2020 Spring Case Review and Annual Meeting of the 4th District Bar Association

5:00 **SIGN IN AND SOCIAL TIME**

5:15 **Fourth District Annual Meeting: Election of new officers / announcements**

5:30 **Employment Law**
Jennifer Hearne
J.A. Hearne Law, PLLC

5:45 **Torts Law**
Leslie Hayes
Attorney General's Office, Civil Litigation Division

6:00 **Environmental Law**
Rick Grisel
Attorney General's Office, Natural Resources Division

6:15 **Evidence and Procedure**
Jim Dickinson
Ada County Prosecutor's Office, Civil Division

6:30 **Workers Compensation Law**
Taylor Mossman-Fletcher
Mossman Law Office, LLP

6:45 **Real Estate/Property Law**
T. Hethe Clark
Clark Wardle, LLP

7:00 **Estate Planning & Probate**
Sean Beck
C.K. Quade Law, PLLC

7:15 **Business & Corporate Law**
David Jensen & Christina Hardesty
Parsons Behle & Latimer

7:30 **Family Law**
Mackenzie Whatcott
Cosho Humphrey, LLP

7:45 **Criminal Law**
Gabriel McCarthy
Canyon County Public Defender

8:00 **Bankruptcy Law**
J.B. Evans
Steol Rives, LLP

8:15 **Ethics and Civility**
Bradley G. Andrews
Idaho State Bar, Bar Counsel

4TH DISTRICT BAR ASSOCIATION
SPRING CASE REVIEW

EMPLOYMENT LAW UPDATE

Presented by Jennifer A. Hearne
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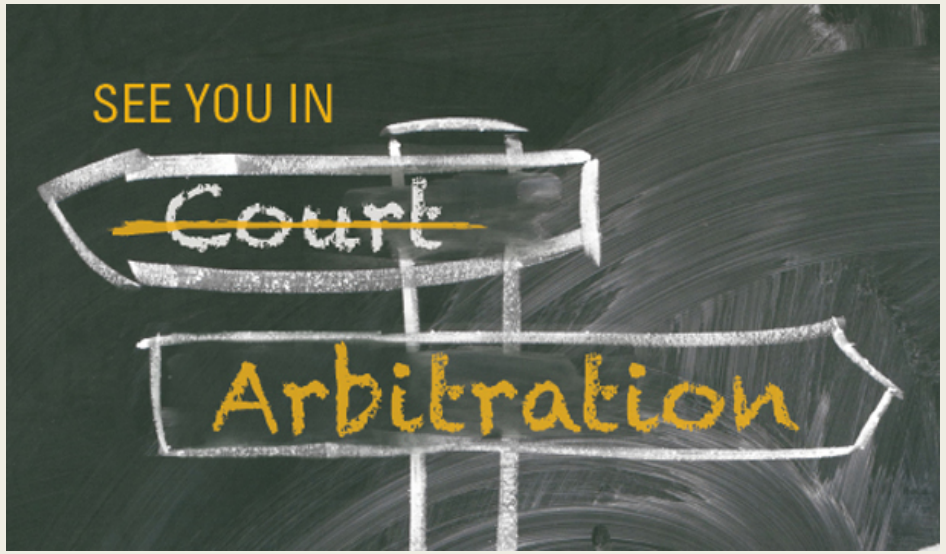
Agreements to Arbitrate

Epic Sys. Corp. v. Lewis, 138 S.Ct. 1612 (May 21, 2018)



- **Decision:** Employees who entered with employers into contract providing for individualized arbitration proceedings to resolve employment disputes between parties were not entitled to litigate Fair Labor Standards Act or related state law claims through class or collective actions in Federal Court.

Retaliation

Hill v. Goodfellow Top Grade, (N.D. Cal., Aug. 21, 2018)

- **Holding**: Defendant's motion for renewed judgment as a matter of law is denied with respect to plaintiff's retaliation claim because a reasonable jury could find that employer's "coach to correct" was in retaliation to her complaints.

