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Smith v. Smith Appellant's Brief Dckt. 45069

IN THE SUPREME COURT OF THE STATE OF IDAHO

SHARON KAY SMITH nka SHARON BERGMANN, Plaintiff-Respondent, vs. VERNON K. SMITH, Defendant-Appellant.	)	SUPREME COURT NO. [redacted] 45069 Fourth Dist. Ada Co. Case No. CV-DR-1990-12684

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District
for the County of Ada

Honorable Gerald F. Schroeder, Presiding

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

This appeal presents several related questions concerning the validity of a series of successive "money judgment renewals" that have been previously undertaken in this proceeding pursuant to the legislatively-granted authority of I.C. § 10-1111(1).[1] At the core of the questions raised on this appeal is the issue of whether the failure to validly complete any single renewal of a money judgment within the series of statutory five-year intervals provided in which those money judgments can be renewed,[2] would thereafter render all subsequently attempted renewals invalid and void on the basis that from the occurrence of the first lapsed renewal forward, the magistrate

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[1] When first enacted in 1978 in its present form, *see*, Chapter 115, Laws of 1978, § 1 at pg. 266, I.C. § 10-1111 represented the entire Idaho Judgment Renewal statute, until that statute was divided into two subsections in 2011 when provision was made for the renewal of child support judgments. *see*, Chapter 104, Laws of 2011, §3 at pg. 268. Subsection (2) of that statute now addresses the renewal of child support judgments, and subsection (1) contains the general judgment renewal provisions of the original 1978 enactment. For ease of reference, the current statutory provision, I.C. §10-1111(1), will be cited throughout this brief, although during the time at issue, the statute had no subsections and was simply codified as I.C. §10-1111. Throughout this brief, the citation to the Idaho Sessions Laws, as provided in I.C. § 67-506, will be used.

[2] In 2015 and 2016 the five year period for the enforcement judgments was extended to ten years. *See*, Chapter 278, Laws of 2015; and Chapter 269, Laws of 2016. A portion of these amendments limiting their application only to judgments entered after July 1, 2015 was not codified, but remains positive Idaho law. *See*, *Peterson v. Peterson*, 156 Idaho 85, 90, 320 P.3d 1244, 1249 (2014) ("[S]ection 5 of Senate Bill No. 1103 is part of a statute enacted by the legislature and approved by the governor, and it is therefore part of the statutory law of Idaho. The district court erred in holding that section 5 of Senate Bill No. 1103 was of no effect."). Because only the former five year period applicable to earlier judgments applies to the questions raised on this appeal, only that five year time period is referred to within this brief.

court no longer had the statutorily-granted jurisdiction under the terms of I.C. § 10-1111(1) to either entertain, or to grant, a motion to renew a money judgment in respect to the particular money judgment in question.

B. COURSE OF PROCEEDINGS BELOW

The money judgments which are at issue in this appeal originally arose out of the parties' divorce granted over twenty-five years ago on February 11, 1991. (R., pp. 195-207).

Apart from the periodic attempts to renew the judgments at issue, this current matter began in December, 2014, when Respondent Bergmann filed a Verified Emergency Petition for Appointment of Receiver for Limited Liability Company and For an Ex Parte Temporary Restraining Order (R., pg. 23; pp. 372-381). Her actions were instigated, according to the face of this Petition, as a result of the death of Appellant's mother, Victoria H. Smith, the previous year, and the alleged resulting transfer of assets to a single member company, VHS Properties, LLC. (R., pg. 374-75). This initial petition was dismissed on a failure to appear, (R., pg. 573-74), but Respondent then refiled an identical Petition May 26, 2015 (R., pp. 575-584). An objection to the petition was filed July 6, 2015 (R., pp. 585-617), with a response to that objection filed July 14, 2015 (R., pp. 618-629).

On September 22, 2015, Appellant filed his Petition for Declaratory Judgment to Confirm Judgments and Order Void and Unenforceable. (R., pp. 630-647). On September 22, 2015, Respondent filed an Objection to Hearing On Vernon K. Smith's Petition For Declaratory Judgment To Confirm Judgments and Order Void and Unenforceable for Lack of Service and

Jurisdiction. (R., pp. 648-651), which was followed by Respondent's Answer to the Petition For Declaratory Judgment filed on October 23, 2015. (R., pp., 652-657).

On December 2, 2015, Appellant filed his Motion for Summary Judgment on his Petition for Declaratory Relief (R., pp., 658-59), supported by Affidavit of Vernon K. Smith (R., pp. 660-66), with attached Exhibits, "a" through "l", (R., pp. 667-714), and supported by a memorandum (R., pp. 715-739). Respondent filed an Objection to Vernon K. Smith's Motion for Summary Judgment on January 5, 2016, (R., pp. 740-751), supported by Affidavit of Larren K. Covert (R., pp. 752-54), with attached Exhibits, "A" through 'K", (R., pp. 755-99). Appellant filed a Summary Judgment Reply Memorandum on January 7, 2016, (R., pp. 800-20), and Further Reply Memorandum in Support of Motion for Summary Judgment on January 19, 2016 (R., pp. 824-33).

On February 26, 2016 the magistrate issued a Memorandum Decision and Order Denying Motion for Summary Judgment and Granting Temporary Restraining Order. (R., p. 834-46). On May 25, 2016, the magistrate, after hearing, entered its Memorandum Decision and Order Denying Petition to Appoint Receiver; Denying Temporary Restraining Order; and Granting Writ of Execution (R., pp. 938-942). The magistrate, incorporating its February 26, 2016 decision, declared the judgments, as renewed, to be valid. (R., pg. 929) ("The court issued a Memorandum Decision on February 26, 2016, which the court incorporates herein. The judgments are not void. The judgments are enforceable. As of March 20, 2015, the outstanding amounts, including interest, totaled $866,285.20 and $93,940.16."). Judgment was entered on that same date. (R., pg. 943).

Appellant timely filed his Notice of Appeal to the district court from this May 25, 2016

entry of Judgment on July 6, 2016. (R., pp. 946-954). The district court issued its opinion on appeal on February 16, 2017. (R., pp. 1117-1124). A notice of appeal to the Idaho Supreme Court from that decision was timely filed March 28, 2017. (R., pp. 1125-1133).

On November 17, 2016 the magistrate court once again granted Respondent's latest motion to renew the "1991" money judgment from the divorce. (R., pp 1016-17). A notice of appeal from that order was timely filed with the district court on December 27, 2016. (R., pp. 1054-1062). An order dismissing that appeal was issued by the district court on April 5, 2017, citing the application of law of case principles and *res judicata*. (R., pp. 1142-45). A notice of appeal to the Idaho Supreme Court was timely filed May 2, 2017 (R., pp. 1146-1154).

On June 29, 2017, an order was issued by the Idaho Supreme Court consolidating these two appeals, in which the issues raised are now addressed by this Appellant's Opening Brief. On September 7, 2017 the Court granted Appellant's Motion to take judicial Notice of the record on appeal in *Smith v. Smith*, 131 Idaho 800, 964 P.2d 667 (Ct.App.1998) (*Smith II*).

C. STATEMENT OF FACTS

The decision of the Idaho Court of Appeals in *Smith v. Smith*, 131 Idaho 800, 964 P.2d 667 (Ct.App.1998) (*Smith II*) had affirmed the November 5, 1996 McDevitt Order Granting Plaintiff's Motion To Renew, as directed to the first requested renewal of the 1991 divorce judgment. Justice McDevitt, who had assigned himself to serve as a district court judge pro tem in the *Smith II* proceedings, had specifically requested at the top of page 3 of that 1996 order that

"Counsel for plaintiff shall present a form of Judgment in this matter."

(R., pg. 305).[3] That requested judgment was never presented, signed, filed, or recorded. Nor was the 1996 McDevitt Order granting Plaintiff's motion to renew, itself, ever recorded. The significance of these facts is that no lien was created as a result of the 1996 attempted judgment renewal. The first page of the McDevitt Order itself had contained the following declaration:

> **"Defendant acknowledges that plaintiff recorded the February 11, 1991 judgment, with the Ada County Recorder's Office."**

(R., pg. 305). Based upon the absence of any recorded judgment arising out of the 1996 McDevitt Order, the original 1991 divorce judgment lien had expired on February 11, 1996. Although the motion underlying the 1996 McDevitt Order was timely filed with the magistrate court before the 1991 judgment lien expired, there was no renewal judgment, and there was then no renewed judgment lien ever created pursuant to the 1996 McDevitt Order, which also was never recorded with the recorder's office.

