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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

Supreme Court Docket No. 45338

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DARIN BERGEMAN,

Plaintiff-Appellant,

v.

SELECT PORTFOLIO SERVICING and MOHAMED ELABED,

Defendants-Respondents,

and

WMC MORTGAGE CORPORATION, U.S. BANK NATIONAL ASSOCIATION,  
ALLIANCE TITLE COMPANY, SILVERCREEK REALTY GROUP, and JOHN DOES 1-6,

Defendants.

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**BRIEF OF RESPONDENT SELECT PORTFOLIO SERVICING**

---

Appeal from the Seventh Judicial District for Bonneville County

Case No. CV 17-1430

The Honorable Bruce L. Pickett, Magistrate Judge

---

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iv
I. STATEMENT OF THE CASE .....	1
A. Nature of the case.....	1
B. Statement of facts and course of proceedings.....	2
1. After Bergeman’s mother died, he occupied the property and paid the mortgage loan, but he did not assume the loan.....	3
2. Bergeman stopped paying on the loan in 2015, the loan went into default, and Elabed bought the property at foreclosure sale in February 2017. ....	3
3. The trial court denied Bergeman’s motion to consolidate and dismissed his second amended complaint for failure to state a claim upon which relief could be granted.....	6
II. ISSUES PRESENTED ON APPEAL.....	7
III. STANDARD OF REVIEW.....	7
IV. ATTORNEY FEES AND COSTS ON APPEAL .....	9
V. ARGUMENT .....	9
A. Bergeman has waived each of his assignments of error on appeal because he fails to support his claims with authority or argument. ....	9
B. Bergeman has not shown the trial court erred in dismissing his second amended complaint for failure to state a claim upon which relief could be granted. ....	11
1. Bergeman alleged no facts that the foreclosure of the property was wrongful and no cause of action that would set aside the foreclosure sale. ....	11
2. The misrepresentation claim fails because Bergeman did not plead the factual circumstances constituting each element of fraud with particularity.....	13
3. The negligent supervision claim fails because Bergeman did not allege facts to show that SPS owed a duty to protect him from an employee’s dangerous propensities. ....	16
4. The trespass claim fails because Bergeman did not allege facts to support wrongful foreclosure or eviction or that Elabed was SPS’s agent.....	18
5. The infliction of emotional distress claims fail because Bergeman did not allege extreme or outrageous conduct (as to intentional infliction) or physical manifestation of emotional injury (as to negligent infliction). ....	20

C. Bergeman has not shown the district court abused its discretion in denying his motion to consolidate this action with Elabed’s eviction action because he does not address the abuse of discretion standard..... 23

D. Bergeman is not entitled to attorney fees and costs on appeal because he cites no legal authority for such awards..... 24

E. If SPS prevails, it is entitled to its attorney fees and costs on appeal under Idaho Code § 12-121 and the Idaho Appellate Rules..... 25

VI. CONCLUSION..... 26

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Armand v. Opportunity Mgmt. Co.</i> , 155 Idaho 592, 315 P.3d 245 (2013).....	24-25
<i>Bach v. Bagley</i> , 148 Idaho 784, 229 P.3d 1146 (2010).....	10, 11
<i>Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Tr.</i> , 147 Idaho 117, 206 P.3d 481 (2009).....	25
<i>Beco Constr. Co. v. Bannock Paving Co.</i> , 118 Idaho 463, 797 P.2d 863 (1990).....	16
<i>Bolognese v. Forte</i> , 153 Idaho 857, 292 P.3d 248 (2012).....	10
<i>Caldwell v. Village of Mountain Home</i> , 29 Idaho 13, 156 P. 909 (1916).....	8-9
<i>Clark v. Olsen</i> , 110 Idaho 323, 715 P.2d 993 (1986).....	8
<i>Colafranceschi v. Briley</i> , 159 Idaho 31, 355 P.3d 1261 (2015).....	8
<i>Cummings v. Stephens</i> , 160 Idaho 847, 380 P.3d 168 (2016).....	24
<i>Curtis v. Firth</i> , 123 Idaho 598, 850 P.2d 749 (1993).....	21, 22
<i>Edmondson v. Shearer Lumber Prods.</i> , 139 Idaho 172, 75 P.3d 733 (2003).....	20, 21, 22
<i>Frogley v. Meridian Joint Sch. Dist. No. 2</i> , 155 Idaho 558, 314 P.3d 613 (2013).....	22
<i>Gill v. Brown</i> , 107 Idaho 1137,1138-39, 695 P.2d 1276 (Ct. App. 1985).....	22

<i>Hatfield v. Max Rouse &amp; Sons Nw.,</i> 100 Idaho 840, 606 P.2d 944 (1980).....	21, 22
<i>Hoffer v. City of Boise,</i> 151 Idaho 400, 257 P.3d 1226 (2011).....	7
<i>Haupt v. Wells Fargo Bank, Nat'l Ass'n,</i> 160 Idaho 181, 370 P.3d 384 (2016).....	12, 13
<i>Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.,</i> 121 Idaho 266, 824 P.2d 841 (1991).....	23
<i>Jenkins v. Boise Cascade Corp.,</i> 141 Idaho 233, 108 P.3d 380 (2005).....	14
<i>Kuhn v. Coldwell Banker Landmark, Inc.,</i> 150 Idaho 240, 245 P.3d 992 (2010).....	19
<i>Lazy Y Ranch Ltd. v. Behrens,</i> 546 F.3d 580 (9th Cir. 2008) .....	9
<i>Mortensen v. Stewart Title Guar. Co.,</i> 149 Idaho 437, 235 P.3d 387 (2010).....	22
<i>Mueller v. Hill,</i> 158 Idaho 208, 345 P.3d 998 (2015).....	18
<i>Nation v. State, Dep't of Corr.,</i> 144 Idaho 177, 158 P.3d 953 (2007).....	21
<i>Nelson v. Holdaway Land &amp; Cattle Co.,</i> 107 Idaho 550, 691 P.2d 796 (Ct. App. 1984).....	18
<i>Orthman v. Idaho Power Co.,</i> 126 Idaho 960, 895 P.2d 561 (1995).....	8
<i>Owsley v. Idaho Indus. Comm'n,</i> 141 Idaho 129, 106 P.3d 455 (2005).....	8, 20
<i>Peterson v. Hailey Nat. Bank,</i> 51 Idaho 427, 6 P.2d 145 (1931).....	12

