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IN THE SUPREME COURT OF THE STATE OF IDAHO

PHH MORTGAGE,
Plaintiff-Third Party Defendant-Counterdefendant-Respondent,

vs.

CHARLES NICKERSON and DONNA NICKERSON,
Defendants-Counterclaimant-Third Party Complainant-Appellant,

And

COLDWELL BANKER MORTGAGE, a d/b/a of PHH MORTGAGE, and JP MORGAN
CHASE BANK, N.A.
Third Party Defendants.

**RESPONDENT PHH MORTGAGE'S
OPENING BRIEF**

Case Number 45146-2017

Appeal from the District Court of the Second Judicial District, Clearwater County.
Appeal from the Honorable Gregory FitzMaurice, District Judge.

Charles Nickerson
Donna Nickerson
3165 Neff Road
Orofino, ID 83544
Appellant-Pro-se

Lewis N. Stoddard
Aldridge Pite, LLP
13125 W. Persimmon Ln, Ste
150
Boise, ID 83713
Attorney for PHH Mortgage

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STATEMENT OF ISSUES ON APPEAL

The Nickersons have listed a total of 17 issues on appeal. A review of those issues shows that many, if not all, are attempts to re-litigate the underlying grant of summary judgment and final judgment in favor of Respondent which was upheld by this Court in *PHH Mortgage v. Nickerson*, 160 Idaho 388 (2016) (hereinafter “*Nickerson I*”). Based upon the procedural posture of this case and the law of the case doctrine, the issues on appeal are rephrased as follows:

I. Whether the district court abused its discretion in denying Appellants’ various post-judgment motions including a motion for sanctions, motion to quash execution and judgment, and motion to vacate or amend order of sale and decree of foreclosure.

ADDITIONAL ISSUES ON APPEAL

I. Whether respondent is entitled to costs and attorney fees on appeal.

STATEMENT OF THE CASE

Nature of Case

This is the second appeal by the Nickersons seeking to interfere with and avoid the judicial foreclosure of approximately 50 acres of land in Clearwater County, Idaho commonly known as 3165 Neff Road, Orofino, ID 83544 (“the Property”). The Nickersons encumbered the Property with a Deed of Trust which Respondent sought to foreclose when the Nickersons defaulted on their payment obligations. The district court granted summary judgment in favor of Respondent on April 4, 2014 which this Court upheld on appeal in *PHH Mortgage v. Nickerson*, 160 Idaho 388 (2016) (hereinafter “*Nickerson I*”).

Following remittitur of this case, Respondent sought and obtained an order from the trial court lifting a stay on enforcement of the trial court judgment and a order of sale and decree of foreclosure and writ. In opposition, the Nickersons continued to challenge the underlying summary judgment and final judgment through a motion to quash execution and judgment and a motion for sanctions. The Nickersons also challenged the form of the order of sale through a motion to vacate or amend order of sale. The district court correctly denied the Nickersons' motions recognizing that they were merely attempts to re-litigate the issues already decided in *Nickerson I*. The present appeal followed.

Factual and Procedural Background

The Court already set forth the relevant factual summary in *PHH Mortgage v. Nickerson*, 160 Idaho 388 (2016) (hereinafter "*Nickerson I*"), as follows:

In October of 2002, Charles and Donna Nickerson (the Nickersons) purchased approximately 50 acres of land in Clearwater County, Idaho. The Nickersons executed a promissory note and a Deed of Trust in favor of Coldwell Banker Mortgage in the principal sum of \$285,000. The district court determined that the original loan to the Nickersons was made by Coldwell Banker Mortgage and was originally serviced by Mortgage Service Center. In December of 2002, the note was assigned to Fannie Mae, and J.P. Morgan Chase acquired the note in November of 2007, at which point Chase Home Financial began servicing the loan. In February of 2010, Mortgage Service Center resumed responsibility for loan servicing, and in June of 2010, Chase assigned the note to PHH. As of December 1, 2013, the amount due on the note, including interest, was \$340,339.84.

On January 10, 2011, PHH filed a complaint against the Nickersons claiming that the Nickersons had defaulted on their loan and seeking to foreclose. On August 12, 2011, the Nickersons answered the complaint. On February 1, 2012, the Nickersons filed an amended answer, counterclaim, and third-party complaint against Chase. The Nickersons' answer, counterclaim, and third party complaint alleged, among other things: breach of the covenant of good faith and fair dealing,

breach of note, breach of 12 U.S.C. § 2605, breach of the federal fair debt collection practices act, breach of the federal fair credit reporting act. In addition to these claims, the Nickersons also sought an award of punitive damages. On October 16, 2012, PHH and Chase each filed motions for summary judgment.

On November 16, 2012, the district court granted in part and denied in part PHH's motion for summary judgment and granted Chase's motion for summary judgment...

In its partial denial of PHH's motion for summary judgment, the district court stated: "PHH's motion for summary judgment should be granted as to all of the Nickersons' counterclaims for failure to present any evidence to support the elements of those counterclaims, and/or the counterclaims are not proper because the cited statutes do not apply to the facts of this case. Summary judgment should also be granted as to the Nickersons' affirmative defense. . . ." However, the district court determined there was a genuine issue of material fact as to whether the Nickersons were in default in 2010 when PHH acquired its interest in the Nickersons' loan.

On December 5, 2012, the Nickersons filed a motion to reconsider. The motion stated that supporting documentation would soon be filed; however, on February 5, 2013, the district court denied the motion because the Nickersons had not presented a supporting memorandum following the motion.

On February 25, 2013, the Nickersons' attorney moved to withdraw. On May 15, 2013, the district court granted the withdrawal motion, and on August 19, 2013, the Nickersons filed a notice of appearance pro se.