Because a motion for judgment renewal must be brought "prior to the expiration of the lien created by section 10-1110, Idaho Code, **or any renewal thereof**" (emphasis added), no renewal lien was ever created, and therefore never existed, much less then able to expire. No motion to renew the divorce judgment could have been brought within the statutorily-dictated terms of I.C.

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[3] The Supreme Court's Order, by which Chief Justice McDevitt appointed himself a *pro tem* district judge in this matter is at pg. 30 in the *Smith II* record, of which this Court has taken judicial notice. Justice McDevitt's appointment as a "district judge" in *Smith II* potentially raised some of the same questions concerning the scope of the magistrate's statutory jurisdiction to renew a judgment, as have been raised on this appeal. Raising those questions does not go so far as to invalidate the divorce itself, as Judge Walker suggested, (R., pg. 841, fn. 2), the magistrate's jurisdiction to act in certain specific respects can be challenged without attacking the dissolution of the marriage itself. *See e.g.*, *Wood v. Wood*, 100 Idaho 387, 389, 597 P.2d 1077, 1079 (1979).

§ 10-1111(1) in 2001, 2006, 2011, or 2016, "prior to the expiration of the lien created by section 10-1110, Idaho Code, **or any renewal thereof**" (emphasis added), as the original judgment and judgment lien was never renewed, and had expired on February 11, 1996, and no renewal lien had ever thereafter been timely created under the terms of the statute. Therefore, all subsequent renewals granted by the magistrate court were void and meaningless.

The Idaho Legislature, in the exercise of its constitutional authority to determine the jurisdiction of inferior courts, including the jurisdiction of magistrate courts to renew divorce money and child support judgments, had set a five year interval, based upon the expiration of the underlying judicial lien. Ida. Const. Art. V, § 2. If that judgment lien had not been created, or had otherwise expired, there existed no statutory authority to renew the judgment under the renewal statute. The last valid judgment lien in respect to the 1991 divorce judgment, expired over 21 years ago by February 12, 1996. In ordering the renewal of judgments in excess of the statutory authority granted and provided by I.C. § 10-1111(1), the magistrate court exceeded its subject matter jurisdiction and statutory authority, and the resulting orders and judgments are and remain void and unenforceable. Void judgments have no *res judicata* effect, as addressed below in the argument section within this Opening Brief.

This same essential fact pattern arose with respect to the child support judgment, but with one subtle twist, in respect to child support, as the Idaho Judgment lien statute *only applies* to child support judgments when "making provision for installment or periodic payment." I.C. § 10-1110. The 1999 child support judgment in this case was for one lump combined sum. The parties' only

child, [redacted] was born [redacted] and any judgment for child support, by statute, could only be enforced on his behalf until he reached his 23rd birthday on [redacted] During the period of 1995 to 2011 there was no provision in Idaho law for the renewal of child support judgments. A lump-sum judgment for child support in this proceeding was entered on January 8, 1999 (R., pp. 317-18). Notwithstanding the absence of any authority for the renewal of child support judgments, that judgment was "renewed" by the magistrate in 2004 (R., pp. 337-38), again in 2009 (R., pp. 349-350), and then most recently in 2014 (R., pp. 365-66).

D. STANDARD OF REVIEW

When an appellate court reviews a decision arising from summary judgment proceedings, it employs the same standard as that used by the district court. *Farmers National Bank v. Green River Dairy, LLC*, 155 Idaho 853, 318 P3d 622 (2014); *Cnty. of Boise v. Idaho Cntys. Risk Mgmt. Program, Underwriters*, 151 Idaho 901, 904, 265 P.3d 514, 517 (2011). Summary judgment is proper only when there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The party moving for summary judgment carries the burden to establish there is no genuine issue of material fact. *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct.App.1992). *See also Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999). This burden may be met by establishing the absence of evidence on any element the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct.App.1994). "Summary judgment dismissal of a claim is appropriate where the plaintiff fails to submit evidence to establish an

essential element of the claim." *Nelson v. City of Rupert*, 128 Idaho 199, 202, 911 P.2d 1111, 1114 (1996). *See also Aardema v. U.S. Dairy Sys., Inc.*, 147 Idaho 785, 793, 215 P.3d 505, 513 (2009).

Because this appeal primarily presents questions of law concerning statutory interpretation, as to the application of Idaho's judgment renewal statutes, the standard is one of free review for the court to decide concerning questions of law, as recently stated and summarized in *Hoffer v. Shappard*, 160 Idaho 868, 380 P.3d 681 (2016):

> "The objective of statutory interpretation is to give effect to legislative intent." *State v. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). "When interpreting a statute, the Court begins with the literal words of the statute. . . ." *Williams v. Blue Cross of Idaho*, 151 Idaho 515, 521, 260 P.3d 1186, 1192 (2011). "If the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect. . . ." *Idaho Youth Ranch, Inc. v. Ada Cnty. Bd. of Equalization*, 157 Idaho 180, 184-85, 335 P.3d 25, 29-30 (2014) (internal quotations omitted) (quoting *St. Luke's Reg' l Med. Ctr., Ltd. v. Bd. of Comm's of Ada Cnty.*, 146 Idaho 753, 755, 203 P.3d 683, 685 (2009)). This Court does not have the authority to modify an unambiguous legislative enactment. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 895, 265 P.3d 502, 508 (2011) (quoting *Berry v. Koehler*, 84 Idaho 170, 177, 369 P.2d 1010, 1013 (1962)). 160 Idaho at 882, 380 P.3d at 695.

The interpretation and application of a statute presents a question of law over which a court exercises free review. *Grazer v. Jones*, 154 Idaho 58, 63-64, 294 P.3d 184, 189-190 (2013). Subject matter jurisdiction is the power of a court to determine cases over a general type or class of dispute, *Bach v. Miller*, 144 Idaho 142, 145, 158 P.3d 305, 308 (2007); statutes which set specific time frames during which a court may act are procedural in nature, and do not affect loss of subject matter jurisdiction, but instead set standards for the court's exercise of its statutorily-

granted authority. *State v. Jensen*, 149 Idaho 758, 762, 241 P.3d 1, 5 (Ct.App.2010); *State v. Armstrong*, 146 Idaho 372, 375, 195 P.3d 731, 734 (Ct.App.2008); and *Cole v. State*, 135 Idaho 107, 110, 15 P.3d 820, 823 (2000). The judgment renewal statutes have been so-construed as in the nature of statutes of limitation. *Grazer v. Jones*, 154 Idaho 58, 67, 294 P.3d 184, 193 (2013); *Stonecipher v. Stonecipher*, 131 Idaho 731, 733, 963 P.2d 1168, 1170 (1998); and *Smith v. Smith*, 131 Idaho 800, 802, 964 P.2d 667, 669 (Ct.App.1998) (*Smith II*).

Also, as stated in *Workman v. Rich*, 44701, (Court of Appeals, August 31, 2017):

> "For an appeal from the district court, sitting in its appellate capacity over a case from the magistrate division, this Court's standard of review is the same as expressed by the Idaho Supreme Court. The Supreme Court reviews the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *State v. Korn,* 148 Idaho 413, 415, 224 P.3d 480, 482 (2009). If those findings are so supported and the conclusions follow therefrom, and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. Id. Thus, the appellate courts do not review the decision of the magistrate. *State v. Trusdall,* 155 Idaho 965, 968, 318 P.3d 955, 958 (Ct. App. 2014). Rather, we are procedurally bound to affirm or reverse the decision of the district court. Id."