<i>Podolan v. Idaho Legal Aid Servs., Inc.</i> , 123 Idaho 937, 854 P.2d 280 (Ct. App. 1993).....	16
<i>Rausch v. Pocatello Lumber Co.</i> , 135 Idaho 80, 14 P.3d 1074 (Ct. App. 2000).....	16
<i>Rueth v. State</i> , 103 Idaho 74, 644 P.2d 1333 (1982).....	9
<i>Shatto v. Syringa Surgical Ctr., LLC</i> , 161 Idaho 127, 384 P.3d 374 (2016).....	19
<i>Spence v. Howell</i> , 126 Idaho 763, 890 P.2d 714 (1995).....	21, 22
<i>State v. Zichko</i> , 129 Idaho 259, 923 P.2d 966 (1996).....	25
<i>Stewart Title of Idaho, Inc. v. Nampa Land Title Co.</i> , 110 Idaho 330, 715 P.2d 1000 (1986).....	15
<i>Stewart v. Arrington Constr. Co.</i> , 92 Idaho 526, 446 P.2d 895 (1968).....	8
<i>Turner v. Turner</i> , 155 Idaho 819, 317 P.3d 716 (2013).....	25
<i>Walston v. Monumental Life Ins. Co.</i> , 129 Idaho 211, 923 P.2d 456 (1996).....	21, 22
<i>Walter E. Wilhite Revocable Living Tr. v. Nw. Yearly Meeting Pension Fund</i> , 128 Idaho 539, 916 P.2d 1264 (1996).....	18
<i>Wechsler v. Wechsler</i> , 162 Idaho 900, 407 P.3d 214 (2017).....	9, 23, 24
<i>Woods v. Sanders</i> , 150 Idaho 53, 244 P.3d 197 (2010).....	10, 25
<b>Statutes</b>	
Idaho Code § 12-121.....	7, 9, 25, 26

Idaho Code § 45-1505.....	12
Idaho Code § 45-1506.....	12, 13, 19
Idaho Code § 45-1508.....	13, 19

**Rules**

Idaho Appellate Rule 40 .....	9, 25
Idaho Appellate Rule 41 .....	9, 26
Idaho Rule of Civil Procedure 12(b)(6).....	passim
Idaho Rule of Civil Procedure 42(a).....	1, 9, 10, 24

## I. STATEMENT OF THE CASE

### A. Nature of the case.

This appeal arises from the district court's dismissal of common law claims made by Appellant Darin Bergeman (Bergeman) regarding the nonjudicial foreclosure sale of real property in Idaho Falls, Idaho. The property was owned by Karen Hansen, Bergeman's mother. Ms. Hansen entered into a mortgage loan secured by a deed of trust on the property. Respondent Select Portfolio Servicing, Inc. (SPS) serviced the loan. After Ms. Hansen died in 2006, Bergeman occupied the property and made payments on the loan, but he did not assume the loan. In 2015, the loan went into default. In February 2017, the property was foreclosed and sold to Respondent Mohamed Elabed (Elabed).

In his second amended complaint, Bergeman alleged the foreclosure sale was wrongful and invalid. He sought to set aside the foreclosure sale, enjoin a separate eviction action brought by Elabed, and hold SPS and Elabed (and other defendants) liable for money damages, all based on claims of misrepresentation, negligent supervision, trespass, and the infliction of emotional distress. Before the district court, Bergeman moved to consolidate this action with Elabed's eviction action under Idaho Rule of Civil Procedure 42(a), and that motion was denied. SPS and Elabed each moved to dismiss Bergeman's complaint under Idaho Rule of Civil Procedure 12(b)(6), and those motions were granted.

On appeal, Bergeman contends the district court erred in dismissing his complaint and in denying his motion to consolidate. But in his opening brief, Bergeman offers no analysis and cites no authority to support his assignments of error. Perhaps most obvious, he does not cite a

single element of any of his causes of action, and he offers no analysis of how the factual allegations in the second amended complaint relate to or support those claims. He also does not explain how the district court abused its discretion in denying his motion to consolidate. A party waives an issue cited on appeal if either authority or argument is lacking. This Court should affirm the district court's rulings for that reason alone.

But even if Bergeman has not waived his appeal issues, he still has not shown error by the district court. The second amended complaint is premised on conclusory allegations that the foreclosure sale was wrongful and that SPS is liable for misrepresentation, negligent supervision, trespass, and the infliction of emotional distress. However, Bergeman alleged no facts to show that the foreclosure violated Idaho's foreclosure requirements. He also admitted that the mortgage loan was in default, that he never assumed the loan, and that Ms. Hansen's estate remained the borrower on the loan. Because Bergeman failed to allege facts to support any of his claims, the district court correctly dismissed his second amended complaint under Rule 12(b)(6). As for his motion to consolidate, Bergeman fails to show how the district court violated any part of the three-part abuse of discretion standard.

The Court should affirm the district court's rulings that the second amended complaint states no valid cause of action against SPS and that consolidation of this action and Elabed's eviction action was not appropriate.

**B. Statement of facts and course of proceedings.**

Because the trial court decided this case on motions to dismiss, the facts are set forth in Bergeman's second amended complaint and the exhibits attached to, incorporated into, and made

part of the complaint. *See* R. 36-66.<sup>1</sup> More legible copies of the exhibits are found at R. 16-35.

**1. After Bergeman's mother died, he occupied the property and paid the mortgage loan, but he did not assume the loan.**

Bergeman's mother, Karen Hansen, owned real property located at 1623 West 145 North, Idaho Falls, Idaho 83401. R. 38-39 (¶¶ 10-11). The property consists of a home and acreage. R. 38 (¶ 10). In October 1998, Ms. Hansen executed a promissory note and, as security for the note, granted a deed of trust on the property in favor of WMC Mortgage Corporation (WMC Mortgage). *See* R. 36-37 (¶ 2), 53, 55, 61. The deed of trust was recorded in the mortgage records of Bonneville County. *See* R. 53, 55. The mortgage loan and deed of trust were eventually assigned to U.S. Bank National Association as trustee (U.S. Bank). R. 37 (¶ 3), 53, 55. SPS is currently the servicer for the loan. R. 37 (¶ 4).

After Ms. Hansen's death in 2006, Bergeman took possession of the property. R. 39 (¶ 12). Mortgage statements continued to be sent to the "Estate of Karen Hansen." R. 39 (¶ 13). Bergeman made payments on the loan, which were accepted and credited to the loan. R. 39 (¶¶ 12-13). Bergeman, however, did not assume the mortgage. R. 39 (¶ 13). In March 2012, Donald Hansen, the executor of Ms. Hansen's estate, granted Bergeman an executor's deed for the property in exchange for \$10. R. 36 (¶ 1), 48.

