court has faith in his legal description.
>
> Hearing Motions Tr p. 209, ll. 8-14.

Because Shafer's second declaration contradicted his previous expert opinion, the *Capstar IV* holding was implicated, and his credibility should have been tested at trial, and his conflicting testimony should have been weighed at trial.

Valiant argues the district court did not err in granting its third motion for summary judgment incorporating Shafer's second legal description because VP failed to present evidence controverting Shafer's testimony, so it was not unfair for the trial court to rely upon Shafer's testimony. This argument misperceives VP's burden in responding to the third motion for summary judgment.

The movant has the burden of showing that no genuine issues of material fact exist. *Stoddart v. Pocatello Sch. Dist. No. 25*, 149 Idaho 679, 683, 239 P.3d 784, 788 (2010). Because Valiant's own evidence displayed an evidentiary conflict and raised credibility and foundation questions regarding Shafer's knowledge to express an opinion on the legal description issues, Valiant failed to establish there was no genuine dispute as to any material fact. VP had no

obligation to refute the disputed material fact regarding the legal description presented by Valiant. The trial court erred when it relied upon Shafer's testimony to grant summary judgment.

Valiant urges this Court to disregard the contradiction in Shafer's testimony because it proved VP's initial argument in summary judgment regarding one of the lots was correct, and because it was harmless because Shafer remained consistent that all the parcels were encumbered by at least one of Valiant's mortgages. This argument is disingenuous.

First, the contradictions in Shafer's testimony raise credibility issues and concerns about his competency to provide an expert opinion regarding the converted legal descriptions. More importantly, the timing of the amended expert opinion is highly suspect. Finally, the change in the expert opinion completely altered the order of sale previously required by the trial court.

On July 22, 2015, Valiant moved for entry of a proposed final judgment and decree of foreclosure and sale. R Vol. XXIV, pp. 2856-2877. VP objected to the order of sale, contending it was equitable to require the four VP parcels containing major water and sewer infrastructure be sold last since all lots were equally encumbered. On August 5, 2015, the district court entered its Decree of Foreclosure and a separate Judgment ordering the VP lots be sold last. R Vol. XXVI, pp. 3075 – 3087.

On August 19, 2015, Valiant filed a motion to amend the decree of foreclosure. R Vol. XXVII, pp. 3240-3243. At the same time, Valiant filed a Motion to Alter, Amend and/or Reconsider the Order of Sale of Real Property. R Vol. XXVII, p. 3249-3252. It was at this juncture Shafer changed his expert opinion upon the urging of Valiant's counsel and opined that 31 lots, including the four VP lots, were not encumbered by the Pensco and MF '08 mortgages. On June 22, 2016, Valiant filed a Motion for an Order of Sale of Real Property supported by a memorandum requesting the VP lots be included in the first lots to be sold. R Vol. XLI, pp. 4985-5014. VP

opposed the order of sale. R Vol. XLI, p. 5015-5018. On July 14, 2016, the district court entered its Order re: Order of Sale of Real Property and relied upon Shafer's expert opinion regarding which lots were encumbered by which mortgages. R Vol. XLIII, pp. 5270-5273. Due to Shafer's revised opinion, VP's lots were then the first to be sold.

Valiant contends the holding in *Losee v. Idaho Co.*, 148 Idaho 219, 220 P.3d 575 (2009), applies in this matter and allowed the trial court to draw reasonable inferences from Shafer's declaration because they were complete and regular on their face. However, the issue raised by VP on appeal does not involve a cloud on title related to documents that are complete and regular on their face. Rather, it involves an expert who changed his expert opinion after urging by the Plaintiff's counsel to reconsider his expert opinion, and which resulted in an outcome desired by the Plaintiff regarding the order of sale, and the properties sold. *Capstar IV* is more analogous to the present issue than *Losee.*

2. The district court erred in holding there was no genuine issue of material fact regarding VP's easement interests and equitable servitudes

On appeal, Valiant contends VP failed to properly oppose Valiant's summary judgment motion. Valiant claimed in its complaint: (1) VP claimed an interest in the real property; (2) Valiant's title was superior to VP's title; and (3) Valiant was entitled to foreclose VP's interest in the mortgaged premises. VP admitted it claimed an interest in the mortgaged premises; denied Valiant's interest was superior to its claimed interest; and denied Valiant was entitled to foreclose VP's interest. Valiant acknowledged in its memorandum supporting its first summary judgment that VP's answer to its cross-claim denied that Valiant had a superior interest in title to the lots within the property described in the three mortgages containing water and sewer infrastructure (the lagoon lots and the well lots) and its utility easements. R Vol. XIV pp. 1735-1738.

a. VP raised genuine issues of material fact precluding a grant of summary judgment on its prescriptive easement claims

Valiant claims VP did not present the district court with any evidence in opposition to Valiant's original motion for summary judgment establishing the elements of a prescriptive easement other than some conclusory evidence which was properly rejected by the trial court. Valiant also criticizes VP for not submitting new evidence or new argument in its two motions to reconsider. However, at the time the trial court finally addressed the substance of VP's prescriptive easement and equitable servitude claims, it had in the record before it sufficient evidence to deny Valiant's summary judgment.

Before moving to the substance of Valiant's arguments, VP would first remind this Court of the procedural posture of the case before the district court when it issued its ruling on the prescriptive easement and equitable servitude issues. On January 20, 2015, Valiant moved for summary judgment against VP regarding the priority of each party's interest (and which Valiant now characterizes as a partial summary judgment on priority divorced from the legal description). On February 4, 2015, VP opposed the summary judgment. VP specifically noted the MF '08 mortgage did not encompass one of its lots, a point Valiant now admits.

Although VP's argument on the prescriptive easements and equitable servitudes was abbreviated based upon Valiant's failure to seek quiet title against VP, VP informed the district court besides the deeded lots, its claimed prescriptive easements and equitable servitudes, cited the district court to the relevant case law regarding equitable servitudes, and directed the Court's attention to the declaration of Villelli filed in opposition to the motion.

On April 14, 2015, the district court entered its Memorandum Decision & Order Granting Valiant's Motion for Summary Judgment holding VP's only alleged interests were recorded on

June 13, 2011 and May 20, 2014 and were therefore junior to all three mortgages. The district court failed to address the prescriptive easements or equitable servitudes raised by VP.

On April 29, 2015, VP filed a motion for reconsideration and clarification of the district court's decision but did not support it with a memorandum. VP renewed this motion for reconsideration and clarification on June 16, 2015 supported by a memorandum. This memorandum directed the district court's attention to Idaho Code § 45-1302 which provides in a suit brought to foreclose a mortgage or lien upon real property, a plaintiff may name as a party any person claiming or appearing to have or claim any title, estate, or interest to the real property, and besides granting relief in the foreclosure action, the court may determine the title, estate or interest of the defendant to the same extent and effect as an action to quiet title. VP reminded the court that Valiant had only moved for summary judgment on priority, which is supported by Valiant's response in this appeal wherein Valiant maintains it only sought partial summary judgment on a priority determination.

On July 21, 2015, the district court entered its memorandum decision and order on VP's motion to reconsider and upheld its dismissal of VP's claims for prescriptive easements and equitable servitudes. The trial court cited VP's failure to file a cross claim or affirmative defenses in its responsive pleadings. The district court concluded because VP failed to interpose a cross-claim or affirmative defenses, its claim to title based upon prescriptive easement and equitable servitudes did not survive Valiant's motion for summary judgment. To the extent the district court perceived Valiant's cross-claim against VP to seek quiet title, a cross-claim was not required. "In an action to quiet title where [a] defendant relies upon title in himself, a cross-complaint is not necessary." (Citation omitted.) *Kiebert v. Goss*, 144 Idaho 225, 227, 159 P.3d 862, 864 (2007).

On May 20, 2015, Valiant moved for entry of final judgment, together with the first Shafer declaration. The district court deemed this a second motion for summary judgment (on an issue already adjudicated) and on June 23, 2015, entered its Memorandum Decision and Order Granting Motion for Entry of Final Judgment.