Also as stated in *Veenstra v. Veenstra,* 40683 (Court of Appeals, February 7, 2014):

> "On review of a decision of the district court, rendered in its appellate capacity, we examine the record from the magistrate court to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *Losser v. Bradstreet,* 145 Idaho 670, 672, 183 P.3d 758, 760 (2008); State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008). If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. *Losser,* 145 Idaho at 672, 183 P.3d at 760. Thus, this Court does not directly review the decision of the magistrate court. *Bailey v. Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012). Rather, we are procedurally bound to affirm or reverse the

decisions of the district court. Id. Over questions of law, including statutory interpretation, we exercise free review. *Fields v. State*, 149 Idaho 399, 400, 234 P.3d 723, 724 (2010); *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Downing v. State*, 136 Idaho 367, 370, 33 P.3d 841, 844 (Ct. App. 2001)."

Also as stated in *Peterson v. Peterson*, 156 Idaho 85, 320 P. 3d, 1244 (2014):

"In an appeal from a judgment of the district court acting in its appellate capacity over a case appealed to it from the magistrate court, we review the judgment of the district court. We exercise free review over the issues of law decided by the district court to determine whether it correctly stated and applied the applicable law." *State Dep't of Health and Welfare v. Slane,* 155 Idaho 274, 277, 311 P.3d 286, 289 (2013) (citations omitted)."

II.
ISSUES PRESENTED ON APPEAL

1. Did the district court err in holding that the issues raised on this appeal were barred by the doctrines of res judicata?

2. Did the Respondent's failure to record a judgment arising out of the 1996 McDevitt Order Granting Plaintiff's Motion To Renew result in all subsequent attempts to renew that 1991 divorce judgment being void?

3. Because all child support judgments entered between 1995 and 2011 were non-renewable as a matter of law, were the Respondent's attempted renewals of the 1999 child support judgment in this case simply void?

4. Does a magistrate court's renewal of a money judgment after the five year statutory period for the renewal of such judgments has elapsed, constitute a "taking" of private property in violation of the United States Constitution?

III.

ARGUMENT

A. The Claims Of The Appellant Smith Are Not Barred By *Res Judicata*

As a threshold issue presented within this appeal, the Court must first address the question whether the issues raised are barred by the doctrine of *res judicata*. In a very short and conclusory decision that provided little rationale for the result reached, the district court on intermediate appeal, affirmed the decision of the magistrate by application of the doctrine of *res judicata*. (R., pp. 1117-1124).

Both the magistrate, and district court on appeal, relied upon the belief the renewal judgments at issue had largely been allowed to go forward without objection from Appellant. The application of *res judicata* depends upon a full and fair opportunity to litigate the issues that are ripe. *Bach v. Bagley*, 148 Idaho 784, 795, 229 P.3d 1146, 1157 (2010). At the core of the issues raised in this appeal is the argument the magistrate lacked statutorily-granted authority to renewed judgments in violation of the statutory authority, lacking jurisdiction. A judgment entered without statutory authority/jurisdiction is void and can have no *res judicata* effect. Issues going to the subject matter jurisdiction/statutory authority are never waived and can be raised at any time, including for the first time on appeal. *State v. Miller*, 151 Idaho 828, 832, 264 P.3d 935, 939 (2011); *State v. Jones*, 140 Idaho 755, 101 P. 3d 699 (2004).

The question of the validity of these subsequent renewal judgments and the *res judicata* effect to be accorded those judgments, is closely interrelated with the unresolved question concerning the ultimate characterization of 1996 McDevitt Order Granting Plaintiff's Motion To Renew, that arose out of the *Smith II* appeal, and the cascade-effect which the 1996 McDevitt

Order had on all subsequent attempted renewals of the 1991 divorce judgment. The essential focal point of this question is the failure of the 1996 McDevitt Order to produce a renewal judgment at all, one that could then be recorded to create the necessary judgment lien under the required standards of the renewal statutes, upon which any subsequent renewal judgment had to be based. In the absence of that outcome, all subsequent attempted renewals arising out of the 1991 divorce judgment were rendered ineffective and void.

As noted in the Statement Of The Proceedings Below, on September 7, 2017 this Court granted Appellant's motion to take judicial notice of the appellate record, including the briefs, and post-hearing requests for reconsideration and rehearing, in *Smith II* so that the full character of the issues that were actually raised and decided in that proceeding, and those issues that could have been raised and decided in that proceeding, could be fully determined on this appeal concerning the *res judicata* question. The bar of res judicata applies to those issues that could have been raised in earlier litigation. *See e.g.*, *Kootenai Electric Cooperative v. Lamar Corp.*, 148 Idaho 116, 120, 219 P.3d 440, 444 (2009) ("... this Court has interpreted claim preclusion to hinge on whether the matter 'might and should have been litigated in the first suit.'").

Appellant's argument here is that the issues that are raised and presented in this appeal are not barred by *res judicata* as arising out of the Idaho Court of Appeal's 1998 decision in *Smith II*, nor as arising out of the decision of *Smith II*, and then affecting those subsequent attempted renewals, because none of the issues presented in this appeal were ripe for adjudication at the time *Smith II* was presented, argued, and decided by the Idaho Court of Appeals. Nor has there been

any full and fair opportunity to litigate those questions within the decision of *Smith II.*

At the time *Smith II* was decided on May 12, 1998, there remained unresolved the question if there was ever going to be a valid renewal judgment filed with the magistrate court, and then would it be recorded, from which the judgment would be extended for a five year period to 2001. That never occurred. On November 5, 1996 Justice McDevitt, sitting as pro tem district judge, had issued the order granting the Plaintiff's motion to renew the 1991 divorce judgment, and within that Order was the following directive:

Counsel for plaintiff shall present a form of Judgment in this matter.

(R., pg. 305). That requested judgment was never presented, signed, filed, and therefore, never recorded. Nor was the McDevitt Order, itself, ever recorded. At this date we have the benefit of the Court's decision in *Grazer v. Jones*, 154 Idaho 58, 66, 294 P.3d 184, 192 (2013) informing us that any renewal – whether of the McDevitt Order, if that Order was sufficient to be recorded on its face, or alternatively, the judgment that was to have been submitted – should then have related back to the November 5, 1996 date of the McDevitt Order, for purposes of calculating the five year judgment renewal and judgment lien renewal, as that is critical for purposes of determining the period of the resulting judgment lien from recording the renewed judgment.

The absence of a valid recorded judgment – as arising out of the 1996 McDevitt Order – which in turn failed to create a valid judgment lien upon which the 2001 renewal of the "1991" divorce judgment could be based, **is the triggering event** upon which all of the issues that have been raised in this appeal are based, concerning the invalidity of the subsequent alleged renewals

of the 1991 divorce judgment, as attempted in 2001, 2005, 2011, and 2016.

As a consequence of the failure to create a valid judgment lien arising out of the 1996 McDevitt Order, all of those attempted renewals were void. Generally, judgments rendered in excess of jurisdiction/statutory authority are considered "void judgments." *See e.g., Jim & Maryann Plane Family Trust v. Skinner*, 157 Idaho 927, 933, 342 P.3d 639, 645 (2015) (stating that the court narrowly construes what constitutes a "void judgment" and stating the three circumstances in which a judgment will be found to be void due to lack of personal jurisdiction, subject matter jurisdiction, or a judgment is entered in violation of due process because a party was not given notice and an opportunity to be heard).

A void judgment cannot have *res judicata* effect. *Berry v. Chitwood*, 362 S.W.2d 515, 517 (Mo. 1962) (a void judgment is not *res judicata*); *Rochin v. Pat Johnson Manufacturing Co.*, 67 Cal.App.4th 1228, 1239-40 (Cal.Ct.App. 1998) ("The doctrine of *res judicata* is inapplicable to void judgments."); *Greisel v. Gregg*, 733 So.3d 1119, 1121 (Fla. 5th DCA 1999) (The entry of a final judgment does not constitute *res judicata* since a void judgment is a legal nullity.); *Maroney v. Bowman* (*In re Maroney*), 195 B.R. 452, 454-455 (Bankr.D.Ariz.1996) (holding that a void judgment cannot be the basis for *res judicata*); *Matsushima v. Rego*, 696 P.2d 843, 845 (Haw. 1985) (a void judgment is not entitled to res judicata effect); *People v. Kidd*, 398 Ill. 405, 75 N.E.2d 851, 854 (1947) (Under Illinois law, a void judgment has no *res judicata* effect.).