**2. Bergeman stopped paying on the loan in 2015, the loan went into default, and Elabed bought the property at foreclosure sale in February 2017.**

In July 2015, Bergeman was convicted of a probation violation and sentenced to serve time in an Idaho correctional facility. R. 39 (¶ 12). Around that time, Bergeman stopped making

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<sup>1</sup> The Clerk's Record is cited as "R." and the Clerk's Supplemental Record is cited as "Supp.R." The transcript is cited as "Tr." Appellant's Opening Brief is cited as "AOB."

payments on the mortgage loan. In the second amended complaint, Bergeman alleges he either made payments or made arrangements for others to make payments until the fall of 2016. *Id.* But a Notice of Default recorded in Bonneville County in September 2016 states that Ms. Hansen or her successor in interest had not made monthly payments since February 2015 and was in default on the loan. R. 55-56; *see also* R. 61 (“As of February 15, [2017] you are 745 days delinquent on your mortgage loan.”). Despite this discrepancy, Bergeman admits the loan was in default. *See* R. 40 (¶ 14); *see also* AOB 9, 16-17, 18, 19 (recognizing Bergeman’s admissions that the loan was in default).

According to the Notice of Default, through September 2016, Ms. Hansen owed \$11,278.02, plus \$221.34 in late charges and \$1,047.38 in other fees and costs. R. 56. In addition, the Notice of Default declared that \$30,942.62 in principal and \$5,486.81 in interest, plus an escrow balance of \$10,382.55, was immediately due. *Id.* The Notice of Default was followed in October 2016 by a Trustee’s Notice of Sale, which announced the property would be sold at a foreclosure sale on February 23, 2017. R. 53-54. The Notice of Default and Trustee’s Notice of Sale were posted on the property, R. 58, and notice of the foreclosure sale was also published in *The Post Register*, R. 59-60.

On December 30, 2016, an Affidavit of Mailing of Trustee’s Notice of Sale was recorded in Bonneville County, along with the Notice of Default and Trustee’s Notice of Sale. R. 50-57; *see also* R. 18-25. According to the affidavit, the notices were mailed to the Estate of Karen Hansen, Donald Hansen (as the executor of the Estate of Karen Hansen), the heirs and devisees

of Karen Hansen, Darin Bergeman, the spouse of Darin Bergeman, and the occupants of the property. R. 50-51.

During this time, SPS continued to send monthly mortgage statements to the Estate of Karen Hansen. R. 39 (¶ 13), 41 (¶ 16(e)). In February 2017, SPS sent a statement stating that the estate owed \$17,932.87 on the mortgage loan. R. 39 (¶ 13), 61-63; *see also* R. 29-31. According to Bergeman, the statements misrepresented that the foreclosure sale could and would be vacated “in the event the plaintiff made a mortgage payment.” R. 41 (¶ 16(e)). The February 2017 statement, however, contains no such statement. *See* R. 61-63; *see also* R. 29-31. It states that \$17,932.87 was due and must be paid to bring the loan current. R. 61; *see also* R. 29.

Bergeman also alleges that because he was incarcerated, he was unable to speak with the defendants named in the second amended complaint. R. 40 (¶ 14). He appointed his father, Jerry Bergeman, to make arrangements to cure any default of the mortgage loan. *Id.*; R. 64-66. Jerry Bergeman made numerous efforts to speak with the defendants, but those efforts were ignored. R. 40 (¶ 14). Bergeman alleges that the defendants refused to discuss the status of the mortgage foreclosure with anyone other than the executor of Ms. Hansen’s estate. R. 41 (¶ 16(a), (b)).

Despite their refusal to discuss the mortgage foreclosure, Bergeman also alleges the defendants indicated they “would accept a certain payment, including penalties and interest, from the plaintiff” but then refused to accept a payment of approximately \$16,000 wired prior to the foreclosure sale. R. 41 (¶ 16(c)). Also, the defendants purportedly accepted another payment of \$19,422.87 from Bergeman and admitted that the foreclosure sale was vacated and invalidated. R. 41 (¶ 16(f)). Bergeman does not state when those payments were made. In any event, the

foreclosure sale went forward on February 23, 2017, with the assistance of Alliance Title Company (Alliance Title). *See* R. 37 (¶¶ 5-6). Elabed purchased the property at the foreclosure sale through Silvercreek Realty Group (Silvercreek Realty). *See* R. 37-38 (¶ 6), 42 (¶ 16(i)).

**3. The trial court denied Bergeman’s motion to consolidate and dismissed his second amended complaint for failure to state a claim upon which relief could be granted.**

In March 2017, Bergeman filed a complaint. R. 7-35. Then in April 2017, he filed an amended complaint against SPS, Elabed, WMC Mortgage, U.S. Bank, Alliance Title, Silvercreek Realty, and John Does 1-6. R. 67-95. Ultimately Bergeman served only Elabed, and SPS appeared. Bergeman filed a motion to consolidate this action with a separate action Elabed had filed to evict the tenant of the property. Supp.R. 1. Elabed filed the eviction action in Bonneville County magistrate court (Case No. CV 2017-1746). R. 43 (¶ 20); *see also* Supp.R. 13-16. The district court denied the motion to consolidate. R. 98-100.

Later in April, Bergeman filed another amended complaint against the same defendants. R. 36. In his second amended complaint, Bergeman alleged claims of misrepresentation and/or negligent supervision, trespass, intentional infliction of emotional distress, and negligent infliction of emotional distress. R. 40-45 (¶¶ 15-26). His prayer for relief asked: (1) for an award of damages, (2) that the nonjudicial foreclosure action be set aside, and (3) for injunctive relief directing Elabed to stop the eviction action. Bergeman also alleged that the defendants “were and still are agents for one another, and are acting under the course and scope of their employment or agency thereof, with knowledge and consent of each other.” R. 38 (¶ 8).

SPS and Elabed both moved to dismiss the second amended complaint based on Bergeman's failure to state a claim upon which relief can be granted under I.R.C.P. 12(b)(6). Supp.R. 60, 93. Bergeman did not move to amend his second amended complaint. *See generally* R. 2-6. The district court heard the motions on May 18, 2017, considering only the facts set forth in the second amended complaint and its exhibits. *See* Tr. 13:2-7, 52:17-19; R. 104. The district court granted the motions to dismiss on June 5, 2017, R. 103-111, and issued a judgment that same day, R. 114. On July 13, 2017, Bergeman filed a notice of appeal. R. 117.