On August 4, 2015, VP objected to Valiant's proposed order of sale and supported the objection with the Declaration of Richard Villelli. On August 19, 2015, VP filed a second motion to reconsider. A supporting memorandum was also filed asking the court to reconsider its holding that VP's title interest did not survive summary judgment. This memorandum reminded the district court: (1) the Third Restated Purchase and Sale Agreement (PSA), attached to the first Declaration of Richard Villelli, excluded the water and sewer system, and the domestic water rights and easements for the domestic water and sewer systems, including the sewer lagoon and the land application area; (2) Barney Ng, the mortgage broker's representative for R.E. Loans, who was also an agent for Pensco fbo Barney Ng loan and the MF '08 loan, received a copy of the PSA prior to any of the three mortgage companies lending money to the developer (POBD), and (3) some of VP's easements for the water and sewer system were in place for over 20 years prior to the summary judgment. VP argued its claims were not affirmative defenses. Alternatively, VP argued if they were affirmative defenses, they were timely raised in response to the summary judgment and the trial court should rule upon them.

A hearing on the pending motions to reconsider and alter or amend was held September 2, 2015. Motions Tr. pp. 185-216. At the hearing, the district court chose to only consider and rule upon JV's motion to reconsider. Motions Tr. p. 188, ll. 7-24.

Valiant then filed a third motion for summary judgment on September 25, 2015. VP opposed the third motion and on October 14, 2015, submitted another Declaration of Richard

Villelli in opposition to the third motion for summary judgment. The district court heard Valiant's third motion for summary judgment and VP's second motion to reconsider on October 23, 2015. A Memorandum Decision & Order re: Motions Heard on October 23, 2015 was filed October 30, 2015. In this decision, the trial court finally addressed the substance of Valiant's prescriptive easement and equitable servitude title claims for the first time, holding there was insufficient evidence in the record before the trial court to establish a genuine issue of material fact regarding these interests. R Vol. XXXIII, pp. 4010-4013.

Valiant contends on appeal the trial court did not err in this ruling because VP did not present adequate evidence in the initial declaration of Villelli to oppose summary judgment. By so narrowing its focus, Valiant avoids a discussion of the relevant evidence that was in the record before the trial court when it finally heard the motion to reconsider and prior to issuing its decision on October 30, 2015, which included the second and third declarations of Richard Villelli in opposition to Valiant's third motion for summary judgment. VP did present adequate evidence in the record in opposition to Valiant's motions for summary judgment prior to the district court's ruling on the motion despite the convoluted path to obtaining the district court's decision.

This Court liberally construes all disputed facts in favor of the nonmoving party and draws all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion. *Kugler v. Nelson*, 160 Idaho 408, 374 P.3d 571 (2016). The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists. *Holdaway v. Broiulim's Supermarket,* 158 Idaho 606, 349 P.3d 1197, 1201 (2015). As noted in *Franklin Building Supply v. Hymas*, 157 Idaho 632, 339 P.3d 357, 362 (2014):

> "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009). The nonmoving party must meet this burden by coming "forward with

> evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Id.* "[A] mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment." *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986).

Valiant claims VP failed to come forward with evidence contradicting Valiant's evidence concerning priority of rights which created the existence of a material issue of disputed fact. Specifically, Valiant claims VP placed no evidence in the record demonstrating VP met the elements of either prescriptive easements or equitable servitudes.

The first argument raised by Valiant is VP did not establish the prescriptive easements it claimed were located on the property upon which Valiant sought foreclosure in its motion for summary judgment. This argument highlights the fallacy of Valiant's arguments that its first motion for summary judgment was only a partial motion for summary judgment regarding priority independent of legal descriptions. It defies logic how VP was supposed to show it had prescriptive easements located on the property being foreclosed in the first summary judgment if the first motion was only for partial summary judgment addressing priority independent of the description of the real property encumbered by the mortgages subject to foreclosure.

Regarding the claim VP failed to provide evidence in the record opposing the priority claim, Villelli's first declaration filed in opposition to Valiant's first summary judgment motion included an Exhibit "A" which was a copy of the Third Amended and Restated Real Property Purchase and Sale Agreement ("PSA") dated March 9, 2006 by which POBD's predecessor acquired the Idaho Club property. Contrary to Valiant's claim, this PSA was adequate to create a question of fact regarding VP's claim to ownership of the water and sewer infrastructure, and a prescriptive easement for its existing infrastructure within the property sold to POBD's predecessor. The PSA indicated NIR owned both developed and undeveloped real property in

Bonner County, Idaho, which it was selling to POBD's predecessor, and which was described in an attachment to the PSA. The PSA specified VP owned the domestic water and sanitary sewer systems which currently served a portion of the property being sold to POBD. The agreement recognized VP owned water and sewer infrastructure in the sold property which wasn't included in the sale, including a sewer lagoon. Since the mortgages were upon the property NIR sold to POBD, this evidence was sufficient to raise the inference that VP's prescriptive easements were encompassed within this same property. This evidence was also sufficient to raise the inference that some of the property within the Idaho Club, was not included in the sale to POBD (i.e. the lagoon) and could therefore not be encumbered by the Valiant mortgages.

Valiant argues pursuant to *Beckstead v. Price,* 146 Idaho 57, 62, 190 P.3d 876, 881 (2007) that a holder of a prescriptive easement must show use of the property which was open and notorious, continuous and uninterrupted, adverse and under a claim of right, with actual or imputed knowledge of the owner of the servient tenement. Valiant alleged in its motion for summary judgment there were no recorded easements for these claimed easements. The PSA specifically recognized VP owned the existing water and sewer infrastructure in the sold property and had easements in the sold property for operation and delivery of domestic water and sewer service through this infrastructure, including the sewer lagoon. This evidence was sufficient to create the inference that VP had prescriptive easements which were open and notorious, continuous and uninterrupted, adverse and under a claim of right, with the actual knowledge of the owner of the servient estate.

Valiant does not dispute that this testimony was placed in the record before the trial court when the first motion for summary judgment was filed. Yet when the trial court finally decided to address VP's prescriptive easement claim, the district court chose not to consider the PSA,

finding it was not admissible evidence because VP was not a party to the PSA. That was not the correct standard since the testimony of Mr. Villelli in that declaration set forth sufficient foundation for the admissibility of that agreement. Even though VP was not a party to the PSA, this document was admissible evidence regarding the elements of the prescriptive easement because it provided evidence regarding VP's prescriptive easement claim, and what was known to the servient estate owner at the time of the sale, and what information was provided to the buyer of the servient estate. It was error for the trial court to disregard this evidence.

Regarding the prescriptive period, the PSA recognized the infrastructure was in place on the sold property at the time of the sale. Villelli testified in his first opposition affidavit that much of the water and sewer system had been in place for at least 20 years. This testimony was clarified in Villelli's second opposition affidavit wherein he testified the existing water and sewer systems were purchased by VP in 1995 and serviced the Hidden Lakes Golf Course and three subdivisions and included the existing sewer lagoon. At argument, the district court was reminded the evidence in the record established the systems were acquired by VP in 1995. Motions Hearing Tr. p. 266, ll. 4-8. Villelli also testified the system was extended by VP in 2000 to 49 lots in the Golden Tee Estates and Golden Tee Estates First Addition subdivision.

The PSA was dated March 9, 2006. At this time, the period of prescription was five (5) years. I.C. § 5-203, amended July 1, 2006. Thus, the reasonable inference from this testimony was the water and sewer system that existed at the time of the sale to POBD was in place for the prescriptive period.

The district court deemed Villelli's testimony regarding the age of the infrastructure a conclusory statement. Valiant contends the district court did not err in holding Villelli's testimony was conclusory. Villelli, as the President of VP, had personal knowledge of VP's assets and

infrastructure. He was qualified to testify to the age of VP's infrastructure, and extensions of the infrastructure. Villelli's testimony was specific regarding the date of purchase by VP of the water and the sewer system in 1995 and was specific there had been one extension in 2000 to two additional subdivisions. Thus, his testimony should not have been disregarded by the district court as conclusory.

