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

Supreme Court Docket No. 47140-2019

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COMPEER FINANCIAL FLCA fka AGSTAR FINANCIAL SERVICES, ACA

Plaintiff -Appellant

v.

NORTHWEST SAND & GRAVEL, INC., and Idaho corporation; GORDON PAVING  
COMPANY, INC., an Idaho corporation; and BLACKROCK LAND HOLDINGS, LLC an  
Idaho limited liability company,

Defendants-Respondents

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**RESPONDENTS' BRIEF**

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Appeal from the District Court of the Fifth Judicial District in and for Twin Falls County

Case No. CV-2012-2731

The Honorable Eric J. Wildman, District Judge, Presiding

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## I. STATEMENT OF THE CASE

This Court has already heard two appeals stemming from the same set of circumstances that give rise to this present case and the Respondents (collectively referred to as “Gordon Paving”) will not recite all of them here. However, Gordon Paving wishes to raise a few points of clarification to what the Appellant (“Compeer”) stated in its opening brief.

### A. Nature of the Case

In its *Notice of Appeal* Compeer stated it would raise the following issues:

1. The district court’s award of 12% prejudgment interest on the restitution from the date of the collateral sales
2. The district court’s refusal to grant Compeer an offset for expenses incurred in the auctioning of the personal property collateral
3. The district court’s refusal to grant Compeer an offset for prior awards of attorney fees and costs
4. The district court’s “failure” to consider principals of equity in granting restitution

In its *Appellant’s Brief* Compeer has abandoned its appeal relating to the offset of attorney fees and the principals of equity.

After this Court ruled in Gordon Paving’s favor that Compeer was not entitled to execute on its personal property collateral it remanded the case to the district court. This Court also ruled on a separate appeal the Compeer could not pursue the Guarantors on the loan as Gordon Paving’s obligation to Compeer was satisfied via the foreclosure sale. *AgStar Fin. Services, ACA v. Gordon Paving Co., Inc.*, 391 P.3d 1287, 1291 (Idaho 2017). This ruling was based on this Court’s prior ruling in *AgStar I* that “[t]he reasonable value determined by the district court should have been credited against Gordon Paving’s outstanding obligation, thereby resulting in full satisfaction of the debt. We hold that AgStar was more than made whole by virtue of the foreclosure and was entitled to no other recovery. Thus, we reverse the district court’s decision allowing AgStar to sell

the personal property.” *AgStar Fin. Services, ACA v. N.W. Sand & Gravel, Inc.*, 391 P.3d 1271, 1285 (Idaho 2017). Consistent with this ruling Gordon Paving filed a motion seeking to recover damages from Compeer relating to its lost personal property. Eventually the district court granted Gordon Paving a judgment in the amount of \$506,823.24 against Compeer. R. at 522.<sup>1</sup> Compeer now appeals portions of that decision.

## **B. Statement of Facts**

In addition to the facts stated by Compeer, Gordon Paving offers the following:

1. Compeer received real property via the foreclosure that had a value of at least \$1,896,765 more than the amount Gordon Paving owed to Compeer. *AgStar I*, 391 P.3d at 1279 (citation to record omitted).

2. Any obligation of Gordon Paving was fully satisfied and extinguished. *AgStar II*, 391 P.3d at 1291 (citation to record omitted).

3. Any losses incurred by Compeer on the two bonds it issued to Gordon Paving were guaranteed by the USDA. The USDA guaranteed the \$1 million bond 70% and the \$9 million bond 80%. Tr. P. 82, ll. 1-8.

4. Gordon Paving, in addition to the \$800,000 in payments made to Compeer, paid additional proceeds from two sales conducted through Ritchie Brothers (arranged by Gordon Paving) and through the payment of royalties during the redemption period. Tr. P. 77-79 & 124-127.

## **C. Procedural History**

Gordon Paving offers the following additional procedural history

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<sup>1</sup> To avoid confusion, Gordon Paving will use the same citing convention and Compeer when citing to the Clerk’s Record in the 2015 appeal, the instant appeal, and the December 11, 2018 court trial.

1. Gordon Paving objected to Compeer's *Motion for Order Directing Defendants to Transfer Titles of Vehicles and for Comfort Order Re Personal Property Auction*. R. (2015 Appeal) at 270-273.