## II. ISSUES PRESENTED ON APPEAL

SPS states the issues on appeal as:

1. Did the trial court correctly dismiss Bergeman's second amended complaint for failure to state a claim upon which relief can be granted?
2. Did the trial court correctly deny Bergeman's motion to consolidate this action with Elabed's eviction action?
3. Is SPS entitled to attorney fees on appeal under Idaho Code § 12-121?

## III. STANDARD OF REVIEW

Motion to dismiss. A motion to dismiss under I.R.C.P. 12(b)(6) tests the legal sufficiency of a complaint. *See Hoffer v. City of Boise*, 151 Idaho 400, 402, 257 P.3d 1226, 1228 (2011). On appeal, the Court reviews the dismissal of a complaint under the rule *de novo*. *Id.* The Court must determine if the facts alleged in the complaint, if true, are sufficient to entitle the plaintiff to relief. *Id.* In doing so, the Court must view all the facts and inferences in favor of the plaintiff and ask if a claim for relief has been stated. *Id.* "The issue is not whether the plaintiff will

ultimately prevail, but whether the party is entitled to offer evidence to support the claims.”

*Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (internal quotation marks and citation omitted).

But only factual allegations will satisfy I.R.C.P. 8(a)(2)’s requirement of “a short and plain statement of the claim showing that the pleader is entitled to relief.” *See Clark v. Olsen*, 110 Idaho 323, 325, 715 P.2d 993, 995 (1986) (stating purpose of complaint is to inform defendant of material facts upon which action is based). Thus, to survive a Rule 12(b)(6) motion to dismiss, it is not enough for the complaint to make conclusory allegations. *See Owsley v. Idaho Indus. Comm’n*, 141 Idaho 129, 136, 106 P.3d 455, 462 (2005). “Although the non-movant is entitled to have his factual assertions treated as true, this privilege does not extend to the conclusions of law the non-movant hopes the court to draw from those facts.” *Id.* (citation omitted).

When ruling on Rule 12(b)(6) motions, the courts examine the complaint in its entirety, including documents incorporated into the complaint by reference. *Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 530, 446 P.2d 895, 899 (1968) (“Where other matters are incorporated by reference in the pleadings, the court may properly consider such matters in passing on the motion attacking the pleadings.”); *Colafranceschi v. Briley*, 159 Idaho 31, 32 n.1, 355 P.3d 1261, 1262 n.1 (2015) (reviewing dismissal pursuant to Rule 12(b)(6) and drawing factual background “from the contents of Colafranceschi’s Second Amended Complaint and the attachments thereto”).

Furthermore, the courts do not accept as true factual allegations that are contradicted by documents incorporated by the complaint. *See Caldwell v. Village of Mountain Home*, 29 Idaho

13, 22, 156 P. 909, 912 (1916) (recognizing that general rule that demurrer admits truth of all facts that are pleaded does not apply “to facts which appear unfounded by a record incorporated in the pleading, or by a document referred to” (citation omitted)); *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008) (“we need not accept as true allegations contradicting documents that are referenced in the complaint”).

Motion to consolidate. Whether to consolidate separate actions is a decision left to the district court’s discretion. *See* I.R.C.P. 42(a) (court “may” order consolidation); *Rueth v. State*, 103 Idaho 74, 80, 644 P.2d 1333, 1339 (1982) (considering whether district court abused its discretion in denying motion for bifurcation under I.R.C.P. 42(b)). When reviewing an exercise of discretion by the district court, this Court considers whether the lower court perceived the issue as one of discretion, acted within the outer limits of its discretion and consistent with the legal standards applicable to the choices available to it, and reached its decision by an exercise of reason. *Wechsler v. Wechsler*, 162 Idaho 900, 909, 407 P.3d 214, 223 (2017).

#### IV. ATTORNEY FEES AND COSTS ON APPEAL

As explained in Section V.E. below, SPS requests an award of attorney fees on appeal under Idaho Code § 12-121 and Idaho Appellate Rule 41 and an award of costs under Idaho Appellate Rule 40.

#### V. ARGUMENT

**A. Bergeman has waived each of his assignments of error on appeal because he fails to support his claims with authority or argument.**

Bergeman contends the district court erred in granting SPS and Elabed’s motions to dismiss and in denying his motion to consolidate. AOB 10. But Bergeman offers no analysis and

cites no authority to support his claims of error as required by I.A.R. 35(a)(6). *See* AOB at 16-20. As a result, he has waived those issues on appeal. *See Woods v. Sanders*, 150 Idaho 53, 58, 244 P.3d 197, 202 (2010) (finding I.A.R. 35(a)(6) was not satisfied when party failed to support issue on appeal with propositions of law or authority). “Where an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court.” *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010). It follows that a party waives an issue cited on appeal “if either authority or argument is lacking, not just if both are lacking.” *Bolognese v. Forte*, 153 Idaho 857, 866, 292 P.3d 248, 257 (2012) (citation omitted).

Bergeman’s opening brief is a general attack on the district court’s findings and conclusions and nothing more. *See* AOB at 16-20. In dismissing the second amended complaint, the district court analyzed each cause of action pled, and their elements, against the factual allegations of the complaint, and found the allegations did not support claims on which relief could be granted. R. 105-111. On appeal, Bergeman does not explain how the district court erred in applying the standard for dismissal under Rule 12(b)(6). *See* AOB at 11-12, 16-20. He does not even cite the elements of misrepresentation, negligent supervision, trespass, or intentional or negligent infliction of emotional distress or attempt to analyze how each claim’s elements relate to his factual allegations. *See* AOB at 16-20. His opening brief does not mention the trespass or emotional distress claims at all. *See* AOB 1-21.

Bergeman’s contention that the district court erred in denying his motion to consolidate suffers from the same lack of argument and particularity. I.R.C.P. 42(a)(2) states that the trial

court “may ... consolidate the actions” if the actions “involve a common question of law or fact.” The district court considered whether this action and Elabed’s eviction action shared common questions of law and fact and decided they did not. R. 98-100. While recognizing that standard in his opening brief, *see* AOB 12-16, Bergeman does not apply it and does not present any analysis of the standard or how it relates to the facts of this case, *see* AOB 20.

Because Bergeman fails to support his assignments of error with argument or authority, those claims of error are too indefinite to address. As such, he has waived the issues raised on appeal. *See Bach*, 148 Idaho at 790, 229 P.3d at 1152 (refusing to consider bulk of Bach’s claims on appeal because he failed to support them with relevant argument and authority). The Court should affirm the district court for this reason alone.