VP also placed in the record evidence that the lenders were aware of the terms of the PSA. Villelli testified R.E. Loans loaned NIR money and Barney Ng was the person who managed the loan. R Vol. XXI, p. 2393, ¶¶ 4, 6. Villelli testified he was asked to execute a subordination agreement for NIR to facilitate R.E. Loans loan to POBD. R Vol. XXI, p. 2394, ¶ 8. Villelli testified as a condition of executing the subordination that he required payments to NIR from sales comply with the PSA. *Id.* Villelli testified R.E. Loans requested and he provided a copy of the second purchase and sale agreement between NIR and POBD, and that R.E. Loans already had a copy of the third PSA. *Id.* Villelli testified he had several discussions with Ng, who spoke on behalf of R.E. Loans, Pensco Trust fbo Barney Ng and Mortgage Fund '08. R Vol. XXI, pp. 2394-2395, ¶ 9. Villelli's testimony was corroborated by Ng's testimony which was placed in the record as part of Valiant's third motion for summary judgment wherein Ng testified he was the president and officer of BarK, which was the broker for the loans between BarK and R.E. Loans, Pensco Trust and Mortgage Fund '08. R Vol. XXXI, p. 3659, ¶¶ 1-2.

Valiant doesn't deny the above facts were in evidence when the trial court denied VP's second motion for reconsideration. Rather, it criticizes VP for not adequately arguing the scope of the evidence to the district court in its opposition and reconsideration memorandums. Valiant claims this makes the evidence extraneous. However, the standard is not whether the non-moving party's arguments were subjectively satisfactory to the moving party. Rather, the issue is whether

VP came forward with evidence by way of affidavit, declaration of deposition that contradicted the evidence submitted by Valiant, and whether such evidence established the existence of a material issue of disputed fact. The trial court recognized this standard, but despite the three Villelli declarations in the record at the time the trial court heard the second motion to reconsider, the trial court held there was insufficient evidence in the record for it to find a question of fact preventing summary judgment on the prescriptive easement claim.

Valiant contends this issue is akin to the one decided in *Armstrong v. Farmers Ins. Co. of Idaho,* 147 Idaho 67, 205 P.3d 1203 (2009) and requires this Court to disregard the evidence placed in the record by VP. *Armstrong* involved the question of whether a "household appliance" provision in a homeowner's insurance policy provided coverage for damage to a dwelling and personal property caused by the collapse of an outdoor above-ground swimming pool. The district court held the insurance policy was unambiguous and the above-ground swimming pool did not fall within the "household appliance" provision of the insurance policy.

Following this ruling, the insurer moved for summary judgment, arguing all the insured's causes of action constituted a general claim of "bad faith". The insured did not dispute the insurer's argument that all the insured's claims related to coverage even though the insured had claims unrelated to coverage. The insured did not raise any additional theories of coverage for the claim other than the rejected coverage claim. Because the insured did not oppose the arguments made by the insurer, this Court held summary judgment was appropriate.

Armstrong is inapposite to the issue before this court on appeal. VP placed evidence in the record opposing Valiant's position. In addition to the evidence contained in the record from the first Villelli declaration, VP included in the record more extensive evidence regarding the water and sewer system, which is set forth in full in the opening brief. Based upon the evidence in the

record at the time the trial court decided the second motion for reconsideration, summary judgment should not have been granted to Valiant on VP's prescriptive easement claims.

Valiant claims the above evidence was not enough because VP misunderstood its burden at summary judgment. Valiant claims VP's prescriptive easements (and equitable servitudes) interests were affirmative defenses to Valiant's claim of seniority and as such, VP had the burden of showing the existence of a genuine issue of material fact supporting the affirmative defense pursuant to *Chandler v. Hayden*, 147 Idaho 765, 215 P.3d 485, 489 (2009). An affirmative defense is '[a] defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true.' Black's Law Dictionary 186 (2d Pocket ed.2001)." *Fuhriman v. State, Dept. of Transp*., 143 Idaho 800, 803, 153 P.3d 480, 483 (2007).

A judicial foreclosure proceeding is controlled by Idaho Code section 45-1302 which provides:

> In any suit brought to foreclose a mortgage or lien upon real property or a lien on or security interest in personal property, the plaintiff, cross-complainant or plaintiff in intervention may make as party defendant in the same cause of action, any person having, claiming or appearing to have or to claim any title, estate, or interest in or to any part of the real or personal property involved therein, and **the court shall, in addition to granting relief in the foreclosure action, determine the title, estate or interest of all parties thereto in the same manner and to the same extent and effect as in the action to quiet title**. (Emphasis added.)

An action to quiet title is addressed in Title 6, Chapter 4. Idaho Code § 6-401 provides in relevant part: "[a]n action may be brought by any person against another who claims an estate or interest in real or personal property adverse to him, for the purpose of determining such adverse claim…"

Valiant's direct averments in the cross-claim were VP claimed a title, estate, or interest in or to a part of the real or personal property it sought to foreclose. VP admitted this averment.

Hence, VP's admission that it claimed a title, estate or interest in the real and personal property upon which Valiant sought foreclosure was not an affirmative defense raised outside the averments of Valiant's cross-claim against VP. Valiant presents no authority for the proposition that admission of a direct averment also requires an affirmative defense supporting the admission.

Valiant also argues evidence in Villelli's affidavits shows the operation and use of the existing water and sewer infrastructure at the time of sale was "clearly permissive" based upon Villelli's testimony that POBD and VP entered into a Construction and Operation Agreement after the sale and asks this Court to draw that inference in its favor. The Construction and Operation Agreement referenced in the PSA concerned *extensions* (not existing infrastructure) that POBD was allowed make to the existing water and sewer infrastructure to serve new developments within the property sold to the developer. These extensions are addressed in VP's arguments on appeal regarding its equitable servitude. Further, Valiant's argument is that this Court should draw inferences in its favor as the moving party, which is not the standard.

b. VP raised genuine issues of material fact precluding a grant of summary judgment on its equitable servitude claims

Besides its claim to a superior interest in the existing infrastructure, VP claimed it had equitable servitudes for the extensions to its water and sewer infrastructure into the Idaho Club. Valiant again claims this is an affirmative defense upon which VP failed to meet its affirmative defense burden. Valiant contends VP failed to: (1) recite the elements of an equitable servitude; and (2) submit evidence to establish an equitable servitude. Valiant also contends t even if the foregoing arguments aren't correct, an equitable servitude is not applicable to the facts of this case.

Similar to its previous argument, Valiant again argues VP did not identify the property burdened by the equitable servitude. Again, the PSA indicated the existing water and sewer infrastructure, including the sewer lagoon, was located within the legal description of the property

sold to POBD's predecessor. The PSA indicated POBD would be allowed to extend VP's existing water and sewer infrastructure within the property sold to it upon entering into a construction and operating agreement with VP. The PSA provided that this grant was conditioned upon POBD granting VP a future easement for the water and sewer infrastructure it extended. The second Villelli Affidavit provided a copy of the construction and operating agreement, which corroborated Villelli's initial testimony that VP and POBD entered into the agreement. The water and sewer extensions were identified as being made within the property sold to POBD's predecessor. Further clarification came with the second Villelli affidavit which supplied plats filed by POBD on the land it purchased showing the water and sewer infrastructure it extended. Thus, the trial court had before it competent evidence that the foreclosed property had water and sewer infrastructure within it.

Valiant acknowledges this Court has utilized equitable servitudes to impose burdens in favor of a party on the real property of another when the promise concerned the use of land. However, Valiant claims this Court has held that the affected property owner claiming an equitable servitude must be a property owner who purchased or sold a portion of their respective property in reliance upon a promise from the other party to the transaction and the promise made by POBD to VP doesn't fit within this requirement. Valiant concludes because VP did not purchase or sell a portion of its real property in reliance on a promise from POBD it may not claim an equitable servitude.

Valiant relies upon *Thomas v. Campbell,* 107 Idaho 398, 690 P.2d 333 (1984) to support this argument. Campbell negotiated the sale of a thirty (30) acre parcel of property to Thomas. Campbell orally represented to Thomas he had a scenic easement on the neighboring parcel owned

by Resnick which was transferred to the U.S. Forest Service, and the Resnick property would never be commercially developed. Thomas purchased in reliance on these representations.