ADA, Retaliation & Wrongful Discharge

Cooper v. Health, CV-18-00116-PHX-DGC
Decided: February 7, 2020

- Plaintiff failed to show that employer's conduct was sufficiently severe and pervasive to support a charge of a hostile work environment claim even though plaintiff suffered panic attacks as a result of how she was treated by her supervisor.
- **United States District Court for the District of Arizona**

Retaliation & Race Discrimination

Collins v. XL Construction, 2:19-cv-1530 TLN-KJN PS
Decided: January 31, 2020

- Defendant's motion to dismiss was granted against pro se Plaintiff even though Plaintiff was harassed for no reason, or because of his race, and work environment was allegedly unsafe.
- **United States Court for the Eastern District of California**

Sexual Harassment

U.S. EEOC v. Pacific Fun Enterprises, LLC
Decided: January 7, 2020

- A federal court ordered the owners of a Waikiki Beach sports bar to pay $225,302 for making lewd comments about female employees' breasts and buttocks, touching female employees and calling them by derogatory names.
- **United States District Court for the District of Hawaii**

Idaho Human Rights Commission 2019 Stats

- 489 total administrative cases resolved
- 71% no probable cause findings
- 12.3% mediations, settlements & successful conciliations
- Issue most frequently raised: Discharge (actual or constructive)
- 1/3 of all claims include sexual harassment

THANK YOU!

Presented by Jennifer A. Hearne
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4TH DISTRICT BAR ASSOCIATION
SPRING CASE REVIEW

2020
EMPLOYMENT LAW UPDATE

Presented by Jennifer A. Hearne
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Disclaimer

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Collins v. XL Constr.

United States District Court for the Eastern District of California

January 31, 2020, Decided; January 31, 2020, Filed

No. 2:19-cv-1530 TLN-KJN PS

Reporter
2020 U.S. Dist. LEXIS 16412 *; 2020 WL 509036

DERRICK L COLLINS, Plaintiff, v. XL CONSTRUCTION, et al., Defendants.

Core Terms

retaliation, amended complaint, ***retaliation*** claim, motion to dismiss, race discrimination, Pay Act, recommends, amend, sex, employees, findings and recommendations, factual allegations, protected activity, leave to amend, exhausted, frivolous, pleadings

Counsel: [*1] Derrick L. Collins, II, Plaintiff, Pro se, Fairfield, CA.

For Southwest Hazard Control Inc, SHCCA Inc, Chrisann Karches, Defendants: John Pickett, LEAD ATTORNEY, The Goldman Law Firm, Tiburon, CA.

Judges: KENDALL J. NEWMAN, UNITED STATES MAGISTRATE JUDGE.

Opinion by: KENDALL J. NEWMAN

Opinion

RECOMMENDATIONS TO DISMISS AND TO GRANT LEAVE TO AMEND ONLY TITLE VII CLAIMS

(ECF No. 11.)

This action concerns a dispute between Plaintiff Derrick L. Collins, who is proceeding without counsel in this action, and Defendants XL Construction, Southwest Hazard Control ("SHC"), SHCCA, Inc., and Chrisann Karches.[1] (ECF No. 1.) Plaintiff asserts claims under *Title VII* for race discrimination, as well as an "Equal Pay Act" claim, a "Whistleblower Protection Act" claim, and a claim for "***Retaliation***." (See Id. at p. 4.) Defendants SHC, SHCCA, and Karches now move to dismiss for failure to state a claim, which Plaintiff opposes.[2] (ECF Nos. 11, 16, 17.) The Court heard oral arguments at a January 30, 2020 hearing. (See ECF No. 18.)

For the reasons that follow, the Court recommends Defendants' motion to dismiss be GRANTED, and Plaintiff be GRANTED leave to amend only his Title VII claims.

Background[3]

In March of 2019, Plaintiff was hired by SHC[4] for **[*2]** lead and asbestos abatement. He was assigned to a

[1] This action proceeds before the undersigned per *Local Rule 302(c)(21)*.

[2] As of the time of this order, Defendant XL Construction has yet to be served. Thus, "Defendants" refers to SHC, SHCCA, and Karches.

[3] These facts derive from the Complaint and attachments, and are construed in the light most favorable to Plaintiff, the non-moving party. *Faulkner v. ADT Sec. Servs., 706 F.3d 1017, 1019 (9th Cir. 2013)*; see also *Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007)* ("In ruling on a 12(b)(6) motion, a court may generally consider . . . exhibits attached to the complaint[.]").