The Texas Court of Appeals, in *Boyd v. Gillman Film Corp.*, 447 S.W.2d 759 (Tex.Civ.App. 1969), addressed the related question of the entry of a "void judgment," which void

judgment had not been first challenged by a direct appeal. The Texas Court reasoned as follows:

> The idea that a dead judgment may be revived by mere inaction to perfect appeal or writ of error is contrary to the very basic concept of void judgments. 'Although a void judgment may be attacked directly, as well as collaterally, there is no necessity for doing so; it need not be vacated or set aside; it may be simply ignored. And when some right is asserted under the judgment, its invalidity may be pointed out by anyone in any kind of proceeding, in any court, and at any time.' 34 Tex.Jur.2d, § 260, p. 170, and cases cited. . . .

447 S.W.2d at 763. *See also*, *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 672 (Tex.App.2001) (noting that failure to appeal does not eliminate other means of attacking a void judgment); and *Lawrence Systems, Inc. By and Through Douglas-Guardian Warehouse Corp.*, 880 S.W.2d 203, 211-12 (Tex. App.1994) (noting that failure to appeal does not eliminate other means of attacking a void judgment). A lapsed or dead money judgment is "void," and involves a judgment that once was valid and enforceable, but is now no longer effective for any purpose due to lapse of time.[4] The essential principle set out by the Texas Courts still applies in either situation. That principle is simply this: The mere failure to appeal the entry of what is otherwise an "unenforceable judgment,"

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[4] For example, the U.S. District Court for Hawaii in *Juneau Spruce Corp. v. International Longshoremen's & Warehousemen's Union*, 128 F.Supp. 697 (D.Haw.1955) noted one possible classification of judgments:

> The judgment debtor would put judgments in three categories: (1) '**live**', where time in the jurisdiction of rendition has not run as to the judgment or writ of execution; (2) '**dormant**', where the time in the jurisdiction of rendition has run as to the writ of execution but not as to the judgment; and (3) '**dead**', where time in the jurisdiction of rendition has run as to both the writ of execution and the judgment. The judgment debtor contends that 28 U.S.C. § 1963 can be used only to register 'live' judgments.

128 F.Supp. at 701 (emphasis added).

does not have the effect of reviving or resurrecting that judgment, or by any means breathing new life into that judgment. An otherwise void or unenforceable judgment remains a void and unenforceable judgment for all purposes.

The general rule in Idaho as to void judgments is that relief from a void judgment is not discretionary. *McClure Engineering, Inc., v. Channel 5 KIDA*, 143 Idaho 950, 953, 155 P.3d 1189, 1192 (Ct.App.2006). A void judgment can be attacked at any time by any person adversely affected by it. *Cuevas v. Barraza*, 152 Idaho 890, 894, 277 P.3d 337, 341 (2012). No reason can be readily discerned why the basis for relief should be any different for the entry of relief from any order made upon a "dead judgment" that is no longer subject to enforcement due to the lapse of time, and no recorded judgment lien from which to renew.

All of these questions and issues remained prospective when *Smith II* was on appeal, and were not yet ripe for adjudication at the time the decision in *Smith II* was handed down on May 12, 1998. Relying upon the November 6, 1996 date of the McDevitt Order, which was the date upon which the November 5, 2001 renewal (R. pg. 360), the November 13, 2006 renewal (R., pg. 361), the November 5, 2011 renewal (R., pg. 363) and the 2016 Renewal of the 1991 divorce judgments were all subsequently based in this matter. Each of those renewal judgments constitutes a single link in this "daisy chain" of five year renewal judgments provided by the Idaho Legislature, the validity of each being dependent upon the validity of the prior renewal judgment. If there is any break in that daisy chain of five year renewal judgments, in which one is invalid, or non-existent, then the judgment "dies," and no subsequent attempt at renewal of the prior judgment

can be undertaken.

In this respect, a failure to record a renewal judgment arising under the 1996 McDevitt Order, or even the 1996 McDevitt Order itself, would render ineffective all attempts to later renew the 1991 divorce judgment as that 1991 divorce judgment could no longer be enforced after February 11, 1996, and no renewed judgment, no recorded renewed judgment, and the McDevitt Order was never recorded as well. As the Court declared in *Grazer v. Jones*, 154 Idaho 58, 69, 294 P.3d 184, 195 (2013) ("Idaho Code section 10-1111(1) does not allow for sua sponte renewal. Moreover, only the . . . court that entered the judgment can renew it. Finally, in order to obtain a lien based on the renewed judgment, **it must be re-filed and re-recorded**. We are not at liberty to ignore these requirements, and neither is Grazer." (Emphasis added)).

Respondent's failure to file and then record a judgment under the 1996 McDevitt Order was fatal to every renewal attempted thereafter in 2001, 2006, 2011, and in 2016. The 1991 divorce judgment was dead and could no longer be enforced. At any time between the date *Smith II* was handed down on May 12, 1998 and the date McDevitt Order would have finally expired on November 5, 2001 (never recorded), the Respondent could have submitted a Renewal Judgment to preserve the life of the divorce judgment, subject to any defenses that may have developed following the filing of such a judgment pursuant to the McDevitt Order, in the event it was found to be insufficient on its face. Arguably, at any time during the 1,273 days between the date of the *Smith II* decision and November 5, 2001, a fully compliant Renewed Judgment could have been presented, signed, filed and recorded, for purposes of creating a renewed judgment and a judgment

lien, from which a new date would have been established in the daisy renewal chain, and met the renewal statute requirements.

Those events never occurred. Therefore, statutory renewal under the 1996 McDevitt Order was ineffective and void, and the 1991 divorce judgment expired, was extinguished and was rendered dead and of no further effect after November 5, 2001. That determination could not have been made until November 6, 2001, and therefore could not have been determined at time of *Smith II*, as decided on May 12, 1998, those issues not being ripe for adjudication at that time. *Pocatello Hosp., LLC v. Quail Ridge Medical Investor, LLC*, 157 Idaho 732, 740-41, 339 P.3d 1136, 1144-45 (2014); *Bell Rapids Mut. Irr. Co. v. Hausner*, 126 Idaho 752, 753-54, 890 P.2d 338, 339-340 (1995); and *Duthie v. Lewiston Gun Club*, 104 Idaho 751, 754, 663 P.2d 287, 290 (1983). Nor was there need to litigate that question in any of the subsequent renewal proceedings, with the outcome of each subsequent renewals resulting in a void judgment, as there was never a judicially entered, signed, filed and then recorded renewed judgment, as required by the McDevitt Order. As fully cited above, a void judgment cannot be accorded *res judicata* effect.

For all the reasons stated above, the doctrine of *res judicata* should not bar Appellant's claims as made on this appeal regarding these void judgments.

B. <u>A Money Judgment Can Only Be Renewed Under I.C. §10-1111(1) After A Judicial Lien Has Been Established For That Money Judgment In Compliance With All The Requirements of I.C. §10-1110</u>

No creditor who obtains an Idaho money judgment is ever compelled to renew that judgment. As provided by Civil Rule 69, within the five year period permitted by I.C. §11-101, a

writ of execution can be issued for the face amount of the judgment, or upon an affidavit of the party or the party's attorney that verifies the computation of the amount which is due under the judgment, and enforce the collection of that money judgment. Both I.C. §10-1110 and §10-1111(1) by those statutes' respectively, the use of the word "may" make permissive a judgment creditor's decision to record any judgment, and as a result of undertaking that action, thereby may obtain a judgment lien. A direct consequence of obtaining a judgment lien is that the judgment becomes renewable, and can be enforced for an additional period of time, as permitted by the terms of those statutes. In the absence of a lien, the judgment cannot be renewed, and the only other way to restore its life is to revive it under I.C. §5-215.

Well over a century ago in the Idaho Supreme Court's decision in *Bashor v. Beloit*, 20 Idaho 592, 119 P. 55 (1911) the Court described the single statutory method then-available, by which a "money judgment" could be "revived" after the expiration of the five year period for execution upon that judgment that is provided by I.C. §11-101:

> Under the provisions of our statutes there is **one method** for keeping a judgment for the recovery of money alive, and that is by action on the judgment [I.C. §5-215]; and there are **two methods** of keeping other judgments alive, one of which is by action on the judgment [I.C. §5-215], and the other by proceedings under the provisions of section 4474 [I.C. §11-105].