Campbell's representations were not true. Campbell had sold the scenic easement to Resnick, thus merging it into Resnick's deed and eliminating the scenic easement. Thomas sued both Campbell and Resnick seeking a declaration the scenic easement existed and could be enforced in equity against Resnick.

Summary judgment was granted against Thomas and Thomas appealed. This Court held "[p]arol evidence is permitted to establish a party's right to an equitable interest in land." *Thomas v. Campbell*, 107 Idaho at 403, 690 P.2d at 338. This Court further held the district court erred in granting summary judgment against Thomas' claim seeking a declaration that the scenic easement on Resnick's land was enforceable even though Resnick was not a party to the transaction. This Court held in viewing the record most favorably to Thomas the grant of summary judgment in favor of Resnick was error because of the nature of the equitable remedy sought

Additionally, Valiant claims the following holding from *West Wood Invs. v. Acord*, 141 Idaho 75, 84, 106 P.3d 401, 410 (2005) supports its position:

> [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. (Emphasis added in Respondent's brief.)

Valiant argues because VP is not a lot owner, and the interest asserted by VP is not a building restriction on a lot, VP has not raised a promise regarding the use of land. In other words, Valiant argues that an agreement allowing use of the land for placement and maintenance of utility infrastructure does not relate to the use of land. Regarding an equitable servitude,

> An implied covenant is one that may reasonably be inferred from the whole agreement and the circumstances attending its execution. A covenant is implied in

> nature when its existence is inferred by legal construction from the use of certain words and phrases, or from the conduct of the parties.

20 Am. Jur. 2d *Covenants, Etc*. § 36 Generally.

VP claims an equitable servitude implied from the conduct of the parties. *West Wood Inv., Inc.*, *supra, Thomas, supra,* and *Middlekauff v. Lake Cascade, Inc.*, 110 Idaho 909, 719 P.2d 1169 (1986) all involved implied covenants establishing the right of the claimants to use the property of another for a specific purpose based upon the conduct of the parties. In *Middelkauff*, it was the right to use an area as a common recreational area. In *West Wood Inv., Inc.*, it was the right to use a pool building and pool on a lot. In *Thomas,* the claim was to a right to limit development of the neighboring property and the right to a scenic view easement. Thus, these cases all involved implied covenants arising from the conduct of the promising party that gave the claimant either the right to use property owned by another for a specific purpose, or the right to limit the use of another's property for a specific purpose. In conclusion, Valiant's contention that POBD's promise to VP that it would have the right over and across POBD's land to repair and maintain its extended infrastructure is unrelated to the use of the land is without merit.

Valiant's argument that only purchasing and selling parties may enforce an implied covenant is without merit.

> [A] court of equity will enforce **any** acceptable agreement affecting land against a purchaser with notice of the agreement, whether or not the agreement runs with land, unless the agreement involved only remotely and indirectly relates to use of the benefited land by the purchasers. Under some authority, a covenant passing with a conveyance of the land and enforceable against subsequent grantees with notice creates what is familiarly known as equitable easements of servitude.

20 Am. Jur. 2d *Covenants, Etc*. § 45 Equitable Enforcement (Emphasis added).

Valiant also claims that an express easement must be in writing to be enforceable. VP does not disagree that express easements are encompassed in writings. While true, this proposition has no bearing on the issues on appeal.

Valiant claims that there was no evidence before the district court that POBD promised to grant future easements to VP if it allowed its infrastructure to be extended. Valiant premises this argument on the fact that the Construction and Operating Agreement was not initially provided to the district court. However, the Construction and Operating Agreement was provided to the district court before it issued its final determination on VP's motion to reconsider the summary judgment.

But assuming, *arguendo*, that Valiant is right that the district court could not consider the Construction and Operating agreement because it was submitted later, the district court still had evidence in the record before it of this agreement. The PSA provided to the district court provided this exact same information to the district court. The district court declined to consider evidence because VP was not a party to the PSA, and not in privity. However, *Middlekauff* expressly ruled that privity is not required in applying the doctrine of equitable servitudes.

Valiant contends even if all of the above is true that there is no genuine issue of material fact that Valiant's predecessors (R.E. Loans, Pensco and MF '08) took with notice of the promise. In its motion for summary judgment, Valiant made no allegations supported by admissible evidence that Valiant' predecessors were bona fide lenders. On appeal, Valiant contends VP had to prove the lenders were not bona fide lenders because the claim to an equitable servitude interest was an affirmative defense.

As discussed in the prescriptive easement section of this brief, VP answered a direct averment that it claimed an interest in the real property. Continuing that position at summary

judgment was not an affirmative defense and VP did not bear the burden at summary judgment of bringing forth evidence that Valiant's predecessors were not bona fide lenders.

VP claims Villelli's first declaration was inadequate to create a genuine issue of material fact on this issue because Villelli discussed his understanding of conversations he had with Ng relating to the R.E. Loans loan. Villelli testified in his February 2015 declaration that prior to the POBD sale, NIR had a loan with R.E. Loans which was managed by Barney Ng. Villelli testified he introduced Ng to two of the principals of Pend Oreille Bonner Development Holding, Inc., POBD's predecessor, and the discussions between all of them focused upon assumption of NIR's loan and a possible additional loan to Pend Oreille Bonner Development Holding, Inc. Villelli testified he subsequently executed a subordination of NIR's vendor lien to facilitate a loan from R.E. Loans to POBD with the understanding the lender would comply with the (Third Restated) PSA, a copy of which he understood Ng had in his possession from the discussion between Ng, Villelli, Reeves and Bowlby. Villelli testified distributions to NIR could not have been made by the lender in compliance with the PSA unless the lender had a copy. Villelli testified R.E. Loans also requested he supply a copy of the Second Restated PSA.

Valiant argues Villelli's testimony raises no inference that R.E. Loans had a copy of the (Third Restated) PSA because Villelli only testified to his understanding of the conversations with Ng. The reasonable inference from Villelli's testimony is that R.E. Loans had the (Third Restated) PSA when the loan discussion occurred because it agreed to distributions in compliance with that agreement if NIR subordinated to its loan. Further, the fact that R.E. Loans also requested a copy of the Second Restated PSA reinforces this inference. It raises the inference that R.E. Loans was engaged in due diligence prior to extending the loan by gathering all relevant sales documents

related to the transaction, including the modified Second Restated PSA. Since it did not request the Third Restated PSA, the inference is it already had a copy.

Nonetheless, Valiant contends Villelli can't testify to his understanding of the conversation with Ng because he has no personal knowledge of whether R.E. Loans had the PSA in its possession at the time. In this matter, R.E. Loans was a party opponent. A statement by Ng is admissible pursuant to Idaho Rules of Evidence 801(d)(2) regardless of whether Villelli has personal knowledge of its truth. If Villelli understood from his conversation with Ng that he had a copy of the (Third Restated) PSA, this fact is admissible even though Villelli does not have personal knowledge of its truth.

Further, Villelli testified to a conversation with Ng in 2009 after learning Ng had other entities he managed (Pensco Trust and MF '08) which had loaned money to POBD. These discussions focused in part upon POBD's failure to deed infrastructure and lots to VP as required by the PSA and subsequent construction agreement. Villelli testified at no time during this discussion did Ng indicate the lenders were unaware POBD had made this commitment to VP, nor did he disavow POBD's commitment to VP. This testimony leads to the inference that R.E. Loans was aware of POBD's promise to VP regarding the extended infrastructure.

Valiant also encourages this Court to not consider material facts before the trial court contained in Villelli's August 4, 2015 declaration in opposition to the order of sale (submitted before the district court reversed its initial summary judgment decision). The most salient fact from this declaration with respect to this issue was that POBD proceeded to submit plats to Bonner County for approval, and VP was requested to issue a will serve letter in connection with the plats, and subsequently reviewed the plats. All plats contained a "Water and Sewer Service Note" which indicated that all Lots shown on the Plat will receive water and sewer service from VP, Inc. (PWS

No. 1090195.) Each plat also contained a reference to a lienholder's certificate filed by R.E. Loans agreeing to the subdivisions as shown on the plat recorded in Bonner County as Instrument No. 714036. The plats showed the water and sewer system extension easements on the face of the plats. Contrary to Valiant's argument, this was not extraneous evidence raised for the first time on appeal. Rather, it was relevant evidence in the record before the district court at the time it denied VP's motion to reconsider and granted Valiant's third motion for summary judgment.