On November 12, 2013, PHH filed a second motion for summary judgment, again contending that the Nickersons were in default and that they had not presented evidence to the contrary. On December 17, 2013, the Nickersons filed their own motion for summary judgment, supported by the affidavit of Charles Nickerson. PHH moved to strike the affidavit, and the district court granted the motion in part. The district court set the hearing on the cross-motions for summary judgment for February 11, 2014. On February 5, 2014, the Nickersons filed an unsuccessful motion to continue the hearing.

On April 4, 2014, the district court issued its order and final judgment granting PHH's motion for summary judgment and denying the Nickersons' motion for summary judgment. The district court concluded that the Nickersons had not

presented evidence to support their conclusory allegation that they had not defaulted on their loan obligation.

Following judgment, the Nickersons filed three motions to reconsider and a motion for leave to amend their answer, counterclaim, third-party complaint and demand for a jury trial. On May 6, 2014, the district court issued an order denying the Nickersons' motions to reconsider, ruling them either untimely or inapplicable to a final judgment.

On May 15, 2014, the Nickersons filed a "Motion for Justice" in Clearwater County Idaho, and on May 16, 2014, the Nickersons filed a motion to suppress and strike the depositions of Charles and Donna Nickerson, which had been taken on October 3, 2012, prior to the initial motion for summary judgment.

On May 16, 2014, the Nickersons filed their notice of appeal. Subsequently, on June 6, 2014, the Nickersons filed a motion for relief with the district court. On June 11, 2014, the district court denied the Nickersons' motions for justice and relief. The district court treated the motions as motions to reconsider and concluded that the Nickersons still had not presented any admissible evidence that would create a genuine issue of material fact.

On October 6, 2014, the Nickersons returned to the district court and filed a motion for relief from judgment or order. The Nickersons argued for relief under Idaho Rules of Civil Procedure 60(b)(1)-(3), and (6). Two weeks later, the Nickersons followed up by filing a motion to set aside judgment based on supplemental evidence of fraud on the court, filed October 21, 2014, and an edited motion to set aside judgment filed October 22, 2014. Those motions were both based on a claim of fraud under Idaho Rule of Civil Procedure 60(b)(3). The Nickersons argued they were entitled to relief based on: mistakes by the court; surprise due to the actions and withdrawal of their former counsel; excusable neglect due to their reliance on their former counsel; new evidence showing PHH did not have standing to pursue foreclosure; fraud regarding PHH's chain of title, the amount of default, and coercion of the Nickersons at closing; and misconduct of the opposing parties regarding the depositions of the Nickersons and the submission of a fraudulent affidavit. The district court denied the Nickersons' motions, concluding that the Nickersons failed to present admissible evidence to support their claims.

PHH Mortg. v. Nickerson, 160 Idaho 388, 391-392, (2016).

In *Nickerson 1*, this Court affirmed the district court's grant of summary judgment in favor of Respondent finding there to be no support in the record for the Nickersons' contention that Respondent lacked standing or that the Nickersons were not in default. *Id.*, 160 Idaho at 392. This Court also found that the district court did not abuse its discretion when it denied the Nickersons' motion to continue the summary judgment hearing, their motions for reconsideration, and their Rule 60(b) motions to set aside judgment. Lastly, this Court found that the Nickersons had raised a number of issues on appeal that had been waived, or were not properly before the Court. *Id.*, 160 Idaho at 399. The Nickersons subsequently filed a Petition for Rehearing on May 18, 2016, which was denied on July 19, 2016, and a Remittitur was issued on July 22, 2016. (Clerk's Record on Appeal ("R. ___"), pg. 2.)

Following the conclusion of *Nickerson 1*, on February 28, 2017, Respondent moved to lift a stay on enforcement previously entered by the district court on October 15, 2015 pending the outcome of the appeal so that it could obtain an appropriate writ of execution and order of sale in order to complete the underlying judicial foreclosure and carry out the Judgment. (*Id.*) In response, the Nickersons filed a response in opposition (R. pgs. 4-107), a motion for sanctions (R. pgs. 108-196), and a motion to quash execution and judgment (R. pgs. 197-199).

On April 13, 2017, the district court issued a written Order denying all of the Nickersons' motions. (R. pgs. 200-202.) It also entered an Order lifting the stay of execution of the Judgment of foreclosure (R. pgs. 203-204), and entering an Order of Sale and Decree of Foreclosure (R. pgs. 205-209). On April 25, 2017 a writ of execution was then issued. (R. pg. 3.)

Un-deterred, on April 27, 2017, the Nickersons filed a motion to vacate or to amend the order of sale and decree of foreclosure (R. pgs. 210-214.), and a motion to reconsider the court's April 13, 2017 denial of their motion to quash execution and judgment and for sanctions (R. pgs. 215-224). Both motions were again denied by the district court on May 16, 2017. (R. pgs. 225-226 and 227-228.)

On May 25, 2017, the Nickersons filed a document entitled Notice of Issues (R. pgs. 229-234), and a notice of appeal from the following district court orders:

- Order of Sale and Decree of Foreclosure, filed April 13, 2017;
- Order Denying Motion to Quash Execution and Judgment and Motion for Sanctions, filed April 13, 2017;
- Order Lifting Stay, filed April 13, 2017;¹
- Order Denying Motion to Vacate or Amend Order of Sale and Decree of foreclosure, filed May 16, 2017; and
- Order Denying Motion to Reconsider Order Denying Motion to Quash Execution and Judgment, filed May 16, 2017.²

(R., pgs. 235:ln 29 –pg.236:ln..4.)