20 Idaho at 600, 119 P. 58 (Emphasis and bracketed references to current Idaho statutes, added).[5]

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[5] At the present there are at least three potential avenues upon which a judgment can be "revived" once the statutory execution period has expired, and the judgment has not been renewed, as provided by I.C. §§10-1110 and 10-1111. First, within six years of the date of the judgment [eleven years after 7/1/15] an action may be brought upon the judgment under I.C. §5-215. This means has existed since 1881, and strictly speaking is not a revival of the existing

The language chosen by the Idaho Legislature for the renewal of judgments in I.C. §10-1111, as interpreted by the Court in *Grazer v. Jones*, establishes a framework for judgment renewal in Idaho that requires the ***recording of judgments*** as a condition precedent to their renewal:

> This lien expires five years after the underlying judgment's entry. *Id.* However, the judgment lienor **may file a motion** to renew the judgment in "the court which entered the judgment" (*i.e.* the sister-state court or federal court), and **then file and record the renewed judgment in Idaho**. **I.C. § 10-1111(1)**; *see also Kopfman*, 226 P.3d at 1074 (under analogous statutory scheme, foreign judgment must be renewed in rendering state before it can be re-filed in forum state). **Under Idaho's renewal statute**, for non-child-support judgments, **the motion to renew must be made within five years of the date of the judgment, and renewal prolongs the lien for an additional five years from the date of the renewed judgment**. **I.C. §10-1111(1)**. However, nothing in Title 10 of the Idaho Code precludes a foreign-judgment creditor from renewing the judgment pursuant to the law of the rendering state. 154 Idaho at 65, 294 P.3d at 191 (emphasis added).

The highlighted language from this passage in the Court's decision cites to §10-1111(1), which is the Idaho Judgment Renewal statute, but what is apparent and is highly significant from

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judgment, since it has been characterized as a new and separate action on the debt represented by the prior judgment. *G & R Petroleum, Inc. v. Clements*, 127 Idaho 119, 122 n.4, 898 P.2d 50, 53 n. 4 (1995). In the past, because this six year period exceeded the five year judgment execution period by one year, I.C. §5-215 presented a useful potential alternative by which to "revive" a judgment. This same one year opportunity to revive a judgment will still exist under the extended period of ten years in which to execute upon a judgment, and the corresponding eleven year period in which to "revive" a judgment under I.C. §5-215. Second, because the judgment at issue on this appeal is a "money judgment," it falls outside the scope of those judgments that might otherwise be "further enforced" by making a motion under I.C. §11-105, which statute expressly excepts "money judgments" from its operation ("In all cases other than for the recovery of money . . . ." (emphasis added)). Finally, the Court in *Collection Bureau, Inc. v. Dorsey*, 150 Idaho 695, 699, 249 P.3d 1150, 1154 (2011) reaffirmed an earlier holding that I.C. § 5-238, (acknowledgment of a debt), **does apply to judgments**. Such an acknowledgment of a judgment debt, when in compliance with the requirements of §5-238, therefore could be the functional equivalent of a renewal/revival/restoration of that judgment.

the Court's reasoning is that the judgment renewal process under this statute can only be completed ***by the recording of the renewed judgment*** "in the same manner as the original judgment," which declaration in itself can only mean that the original judgment must be recorded in order for the first sentence of I.C. §10-1111(1) to have any meaning as to any right to renew an original judgment, just as the renewed judgment must likewise be recorded if that judgment is to be subsequently renewed.

The general Idaho Judgment Renewal Statute, as now codified within subsection (1) of I.C. §10-1111, contains a series of legislatively-declared conditions precedent to submitting a validly-filed motion for the renewal of a money judgment. Because the Idaho Legislature has the constitutional authority under Article V, §2 of the Idaho Constitution to determine "The jurisdiction of such inferior courts," including Idaho's magistrate courts, those courts are not free to ignore these legislatively-imposed limits on the grant of money judgment renewals. Therefore, either the mere failure to object to an invalid motion under I.C. §10-1111(1), or the failure to appeal a grant of a renewal motion made in excess of the legislative grant, cannot function to actually renew a money judgment that exceeds this legislative grant. *Boyd v. Gillman Film Corp.*, 447 S.W.2d 759, 763 (Tex.Civ.App.1969).

There are at least ten separately identifiable substantive conditions that must be established as either existing, or that must be satisfied as a condition prior to filing a motion to renew a money judgment under I.C. §10-1111(1). In the form of a list, these ten conditions consist of the following:

1. Any motion for the renewal of a money judgment must be made to **the court that entered that money judgment** (I.C. §10-1111(1)) (here, **the magistrate court** which granted the divorce and entered the money judgment); and,

2. The judgment to be renewed **must not have been satisfied** (10-1111(1)); and,

3. The enforcement of the judgment **must not have been stayed** as provided by law (10-1110); and,

4. The judgment to be renewed must have been **certified by the court clerk** (10-1110); and,

5. In order for a renewed judgment to be subject to subsequent five year renewal that judgment **must be recorded with the county recorder** (10-1110); and,

6. Any judgment, or renewed judgment, "**so recorded becomes a lien** upon all real property of the judgment debtor in the county, not exempt from execution, owned by him at the time or acquired afterwards at any time prior to the expiration of the lien" (10-1110); and,

7. The lien established by recording the judgment, or renewed judgment, continues for five (5) years **from the date of the renewed judgment** (10-1111(1)); and,

8. The judgment to be renewed must indicate each of the following **required elements** (10-1110):

   - The title of the Court;
   - The cause and number of action;
   - The names of judgment creditors and debtors;
   - The time of entry;
   - The **amount of judgment**; and,

9. For **an original judgment**, the motion to renew can only be filed **prior to the expiration of the lien** created by section 10-1110 (10-1111(1)); and,

10. For a **previously renewed judgment**, the motion to renew can only be filed **prior to the expiration of the lien created by a previous renewal of the judgment** under section10-1110 (10-1111(1)); and,

These ten conditions are derived from the text of I.C. §10-1111(1), which itself

incorporates provisions of I.C. §10-1110:

> **10-1111. Renewal of judgment – Lien.** – (1) Unless the judgment has been satisfied, at any time prior to the expiration of the lien created by section 10-1110, Idaho Code, or any renewal thereof, the court that entered the judgment, other than a judgment for child support, may, upon motion, renew such judgment. The renewed judgment may be recorded in the same manner as the original judgment, and the lien established thereby shall continue for ten (10) years from the date of the renewed judgment.
>
> . . .

A motion to renew a "money judgment, which has been based upon nothing more than an "order" that never resulted in a "recorded judgment" which never resulted in a lien, and that has been made more than five years after that last recorded judgment that did create a lien, results in a renewed judgment made in excess of the jurisdiction and statutory authority granted by statute under the exercise of the legislative grant to determine the scope of the magistrate court's jurisdiction. Ida. Const. Art. V, § 2. ("The jurisdiction of such inferior courts shall be as prescribed by the legislature.") *See e.g.*, *Rammell v. Idaho State Dept. of Agric.*, 147 Idaho 415, 424, 210 P.3d 523, 532 (2009) ("The inferior courts established by the legislature are the Court of Appeals and the magistrate's division of the district court."); and *State v. Flores*, 162 Idaho 298, 302, 396 P.3d 1180, 1184 (2017) ("[T]he sentencing court has only the authority granted by the legislature. [citation omitted] Idaho Const. art. V, § 2 ('The jurisdiction of such inferior courts shall be as prescribed by the legislature.').").

In 1955 the Idaho Legislature amended I.C. §10-1110 to add the discrete list of elements which an abstract or transcript of judgment must include in order for that judgment – and the corresponding lien – must include to be valid under the statute. *See*, Chapter 45 Laws of 1955, §1

at pg. 64 declaring:

> The transcript or abstract above mentioned shall contain the title of the Court and cause and number of action, names of judgment creditors and debtors, time of entry, where entered in judgment book and amount of judgment.

Twin Falls County. v. Idaho Comm'n on Redistricting, 152 Idaho 346, 349, 271 P.3d 1202, 1205 (2012) (The word "shall" when used in a statute is to be construed as mandatory).