In summary, VP presented more than conclusory allegations in support of its equitable servitude claim. The district court erred in granting summary judgment against the claim.

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

On appeal, VP seeks reversal of the Decree of Foreclosure with respect to Clause C.2(aa) of the court's Decree of Foreclosure, which provided:

> 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.

In its opening brief, VP asserted the district court erred in including this clause in the decree of foreclosure because it was a declaration of rights of future purchasers and holdover tenants when no justiciable controversy existed between potential future purchasers and potential holdover tenants at the time of the declaration by the district court.

"Justiciability is generally divided into subcategories—advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions." *Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757, 761 (1989). "It [the controversy]

must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Wylie v. State, Idaho Transp. Bd.*, 151 Idaho 26, 31, 253 P.3d 700, 705 (2011) (quoting *Idaho Schools for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 281–82, 912 P.2d 644, 649–50 (1996)).

The above challenged clause of the decree violated the justiciability requirement in several ways. First, a portion of it was an opinion advising what the law would be upon a hypothetical state of facts. The portion which held the occupant would immediately become the tenant of the purchaser at such sale merely reiterated the provisions of I.C. § 11-407. The remainder was an advisory opinion and/or was not yet ripe for adjudication because there was no controversy pending before the district court regarding the amounts owed to future purchasers by any holdover tenant.

Ripeness is a subcategory of justiciability. A case is not justiciable if it is not ripe. *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002). "The traditional ripeness doctrine requires a petitioner or plaintiff to prove 1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication." *Id*.

Valiant contends this Court should reject VP's justiciability claims on several grounds. Valiant claims an actual controversy existed because VP occupied some of the property subject to foreclosure at the time of the foreclosure decree was entered. This argument has no merit. The language of the decree itself recognizes there is not a current controversy. It is phrased using the contingent term "should" to denote future events that might occur and the legal consequences if

they do occur in the future. No real or substantial controversy existed between the future purchasers and holdover tenants at the time of entry of this clause of the decree.

Valiant also claims the district court could include this language in the decree because of language found in Idaho Code section 45-1302 which allows the district court in a foreclosure to determine the title, estate or interest of all parties thereto in the same manner and to the same extent and effect as in the action to quiet title. This grant of authority applies to parties, not non-parties.

Idaho Code section 6-401 provides: "[a]n action may be brought by any person against another who claims an estate or interest in real or personal property adverse to him, for the purpose of determining such adverse claim…" By the terms of the statute, it only applies to claims between parties to the quiet title action regarding a claimed interest at the point in time the suit is filed. Valiant directs this Court to *Pro-Indiviso, Inc. v. Mid-Mile Holding Trust*, 131 Idaho 741, 963 P.2d 1178 (1998) to support its argument the trial court could declare the rights of future owners who had no cause of action pending before the trial court at foreclosure. However, this case is inapposite to the present case.

In *Pro-Indiviso, Inc.*, a couple who owed income taxes to the United States deeded their property to a trust. The Internal Revenue Service (IRS) later filed a lien against the property for unpaid taxes which named the trust as a nominee of the couple. A tax sale was held and Pro Indiviso purchased the property. The IRS issued a deed after the redemption period.

After receiving the deed, Pro-Indiviso filed a verified complaint seeking ejectment of the hold-over tenants, and issuance of a writ of assistance to remove them. The tenants challenged Pro-Indiviso's standing to bring a suit for ejectment absent an action for quiet title.

This Court held "[t]o satisfy the standing requirement, litigants must allege an injury in fact and a substantial likelihood that judicial relief will redress the alleged injury." This Court held

standing did not require Pro-Indiviso file a quiet title suit because Pro-Indiviso alleged it had a deed to the property and the couple were in possession adverse to their interest. This Court concluded Pro-Indiviso involved an actual case and controversy because there was a pleaded and proved case for ejectment. *Id.,* 131 Idaho at 746, 963 P.2d at 1183.

The present case does not share the same facts. The challenged clause did not result from litigation between a purchaser and a holdover tenant alleging an injury in fact. It anticipates such a suit and makes an advisory determination.

Valiant subsequently sought (as the purchaser at foreclosure) to have VP (as the holdover tenant) removed from the foreclosed property through a writ of assistance without an eviction action and requested damage. The trial court issued its Memorandum Decision and Order indicating it would issue a writ of assistance to remove VP from the parcels sold at foreclosure pursuant to clause C.2(y) and held Valiant was awarded damages for daily rent until Valiant entered into possession of Parcels 1 and 2. The district court also held Valiant was entitled to damages for all hookup/tap fees and all other amounts VP collected from the use, occupancy and operation of the sanitary sewer and water systems appurtenant to, located on or under, *and existing in conjunction with* any of the foreclosed lots. Since the water system is one integrated system and the sewer system is one integrated system, the court determined Valiant was entitled to all operating revenues. The memorandum decision held, "[t]he Decree expressly states that Valiant is entitled to receive from VP 'a rental per day based upon the value of the Parcel ad improvement, cash rental to be due daily to the purchaser." R Vol. XLIV, p. 9357. The trial court further held "[s]imilarly, under the express terms of the decree, Valiant is entitled to receive from VP any and all hookup/tap fees and all other amounts VP has collected from the use, occupancy and operation of the sanitary and water systems and associated infrastructure appurtenant to, located on or under

and existing in conjunction with all 154 parcels from the date of sale to the fate that Valiant enters into possession." *Id.* at pp. 9357-9358. In its Order, the district court noted: "The Court reserves determination of the amount of damages until the conclusion of VP's appeal." *Id.* at 9359. In other words, even though the trial court issued a final judgment in this matter, including its damage award, it intends following resolution of this appeal to continue litigation to determine the rights as between the future purchaser and hold-over tenant even though that matter was not before it in the foreclosure action.

A trial court may exercise its discretion and issue a writ of assistance to place a purchaser at foreclosure in possession as a means of enforcing its foreclosure decree. In *Eagle Rock Corp. v. Idamont Hotel Co.,* 60 Idaho 639, 647-48, 95 P.2d 838, 841 (1939), this Court held:

> Upon an application for a writ of assistance, no question determined by the original decree can be litigated nor can the original case be reviewed or the decree therein be modified. The legal or equitable title will not be adjudicated. The sole question to be determined on the motion is whether applicant has a right, as against the party in possession to use the writ to obtain possession.

Despite this ruling, the trial court intends to modify its decree following appeal to award damages to Valiant as a purchaser at foreclosure based upon the challenged clause.

Valiant suggest that this challenged clause is acceptable because Valiant was a purchaser at foreclosure, and the period for redemption has expired without VP redeeming the property.[1] In other words, Valiant proposes these facts render the justiciability issue moot. VP does not explain how these facts moot the justiciability issue.

In *Caldwell v. Thiessen*, 60 Idaho 515, 92 P.2d 1047 (1939) this Court interpreted I.C.A. § 8-407, now codified as I.C. § 11-407, and held a purchaser at foreclosure is entitled to the value of use and occupancy of a property purchased at foreclosure. This Court has also recognized that

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[1] There are no facts in the record regarding redemptions. However, VP acknowledges it has not redeemed any property.

offsets may be allowed regarding the amounts owed pursuant to this statute. *See generally First State Bank of Eldorado v. Rowe*, 142 Idaho 608, 615, 130 P.3d 1146, 1153 (2006) (holding to the extent rents were owed they were substantially compensated by way of payment of outstanding utility charges owed on the property.) Also, Idaho Code § 6-404 indicates VP may be entitled to the value of improvements as a set-off to any claim of damages. Pursuant to the applicable statute and relevant case law, prior to entry of judgment for damages arising from a holdover tenancy, VP is entitled to a determination by a trier of fact regarding the value of the use and occupancy of the property purchased at foreclosure (as opposed to a rental per day based upon the value of the Parcel and Improvement).