Notwithstanding the Nickersons' notice of appeal, the judicial foreclosure process continued forward and a Sheriff's Sale of the Property was set for August 25, 2017, which the Nickersons sought to stay by filing an emergency motion to stay with this Court on or about

¹ While the Nickersons identified the order lifting stay as one of the district court orders being appealed, they have provided no authority or argument supporting any errors with the subject order, such that the issue is waived. *Trotter v. Bank of New York Mellon*, 275 P.3d 857 (Idaho 2012).

² The Nickersons present no authority or argument with respect to the district court's denial of their motion to reconsider such that the issue has been waived on appeal. *Id.*

August 21, 2017. By written order this Court denied Appellants' request for stay on August 25, 2017 and the Sheriff's Sale took place where the Property was purchased by Respondent.³

ARGUMENT

The Nickersons have already lost an appeal of the district court's grant of summary judgment and final judgment in favor of Respondent which authorized the Property to be judicially foreclosed upon and sold at a Sheriff's Sale. Based upon this Court's ruling in *Nickerson I*, the Nickersons' continued attempts to re-litigate whether summary judgment and final judgment were appropriately entered are improper and barred under the law of the case doctrine. The district court recognized the same when it denied the Nickersons' various post-judgment motions filed in opposition to Respondent's request to obtain the necessary writ and order of sale to complete the judicial foreclosure of the Property.

As is discussed in greater detail below, the district court did not abuse its discretion when it denied the Nickersons' motion for sanctions, motion to quash execution and judgment, and motion to vacate or amend the order of sale and decree of foreclosure. Accordingly, the district court's decisions should be affirmed and this case brought to an end.

I. STANDARD OF REVIEW

The Nickersons fail to set forth the correct standard of review to be applied to this matter primarily citing to the standard of review for summary judgment which this Court already decided in *Nickerson I*. Rather, the Nickersons' attempts to challenge the underlying judgment

³ Attached hereto is a true and correct copy of the Sheriff's Certificate of Sale which was recorded in the Clearwater County land records on August 28, 2017, as Instrument No. 231642. The certificate of sale notes that the Property was sold in one lot or parcel to the Respondent and that the Property is subject to a 1 year redemption period because it is more than 20 acres. See I.C. § 11-403.

and have it set aside post appeal, or to have sanctions issued based upon their conclusory arguments that summary judgment was improperly entered, are more accurately characterized as requests for relief from the final judgment under I.R.C.P. 60(b).

Thus *de novo* review is not the appropriate standard. Rather, the appropriate standard of review is for abuse of discretion.⁴ See *Printcraft Press, Inc., v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 448, 283 P.3d 757, 765 (2012); see also *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643 (1992). The abuse of discretion inquiry examines (1) whether the district judge correctly perceived the issue as one of discretion; (2) whether the district judge acted within the outer boundaries of his discretion and consistently with the legal standards applicable to the specific choices available; and (3) whether the district judge reached his decision through an exercise of reason. See *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 423 (2004).

The Nickersons have presented no factual or legal basis to deviate from the abuse of discretion standard, and therefore their arguments asking this court to apply a *de novo* review should be rejected. *Id.*

II. THE PRESENT APPEAL IS MOOT.

Appellant filed the present lawsuit in order to stop and/or interfere with the judicial foreclosure of the Property. Appellant sought to stay the August 28, 2017 Sheriff's Sale of the Property, which this Court denied. Since no stay applied either based on the filing of this appeal or by an order of the district court, a Sheriff's Sale of the Property took place on August 28, 2017, and rendered the present appeal moot. Under the mootness doctrine:

⁴ I.R.C.P. 59(e) does not apply where the various motions seeking to challenge the underlying judgment were filed more than 14 days after the entry of judgment.

This Court may dismiss an appeal when it appears that the case involves only a moot question. A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. A case is moot if it presents no justiciable controversy and the judicial determination will have no practical effect upon the outcome.

State v. Long, 153 Idaho 168, 280 P.3d 1995 (App. 2012). Specifically, in *Eagle Rock Corporation v. Idamont Hotel Co.*, 60 Idaho 639 (1939), this Court addressed the impact of a sheriff's sale in the context of a judicial foreclosure. The *Eagle Rock* Court noted that when no undertaking has been given to stay foreclosure proceeding pending appeal, a successful purchaser is entitled to all the rights and title incident to a sale and issuance of a sheriff's certificate and that the only property right remaining in the mortgagor is the right of redemption. *Eagle Rock Corporation v. Idamont Hotel Co.*, 60 Idaho 639 (1939).

Here, because a Sheriff's Sale has taken place, the Nickersons have lost all rights they had in the Property, with the exception of their redemption rights, rendering the present appeal moot. *See Eagle Rock Corporation v. Idamont Hotel Co.*, 60 Idaho 639 (1939). Stated differently, where there is no longer a foreclosure proceeding to stay, no longer a deed of trust at issue, and where the Nickersons have no rights remaining in the Property besides the right of redemption which they have not exercised, the present appeal is now moot.

For the foregoing reasons, the present appeal should be dismissed in its entirety.

III. THE LAW OF THE CASE DOCTRINE BARS THE NICKERSONS' ATTEMPTS TO RE-LITIGATE WHETHER SUMMARY JUDGMENT AND FINAL JUDGMENT WERE PROPERLY GRANTED IN FAVOR OF RESPONDENT.

Even if the present appeal were not moot, the majority of the Nickersons' arguments/issues on appeal are barred by the law of the case doctrine.

Specifically, Idaho follows the law of the case doctrine. *Suits v. First Sec. Bank, N.A.*, 110 Idaho 15, 21-22 (1985). That doctrine provides that when “the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and up on subsequent appeal.” *Taylor v. Maile*, 146 Idaho 705, 709 (2009); quoting *Suits v. First Sec. Bank of Idaho, N.A.*, 110 Idaho 15, 21 (1985). “The underlying purpose for the doctrine is to “maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit...” *State v. Dunlap*, 155 Idaho 345, 375-376 (2013); citing to *Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005) (quoting 18B Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 4478, at 637-38 (2002)). The doctrine applies to not only issues actually raised, but “also prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal.” *Rockefeller v. Grabow*, 139 Idaho 538, 543 (2003); citing to *Bouten Constr. Co., v. H.F. Magnuson Co.*, 133 Idaho 756 (1999).