In 1998 the Idaho Supreme Court, in performing its constitutional "defects in the law," duty, requested that the, "entry in the judgment book," element be deleted as obsolete. *See*, Statement of Purpose to SB 1301, 54th Idaho Legislature, First Session (1998); and Chapter 68 1998 Laws, § 1 at pg. 262.

There has never been any order, nor any judgement, nor any document whatsoever, either within the record on this appeal, nor anyplace else within the public record of this proceeding which reflects the existence of any money judgment that was ever entered for the $200,690.37 amount of the 1991 divorce judgment.

The 1996 McDevitt Order (R., pp. 303-05) on its face was not intended to be a final judgment, instead it expressly requested that such a judgment be presented for filing. The 1996 McDevitt Order is itself silent, and therefore deficient as to the amount of the judgment that is to be renewed.

The January 5, 2016 Affidavit of Respondent's Counsel, listing Exhibits "A" through "K," which represent the various "renewal orders" issued over the course of the years (R., pp. 752-799), are all silent as to the "amount" of the judgment allegedly being renewed.

Likewise, no affidavit ever has been submitted in support of the issuance of any of those alleged renewal orders which declared the amount of the judgment to be renewed. (1996 Aff., R., pg. 286; 2001 Aff., pp. 330-31; 2006 Aff., pp. 341-42; 2011 Aff., R. pp. 353-54). Yet, by statutory requirement a "judgment amount," and an actual recorded judgment which has the effect of creating a "judgment lien," are essential requirements for the use of the statutory judgment renewal process, should the Judgment holder elect not to use the alternative process under I.C.§5-215.

Alternatively, the Legislature could have, by means of nothing more than a direct reference to the right to renew a money judgment at any time, regardless of recording, before the five year period for the issuance of a writ of execution to enforce such a judgment under I.C. §11-101 has expired, provide a simpler process and direct method for the renewal of money judgments in Idaho. This alternative means of money judgment renewal could have been completely unrelated to, and entirely divorced from, any lien that otherwise they required for the renewal of those same money judgments. Such an alternative process does not exist, and the choices for revival/renewal are either file a new action within the sixth year of the judgment to be revived (I.C. §5-215), or properly record the judgment that you then want to renew (I.C. §10-1111).

Forty (40) years ago in 1978, the Legislature made the decision to tie the "renewal" of money judgments to liens, and the "renewal" of judgment liens, as now stated in I.C. §10-1111(1), by reference to, "the expiration of the lien created by section 10-1110, Idaho Code, or any renewal thereof, ..." The Court of Appeals in *Smith II* recognized this fact when it declared, "By its terms, §10-1111 provides for the renewal of judgments, not just judgment liens." 131 Idaho at

802, 964 P.2d at 669. The Idaho Supreme Court in *Grazer v. Jones*, 154 Idaho 58, 294 P.3d 184 (2013) recognized this direct tie-in when it only cited to the judgment renewal statute, I.C. §10-1111(1) when describing the process of lien renewal under Idaho law:

> This lien expires five years after the underlying judgment's entry. *Id.* However, the judgment lienor may file a motion to renew the judgment in "the court which entered the judgment" (*i.e.* the sister-state court or federal court), and **then file and record the renewed judgment in Idaho**. **I.C. §10-1111(1)**; *see also Kopfman*, 226 P.3d at 1074 (under analogous statutory scheme, foreign judgment must be renewed in rendering state before it can be re-filed in forum state). **Under Idaho's renewal statute**, for non-child-support judgments, **the motion to renew must be made within five years of the date of the judgment, and renewal prolongs the lien for an additional five years from the date of the renewed judgment**. **I.C. §10-1111(1)**. However, nothing in Title 10 of the Idaho Code precludes a foreign-judgment creditor from renewing the judgment pursuant to the law of the rendering state. 154 Idaho at 65, 294 P.3d at 191 (emphasis added).

This was the choice the legislature made, and the lower Idaho courts are bound to follow that choice in deciding grants of money judgment renewals. Beginning with Respondent's failure to file and record a judgment following entry of the 1996 McDevitt Order, and continuing with each subsequent renewal thereafter, each of the alleged judgment renewals undertaken in 2001, 2006, 2011, and 2016 is defective and void, and should be declared so and set aside.

C. The Supreme Court's 2015 Curative Order Does Not Apply To The 1996 McDevitt Order

The Supreme Court's 2015 Curative Order does not apply to the 1996 McDevitt Order.

First, the 2015 Curative Order was only intended to apply to those judgments, decrees or orders entered before April 15, 2015 that were intended to be final judgments, but which did not comply with Idaho Rule of Civil Procedure 54(a). Clearly, the 1996 McDevitt Order was never

intended to operate as a final judgment under Rule 54(a) when on its face Justice McDevitt had requested "**Counsel for plaintiff shall present a form of Judgment in this matter.**" *Cf.*, *Lunders v. Lunders*, 2016 WL 2963348 at *2 (Ida. Ct. App., May 23, 2016) (2015 Curative Order does not apply to an interlocutory support order not intended to be final).

Second, The 1996 McDevitt Order – on its face – completely omitted any statement of the relief to which Plaintiff was entitled (primarily, the amount of the judgment) (R., pp. 303-05) an essential element of an appealable Rule 54(a) judgment, "the relief to which a party is entitled."

Third, the 2015 Curative Order was issued for the limited purpose of curing otherwise defective "final judgments" as required by Rule 54(a), but not intended to operate as a substitute for other statutory requirements in which a "judgment" plays a role, such as the renewal of a judgment, or to oust other judicial doctrines which also may apply to a judgment. *See e.g.*, *Lanham v. Lanham*, 160 Idaho 89, 92, 369 P.3d 307, 310 (2016) (Discussing how the 2015 Curative Order does not supersede an application of the law of the case doctrine as based upon an earlier decision in *Wickel v. Chamberlain*, 159 Idaho 532, 363 P.3d 854 (2015)).

No order of the Idaho Supreme Court issued in 2015 was capable of creating a recorded document that simply did not exist, or of inserting onto any existing document information, (the amount of the judgment), which that document did not already contain. Under Idaho's judgment renewal statute, the creation of a lien requires certain actions be taken in addition to the existence of a "final judgment." The 1996 McDevitt Order simply did not meet those additional requirements. That 2015 Curative Order was insufficient to create a judgment lien in 1996, thus

rendering all successive attempts at judgment renewal entirely futile, in addition to those later attempts were also statutorily insufficient.

Ultimately, all of the attempted judgment renewals arising out of the 1991 divorce judgment failed to create a valid judgment lien after February 11, 1996. In the absence of a valid judgment lien, after the original judgment lien had lapsed on February 11, 1996, there was – and is – no basis upon which any valid writ of execution can be issued for the enforcement of that lapsed and void judgment. That divorce judgment can no longer be enforced. It is a dead judgment.

As addressed above, a motion for a renewal judgment must be made "prior to the expiration of the lien created by section 10-1110, . . . or any renewal thereof," if no valid lien exists, or has not been renewed, a valid motion cannot be made, and the judgment cannot be renewed. In the end, the 2015 Curative Order, even if it could have cured the defects of the 1996 McDevitt Order and made it to become a "final judgment," that could not create a judgment lien, as it could not create a "recording" of that document, as required for its lien status, which recording simply did not exist.

D. No Statutory Right To Renew Child Support Judgments Existed In Idaho Between 1995 and 2011

Between July 1, 1995 and March 22, 2011, a period of almost 16 years, there was no provision within Idaho law that permitted the renewal of child support judgments. I.C. §§5-245 and 10-1110; *Peterson v. Peterson*, 156 Idaho 85, 86, 320 P.3d 1244, 1245 (2014); and *Thomas v. Worthington*, 132 Idaho 825, 829, 979 P.2d 1183, 1187 (1999). Since the amendment of I.C. §5-

245 in 2011, child support judgments can now be renewed on the same basis as any other money judgment. *See*, Chapter 104 of the Laws of 2011, § 3 at pg. 268; I.C. § 10-1111(2). The parties to this appeal had one child, [redacted] who was born in [redacted] (R., pg. 32).