Valiant suggests even if the matter is not moot, no substantial right of VP is implicated in the trial court's challenged foreclosure clause. Because the district court erred in including the challenged clause, VP is stripped of its right to have the matter heard by a trier of fact. It is axiomatic that a party is entitled to defend prior to an entry of judgment against it.

Outside of the justiciability issue, Valiant contends the district court was merely enforcing a clause of the Valiant Mortgages with the inclusion of clause 2.C(aa). Valiant cites to the R.E. Loans Mortgage in the record in support of this argument. Clause 3.10 of this mortgage provided:

> 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 purchase 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. An action of unlawful detainer shall lie if the tenant holds over after a demand in writing for possession of said Premises and Improvements and this agreement and the trustee's deed shall constitute a lease and agreement under which any tenant's possession arose and continued.

R Vol. VI, p. 691, Clause 3.10.

This clause is limited to the heirs and assigns of POBD, not the successors. This distinction is important because there is no privity of contract between R.E. Loans and successors to bind them to this contractual clause.

Valiant observes VP did not object to this specific language in the foreclosure decree and maintains a failure to object constitutes sub silencio approval of the language of the clause. VP moved to alter, amend and reconsider the decree of foreclosure and judgment, supported by a memorandum. R Vol. XLVI, pp. 5555-5575.

Valiant implies this issue on appeal is akin to the one raised in *Bach v. Bagley*, 148 Idaho 784, 793, 299 P.3d 1146, 1155 (2010). In *Bach*, Bach sought quiet title to an 8.5-acre parcel of property. The district court quieted title in Bach to the 8.5 acre. Bach also had other claims on which he was not successful. Bach appealed, asserting his chapter 13 bankruptcy proceeding impacted several claims and the district court erred in failing to so find. The 8.5-acre parcel was mentioned in passing in the brief, but no explanation was provided on how the district court erred or why it was relevant to the appeal, and no argument was made regarding relief sought on that parcel, so this Court did not address it. Unlike *Bach*, VP is not appealing an issue it won at the trial court level. Nor did it mention the matter in passing in its opening brief. The issue occupied an entire section of VP's brief.

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

Valiant claims it maintained a consistent position throughout the post-judgment proceedings that it sought to immediately eject VP from the sewer facilities, but not the water facilities. Valiant's own pleadings demonstrate VP did not mischaracterize Valiant's initial position that VP was to be ejected from all parcels.

On February 6, 2017, Valiant filed a Motion to Enforce Judgment Under I.A.R. 1(b)(10) and 13(b)(13) indicating it was moving the court "for an order enforcing the Judgment entered July 20, 2016 as it related to and affects Parcels 1 and 2…" R Vol. XLVII, p. 8269. In its supporting memorandum, Valiant sought possession of Parcel 1 and Parcel 2, and argued "[t]hese parcels were the subject of much discussion in briefing filed pursuant to Valiants Motion for Order of Sale of Real Property filed on or about June 22, 2016, as certain infrastructure for the sanitary and water system is affixed to said parcels." R Vol. XLVII, p. 8273. Valiant concluded its memorandum indicating "[b]ased upon the foregoing points and authorities, Valiant respectfully requests this Court to enter a writ of ejection ejecting VP from the Parcels." R Vol. XLVII, p. 8277. The Declaration of Richard Stacey was submitted in support of the motion. R Vol. XLVII, p. 8279 – LXX, p. 8708. Exhibit 8 to the declaration was a copy of a letter from Valiant's counsel to VP's counsel dated December 30, 2016 and entitled "Notice of Eviction". R Vol. LXIX, p. 8551. This letter notified VP Valiant purchased the real property owned by VP identified as Parcel 1 and Parcel 2. *Id.* The letter required VP to "vacate the Parcels". R Vol. LXIX, p. 8552. Valiant proceeded to inform the district court:

> "…VP has refused to deliver possession of the VP Parcels to Valiant and discontinue usage of all sanitary sewer and water infrastructure owned by Valiant.

R Vol. LXXV, p. 9331.

Valiant then requested the district court order VP remove from all 154 Parcels. R Vol. LXXV, p. 9332.

In response to the motion, the district court ordered "VP is ordered to **immediately** vacate any and every part of all 154 parcels." (Emphasis added.) R Vol. LXXV, p. 9358

Thereafter, Valiant's counsel prepared and presented a Writ of Assistance which was accepted by the district court. This Writ of Assistance provided VP was to "deliver to

Valiant possession of the Valiant Parcels and all fixtures, appurtenances and improvements associated therewith, without delay, including Parcel 1, Parcel 2 and the Sewer/Water System, or any part thereof…" R Vol. LXXV, pp. 9363-9364.

When VP moved for a stay of the ejectment on both the water and the sewer system pending appeal, Valiant opposed it. It was not until VP discontinued supplying water from its wells that Valiant changed course.

Valiant claims the district court did not err in fashioning its injunction, and VP has failed to demonstrate facts showing the district court abused its discretion in issuing the injunction. In *Wolford v. Montee*, 161 Idaho 432, 442, 387 P.3d 100, 110 (2016), in ruling for the first time upon the appropriateness of issuance of a post-judgment injunction by a trial court, this Court held:

> In this case, however, the purpose of the injunction was to prevent Appellants from engaging in activities that would "render the judgment ineffectual." Such a reason is specifically provided for under Idaho Rule of Civil Procedure 65(e)(3): "When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to *render the judgment ineffectual*." (emphasis added). Such language, as the district court noted, presupposes a judgment and makes clear that post-judgment injunctions can be asked for and granted. Thus, under the language of Rule 65(e)(3), the district court did not err in issuing an injunction post-judgment.
>
> As an additional note, while this direct issue has not been dealt with in Idaho, a similar situation appears in *State ex rel. Evans v. Click*, 102 Idaho 443, 631 P.2d 614 (1981). In that case, the district court attached a post-judgment "lien" on the appellants' machinery to ensure that appellants complied with the court's order. *Id*. at 449-50, 631 P.2d at 620-21. In upholding the district court's imposition of the post-judgment " lien," we looked to Idaho Code section 1-1603:
>
> While the district court may have confused the issue here by the manner in which it imposed and the way it characterized the "lien" . . . it is our conclusion that such action was within the inherent power of the court to insure compliance with not only the intent of the statute but also its own related orders.
>
> *Id*. at 450, 631 P.2d at 621 (citing I.C. § 1-1603). We then also recognized that since the matter had been appealed the "lien" could be upheld under Idaho Rule of Civil

> Procedure 62(c), which "grants the court power to grant, suspend or modify an injunction during the pendency of an appeal upon imposition of sufficient security through bonds or other means to preserve the subject matter of the litigation and the rights of the parties." *Id*.
>
> Accordingly, because at the time the injunction was issued Rule 65(e)(3) contemplated the grant of an injunction post-judgment and because Idaho Code section 1-1603 and Rule 62(c) also grant the district court authority to issue a post-judgment injunction of this nature, we affirm the district court's grant of an injunction.

Rule 65 was modified after this case was issued. However, it contained similar language and this case remains relevant.

To determine whether the district court's injunction in this case was rendered to prevent VP from doing an act in violation of Valiant's rights, one must first turn to the judgment rendered by the district court. The judgment held Valiant's Mortgages were priority mortgages which were superior in right, title and interest to any interest claimed by another or entity with respect to the foreclosed property and required any person in possession of the foreclosed lot at sale to deliver possession to the purchaser. The district court's subsequent enforcement order and writ of assistance ordered VP to cease operation of its sewer and water system upon the 154 foreclosed lots purchased by Valiant. Unlike *Wolford*, it was VP's compliance with the judgment and decree that led to the issuance of the post-judgment injunction prohibiting its compliance until such time as Valiant developed adequate utility infrastructure to independently serve its 154 foreclosed parcels within the Idaho Club development without reliance upon VP's water and sewer infrastructure.

In its reply brief, Valiant does not deny VP was complying with the judgment, decree, enforcement order and writ when Valiant sought the injunction. Valiant does not deny it sought the injunction because VP's compliance with the district court's judgment and decree would leave its parcels without fire protection; and without water service, which was likely to cause the

property value of the foreclosed property to diminish, and cause Valiant to be unable to further develop, market or sell its real property.