In this case, the gravamen of the Nickerson’s post-judgment motions to the district court, as well as the issues being raised on appeal, are simply attempts to re-litigate issues already decided in *Nickerson I* or which they waived by failing to have raised the arguments in *Nickerson I*. Specifically, the Nickersons’ Notice of Appeal identifies a total of 12 preliminary issues on appeal which their opening brief then adds to, bringing the total number of issues to 17.

Of the 17 issues identified, only 4 of the issues⁵ appear to relate to decisions issued by the district court following this Court's ruling in *Nickerson I*. The other 13 issues relate to the underlying foreclosure action and issues already decided in *Nickerson I*. Indeed, issues D through L identified in the Notice of Appeal and in the opening brief all explicitly reference issues decided in *Nickerson I*.

By way of further example, in their opening brief, the Nickersons are again directly trying to challenge the entry of summary judgment and final judgment based upon allegations that they were somehow prevented from performance and denied the right to cure or their contractual rights;⁶ that the judgment was obtained through fraud,⁷ that Respondent lacked standing,⁸ that they were not in default,⁹ or that there was misconduct of opposing counsel.¹⁰ In fact, a review of the Nickersons' opening brief leaves no doubt that they are seeking to re-litigate issues decided in *Nickerson I*, or which they could have raised in that earlier appeal but did not. Specifically, at pages 32-33 of the Nickersons' opening brief they continue to contest "PHH's standing" to foreclose and that because PHH did not have the note in its possession, the district court should have quashed "execution and vacated summary judgment in favor of PHH." On

⁵ Specifically, issues A, B, O and P, set forth on pages 24-27. Issues A and B appear to pertain to the Nickersons' motion to vacate or amend the order of sale and decree of foreclosure while issues O and P are new issues being raised for the first time on appeal in the Nickersons' opening brief.

⁶ See Appellant's (sic) Brief, pg. 25, issue D.

⁷ See *Id.*, pgs. 25-27, issues E, F, G, H, I, K, L, M, and N.

⁸ See *Id.*, pg. 32-35.

⁹ See *Id.*, pg. 25, issue E.

¹⁰ See *Id.*, pg. 26-27, issue M-N.

pages 35-41, the Nickersons' continue to argue that the underlying summary judgment and judgment must be overturned because it was obtained through fraud, or not based upon the underlying facts.

All of the foregoing arguments were either raised, considered and addressed by this Court in *Nickerson I*, or could have been raised and thus no matter how the Nickersons attempt to characterize their issues on this appeal or how they attempt to construct or phrase their arguments, their attempts to re-litigate issues already decided in *Nickerson I* are barred. In fact, as this Court noted in *Nickerson I*, the district court addressed all of the same arguments when it denied the Nickersons' separate motion for summary judgment claiming, amongst other things, that:

...the claim that PHH did not have standing was not supported by an evidence; the Nickersons did not allege fraud as an affirmative defense and ...had not presented any admissible evidence of fraud; the Nickersons had not presented any authority in support of their contention that a note cannot be assigned; and the Nickersons' claim that they were not in default was conclusory and not supported by any evidence.

PHH Mortgage v. Nickerson, 160 Idaho 388, 393 (2016). This Court then noted that the Nickersons waived most of the arguments advanced before the trial court in support of their motion for summary judgment on appeal.

With the foregoing in mind, while the Nickersons may believe that they are entitled to re-litigate every decision with which they disagree, the law of the case doctrine prohibits such re-litigation and thus limits the permissible scope of this appeal to issues arising since the issuance of *Nickerson I* which do not implicate the ruling in *Nickerson I*. For the foregoing reasons,

Issues D-N of the Nickersons' appeal and all other arguments advanced by the Nickersons' contesting the entry of summary judgment and judgment in favor of Respondent, are barred.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE NICKERSONS' VARIOUS POST-JUDGMENT MOTIONS

Following this Court's decision in *Nickerson 1*, this matter returned to the district court where PHH moved to lift a previously entered stay on enforcement and to have a necessary order and writ to execute on the Judgment. The Nickersons' opposed PHH's request and also separately filed a motion seeking to quash execution and judgment and a motion seeking sanctions and later a motion to vacate or amend order of sale and decree of foreclosure. In support of their motion to quash execution, the Nickersons repeated their arguments related to lack of standing (R. pg. 6, Sec. 1), lack of default (R. pg. 7, Sec. 2), and denial of a right to cure (R. pg. 8). The Nickersons also attached a copy of their 95 page Brief in Support of Petition for Rehearing which this Court had already considered and denied in *Nickerson 1*. (R. pgs. 12-107.) The Nickerson's motion for sanctions against Respondent was based upon their continued assertion that Respondent lacked standing. (R. pg. 109, ln. 28-32.) Because the Nickersons' motions were merely disguised attempts to re-litigate issues already resolved in *Nickerson 1*, the district court denied them all.¹¹

On appeal, the Nickersons challenge the district court's denial of their motion seeking to quash execution and judgment, motion for sanctions, and denial of their motion to vacate or

¹¹ The Nickersons have not challenged the district court's decision lifting the stay, nor have they challenged the district court's denial of their motion to reconsider. Rather, they have focused entirely on the district court's denial of their motion to quash execution and judgment and their motion for sanctions. Thus, those issues are waived on appeal.

amend order of sale and decree of foreclosure. All of the Nickersons' challenges fail as reasons discussed below. Accordingly, the district court's decisions should be affirmed.