## II. ATTORNEY FEES ON APPEAL

Gordon Paving requests attorney fees and costs under I.A.R. 40 (costs) and I.A.R. 41 (fees) and under Idaho Code § 12-120(3).

## III. ARGUMENT

### A. The District Court was Correct in Declining to Award Compeer an Offset for Costs incurred in Auctioning the Personal Property Collateral

Compeer argues that the district court erred in declining to award Compeer an offset to reduce the restitution amount that Compeer owes Gordon Paving. *Appellant's Brief* pgs. 9-15. Namely, Compeer argues that is entitled to an offset for (1) the auctioneer's, Masters Auction Service, commissions and expenses in the amount of \$43,747.43 and (2) expenses in the amount of \$32,025.12 that Compeer paid to a company, Laser Line, to prepare some of the collateral for auction and possibly do additional work readying the real property for sale. *Id.* at 12-14.

The district court did not abuse its discretion in ruling that Compeer was not entitled to these offsets on the amount of restitution owed. In reviewing the Restatement (Third) of Restitution and Unjust Enrichment, the court correctly noted that no deduction of expenses is expressly provided for in Restatement §18. *Memorandum Decision and Order*, pg. 8. The court quoted the pertinent part:

A obtains a judgment against B for \$25,000. Property of B worth \$35,000 is sold at execution to C, a bona fide purchaser who is otherwise a stranger to the transaction. C is aware that B is prosecuting an appeal from A's judgment. *The sale, although properly conducted, brings only \$25,000: this amount is paid to A. A's judgment against B is subsequently reversed on appeal. B has no claim to recover the property from C. B has a claim in restitution against A to the extent of A's unjust enrichment. If A's actions have been in good faith, B's claim is for \$25,000 plus interest.*

Restatement (Third) of Restitution and Unjust Enrichment § 18 (emphasis added). Compeer’s references to additional sections of the Restatement and other case law where expenses were deducted from amount of restitution are not persuasive because the district court did consider these defenses and rejected them based on sound reasoning, the law, and the facts of this particular case. The importance of the Supreme Court’s reasoning on the prior appeal of this cannot be overstated. As the district court noted, the Supreme Court ruled that “[Compeer] was more than made whole by virtue of the [real property] foreclosure and was entitled to no other recovery.” *AgStar I*, 391 P.3d at 1285. Indeed, it was Compeer that had been unjustly enriched by selling the personal property, as the Supreme Court noted in its decision, and the district court correctly ruled that Compeer was not entitled to an offset of those expenses, especially since the Restatement of Restitution does not provide for such.

Additionally, the district court only awarded Gordon Paving a judgment for the actual amount of gross proceeds from the sale of the personal property. The fair market value of these items was never determined. Gordon Paving maintained that personal property had a value of over \$1 million beyond what Compeer sold it for.

Although Compeer correctly stated that “change of position” is a defense to unjust enrichment, the elements for that defense have not been proven. As stated in *Harrentsian v. Hill*,

Change of position is a defense to unjust enrichment. ‘If receipt of a benefit of has led a recipient without notice to change position in such manner that an obligation to make restitution of the original benefit would be inequitable to the recipient, the recipient’s liability in restitution is to that extent reduced.’ Restatement (Third) of Restitution and Unjust Enrichment § 65 (2011). The commentary to this section explains that this defense is **only available to a recipient without notice, and “only to the extent that an obligation to make restitution would be inequitable to the recipient.”** *Id.* cmt. a. It follows, then, that this defense is unavailable to a conscious wrongdoer or to a recipient who is “primarily responsible for his own unjust enrichment.” *Id.*

*Harrentsian v. Hill*, 385 P.3d 887, 893 (Idaho 2016) (emphasis added). Gordon Paving strenuously objected to Compeer's proposed sale of the personal property, and timely appealed the district court's order allowing the sale, which was ultimately overturned on appeal for being wrongful. Compeer was certainly on notice of the objections to the sale. Furthermore, it would not be inequitable for Gordon Paving to receive the full gross proceeds of Compeer's wrongful sale. Rather, it would be inequitable for the district court to award Gordon Paving anything less than the full gross proceeds. As the Supreme Court ruled, the "indebtedness to AgStar, which the Guarantors had guaranteed, was fully satisfied and extinguished in AgStar I and there is no basis for any recovery here against the Guarantors." *AgStar II*, 391 P.3d at 1291. The district court did not abuse its discretion in holding that Compeer did not prove its defense for "change of position" to merit an offset of expenses.