Thus, it is clear the injunction was not issued because VP engaged in a post-judgment or post-foreclosure decree act rendering the judgment to vacate the parcels and surrender possession to Valiant ineffectual. Thus, Rule 65 did not justify the post-judgment injunction.

The district court relied upon I.A.R. 13(b)(10) and 13(b)(13) as its authority for issuing the injunction. Valiant claims in doing so, the district court acted within the boundaries of its discretion. Valiant maintains the district court acted consistently with the legal standards applicable to its specific choices and reached its decision by an exercise of reason.

As noted in the opening appeal brief, the district court premised its injunction in part on I.A.R. 13(b)(13) allowing the district court to enter any order required for the enforcement of any judgment or order. I.A.R. 13(b)(13) is similar to I.R.C.P. 65(e)(3) in this respect. The district court never explained how its injunction enforced its decree of foreclosure. As discussed above, the district court ordered VP supply water to Valiant on the foreclosed lots without any contractual obligation, until Valiant developed its own water source and delivery system. In conclusion, the injunction was unrelated to enforcement of the district court's judgment and order requiring VP to vacate the 154 lots and cease using its infrastructure on those lots to deliver water and sewer services.[2]

Further, the injunction also diverted monies to Valiant which were owed to VP by its customers for sewer services on all lots served by VP, not just the foreclosed lots, even though most of Valiant's 154 parcels were vacant and not receiving water and sewer service. This portion

[2] VP sought a stay on appeal asking the district court to allow its infrastructure to remain in place during the appeal and allowing VP to continue its operation of the water and sewer systems to serve the developed lots which included a territory greater than just the foreclosed parcels. Most of the foreclosed lots were vacant.

of the injunction was not premised upon enforcement of the district court's judgment. Thus, the district court exceeded the legal standard of I.A.R. 13(b)(13) because the injunction was unrelated to enforcement of its judgment. Rather, it was an accommodation to Valiant unrelated to the terms of the judgment and decree. The district court did not reach its decision by an exercise of reason.

Further, the district court's injunction was not proper under I.A.R. 13(b)(10) (allowing an order regarding the use, preservation or possession of any property which is the subject of the action on appeal) because it exceeded the scope of this rule. The requirement that VP provide service to the foreclosed lots extended beyond the period of appeal until such time as Valiant constructs its own system. The order allowing Valiant to collection all the sewer service fees was also unrelated to the use, preservation or possession of the real property that was the subject of the appeal. As such, the district court did not act consistently with the legal standards applicable to its specific choices under I.A.R. 13(b)(10) and did not reach its decision by an exercise of reason. Therefore, the district court abused its discretion when it included these terms in the injunction.

D. THE DISTRICT COURT'S AWARD OF DISCRETIONARY COSTS WAS AN ABUSE OF DISCRETION

In reviewing a trial court's award of discretionary costs for an abuse of discretion, this Court employs the following three-step inquiry:

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

Richard J. & Esther E. Wooley Tr. v. DeBest Plumbing, Inc., 133 Idaho 180, 186, 983 P.2d 834, 840 (1999). Review of the district court's award of discretionary costs against VP reveals that the district court's award was an abuse of discretion with respect to each of the above three steps of inquiry.

1. The District Court Failed to Recognize the Issue as Discretionary

Other than referring to its award of discretionary costs as "discretionary costs", the district court never expressed its perception it was exercising its discretion. Valiant urges this Court to avoid analyzing specific words used by the district court, yet Valiant then asserts that the district court perceived its award of such costs as an issue of discretion because of the use by it of the specific words "should," "authorized," and discretionary." However, the district court's award reveals it simply made the award because the claimed costs were necessary and not otherwise awardable as costs as a matter of right, holding:

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

R Vol. XL VIII, pp. 5839-40 (emphasis added).

Valiant asserts that the standard in *Boll v. State Farm* allows the trial court to simply recite the language of the rule to show that it perceives the discretionary nature of its decision. That proposition is not supported by the *Boll* case. To the contrary, the *Boll* case, and numerous others, stand for the proposition that unequivocal statements of the trial court acknowledging the discretionary nature of their awards, evidences that the court has correctly perceived the issue as discretionary. For instance, in *Boll* the trial court stated "[t]he decision whether to grant a new trial is committed to the discretion of the court." *Boll v. State Farm Mut. Auto. Ins. Co.*, 140 Idaho 334, 341, 92 P.3d 1081, 1088 (2004). Similar unequivocal statements have been found by this Court to satisfy the first element in the abuse of discretion analysis. *See DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 755, 331 P.3d 491, 497 (2014); *Griff, Inc. v. Curry Bean Co.,* 138 Idaho 315, 322, 63 P.3d 441, 448 (2003); *Fish v. Smith,* 131 Idaho 492, 493, 960 P.2d 175, 176

(1998). No such unequivocal statement exists in the trial court's award of discretionary costs against VP in this case.

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

Before a trial court can exercise its discretion and award discretionary costs, the proponent of the discretionary costs must first make a "showing that the costs were necessary *and* exceptional costs, reasonably incurred, and should in the interest of justice be assessed against the adverse party." I.R.C.P. 54(d)(1)(D) (emphasis added). "The burden is on the prevailing party to make an adequate initial showing that these costs were necessary and exceptional and reasonably incurred and should in the interests of justice be assessed against the adverse party." *Auto. Club Ins. Co. v. Jackson*, 124 Idaho 874, 880, 865 P.2d 965, 971 (1993); *Westfall v. Caterpillar, Inc.*, 120 Idaho 918, 926, 821 P.2d 973, 981 (1991); *Fuller v. Wolters*, 119 Idaho 415, 425, 807 P.2d 633, 643 (1991). "This Court exercises free review of the district court's compliance with the rules of civil procedure in awarding costs and attorney fees," including whether the prerequisite showing was made by the proponent of a discretionary cost award. *Hoagland v. Ada Cty.,* 154 Idaho 900, 913, 303 P.3d 587,600 (2013); *J.R. Simplot v. Chemetics Int'l,* 130 Idaho 255, 257, 939 P.2d 574, 576 (1997).

Rule 54(d)(1)(D) sets the boundaries of a trial court's discretion to award discretionary costs, and a trial court abuses its discretion when it makes an award that fails to satisfy those requirements. *See Richard J. & Esther E. Wooley Tr. v. DeBest Plumbing, Inc.*, 133 Idaho 180, 187, 983 P.2d 834, 841 (1999) (identifying IRCP 54(d)(1)(D) as the boundaries of the court's discretion).[3]

[3] Valiant cites the Court to the *DeBest Plumbing* case for the proposition that a court acts within the boundaries of its discretion simply by stating "its authority for awarding the fees under I.R.C.P. 54(d)(1)(D)." Respondent's Brief, p. 51. However, that proposition is not supported by the *DeBest Plumbing* case, nor the plain language of the rule itself.

A cost can appropriately be determined exceptional in one of two circumstances: First, if the cost is uncommon in a particular type of case. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005); *Fish v. Smith*, 131 Idaho 492, 493–94, 960 P.2d 175, 176–77 (1998); *Inama v. Brewer*, 132 Idaho 377, 384, 973 P.2d 148, 155 (1999); *Nightengale v. Timmel*, 151 Idaho 347, 354–55, 256 P.3d 755, 762–63 (2011). Second, costs can be exceptional if incurred in a case that itself is exceptional. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005). Thus, a proponent of an award of discretionary costs bears the burden of showing that at least one of these circumstances is applicable to the case and requested discretionary costs.

Valiant claimed in its application it was entitled to an award of discretionary costs because they were necessary and exceptional without providing any reason why the costs were "exceptional." R Vol. XLI, pp. 5052 – 5055. Valiant also failed to make any showing why those costs should in the interests of justice be awarded against VP. *Id*. Contrary to Valiant's claims, its original memorandum did not explain why any of the claimed costs were exceptional. Valiant merely concluded the claimed costs were exceptional. Valiant claimed it was entitled to an award of discretionary costs because the "costs allowed as a matter of right are woefully inadequate to cover many of the costs incurred in a case of this length, scope and complexity. R Vol. XLI, p. 5033. This however, is not the correct legal standard, although it was adopted by the district court.