A. The District Court Properly Denied the Nickersons' Motion to Quash Execution and Judgment, and Motion for Sanctions.

With respect to the Nickersons' claim that the district court incorrectly denied their motion to quash execution and judgment and motion for sanctions, the Nickersons' fail to cite to any authority or portions of the record that demonstrate that the district court abused its discretion, nor do they present any argument to support any claimed abuse of discretion. Instead, as they did before the district court, the Nickersons seek to use their motions and this appeal as a means of re-litigating *Nickerson I*, which is improper.

As an initial starting point, I.A.R. 35(a)(6) provides that "the argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript relied upon." "Issues that are not argued and supported as required by the Appellate Rules are deemed to have been waived. *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 326, 297 P.3d 1134, 1143 (2013); *citing to Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005)). Similarly, issues on appeal that are not supported by propositions of law or authority are **deemed waived and will not be considered**. *Michalk v. Michalk*, 148 Idaho 224, 230, 220 P.3d 580, 587 (2009) (emphasis added); *citing to Wheeler v. Idaho Dept. of Health Welfare*, 147 Idaho 257, 266, 207 P.3d 988, 997 (2009). The reasoning behind such a rule "lies in the fact that it is the appellant who has asserted error on the part of the [trial court]. Absent compliance with the rules, this Court will

not search the record for error. Error is never presumed on appeal and the burden of showing it is on the party asserting it.” *Idaho Power Co., v. Cogeneration, Inc.*, 134 Idaho 738, 745, 9 P.3d 1204, 1211 (2000). Thus “regardless of whether an issue is explicitly set forth in the party’s brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by an cogent argument or authority, it cannot be considered by this Court. *Liponis v. Bach*, 149 Idaho 372, 374, 237 P.3d 696, 698 (2010); *citing to Inama v. Boise County ex rel. Bd. Of Comm’rs*, 138 Idaho 324, 330, 63 P.3d 450, 456 (2003). “Pro se litigants, like all other litigants, must comply with the Idaho Appellate Rules and standards of appellate practice.” *Federal Home Loan Mortgage Corp. v. Butcher*, 338 P.3d 556, 580 (2014). Additionally, as set forth above, once an issued has been ruled upon by this Court, that ruling becomes the law of the case and is not subject to re-litigation. *Taylor v. Maile*, 146 Idaho 705, 709 (2009).

With the foregoing in mind, the Nickersons’ arguments that the district court erred when it denied their motion for sanctions and motion to quash execution and judgment are waived and should not be considered. First, the Nickersons’ fail to support their arguments with anything more than inaccurate conclusory statements and with no legal authority to support their contention that the district court abused its discretion by refusing to set aside and vacate summary judgment and final judgment and to impose sanctions on Respondent when the foregoing decisions were affirmed by this Court in *Nickerson I*.

Even if not waived, the record below clearly shows that the district court appropriately exercised its discretion when it denied the Nickersons’ motions. Specifically the district court ruled as follows:

...
The appeal is fully resolved and Nickersons are merely attempting to relitigate a matter that has been through the litigation process. Nickersons have not provided any factual or legal basis for relief from the Judgment. The Supreme Court has made the final determination and nothing can be accomplished by this Court hearing oral argument on either motion. Sanctions are obviously not warranted against PHH, the prevailing party and Plaintiff is entitled to proceed with execution of it's Judgment of Foreclosure.

(R. pgs. 200-201.)

Implicit in the district court's decision was the recognition of the binding impact of this Court's ruling in *Nickerson 1* and that because the Nickersons had already unsuccessfully litigated over whether summary judgment had been appropriately entered in favor of the Respondent and lost, successive attempts to re-litigate the appeal, regardless of how they are characterized or what they are called were improper.

Thus, the district court clearly acted within the bounds of its discretion and consistent with existing law. Accordingly, the district court's decisions should be affirmed.

B. The District Court Properly Denied the Nickersons' Motion to Vacate or Amend Order of Sale and Decree of Foreclosure.

On appeal, the Nickersons also challenge the district court's denial of their motion to vacate or amend the order of sale and decree of foreclosure entered by the district court on April 13, 2017, in two respects. (R. pgs. 205-209.) First, the Nickersons argue on appeal, as they did before the district court, that their right of redemption entitles them to exclusive possession during the redemption period. (R. pg. 210-211.) Second, the Nickersons contend that they should have been allowed to dictate the order in which the underlying parcels that comprised the

Property were sold pursuant to I.C. § 11-304. The district court denied the Nickersons' motion and on appeal they raise the same arguments, both of which are without merit.

Turning first to the Nickersons' contention that their right to redemption entitles them to exclusive possession for the entire redemption period, the Nickersons' argument fails because it is not ripe and because Idaho case law and statutes addressing redemption rights and the impact of a Sheriff's sale make clear that the only rights the Nickersons have in the Property following a sale are their rights of redemption.

Here, section 11 of the order of sale and decree of foreclosure entered by the district court provides:

That after the confirmation of the sale of the Subject Property, the purchaser or purchasers at such sale, or their heirs or assigns, be let into possession of the premises so sold on production of the certificate of sale or a duly authenticated copy thereof, and that each and every other party to this action who may be in possession of the premises, under them or either of them shall deliver to such grantee or grantees named in such certificate of sale possession of such portion of the premises as shall be described under the certificate of sale.

(R. pg. 208.) The foregoing section is consistent with Idaho law.