On January 8, 1999, judgments for both child support, in the amount of $25,280.16, and for spousal maintenance, in the amount of $9,490.00, were entered in one document in favor of Respondent, and against Appellant. (R., pp. 317-18). The child support portion of this judgment could be enforced for a period up to five years after the parties' child reached the age of majority, being until the age 23 which occurred [redacted] under the then-prevailing provision of I.C. § 5-245.

The child support portion of the January 8, 1999 money judgment was never enforced prior to the date that [redacted] reached the age of 23 on [redacted] Instead, a motion for a five-year renewal, supported by an affidavit, was submitted to the court in 2004 (R., pp. 333-36), as followed by an order granting the motion to renew on January 12, 2004 (R., pp. 337-38). A similar motion with supporting affidavit was subsequently made in 2009 (R., pp. 345-48), as followed by an order granting the motion to renew on January 13, 2009 (R., pp. 349-350). The same occurred in 2014, motion & affidavit (R., pp. 365-68), and then an order was entered on January 14, 2014 (R., pp. 369-370). The magistrate court acknowledged the law at the time did not permit the renewal of the child support judgments, and that the judgment as renewed was combined with spousal support, but *reasoned that a failure to appeal at the time, waived those objections.* February 25, 2016 Memorandum Decision Denying Motion For Summary Judgment

at pp. 11-12 (R., pp. 844-45). The same arguments already made above at pp. 21-25, as to void judgments in respect to the 1991 divorce judgment, are incorporated by reference here in reference to this alleged renewal of a non-renewable 1999 child support judgment.

The Idaho Supreme Court in *Thomas v. Worthington*, 132 Idaho 825, 979 P.2d 1183 (1999) had addressed this very question concerning the inability to renew a child support judgment under Idaho law as it existed at the time that applied to the alleged renewals which are at issue on this appeal:

> Legislative history also supports our determination that Kathy's complaint was not an "action or proceeding" under I.C. § 5-245. The purpose behind I.C. § 5-245, as this Court noted in *Stonecipher*, was to remove the need for child support judgments to be renewed. The legislature, when writing I.C. § 5-245, intended to extend the viability of judgments and thus increased the term of the judgment to a child's twenty-third birthday. *Stonecipher*, 131 Idaho at 735 & n. 2, 963 P.2d at 1172 & n. 2. Therefore, an action or proceeding to collect would necessarily mean something beyond filing a complaint to renew judgment because the legislature intended that I.C. § 5-245 remove the need to do that very thing. Therefore, when Kathy unnecessarily attempted to renew her judgment and did not collect on the judgment before her children turned twenty-three, she did not commence "an action or proceeding" to collect back child support under I.C. § 5-245.
>
> In sum, we hold that the district judge incorrectly interpreted I.C. § 5-245 to include a complaint for renewal of judgment for past child support arrearages as an action or proceeding to collect past child support obligations. Accordingly, Kathy's November 5, 1997 attempt at execution was not within the statute of limitations. We therefore reverse the district judge's denial of Robert's motions. 132 Idaho at 829, 979 P.2d 1187.

The Court in *Worthington* specifically held that an action to renew a child support judgment was not a recognized action or proceeding under the Idaho law applicable in that case, which holding also governs the decision of this appeal. Yet in this matter the magistrate upheld the

validity of such child support renewal orders, even in the absence of any statutory authority to permit such renewal orders, merely because Vernon K. Smith, Jr. had failed to contest the grant of those renewal judgments by means of an appeal. In short, in circumstances where the Idaho Legislature had specifically declared that the enforcement of child support judgments was to be limited to a period of no more than 23 years at its greatest extent – without any right of renewal of those judgments – a magistrate simply declared that such child support judgment renewals will nonetheless occur, and then be perpetuated, on the same basis as any other money judgment, for no other reason than a failure to contest the entry of the illegal renewal by an appeal at the time it was first ordered! For that to take place would mean the very statutory prohibition enacted by the Legislature is undermined by a non-required procedure of appeal! The magistrate is essentially saying that a child support judgment can be renewed by a magistrate in direct contradiction to the statute which the legislature specifically declared will not take place. The only basis from which the magistrate is conferred with the jurisdictional and statutory authority is the statutes enacted by the Legislature, and this magistrate has elected to do what the statute said would not take place.

The mere decision of Vernon K. Smith Jr., not to appeal a void renewal of that 1999 child support judgment, taking place in 2004, 2009, and again in 2014, had no more effect of reviving that 1999 judgment, than the failure to otherwise appeal the entry of any other "void judgment", as you cannot revive such a void judgment. *Boyd v. Gillman Film Corp.*, 447 S.W.2d 759, 763 (Tex.Civ.App.1969).

As noted in the Statement of Facts, there is one additional subtle twist with respect to the

creation of a judgment lien for child support judgments under the specific terms of I.C. §10-1110. Since amended in 1955, the judgment lien statute, I.C. §10-1110, which is incorporated by reference into both subsections of the judgment renewal statute, I.C. §10-1111(1) & (2), provides that child or spousal support payments shall only be a lien in an amount for such payments when those payments are stated in terms of an installment or periodic payment for such support. Here, the 1999 child support judgment was ordered in a lump sum. Apparently Idaho follows the statutory construction rule of *inclusio unius est alterius* (the inclusion of one thing is the exclusion of another). *See e.g.*, *State v. Edghill*, 155 Idaho 846, 851 n.5, 317 P.3d 743, 748 n.5 (Ct.App.2014), citing to *Schoger v. State*, 148 Idaho 622, 629, 226 P.3d 1269, 1276 (2010). Because the legislature specifically addressed the creation of a judgment lien for periodic and installment spousal and child support payments, by its exclusion from the judgment lien statute, even if and when renewal was permitted, no judgment lien could be created for the lump sum child support or spousal support payments.

Even if that specific statutory judgment lien exclusion did not exist, the child support renewal judgments suffer from the same statutory disability under I.C. §10-1111(2) as do the divorce judgment renewals, the simple absence of any actual judgment, as it had expired as a matter of law, which when recorded cannot create a required supporting judgment lien, the failure to renew the judgment lien, and the absence of the required statutory elements, especially a statement as to the amount of the judgment.

In summary, when a judgment has completely lapsed and expired, then it becomes entirely

unenforceable, and certainly no interest can continue to accrue on that lapsed judgment. Here, on the alleged renewed judgments now on appeal, Respondent has sought, and obtained a writ of execution, for amounts well in excess of one million dollars. Those judgments have been repeatedly renewed in disregard of the statutorily-required conditions precedent to obtaining a renewed judgment. So the question necessarily arises that if the legislature declares a money judgment can only be renewed upon meeting certain statutorily and specifically defined conditions, can such a money judgment essentially become perpetual, only for the reason that no objection is interposed to the wrongful renewal of such lapsed judgments, or for the reason that no appeal is taken from a magistrate court's action in excess of its jurisdictional/statutorily-granted authority? If a judgment is void, it should be void for all purposes, and not revived or resurrected in excess of legislatively-granted authority due to a failure of a magistrate to read the statutes when asked to do what it could not do, of a failure to challenge the fact the judgment was void, to which no appeal is required to challenge a void judgment.

E. Any Execution That Might Be Permitted To Proceed Upon A Money Judgment After The Time Permitted By Idaho Statute For The Execution Upon That Money Judgment Had Elapsed And Expired , Would Constitute A "Taking" Of Private Property In Violation Of The United States Constitution

Obviously, neither the 1991 divorce judgment, nor the 1999 child support/spousal maintenance judgment was ever satisfied during the time either of those judgments remained viable. They simply expired. *See Workman v. Rich,* 44701, (Court of Appeals, August 31, 2017), wherein the Court stated:

"The Court did not hold that a court order of restitution is extinguished and loses

> enforceability when the order is also recorded as a judgment for purposes of constituting a civil judgment, or that an order of restitution is always and solely a civil judgment.[4] Workman's argument fails to make a distinction between criminal restitution orders, that do not expire, and ***civil judgments, which do expire."*** (Emphasis added).

Apart from the argument that each judgment as to its original principal amount, and accrued interest during its period of viability has simply lapsed and expired and can no longer be collected, the argument has been set out above that the judgments at issue have not been validly "renewed," such that at the present time nearly a half million dollars in interest alone has accrued in what are "dead judgments."