**B. Bergeman has not shown the trial court erred in dismissing his second amended complaint for failure to state a claim upon which relief could be granted.**

**1. Bergeman alleged no facts that the foreclosure of the property was wrongful and no cause of action that would set aside the foreclosure sale.**

Even if Bergeman has not waived his assignments of error, he still has not demonstrated any error by the district court. In his second amended complaint, Bergeman sought monetary damages, to set aside the foreclosure sale, and to stop Elabed’s attempted eviction action—all based on common law claims of misrepresentation, negligent supervision, trespass, and emotional distress. R. 40-45. Each cause of action was premised on the underlying assumption that the foreclosure sale was “wrongful.” *See generally id.* Bergeman, however, did not plead facts to support a wrongful foreclosure.

Under Idaho law, an action for wrongful foreclosure is equated with a cause of action for conversion. *See Houpt v. Wells Fargo Bank, Nat'l Ass'n*, 160 Idaho 181, 189–90, 370 P.3d 384, 392–93 (2016) (citations omitted). A lender cannot foreclose a mortgaged property except as provided by statute, and the failure to comply with the statutory procedures gives rise to a conversion action. *Peterson v. Hailey Nat. Bank*, 51 Idaho 427, 431-32, 6 P.2d 145, 147 (1931). In that situation, the lender becomes liable to the borrower just as anyone else who converts property. *Id.* Thus, the remedy is not the return of the property but damages measured by the value of the property at the time and place of sale. *See id.* at 433, 6 P.2d at 147.

It necessarily follows that Bergeman cannot set aside the foreclosure sale, or halt Elabed's eviction action, even if the sale was wrongful. But even more problematic for Bergeman is that he pled no facts to support a claim of wrongful foreclosure. Other than making conclusory allegations that the foreclosure sale was “wrongful,” “bogus,” and “invalid,” Bergeman did not allege any facts to show that any defendant failed to comply with the recording, notice, or sale requirements of Idaho Code §§ 45-1505 and 45-1506. *See* R. 39-44 (¶¶ 11-21). At most, he alleged that the defendants would not answer telephone calls or allow him to cure the default of a mortgage loan he was not party to. *Id.*

To be sure, based on the second amended complaint, Bergeman had no rights under the deed of trust or the mortgage loan. He admitted that his mother granted WMC Mortgage a deed of trust to secure the loan, R. 36-37 (¶ 2), 53, 55; that following her death he never assumed the loan, R. 39 (¶ 13); that the loan remained in the name of the Estate of Karen Hansen, *id.*; that he was not the executor of the estate, *see* R. 36 (¶ 1), 48-49; that the loan was in default at the time

of the foreclosure sale, AOB 9, 16-17, 18, 19; and that the property was sold to Elabed at the foreclosure sale, R. 37-38 (¶ 6). Following the foreclosure sale, any rights the estate (or Bergeman) had in the property were extinguished. *See* Idaho Code § 45-1508 (“A sale made by a trustee under this act shall foreclose and terminate all interest in the property covered by the trust deed of all persons to whom notice is given under section 45-1506, Idaho Code ....”).

In sum, Bergeman did not allege facts to show the property was wrongfully taken from his possession. *See Houpt*, 160 Idaho at 190, 370 P.3d at 393 (stating conversion requires distinct act of wrongfully asserted dominion over another’s property). Having admitted that he did not assume the mortgage loan and that the loan was in default, Bergeman did not state a claim for wrongful foreclosure, and he cannot set aside the foreclosure sale or stop Elabed’s attempted eviction through this action. Bergeman’s failure to allege a wrongful foreclosure also undermines his remaining claims seeking money damages.

**2. The misrepresentation claim fails because Bergeman did not plead the factual circumstances constituting each element of fraud with particularity.**

SPS now turns to Bergeman’s common law claims and request for damages. In the second amended complaint, Bergeman asserted a cause of action for misrepresentation based on allegations that “the defendants” refused to discuss the foreclosure with him or his father, indicated they would accept “a certain payment” but then refused, stated in mortgage statements that the foreclosure sale would be vacated if he “made a mortgage payment,” and misled Elabed into believing the foreclosure sale was valid. R. 40-42 (¶ 16). The district court dismissed the claim because Bergeman failed to plead with particularity facts showing the defendants’

knowledge that the alleged statements were false, their intent that he rely on the statements, his right to rely on the statements, or how he was injured. R. 105-107.

The district court did not err. Accepting Bergeman's allegations as true, he did not state a cause of action for misrepresentation. The claim has nine elements: (1) a statement of fact, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that there be reliance, (6) the hearer's ignorance of the falsity of the statement, (7) reliance by the hearer, (8) the hearer's right to rely on the statement (*i.e.*, justifiable reliance), and (9) resultant injury. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380, 386 (2005). The absence of just one element precludes recovery. *Id.* Further, Bergeman must support the existence of each element "by pleading with particularity the factual circumstances constituting fraud." *See id.* (citation omitted); *see also* I.R.C.P. 9(b).

The failure to plead each element with specificity is grounds for dismissal. *See Jenkins*, 141 Idaho at 239-40, 108 P.3d at 386-87. *Jenkins* illustrates this point. In that case, Jenkins asserted a claim of fraud related to the termination of his employment. *Id.* at 237, 108 P.3d at 384. The district court dismissed the claim because Jenkins failed to plead the fraud elements with specificity, and the Idaho Supreme Court affirmed. *Id.* at 239-40, 108 P.3d at 386-87. Both Jenkins's original and amended complaints only generally alleged that the defendant was involved in several false accusations and statements. *Id.* In particular, there were no facts alleged that showed Jenkin's reliance on any representations made to him; in fact he admitted that he knew many of the statements made were false and did nothing about it. *Id.* at 240, 108 P.3d at 387.

Bergeman's second amended complaint also failed to specify what factual circumstances constitute fraud. His allegations that the defendants failed to discuss the status of the foreclosure sale is not actionable because it involves no statement at all. *See* R. 41 (¶ 16(a), (b)). His allegation that the defendants indicated they would accept "a certain payment" does not specify which defendant made the statement, when the statement was made, how much should be paid, that the defendant knew the statement was false, that the defendant intended for him to rely on it, or that he did right rely on it. *See* R. 41 (¶ 16(c), (d)). His allegation that the defendants stated the foreclosure sale would be vacated if he "made a mortgage payment" also does not specify who the speaker was, that the defendant knowingly made a false statement or intended that he rely on the statement, or that he could rely on it. *See* R. 41 (¶ 16(e), (f)).