Idaho law provides that a purchaser at a sheriff's sale acquires all the rights, title, and interest of the judgment debtor subject to the right of redemption. *See* I.C. § 11-309; *see also Eagle Rock Corporation v. Idamont Hotel Co.*, 60 Idaho 639 (1939). While the Nickersons are correct that they have a 1 year right of redemption,¹² nothing in Idaho Code or Idaho law equates their right of redemption with an unequivocal right of continued possession. *See* I.C. § 11-401(2). Rather, Idaho law makes clear that whatever sticks in the proverbial property rights

¹² I.C. § 11-402.

bundle the Nickersons had, they lost when the underlying Sheriff's sale was completed, including any right to possession as the fee simple owners of the Property. Thus the impact of the Sheriff's sale was to convert the Nickersons status as owners of the Property to that of a mere tenant. *See Caldwell v. Thiessen*, 60 Idaho 515, 519 (1939); *adopting Harris v. Reynolds*, 13 Cal. 514, (Cal. 1859)(holding that during the year's period of redemption the mortgagor must pay the purchaser as owner of the land for the use and occupancy thereof.)

In *Aker v. Mader*, 94 Idaho 94 (1971) this Court addressed the rights of a purchaser of property at a foreclosure sale and found that not only does a purchaser have the right to demand and receive rents from a the prior mortgagor who fails to vacate during the period of redemption, but that a mortgagor who fails to pay can be removed. *Id.*, 94 Idaho at 96. In reaching its' conclusion, the Court examined Idaho Code § 11-407 and *Caldwell v. Thiessen*, 60 Idaho 515 (1939) and noted that upon purchase of a property at a foreclosure sale, the purchaser obtains all right title and interest of the mortgagors in the property and that the "**only right**" remaining thereafter is the right to re-obtain title through redemption. *Aker v. Mader*, 94 Idaho at 96 (1971)(emphasis added). The Court further noted that under Idaho Code § 11-407 a purchaser, from the time of sale until redemption is entitled to receive rents of the property sold, or the value of the use and occupation thereof from the "tenant in possession" which included a mortgagor holding over during the period of redemption.

While not directly dispositive of the issue here, the *Aker* case does identify the rights of a mortgagor who fails to vacate following a foreclosure sale, such as the Nickersons in this case,

and notes that their only right is that of redemption. Accordingly, the language in the order of sale that the Nickersons' take issue with is not improper.

Additionally, it should be noted that even if the Nickersons' argument were correct, their challenge is not ripe. The ripeness doctrine is to prevent courts from entangling themselves in purely abstract disagreements. *Tucker v. State*, 394 P.3d 54, 70 (Idaho 2017). Under the ripeness test, a party must show (1) the case presents definite and concrete issues; (2) a real and substantial controversy exists (as opposed to hypothetical facts); and (3) there is a present need for adjudication." *Id.*, quoting *State v. Manley*, 142 Idaho 338, 342 (2005).

Here there is no evidence in the record that the Nickersons have been divested of possession prior to the expiration of their redemption rights. Instead, the Nickersons have attached to their opening brief as Exhibit 3 a Demand for Possession dated September 13, 2017 and a subsequent letter retracting that demand for possession and there is no evidence in the record that evidences any action to eject the Nickersons from the Property. Further, there is no evidence that the Nickersons are at risk of being ejected from the Property before their redemption period expires.

Accordingly, where the Nickersons continue to remain in possession of the Property during the applicable redemption period, their argument is not ripe, nor does Idaho law render the order of sale in this case inappropriate.

Turning next to the Nickersons' contention that they should have been allowed to dictate the order in which purported underlying parcels that comprised the Property were sold pursuant to I.C. § 11-304, the Nickersons' argument fails and is not properly supported such that it is

waived. Specifically, the record in this case shows that the Nickerson's took out a loan for \$285,000, in return for which they pledged the Property legally described as:

SITUATE IN THE COUNTY OF CLEARWATER, STATE OF IDAHO.

**TOWNSHIP 36 NORTH, RANGE 2 EAST, BOISE MERIDIAN
SECTION 22: SE1/4 NW1/4, SE1/4 SW1/4 NW ¼**

Commonly known as 3165 Neff Road, Orofino, ID 83544.

The District Court ordered the foregoing Property to be sold which the Sheriff did sell "in one lot or parcel."¹³

In their objection before the district court as well as on appeal, the Nickersons' provide no evidence by way of affidavit or otherwise establishing that the Property is comprised of more than one parcel and thus it was not error for the district court to have denied their objection and their arguments should not be considered on appeal. *Liponis v. Bach*, 149 Idaho 372, 374, 237 P.3d 696, 698 (2010). In fact, the Nickersons' objection is far from clear as to whether they contend that the Property as legally described above is comprised of multiple parcels which certainly does not appear in to be the case from the legal description itself. The Nickersons' opening brief provides no further explanation. Rather a review of the Nickersons' objection before the district court simply provided they purchased two parcels but only agreed to provide "one parcel to Coldwell Banker as a security interest when the original loan was negotiated." (R. pg. 211.)

¹³ See Sheriff's Certificate of Sale attached hereto and recorded in the Clearwater County land records on August 28, 2017 as Instrument No. 231642.

Based upon the record before the district court as well as this court on appeal, there is no evidence that the district court erred in denying the Nickersons objection to the order for sale. And because this Court "will not consider assignments of error not supported by argument and authority in the opening brief," the district court's rulings should be affirmed. *See Bagley v. Thomason*, 149 Idaho 799, (2010); quoting *Hogg v. Wolske*, 142 Idaho 549, 599 (2006).

V. THE NICKERSONS' REMAINING ISSUES ON APPEAL ARE WAIVED.

For the first time on appeal, the Nickersons' raise two new challenges. First they contend that an entity other than PHH submitted a credit bid thereby voiding the enforceability of the Sheriff's Sale that took place on August 28, 2017. Second they contend that this Court should overturn its decision in *Nickerson I* because of a Settlement Agreement and Consent Order recently entered into between Respondent and the Idaho Department of Finance. Again, the Nickersons' arguments are meritless.