Furthermore, the district court ruled that even if Compeer was entitled to an offset of these expenses, Compeer failed to prove the amount of expenses it asserts. *See Memorandum Decision and Order*, p. 8-10. The court found that testimony of Compeer's witness, employee Joseph Oliver, was inconsistent and inconclusive on the amount of expenses of preparing personal property collateral, as opposed to real property collateral, or both. The court noted portions of the trial transcript that showed conflicting testimony by Mr. Oliver, at one point stating that they were retained to clean up and prepare commercial property, the building, so that it could be sold, and also testifying that they were retained simply for personal property and did nothing with respect to the real property. *See Memorandum Decision and Order*, p. 9. Furthermore, Compeer did not provide or admit into evidence a break down or itemization of the work done by Laser Line as it pertained to personal property, real property, or both. Courts strongly defer to trial courts on issues of witness credibility, and the trial court did not abuse its discretion in holding that Compeer could

not adequately prove the amount of expenses that they claimed should be reduced from restitution. Therefore, the Court must AFFIRM the district court's ruling and not allow Compeer to offset any of these expenses in awarding restitution to Gordon Paving.

**B. The District Court was Correct in Awarding Gordon Paving Prejudgment Interest from the Dates of the Collateral Sales**

Next, Compeer argues that the district court erred in deciding (1) that prejudgment interest was appropriate, (2) that prejudgment interest runs from the date of the collateral sales, and (3) in declining to suspend the running of interest due to a continuance of the trial.

**1. The proper standard of review for an award of prejudgment interest is abuse of discretion**

As a preliminary matter, Compeer argues that this Court should re-examine prior case law and hold that the standard of review on these matters is *de novo* instead of abuse of discretion. Compeer's argument as to the standard of review is unpersuasive, and this Court should continue to examine this issue under an abuse of discretion standard, as it has done in recent cases. *See, e.g. Med. Recovery Services, LLC v. Neumeier*, 415 P.3d 372, 379 (Idaho 2018) (holding that a review of an award of prejudgment interest is under the abuse of discretion standard); *Dillon v. Montgomery*, 67 P.3d 93, 96 (Idaho 2003); *Belk v. Martin*, 39 P.3d 592, 600 (Idaho 2001); *Ross v. Ross*, 178 P.3d 639, 642 (Idaho App. 2007) (acknowledging that there was some inconsistent case law on the appropriate standard in the past, but that *Belk* has not been overturned, and that the standard of review on award of prejudgment interest is abuse of discretion). Compeer has not met the heavy burden that is needed to show that this Court should ignore the rule of stare decisis. *See Houghland Farms, Inc. v. Johnson*, 803 P.2d 978, 983 (Idaho 1990) (holding that the court must follow controlling precedent, unless it is "manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice.")

**2. The district court did not abuse its discretion in awarding prejudgment interest to Gordon Paving**

The district court did not abuse its discretion when it awarded prejudgment interest. First, the district court recognized that “[t]he decision to award prejudgment interest is left to the discretion of the trial court.” R. at 513. Second, the trial court acted within the boundaries of its discretion and consistent with applicable legal standards. The district court followed the direction of the Restatement (Third) of Restitution and Unjust Enrichment that the judgment debtor is entitled to recover the amount of the sale proceeds, with interest. R. at 511. The district court further followed notion of fairness and equity in exercising its discretion as directed by this Court’s decision in *Chenery v. Agri-Lines Corp*, 766 P.2d 751 (Idaho 1988). R. at 511-512. Being guided by these standards the district court reasoned that:

Interest represent the time value of money. It is awarded in litigation to compensate a property owner for the loss of the use of his property. From the time AgStar sold Gordon Paving’s personal property it, not Gordon Paving, had the use of those proceeds. To be fully and fairly compensated for its loss, Gordon Paving is entitled to the return of those proceeds together with interest. Otherwise, Gordon Paving would not be made whole and AgStar would have enjoyed a windfall from the use and benefit of the funds it received as a result of the vacated judgment. The Court therefore finds that equitable principles and considerations require that Gordon paving be awarded prejudgment interest.