That Bergeman did not adequately plead the elements of fraud is perhaps best shown by his failure to allege with particularity his right to rely on any of the statements purportedly made by the defendants. It is essential that the hearer's reliance on the representation be justified. *Stewart Title of Idaho, Inc. v. Nampa Land Title Co.*, 110 Idaho 330, 332, 715 P.2d 1000, 1002 (1986). Bergeman's complaint showed that his reliance was not justified. In particular, he acknowledged that he did not assume the mortgage loan and was not the executor of his mother's estate, and that the loan was in default. *See* R. 39 (¶ 13). To be sure, the complaint showed that the Estate of Karen Hansen was the borrower on the loan, that the estate was 745 days delinquent on the loan, that a total of \$17,932.87 was due, and that the borrower "must pay this amount to bring your loan current." R. 39 (¶ 13), 53-63. Under those allegations, Bergeman had no reason to believe the alleged statements that he could cure the default of the mortgage loan.

Finally, Bergeman's claim that the defendants committed fraud by misleading Elabed also fails. *See* R. 42 (§ 16(g)-(i)). Idaho does not recognize third party fraud in circumstances such as these. *See Beco Constr. Co. v. Bannock Paving Co.*, 118 Idaho 463, 468, 797 P.2d 863, 868 (1990). In *Beco Construction*, the alleged misrepresentation was not directed to the plaintiff. *Id.* As a result, the Court found the plaintiff failed to establish that it was expected to rely on the statement (element 5), that it was ignorant of the statement's falsity (element 6), that it relied on the statement (element 7), or that it had a right to rely on the statement (element 8). *Id.* The same is true here. Since Bergeman was not the hearer, he has not alleged facts to support a claim of misrepresentation based on statements the defendants made to Elabed.

In sum, the Court should affirm the district court's dismissal of Bergeman's cause of action for misrepresentation. Because he failed to plead the factual circumstances constituting each element with particularity, he did not state a claim upon which relief can be granted.

**3. The negligent supervision claim fails because Bergeman did not allege facts to show that SPS owed a duty to protect him from an employee's dangerous propensities.**

The district court also correctly dismissed Bergeman's cause of action for negligent supervision. A negligent supervision claim is based on the supervisor's negligence in failing to exercise due care to protect third parties from the foreseeable tortious acts of an employee. *Rausch v. Pocatello Lumber Co.*, 135 Idaho 80, 86, 14 P.3d 1074, 1080 (Ct. App. 2000). To establish the claim, a plaintiff must show the defendant owed a legal duty to conform to a standard of conduct, a breach of that duty, a causal connection between the allegedly negligent conduct and the plaintiff's injury, and damages. *Podolan v. Idaho Legal Aid Servs., Inc.*, 123

Idaho 937, 945, 854 P.2d 280, 288 (Ct. App. 1993). “The duty requires the supervisor who knows of the supervisee’s dangerous propensities to control the supervisee so he will not injure third persons.” *Id.* at 946, 854 P.2d at 289.

According to the district court, Bergeman failed to allege that SPS or Elabed owed him any duty or that the tortious acts of an employee were foreseeable. R. 106-107. The court also recognized that Bergeman did not assume the mortgage loan. R. 107. All that is true. The complaint provided no factual allegations whatsoever to support the negligent supervision claim. *See* R. 36-46. In fact, the words “negligent supervision”—or words to that effect—were only used in the heading of Count One. R. 40. Nowhere in the second amended complaint did Bergeman allege that SPS (or any other defendant) supervised an employee, knew or should have known of an employee’s dangerous propensities to harm third parties, owed a duty to protect him from an employee’s dangerous propensities, or failed to exercise due care to protect him from an employee’s dangerous propensities, causing him injury. *See* R. 36-42.

In light of those failures, in his opening brief, Bergeman suggests, without citing any authority, that the district court improperly focused on the relationship between SPS and Elabed, rather than the relationship between SPS and its employees. AOB 17, 18. The district court’s order shows otherwise. *See* R. 106 (recognizing that negligent supervision claim is not based on vicarious liability). Bergeman also states that the court ignored “clear statements” made in the complaint “with respect to the managers and employees of SPS.” AOB 9-10. But, again, the complaint contained no such statements and made no mention of any duty SPS owed to

supervise its employees. Given Bergeman's failure to state a cause of action for negligent supervision, the Court must affirm the district court's dismissal of the claim.

**4. The trespass claim fails because Bergeman did not allege facts to support wrongful foreclosure or eviction or that Elabed was SPS's agent.**

Bergeman's opening brief makes no mention of his trespass claim at all, and as such, he has waived any argument that the district court's dismissal of the claim was in error. *See supra*, p. 10. But even if the Court considers the claim, the district court did not err. Trespass requires a showing that one wrongfully entered the premises and a causal connection between the defendant's alleged wrongful conduct and the plaintiff's injury. *Mueller v. Hill*, 158 Idaho 208, 212-13, 345 P.3d 998, 1002-03 (2015); *Nelson v. Holdaway Land & Cattle Co.*, 107 Idaho 550, 552, 691 P.2d 796, 798 (Ct. App. 1984). "Trespass is a tort against possession committed when one, without permission, interferes with another's exclusive right to possession of the property." *Walter E. Wilhite Revocable Living Tr. v. Nw. Yearly Meeting Pension Fund*, 128 Idaho 539, 549, 916 P.2d 1264, 1274 (1996).

Without specifying which defendant, Bergeman alleged that "these defendants appointed their agents, Silver Creek [sic] Realty and Mohamed Elabed to enter on the premises and to attempt to wrongfully evict the plaintiff and his current tenant thereon." R. 43 (¶ 19). He also alleged that Elabed entered the property and "made numerous threats that he would take possession of the personal property of the plaintiff herein and begin various building projects on the property as a result of the issuance of a bogus trustee's deed." R. 44 (¶ 21). The district court

found that the facts alleged failed to show Bergeman possessed or had legal title to the property at the time of the alleged trespass or that he suffered any injury to the property. R. 108.

The district court was correct. Silvercreek Realty and Elabed were statutorily entitled to possess the property after purchasing it at the foreclosure sale. *See* Idaho Code §§ 45-1508, 45-1506(10)-(11). Because Bergeman failed to present facts that support a wrongful foreclosure or eviction, Silvercreek Realty and Elabed did not wrongfully enter the property, and there can be no trespass. He also failed to allege any damage to the property, only the threat of damage. *See* R. 44 (¶ 21).