First, as a procedural matter, both of the foregoing issues are being raised for the first time on appeal and thus are not properly before this Court. *Fed. Home Loan Mortg. Corp v. Butcher*, 157 Idaho 577, 581 (2014)(noting that an issue presented on appeal must have been properly preserved in the court below and issues raised for the first time on appeal will not be considered by the Court.) Additionally,

The Idaho Appellate Rules require an appellant to support its contentions "with citations to the authorities, statutes and parts of the transcript and the record relied upon." I.A.R. 35(a)(6). Thus, it is "well settled" that an issue on appeal will not be considered if it is "not supported by propositions of law, authority, or argument." *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 376, 973 P.2d 142, 147 (1999) (quoting *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)). Even where an issue is "explicitly set forth in the party's brief" as one of the bases for

appeal, if it is" only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court." *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 382-83, 234 P.3d 699, 706-07 (2010) (citing *Inama v. Boise Cnty. ex rel. Bd. of Comm'rs*, 138 Idaho 324, 330, 63 P.3d 450, 456 (2003)).

Trotter v. Bank of New York Mellon, 275 P.3d 857 (Idaho 2012). Further, as noted by the Court in *Nickerson 1*:

"This Court does not review an alleged error on appeal unless the record discloses an adverse ruling forming the basis for the assignment of error." *Ada Cnty. Highway Dist. v. Total Success Investments, LLC*, 145 Idaho 360, 368, 179 P.3d 323, 331 (2008). "This Court will not search the record for error. We do not presume error on appeal; the party alleging error has the burden of showing it in the record." *VanderWal v. Albar, Inc.*, 154 Idaho 816, 822, 303 P.3d 175, 181 (2013) (quoting *Miller v. Callear*, 140 Idaho 213, 218, 91 P.3d 1117, 1122 (2004)).

PHH Mortgage v. Nickerson, 160 Idaho 388, 399 (2016).

Due to the Nickersons' failure to have raised either of these arguments before the district court, they have waived these issues on appeal.

Notwithstanding the foregoing, even if the Nickersons' newest claims had been properly raised, they are both meritless. Specifically, the Sheriff's Certificate of Sale which was issued clearly states that the Property was purchased via credit bid by the Respondent and not "Genworth Financial" as alleged by the Nickersons.¹⁴

Additionally, the Settlement Agreement and Consent Order included with the Nickersons

¹⁴ While it is the Nickersons' obligation to present a complete record on appeal and they have failed to do so by failing to include any evidence supporting their contention that someone other than the Respondent purchased the Property at the foreclosure sale via a credit bid, out of an abundance of caution and for the Court's convenience, it is attached hereto. *See State v. Willoughby*, 147 Idaho 482, 488 (2009)(noting that it is the appellant's burden to produce a record demonstrating error and if they present an incomplete record, the Court will not presume error.) As a publically recorded document, recorded on August 28, 2017 as Instrument No. 231642, this is a document of which the Court may take judicial notice. The Sheriff's Certificate of Sale clearly sets forth that the Property was purchase by the Respondent.

opening brief still does not provide any direct evidence to support any of the Nickersons' accusations or arguments in this matter. Rather, courts that have been faced with similar attempts to enforce and/or use such consent decrees have found that borrowers such as the Nickersons lack standing to enforce such judgments as a matter of law but also via the express provisions of the consent orders. *See Duque v. Wells Fargo, N.A.*, 462 S.W.3d 542, 549-550 (Tex. App. 2015); *see also* Appellant's Brief, Addendum, Ex. 1, pg. 12-13, Sec. 21 and 27 (noting that only the State Mortgage Regulator has standing to enforce the Agreement and that the Agreement does not create any private rights or remedies against Respondent); *see also United States v. FMC Corp.*, 531 F.3d 813 (9th Cir., 2008)(interpreting a similar provision to section 27 in the Respondent's settlement agreement and consent order with the State of Idaho to preclude enforcement by third parties.)

For the foregoing reasons, the Nickersons' new arguments on appeal fail.

VI. RESPONDENT IS ENTITLED TO ATTORNEY'S FEES AND COSTS ON APPEAL.

Respondent requests costs and attorney fees against the appellant pursuant to Idaho Code § 12-121 on the grounds that it is the prevailing party in this matter and appellant has brought, pursued, or defended frivolously, unreasonably or without foundation. *See Lower Payette Ditch Co., v. Harvey*, 152 Idaho 291 (2011). Here, the gravamen of the Nickersons' appeal is to seek to re-litigate this Court's ruling in *Nickerson 1*. This Court already ruled that the Nickerson's previous appeal was pursued "frivolously, unreasonably, and without foundation" and the present appeal is nothing more than a second attempt to re-litigate the same issues and arguments

already considered by this Court when it affirmed the district court's grant of summary judgment and final judgment in favor of Respondent in *Nickerson I*, and when it denied the Nickersons petition for re-hearing. The law of the case doctrine clearly bars the Nickersons' attempts to re-litigate the judgment in this matter and thus it cannot be said that they have acted in good faith or with reasonable basis in law or fact.

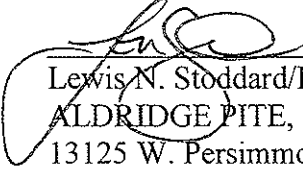
Lastly, the Nickersons' request for attorney fees should be denied where "this Court has long held that pro se litigants are not entitled to attorney fees." *Michalk v. Michalk*, 148 Idaho 224 (2009).

CONCLUSION

For the reasons stated above, the district court's decisions should be affirmed in all respects and this matter should be allowed to come to its inevitable conclusion. The Property has been sold and the Nickersons have lost all rights in the Property, subject to their right to revive their interests through redemption.