During this entire time Compeer had the full use and advantage of Gordon Paving’s money. Compeer is a lending institution and had the ability to lend Gordon Paving’s money to other borrowers or otherwise invest it. Compeer’s wrongful sale of the personal property precluded Gordon Paving from having these same opportunities. It was denied the right to sale, lease, or otherwise use its property in a manner other than the fire sale auction conducted by Compeer. Furthermore, it was denied the ability to use any revenue that could have been generated by its property. Gordon Paving was unable to use the money to pay down other debts or to reinvest in other ventures.

Compeer argues that the prejudgment interest of 12% is inappropriate in this case because the damages were not liquidated or unascertainable by mathematical process. Idaho law allows prejudgment interest when damages are liquidated or are ascertainable by mathematical process. *Davis v. Professional Business Services, Inc.*, 712 P.2d 511, 518 (Idaho 1985).

An award of prejudgment interest is proper to fully compensate the prevailing party for the loss of use of money representing its fixed or ascertainable damages. *Seubert Excavators, Inc. v. Eucon Corp.*, 874 P.2d 555, 561 (Idaho App. 1993), *aff'd in part, rev'd in part*, 871 P.2d 826 (Idaho 1994). The district court determined that Gordon Paving's damages were ascertainable and properly used its discretion to award Gordon Paving prejudgment interest during the entire period of time that Compeer denied Gordon Paving the use of its money. The district court reasoned as follows:

The Court finds that Gordon Paving's damages were both liquidated and readily ascertainable on the dates AgStar sold Gordon Paving's personal property. The Court is not aware of any personal property collateral that was not liquidated. The Court further finds that the dates of the various sales are known and are part of the record. The proceeds received by AgStar were definite and certain mathematical amounts. Gordon Paving's total amount of damages was easily mathematically calculable by adding the proceeds received together.

R. at 512. It is plain to see that the district court's decision was based on applicable legal principles and sound reasoning.

Thus, the district court did not abuse its discretion in holding that Gordon Paving's damages were both liquidated and readily ascertainable. As noted by the district court, the date of sales and amounts received by Compeer as a result the auction of Gordon Paving's personal property were all a part of the record. The mere fact that the amounts were disputed and litigated, and various defenses by Compeer were raised, does not make the damages unascertainable. *See Ace Realty, Inc. v. Anderson*, 682 P.2d 1289 (Idaho App. 1984).

When a judgment creditor executes upon a judgment that is subsequently reversed, as is the case here, the Restatement expressly states that the judgment debtor is entitled to recover “the amount of the sale proceeds, *with interest*.” Restatement (Third) of Restitution and Unjust Enrichment § 18 (emphasis added); *see also* Restatement (First) of Restitution § 74 cmt. d. The district court also noted several cases in a number of jurisdictions that have held similarly:

...[t]he weight of jurisdictions have likewise so directed. *See, e.g., State v. A.N.W. Seed Corp.*, 116 Wash.2d 39, 47 (1991) (a judgment debtor is entitled to “the proceeds from the sheriff’s execution sales ... together with interest from the date of the seizure”); *In re Popkin & Stern*, 263 B.R. 885, 889 (8th Cir. BAP 2001) (a judgment debtor is entitled to “the benefits actually received by the trustee under the erroneous judgment, together with interest from the date of the levy under execution and taxable costs”); *Tuscany, LLC v. Western States Excavating Pipe & Boring, LLC*, 128 P.3d 274, 281 (Colo.App. 2005) (a judgment debtor is entitled to “proceeds from the sheriff’s sale, plus statutory interest”). The Restatement and case law are plain. They provide that a judgment creditor who executes on a judgment that is subsequently reversed must return the sale proceeds together with prejudgment interest to the judgment debtor.

R. at 511. The district court’s reasoning was also sound, in that awarding prejudgment interest to Gordon Paving comports with the notions of fairness and equity. *Id.* The Supreme Court’s ruling is abundantly clear that Compeer’s auction sale of Gordon Paving’s personal property was wrongful, and therefore Compeer had been unjustly enriched on the day of the wrongful sale. As the district court noted that “[t]o be fully and fairly compensated for its loss, Gordon Paving is entitled to the return of those proceeds together with interest.” *Id.* at 512.