Lastly, the trespass claim against SPS cannot stand because it was based on the conclusory allegation that Silvercreek Realty and Elabed were SPS's agents when they entered the property. R. 38 (¶ 8), 43-44 (¶¶ 19, 21). Bergeman did not support his claim of agency with any factual allegations.<sup>2</sup> *See id.* There are three types of agencies: express authority, implied authority, and apparent authority. *Shatto v. Syringa Surgical Ctr., LLC*, 161 Idaho 127, 131, 384 P.3d 374, 378 (2016). Bergeman did not allege facts to support the actual authority necessary for Silvercreek Realty or Elabed to act on behalf of SPS through express or implied authority. *See id.* (explaining that express and implied authority are forms of actual authority). Nor did he allege any facts to support a reasonable belief that they acted on SPS's behalf via apparent authority.

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<sup>2</sup> The district court did not address Bergeman's conclusory allegations of agency, but the Court can. *See Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 248, 245 P.3d 992, 1000 (2010) (stating that where lower court's order is correct, but based on erroneous theory, order will be affirmed on correct theory).

*See id.* at 133, 384 P.3d at 380 (explaining that apparent authority requires conduct by principal that would lead person to reasonably believe that another person acts on principal's behalf).

In sum, Bergeman's conclusory allegations of trespass and agency were insufficient to show that SPS was directly liable for trespass or vicariously liable for Silvercreek Realty's or Elabed's acts. *See Owsley*, 141 Idaho at 136, 106 P.3d at 462. The Court should affirm the district court's dismissal of the trespass claim.

**5. The infliction of emotional distress claims fail because Bergeman did not allege extreme or outrageous conduct (as to intentional infliction) or physical manifestation of emotional injury (as to negligent infliction).**

Like his trespass claim, Bergeman does not address the dismissal of his intentional and negligent infliction of emotional distress claims in his opening brief. *See* AOB 1-21. Thus he has waived any claim of error in the dismissal of those claims. *See supra*, p. 10. Even so, the district court did not err in dismissing the claims. In his second amended complaint, Bergeman's only allegation of emotional distress was this: as a result of defendants' "intentional or negligent effort to take" his property and Elabed's eviction action, he "has suffered extreme emotional distress and continues to suffer the effect of this stress resulting in further emotional trauma and grief over the possible loss" of his property. R. 44 (¶ 21).

The district court correctly found that those allegations do not state a claim for intentional infliction of emotional distress. R. 109-110. The claim requires a plaintiff to show: (1) the defendant's conduct was intentional or reckless, (2) the conduct was extreme and outrageous, (3) there was a causal connection between the conduct and the emotional distress, and (4) the emotional distress was severe. *Edmondson v. Shearer Lumber Prods.*, 139 Idaho 172, 179, 75

P.3d 733, 740 (2003). “By requiring both conduct of an ‘outrageous’ nature and ‘severe’ emotional distress this rule affords courts a means of limiting fictitious claims.” *Hatfield v. Max Rouse & Sons Nw.*, 100 Idaho 840, 849, 606 P.2d 944, 953 (1980), *overruled on other grounds by Brown v. Fritz*, 108 Idaho 357, 359–60, 699 P.2d 1371, 1373–74 (1985).

Bergeman’s allegations of improper foreclosure and attempted eviction do not constitute extreme or outrageous behavior. As discussed (at pp. 11-13), the second amended complaint does not support his claim that foreclosure and the attempted eviction were wrongful. And even if the allegations were true, Bergeman did not allege that SPS was reckless, extreme, or outrageous in commencing foreclosure proceedings based on its rights under the mortgage loan. Idaho courts require “very extreme conduct” before awarding damages for the claim.

*Edmondson*, 139 Idaho at 180, 75 P.3d at 741. Bergeman must have alleged conduct that rises to the level of “‘atrocious’” or “‘beyond all possible bounds of decency.’” *Id.* (citation omitted). Whether such conduct is “so extreme and outrageous as to permit recovery is a matter of law.” *Nation v. State, Dep’t of Corr.*, 144 Idaho 177, 192, 158 P.3d 953, 968 (2007).

Examples of extreme and outrageous conduct supporting a claim for intentional infliction of emotional distress include an insurer’s unfair dealings with a grieving widower, *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 219-20, 923 P.2d 456, 464-65 (1996); real estate developers swindling a family out of their “life long dream,” *Spence v. Howell*, 126 Idaho 763, 774, 890 P.2d 714, 725 (1995); prolonged physical, mental, and sexual abuse, *Curtis v. Firth*, 123 Idaho 598, 605-06, 850 P.2d 749, 756-57 (1993); or recklessly shooting and killing a donkey that was a pet and a pack animal, *Gill v. Brown*, 107 Idaho 1137, 1138-39, 695 P.2d 1276, 1277-

78 (Ct. App. 1985). *See also Hatfield*, 100 Idaho at 850, 606 P.2d at 954 (citing case examples of “very extreme conduct”).

In contrast, in *Edmondson*, an employer’s conduct surrounding the rightful termination of an employee did not rise to the level of extreme and outrageous conduct, despite understanding the termination would cause the employee emotional distress. *See* 139 Idaho at 180, 75 P.3d at 741; *see also Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 446-47, 235 P.3d 387, 396-97 (2010) (“Merely exercising a legal right does not satisfy the outrageousness element of an emotional-distress claim.”). As alleged, SPS’s actions fall within the circumstances of *Edmondson*, not those of *Walston*, *Spence*, or *Curtis*. Indeed, Bergeman admitted he did not assume the mortgage loan and that the loan was in default. R. 39 (¶ 13); AOB 9, 16-17, 18, 19. SPS did no more than insist on its rights in a permissible way.

As for Bergeman’s claim for negligent infliction of emotional distress, the claim requires a showing of: (1) a legally recognized duty, (2) a breach of that duty, (3) a causal connection between the defendant’s conduct and the breach, and (4) actual loss or damage. *Frogley v. Meridian Joint Sch. Dist. No. 2*, 155 Idaho 558, 569, 314 P.3d 613, 624 (2013). It also requires some physical manifestation of the plaintiff’s emotional injury. *Id.* (stating requirement of physical injury is designed to provide degree of genuineness that claims of mental harm are not imagined). The district court dismissed the claim because Bergeman failed to allege the manifestation of a physical injury or a recognized legal duty on the part of SPS. R. 110-111.