However, Valiant provided no support for its contention that complexity of an action renders all associated costs exceptional and uncommon. In fact, as this Court held in *Fish,* some cases are complex from the very nature of the case, and such complexity is expected and does not automatically make associated costs exceptional. 131 Idaho at 493–94, 960 P.2d at 176–77.

In reply to VP's objection to Valiant's requested discretionary costs, Valiant asserted its claimed costs were exceptional because VP and others acted frivolously in defending. R Vol. XLVII, p. 5767. The trial court rejected Valiant's argument. R Vol. XLVII, pp. 5835-5837. the district court acted outside the bounds of its discretion in then awarding discretionary costs against VP without the prerequisite showing having been made.

The district court cost award made no finding that the awarded discretionary costs were uncommon in this particular type of case, nor do the facts support such a conclusion. [4] Thus, the only remaining basis left to award discretionary costs was a determination that the case itself was exceptional.

This Court recently clarified the analysis to determines a case is exceptional, making all resultant costs exceptional:

> We therefore clarify that numerous complaints, depositions, and expert testimony does not render a case in and of itself exceptional. Rather, courts should assess the context and nature of a case as a whole along with multiple circumstances. *See Nightengale,* 151 Idaho at 354, 256 P.3d at 762. The mere fact numerous experts were retained or numerous amendments were filed does not standing alone render a case exceptional. **Particular standards a court should consider include, but are not limited to, whether there was unnecessary duplication of work, whether there was an unnecessary waste of time, the frivolity of issues presented, and creation of unnecessary costs that could have been easily avoided. Most importantly, however, a court should explain *why* the circumstances of a case render it exceptional.**

Hoagland v. Ada Cty., 154 Idaho 900, 914, 303 P.3d 587, 601 (2013) (emphasis added).

The district court never found the case itself was exceptional. The district court clearly and unambiguously expressed the reason for the discretionary award as the inadequacy of the

[4] Valiant acknowledges and concedes that none of the discretionary costs it was awarded are exceptional as uncommon costs in a mortgage foreclosure action. Rather, Valiant contends the district court correctly determined the costs were exceptional because the case itself was exceptional. Respondent's Brief, pp. 53-55.

award of costs as a matter of right as compared to other necessary and reasonable costs incurred by Valiant:

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

R Vol. XL VIII, pp. 5839-40 (emphasis added). Valiant asks the Court to ignore the second half of the district court's explanation and focus simply on the first twenty-seven words. However, the district court made it clear the reason it awarded Valiant discretionary costs was because they were not awardable as costs as a matter of right although they were necessary in this case. The district court did not award them because of the general nature of the case.

The trial court is not required to evaluate each requested discretionary cost item by item but can make "express findings as to the general character of requested costs and whether such costs are necessary, reasonable, exceptional, and in the interests of justice." *Puckett v. Verska*, 144 Idaho 161, 169, 158 P.3d 937, 945 (2007).

Review of the district court's evaluation of the awarded costs in this case reveals the award was made because the costs were necessary and reasonable, not because they were exceptional or should be awarded in the interests of justice. For instance, the court found the cost of the litigation guarantee was necessary for the foreclosure action. R Vol. XLVIII, p. 5840. Necessity was also the justification the court provided for awarding Valiant its travel costs. *Id*. However, the fact that the trial court explained its award generally, and then with respect to some of the individual categories as motivated by necessity of the cost and inability to recover as a cost as a matter of right illustrates its abuse of discretion in awarding the costs.

This approach was rejected by this Court in *Nightengale v. Timmel*, 151 Idaho 347, 354–55, 256 P.3d 755, 762–63 (2011). In that case, this Court held that the necessity of a cost does not equate to its exceptional nature.

The district court also failed to address why the discretionary costs should in the interest of justice be assessed against VP, as opposed to any of the other defendants in the action. This failure is most evident with the award of costs for the litigation guarantee. The cost of the litigation guarantee was incurred before VP was even named as a cross-claimant by Valiant. The only party that had responsibility for the foreclosure action was the defaulting party, POBD. The district court provided no explanation addressed why VP should be responsible for this cost.

The same shortcoming exists with respect to each of the discretionary costs awarded to Valiant. The district court simply concluded the costs were necessary and should therefore be awarded to Valiant and failed to consider why the cost, or a portion of it, should be awarded against VP, as opposed to any other defendant or combination of them.

Valiant contends that the district court considered the interest of justice when it awarded discretionary costs against VP because VP engaged in unwarranted, although not frivolous, conduct. Respondent's Brief, p. 56. This contention further highlights the deficiency in the district court's award of discretionary costs. Specifically, the district court concluded "counsel for one or more of the defendants presented oral arguments not supported by any legal authority or raised issues and claims that had already been determined on summary judgment." R Vol. XLVIII, p. 5840. This vague characterization cannot form the basis of an award of discretionary costs against VP when the court failed to specifically attribute any such action to VP or its counsel.

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

The district court abused its discretion in awarding Valiant discretionary costs against VP because its award was not reached through an exercise of reason. As set forth above, the district court's awarded discretionary costs because they were necessary and not otherwise compensable as costs as a matter of right. R Vol. XLVIII, pp. 5839-5840.

Valiant cites to *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho at 314, 109 P.3d at 168, for the proposition that a trial court's award of discretionary costs is reached through an exercise of reason if it contains a "description of the circumstances giving rise to a grant or denial of discretionary costs." Respondent's Brief, p. 57. Valiant asks this Court to extend this holding and find an award of discretionary costs is reached through an exercise of reason if the trial court concludes a cost is "reasonable, necessary, exceptional, and should be awarded in the interest of justice," without explanation of how the conclusion was reached. Respondent's Brief, p. 57. Such a holding would make review of the decision impossible because it gives no insight to the parties or this Court how the conclusion was reached.

When the discretionary costs award in this case are considered in light of the procedural context of the case and in light of the various parties and their relationship, or lack thereof, to the costs, it becomes obvious that the discretionary cost award against VP lacked reason. As discussed previously, the litigation guarantee cost was awarded because it was necessary to the foreclosure action. However, no analysis was given by the district court why cost should be taxed to any party other than POBD, the debtor in default. Yet, the record is clear that only costs as a matter of right and attorney fees were awarded against POBD, with no discretionary costs included in that award. R Vol. XLVIII, pp. 5832-5835.

Other specific awards of discretionary costs also lack reason when viewed in the specific facts of the case. For instance, the district court awarded Valiant travel costs and administrative costs because counsel for one or more of the defendants presented oral arguments not supported by legal authority, raised issues and claims that had already been determined on summary judgment, and filed motions unsupported by any legal authority. R Vol. XLVIII, p. 5840. Instead of identifying which parties specifically engaged in this behavior and the corresponding costs Valiant incurred, the district court simply made a blanket award.

The ratio the district court used to "apportion" the discretionary cost award between VP, NIR, and JV also lacked reason. The only reasoning provided by the district court was "NIR participated in pre- and post-trial practice, but not in the court trial." R Vol. XLVIII, p. 5841. While this reasoning would support some variance in the awards against the three parties, the actual sharing ratios derived by the district court does bears no logical relationship to any of the specific costs and the involvement of the different parties. The ratio is arbitrary.

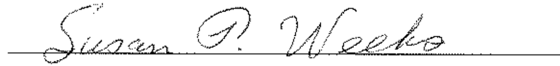
Rather than addressing what parties in the interest of justice should be taxed with discretionary costs, the district court awarded those costs against NIR, VP, and JV according to a ration it utilized with no explanation. This was an abuse of discretion.

II. CONCLUSION

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

Respectfully submitted this 29th day of May, 2018.

JAMES, VERNON & WEEKS, P.A.



SUSAN P. WEEKS
Attorneys for Appellant VP

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of May, 2018, I caused to be served a true and correct copy of the foregoing instrument by the method indicated below, and addressed to the following:

Richard L. Stacey Jeff Sykes McConnel Wagner Sykes & Stacey, PLLC 755 W Front Street, Suite 200 Boise, ID 83702	☒ U.S. MAIL ☐ FACSIMILE ☐ EMAIL

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

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