Dated: February 28th, 2018

Respectfully submitted,


Lewis N. Stoddard/ISB #7766
ALDRIDGE PITE, LLP
13125 W. Persimmon Ln., Suite 150
Boise, ID 83713

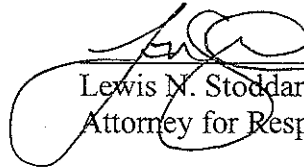
CERTIFICATE OF SERVICE

The undersigned does hereby certify that two copies of the Respondent's Opening Brief and this certificate of service was served upon the following designated parties, by first class mail, at the address listed below:

Charles and Donna Nickerson
3165 Neff Road
Orofino, ID 83544

Dated and certified this 28th day of February, 2018

ALDRIDGE PITE, LLP



Lewis M. Stoddard
Attorney for Respondent

EXHIBIT A

231642 ↗

RECEIVED
Clearwater County Sheriff's Office
Date 8/28/17 Time 3:41

PETER J. SALMON (ID SBN 6659)
SYDNEY K. LEAVITT (ID SBN 8933)
ALDRIDGE PITE, LLP
13125 W Persimmon Ln. Ste. 150
Boise, ID 83713
TELEPHONE: (858) 750-7600
FACSIMILE: (858) 412-2789
E-mail: sleavitt@aldridgepite.com

Instrument # 231642
CLEARWATER COUNTY, OROFINO, IDAHO
8-28-2017 03:49:00 PM No. of Pages: 3
Recorded for : CLEARWATER COUNTY SHERIFF *
CARRIE BIRD Fee: 16.00
Ex-Officio Recorder Deputy J. Scott
Index to: SALE, SHERIFFS CERTIFICATE OF return

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

PHH MORTGAGE,

Plaintiff,

v.

CHARLES NICKERSON, DONNA
NICKERSON; COLDWELL BANKER
MORTGAGE; J.P. MORGAN CHASE
BANK, N.A.; KNOWLTON & MILES PLLC;
WELLS FARGO BANK, N.A.

Defendants.

Case No. CV-2011-0000028

SHERIFF'S CERTIFICATE OF SALE

The Sheriff of Clearwater County, State of Idaho, do hereby certify that, by virtue of an Order for Sale of Foreclosure entered on April 13, 2017, and Writ of Execution on Judgment of Foreclosure issued on April 25, 2017, in the above-entitled action, directed to me, setting forth a judgment recovered in the amount of \$385,276.45, lawful money of the United States, to be satisfied out of the real property of Defendants, belonging to the said Defendants on the day said judgment became a lien thereon, or attachment or execution was levied herein, or thereafter, according to said writ and the statutes in such cases made and provided, I have levied on, and

posted in the a newspaper of general circulation in Clearwater County, Idaho for (3) three consecutive weeks on July 11, 2017, July 18, 2017 and July 25th 2017, and also posted the Real Property at **3165 NEFF ROAD, OROFINO, ID, 83544** and the following (3) three places in the Courthouse Precinct and (3) places in the Precinct of the Real Property to be sold:

- | | |
|---------------------------|---------------------------|
| Courthouse Precinct: | 1. 150 Michigan Avenue |
| | 2. 330 Michigan Avenue |
| | 3. College/Johnson Street |
| Real Property's Precinct: | 1. Crow Bench/Neff Road |
| | 2. 3165 Neff Road |
| | 3. 245 Main |

On the 28th day of August, 2017 at 2:00 p.m. at the location of the Clearwater County Courthouse, 150 Michigan Ave., Orofino, ID 83544, sold at public auction, in one lot or parcel to PHH Mortgage, c/o PHH Mortgage Services, One Mortgage Way, Mt. Laurel, NJ 08054, without recourse, together with its successors and assigns, who was the highest bidder, in the sum of \$333,000.00, which was bid in credit by purchaser, claim and interest of the within named Defendants, as aforesaid, in and to the real estate located **3165 NEFF ROAD, OROFINO, ID, 83544** particularly described as follows, to-wit:

SITUATE IN THE COUNTY OF CLEARWATER, STATE OF IDAHO.

**TOWNSHIP 36 NORTH, RANGE 2 EAST, BOISE MERIDIAN
SECTION 22: SE1/4 NW1/4, SE1/4 SW1/4 NW ¼**

And that the said real estate is subject to redemption within one year after the sale if the real property sold consisted of a tract of land more of twenty (20) acres , pursuant to the

statute in such case made and provided, except: No exceptions.

This Sheriff's Certificate of Sale confirms that the Writ of Execution on Judgment of Foreclosure issued on April 25, 2017, has been satisfied and, therefore, the Writ can be returned to court.

GIVEN UNDER MY HAND. On this 28th day of August, 2017

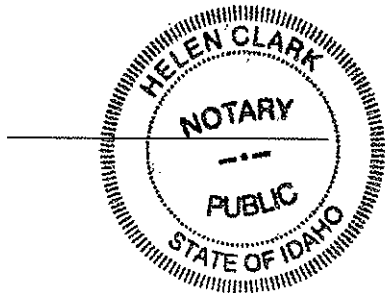
By: *Chris Goetz*
CLEARWATER COUNTY SHERIFF

STATE OF IDAHO)

COUNTY OF CLEARWATER)

On this 28th day of August, 2017, before me, the undersigned, a Notary Public in and for said County and State, personally appeared **Chris Goetz**, known or identified to me to be the person whose name is subscribed to the within instrument as Sheriff of Clearwater County, State of Idaho, and acknowledged to me that he executed the same as such Sheriff of Clearwater County, State of Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Helen Clark
Notary Public for the State of Idaho
Residing at: *Active*, Idaho
My Commission Expires: *5-7-2019*