A significant constitutional issue is raised here as to the denial of Appellant's substantive due process rights in the wrongful taking of property in violation of the United States Constitution. Under Idaho law, money is defined as property that cannot be taken in violation of due process. *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 172, 108 P.3d 315, 319 (2004). An execution issued upon a void judgment can be characterized as a taking in violation of the Fourteenth Amendment to the United States Constitution. *Seaboard Air Line Ry. Co. v. Fowler*, 275 F. 239, 240 (W.D.N.C., 1921).

In *Guzman v. Piercy*, 155 Idaho 928, 318 P.3d 918 (2014) the Court held that Piercy's substantive due process rights were not violated when a statute of limitation prevented him from pursuing a cause of action in that case. 155 Idaho at 940-41, 318 P.3d at 930-31. The exact opposite situation has arisen here, where in contrast, the issue presented is the failure of the magistrate court to apply what the Idaho Court of Appeals in *Smith II* characterized to an applicable

statute of limitations barring the further enforcement of a lapsed judgment. ("We view I.C. § 10-1111 to be in the nature of a statute of limitation; it sets the time limit for a judgment creditor to take action to renew the judgment." 131 Idaho at 802, 964 P.2d at 669). This is a characterization which the Idaho Supreme Court in *Grazer* did not repudiate ("We are aware that our Court of Appeals has remarked that it 'view[s] I.C. §10-1111 to be in the nature of a statute of limitation; it sets the time limit for a judgment creditor to take action to renew the judgment.' *Smith v. Smith*, 131 Idaho 800, 802, 964 P.2d 667, 669 (Ct.App.1998)." 154 Idaho at 67, 294 P.3d at 193).

As argued above, under I.C. §10-1111(1) a motion to renew a judgment must be brought, "at any time prior to the expiration of the lien created by section 10-1110, Idaho Code or any renewal thereof, ..." The only valid judgment lien arising out of the 1991 divorce judgment expired on February 11, 1996. No effective renewal of that judgment was ever accomplished, as arising out of the 1996 McDevitt Order as based upon the argument set out above. Neither a renewal, nor a judgment lien was permitted, in respect to any child support judgment at issue in this matter.

As based upon the amount of the writ of execution requested, (R., pp. 569-570), the May 25, 2016 decision of the magistrate in granting that writ, (R., pp. 938-942), and the ensuing Judgment entered on May 25, 2016, (R., pg. 943), in conjunction with daily accruing interest, have now placed well over a million dollars at issue on these judgments. Therefore, the decision of this appeal will have a profound impact on Appellant Smith's property interest by compelling him to pay money on what otherwise should be characterized under the controlling Idaho judgment

renewal statutes as unenforceable void judgments, which should be properly characterized as "dead judgments" incapable as being enforced by any writ(s) of execution.

Idaho law properly recognizes the existence of periods of "repose," which arise after a recognized period of time, when a particular action can no longer be pursued to vindicate a right or in which to collect a judgment. *See*, Garner, BLACK'S LAW DICTIONARY (9th ed., 2009) at pg. 1415 "repose." For example, the 10-year "useful safe life" provision, as provided in Idaho's Product Liability statute (I.C. § 6-1403) is one specific type of a strict "statute of repose," establishing that time after which a seller of a produce shall not be subject to liability for the harm caused by the use of that product.

Almost fifty years ago the Court in *Renner v. Edwards*, 93 Idaho 836, 475 P.2d 530 (1969) discussed the purposes served by statutes of limitations in the character of statutes of repose:

> They are, to be sure, a bane to those who are neglectful or dilatory in the prosecution of their legal rights. 1 Wood, Limitation of Actions, § 4, p. 8. As a statute of repose, they afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court. The statutes are predicated on the reasonable and fair presumption that valid claims which are of value are not usually left to gather dust or remain dormant for long periods of time. *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 19 L.Ed. 257; 1 Wood, Limitation of Actions, *supra*, § 4; *Spath v. Morrow*, *supra* (174 Neb. 38, 115 N.W.2d 581). To those who are unduly tardy in enforcing their known rights, the statute of limitations operates to extinguish the remedies; in effect, their right ceases to create a legal obligation and in lieu thereof a moral obligation may arise in the aid of which courts will not lend their assistance. *Cf.* 34 Am.Jur., 'Limitation of Actions,' § 11, p. 20.

93 Idaho at 838-39, 475 P.2d at 532-33. *See also*, *Twin Falls Clinic & Hospital Bldg. Corp. v. Hamill*, 103 Idaho 19, 644 P.2d 341 (1982) (declaring that the statute of repose provided by I.C. § 5-241 governing the accrual of actions arising out of the design or construction of improvements to real property was not unconstitutional).

Five years ago in *Grazer v. Jones*, 154 Idaho 58, 294 P.3d 184 (2013) the Court only spoke partially to the effect of the time bar provided by Idaho's statutes based upon existing Idaho precedent:

> A judgment lien is distinct from the underlying judgment, and therefore the judgment does not expire merely because the lien has expired. *See Clements*, 127 Idaho at 121, 898 P.2d at 52; *Platts v. Pac. First Fed. Sav. & Loan Ass'n of Tacoma*, 62 Idaho 340, 348-49, 111 P.2d 1093, 1096 (1941) ("Expiration of the lien of a judgment does not extinguish the judgment. It simply terminates the statutory security." (emphasis in original)); *accord Gamles Corp. v. Gibson*, 939 A.2d 1269, 1272 (Del.2007); *Krueger v. Tippett*, 155 Wash.App. 216, 229 P.3d 866, 871 (2010). 154 Idaho at 65, 294 P.3d at 191.

Grazer, and the associated Idaho decisions upon which it cited and relied, including *G & R Petroleum, Inc. v. Clements*, 127 Idaho 119, 898 P.2d 50 (1995), *Tingwall v. King Hill Irr. Dist.*, 66 Idaho 76, 155 P.2d 605 (1945), *Platts v. Pacific First Federal Savings & Loan Ass'n of Tacoma*, 62 Idaho 340, 111 P.2d 1093 (1941), and *Caxton Printers v. Ulen*, 59 Idaho 688, 86 P.2d 468 (1939), all appeared to be based only upon the remaining possibility that an Idaho judgment could be revived by resort to an independent action under the provision codified in I.C. §5-215. That option was never pursued in this case. In addition to an independent action brought under I.C. § 5-215, and as previously addressed in footnote 5 to this brief, there are two other means to keep a

judgment alive under Idaho law, in addition to a renewal action under I.C. §10-1111(1). First was the right to bring a motion under I.C. § 11-105, the replacement statute for the common law writ of scire facias, which has excepted from its operation "money judgments," which makes that alternative inapplicable to the money judgments at issue in this appeal. The last option is an acknowledgment of the obligation owed under the judgment pursuant to I.C. § 5-238, which has never been supported by any facts here, as the judgments are believed to be void. *See e.g.*, *Collection Bureau, Inc. v. Dorsey*, 150 Idaho 695, 699, 249 P.3d 1150, 1154 (2011).

So, in conclusion, the question that remains for decision on this appeal, is if money judgments that have not been (or could not be) validly renewed as provided by I.C. §10-1111(1) & (2), should those judgments be declared to be effectively dead and incapable of any further enforcement by any means under Idaho law? If so, then does the continued enforcement of those "dead" or "void" judgments by the magistrate constitute a "taking" of property in violation of the Fourteenth Amendment, when the judgments were not renewed/renewable under Idaho law? Furthermore, does, such a magistrate judge who acts to enforce such judgments act is excess of statutorily-granted subject matter jurisdiction? *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978); and *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978).

III.

CONCLUSION

On the basis the lower court had no statutorily-granted subject matter jurisdiction to renew

a lapsed and expired judgment, as lacking the required support of an enforceable judgment lien, and also had no statutory authority to thereafter renew those judgments upon an inadequate motion, which as a matter of law could no longer be renewed, this Court on appeal is requested to vacate all allegedly renewed judgments that the magistrate has purported to renew, and vacate all writs of execution as issued to satisfy those void and unenforceable judgments.

Respectfully submitted this 11th day of October, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 11th day of October, 2017 two true and correct copies of the foregoing **APPELLANT'S OPENING BRIEF** were served upon the following:

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