The district court thoroughly discussed the case law and Restatement to hold that prejudgment interest was appropriate in this matter. *See* R. at 511-513. It did not abuse its discretion in doing so. The ruling was reasonable, based in law, and appropriate under the circumstances of this case.

**3. The district court was correct in awarding prejudgment interest from the date of the collateral sales**

Lastly, Compeer argues that the interest should not run from May 1, 2018 (the original trial date) to December 11, 2018 (when the trial was ultimately held based on Gordon Paving's motion to continue, which was granted by the court). Compeer argues that they were ready for the trial to commence on May 1, 2018, but that Gordon Paving caused the continuance because it's disclosure of expert witnesses was untimely. Compeer points to the court's ruling granting the continuance, imposing a sanction on "defendants [Gordon Paving] to reimburse the plaintiffs for reasonable and legitimate expenses that the plaintiffs [Compeer] incur as a result of the discovery violation." *Appellant's Brief* at 23 (citation to record omitted). However, Compeer acknowledges that it did not request payment for these expenses caused by the delay, because "it would cost more in counsel time than the ultimate award." *Id.* at 24. Compeer is now attempting to bootstrap these expenses by having that amount being deducted from the calculation of prejudgment interest. There is no evidence in the record at all relating to any monetary damages Compeer suffered due to the delay. This should be denied for the same reasons as the district court denied Compeer's other proffered defenses on the issue of prejudgment interest. Namely, that to not award prejudgment interest would unjustly enrich Compeer and fail to fully compensate Gordon Paving for the damages it sustained by Compeer's wrongful personal property sale.

Additionally, Compeer's argument that interest should not run at least until the Supreme Court overturned the district court's order allowing the personal property sale is not persuasive, because it is contrary to the principles of fairness, equity, and law. The day Compeer proceeded with the sale of personal property was the day that Compeer became unjustly enriched, to the detriment of Gordon Paving. The district court did not abuse its discretion in ruling that prejudgment interest would commence from the date of the wrongful sale.

It is clear from the pleadings in this case that Gordon Paving objected to the turnover and sale of the personal property. This should have alerted Compeer that there was a risk that the judgment allowing it to sell the personal property would be overturned on appeal. Unfortunately, Compeer ignored the risk and proceeded anyway and kept the money from the sale.

Furthermore, as discussed above, during this time of delay Compeer continued to have the use of Gordon Paving's money. The purpose of a prejudgment interest award is not to punish Compeer, rather it is to make Gordon Paving whole. There is a time value of money, a lending institution like Compeer knows this as well as anyone, and Gordon Paving cannot be made whole without compensating it for that value. The district court did not abuse its discretion in failing to reduce the prejudgment interest by letting it run during the time of the trial's continuance.

#### **IV. ATTORNEY FEES**

Gordon Paving requests an award of attorney fees and costs under I.A.R. 40 (costs) and I.A.R. 41 (fees) and under Idaho Code § 12-120(3). This dispute involves a commercial transaction, and an award of attorney's fees would be justified under Idaho Code §12-120(3) as the prevailing party on appeal.

The Court may also award attorney fees to Gordon Paving under § 12-121 as the prevailing party because the appeal brought by Compeer is frivolous, unreasonable, and without foundation.

To receive an I.C. § 12-121 award of fees, the entire appeal must have been pursued frivolously, unreasonably, and without foundation. Such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the trial court incorrectly applied well-established law.

*PHH Mortg. V. Nickerson*, 374 P.3d 551, 563 (Idaho 2016) (internal citations omitted).

Likewise, this Court should not award Compeer attorney fees on appeal.

## V. CONCLUSION

The district court did not error or abuse its discretion when it denied Compeer's request for an offset. It also did not abuse its discretion when it awarded Gordon Paving prejudgment interest. None of these rulings were punitive to Compeer. Rather, they were the district court's best attempt to comply with this Court's ruling and make Gordon Paving whole after Compeer wrongfully sold its property. Accordingly, Gordon Paving respectfully requests that this Court affirm the district court's rulings.

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