The district court was correct. Bergeman made no allegation of having suffered any physical manifestation as a result of his alleged emotional distress. R. 44 (¶ 21.) Rather he made

the conclusory allegation that he “suffered extreme emotional distress and continues to suffer the effect of this stress resulting in further emotional trauma and grief.” *Id.* He also did not allege any legal duty that was breached by the foreclosure. *See* R. 36-46. SPS had no duty to refrain from foreclosing on property that secured a mortgage loan in default. Even assuming Bergeman was a borrower under the loan and SPS was a lender, the relationship in a borrower-lender situation is no more than one of debtor-creditor. *See Idaho First Nat’l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 277, 824 P.2d 841, 852 (1991). But again, Bergeman admitted he did not assume the mortgage loan after his mother’s death and that the loan was in default.

In sum, Bergeman failed to allege and cannot allege facts that would entitle him to relief for intentional and negligent infliction of emotional distress. The Court must affirm the dismissal of these claims.

**C. Bergeman has not shown the district court abused its discretion in denying his motion to consolidate this action with Elabed’s eviction action because he does not address the abuse of discretion standard.**

If the district court correctly dismissed Bergeman’s amended complaint, there is no need to address his claim that the court erred in refusing to consolidate this action with Elabed’s separate action to evict the tenant from the property. Even so, Bergeman has shown no error in the district court’s decision. It is Bergeman’s burden to demonstrate that the district court abused its discretion. *See Wechsler*, 162 Idaho at 908, 407 P.3d at 222. To show the district court abused its discretion, he argues, only, that “[i]t is not hard to conclude that the district court was more focused on the headache presented to it by virtue of the filing of the complaint (and amended complaints) in District Court.” AOB 20. Bergeman’s argument fails because he does not address

the three-part abuse of discretion standard. *See Cummings v. Stephens*, 160 Idaho 847, 853, 380 P.3d 168, 174 (2016) (when party fails to address factors, such a “conclusory argument is fatally deficient” to the party’s case).

In addition, he does not demonstrate that the district court violated any part of the standard. The district court satisfied the first part of the test, noting that it “may” consolidate under Rule 42(a). R. 99. It satisfied the second part of the test by properly considering whether the two actions involved common questions of law or fact. R. 99-100. The third prong of the test is also satisfied, because the district court’s decision to deny consolidation was reasonable. In particular, it recognized that the law governing Bergeman’s common law claims in this action is far different than the statutes governing tenancy and eviction proceedings. *Id.*

Having failed to address or apply the abuse of discretion standard, Bergeman has shown no error in the district court’s decision to deny his motion to consolidate. *See Cummings*, 160 Idaho at 853, 380 P.3d at 174 (affirming decision to grant motion for I.R.C.P. 60(b) relief); *Wechsler*, 162 Idaho at 909-10, 407 P.3d at 223-24 (affirming decision to grant motion to compel). As such, the Court must affirm that decision.

**D. Bergeman is not entitled to attorney fees and costs on appeal because he cites no legal authority for such awards.**

In his opening brief, Bergeman seeks attorney fees on appeal based on the district court’s “gross misapplication of the facts and the law” and SPS and Elabed’s “efforts to mislead” the district court. AOB 10. A party is entitled to attorney fees on appeal only if a statute, contract, or court rule authorizes fees. *Armand v. Opportunity Mgmt. Co.*, 155 Idaho 592, 602, 315 P.3d 245,

255 (2013). Like the rest of his arguments on appeal, Bergeman cites no authority for his request; and failing to do so, he makes no attempts to apply it. *See* AOB 10. Those failures preclude an award of attorney fees or costs on appeal. *See State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (“When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered.”); *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Tr.*, 147 Idaho 117, 132-33, 206 P.3d 481, 496-97 (2009) (denying award of attorney fees on appeal where party “failed to support her request with both argument and authority.”).

**E. If SPS prevails, it is entitled to its attorney fees and costs on appeal under Idaho Code § 12-121 and the Idaho Appellate Rules.**

SPS seeks its costs on appeal under I.A.R. 40. SPS also seeks its attorney fees on appeal under Idaho Code § 12-121, which permits the Court to award reasonable attorney fees to the prevailing party. Under the statute, an award of attorney fees on appeal is appropriate if the Court “determines that the action was brought or pursued frivolously, unreasonably or without foundation.” *Turner v. Turner*, 155 Idaho 819, 827, 317 P.3d 716, 724 (2013). “An appeal may be deemed frivolous, and attorney fees awarded, for failure to properly comply with I.A.R. 35(a)(6).” *Woods*, 150 Idaho at 61, 244 P.3d at 205 (awarding attorney fees against party who failed to support arguments and allegations with citations to specific relevant legal authority).

In *Turner* and *Woods*, the Court awarded attorney fees to the respondent when the appellant failed to develop an argument as to the issues on appeal and failed to present little by way of citation to authority. *Turner*, 155 Idaho at 827, 317 P.3d at 724; *Woods*, 150 Idaho at 61, 244 P.3d at 205. Here Bergeman waived his assignments of error on appeal due to his failure to

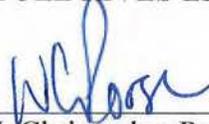
provide argument and citation to authority as required by I.A.R. 35(a)(6). In short, Bergeman has failed to present a cogent argument as to why it should prevail on appeal. As a result, an award of SPS's attorney fees is appropriate under to Idaho Code § 12-121 and I.A.R. 41.

## VI. CONCLUSION

SPS respectfully requests the Court affirm the trial court's dismissal of Bergeman's amended complaint and denial of his motion to consolidate. Bergeman has waived each assignment of error by failing to cite either authority or argument in his opening brief. Even considering his assignments of error, Bergeman failed to allege facts that would support granting relief for wrongful foreclosure or on any of his common law claims. He also failed to show the district court violated any part of the abuse of discretion test in denying his motion to consolidate.

DATED: May 21, 2018.

STOEL RIVES LLP



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W. Christopher Pooser  
Elijah M. Watkins  
*Attorneys for Respondent Select Portfolio  
Servicing*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 21, 2018, I served a true and correct copy of the foregoing **BRIEF OF RESPONDENT SELECT PORTFOLIO SERVICING** on the following, in the matter indicated below:

<p>Robert K. Beck <b>ROBERT K. BECK &amp; ASSOCIATES, P.C.</b> 3456 E. 17<sup>th</sup> Street, Suite 215 Idaho Falls, Idaho 83406 Email: <a href="mailto:jlbecklaw@ida.net">jlbecklaw@ida.net</a></p>	<p><input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Mail <input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Email</p>
<p>Steven L. Taggart <b>Maynes Taggart PLLC</b> P.O. Box 3005 Idaho Falls, Idaho 83405 Email: <a href="mailto:staggart101@gmail.com">staggart101@gmail.com</a></p>	<p><input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Mail <input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Email</p>

  
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W. Christopher Pooser