[4] It is possible SHCCA was Plaintiff's employer. For simplicity, the Court refers to SHC only.

project in Roseville, for which SHC was subcontracted; XL Construction was the main contractor. On March 29, while Plaintiff was working on a ladder, an XL supervisor named Antonio "decided to get on [a] tile remover machine and start driving it all around [the] work area." When Antonio "came dangerously close (inches) to the ladder," Plaintiff told him "do not get that close to me." Antonio disregarded Plaintiff, and so Plaintiff informed his foreman he was leaving work. Plaintiff alleges it was "common" for Antonio to harass him "for no reason." Plaintiff was later told by XL to not return until after an investigation was completed.

After receiving a right to sue letter from the California Department of Fair Employment an Housing ("DFEH"), Plaintiff filed suit in this Court. Plaintiff asserted claims of race discrimination and ***retaliation*** under Title VII, as well as claims for violation of the "*Equal Pay Act*" and the "*Whistleblower Protection Act*." Plaintiff alleges PTSD, emotional distress, pain and suffering, depression, and anxiety. He seeks lost wages, $25,000 in damages and $30,000 in punitive damages. Defendants SHC, SHCCA, and **[*3]** Karches moved to dismiss, and Plaintiff opposed. (ECF Nos. 11, 16, 17.)

Legal Standard

Federal Rule of Civil Procedure 8(a) requires that a pleading be "(1) a short and plain statement of the grounds for the court's jurisdiction . . . ; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief."

A motion to dismiss brought pursuant to *Federal Rule of Civil Procedure 12(b)(6)* challenges the sufficiency of the pleadings set forth in the complaint. *Vega v. JPMorgan Chase Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009)*. When a court considers whether a complaint states a claim upon which relief may be granted, all well-pled factual allegations must be accepted as true, *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*, and the complaint must be construed in the light most favorable to the non—moving party, *Corrie v. Caterpillar, Inc., 503 F.3d 974, 977 (9th Cir. 2007)*. The court is not, however, required to accept as true "conclusory [factual] allegations that are contradicted by documents referred to in the complaint," or "legal conclusions merely because they are cast in the form of factual allegations." *Paulsen v. CNF Inc., 559 F.3d 1061, 1071 (9th Cir. 2009)*. Thus, to avoid dismissal for failure to state a claim, a complaint must contain more than "naked assertions," "labels and conclusions," or "a formulaic recitation of the elements of a cause **[*4]** of action." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-57, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Simply, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 570*). Plausibility means pleading "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

Pro se pleadings are to be liberally construed. *Hebbe v. Pliler, 627 F.3d 338, 342 & fn. 7 (9th Cir. 2010)* (liberal construction appropriate even post-Iqbal). Prior to dismissal, the court is to tell the plaintiff of deficiencies in the complaint and give the plaintiff an opportunity to cure them--if it appears at all possible the defects can be corrected. See *Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000)* (en banc). However, if amendment would be futile, no leave to amend need be given. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 339 (9th Cir. 1996)*.

Parties' Arguments

Defendants argue Plaintiff's Complaint fails to state a Title VII claim, as it lacks facts to indicate that Plaintiff was discriminated against on the basis of his race, or that he exhausted his administrative remedies on the ***retaliation*** claim. Further, Defendants argue the Equal Pay Act is inapplicable, as it protects against sex discrimination, and the Whistleblower Act claim cannot be responded to because Defendants are unsure what source of law Plaintiff **[*5]** relies on. (ECF No. 11.)

Plaintiff's half—page opposition deems the motion to dismiss "a waste of the court's time and resources," and that the record is not sufficiently developed. He otherwise requests an opportunity to amend. (ECF No. 16.)

Analysis

As Plaintiff does not specifically oppose Defendants' motion to dismiss, and instead requests an opportunity to amend, the Court recommends dismissal. However, not all of Plaintiff's claims may be amended. For clarity, the Court recites the standards for each claim and

informs Plaintiff which claims can be amended.

I. Plaintiff's Title VII race discrimination claim may be amended.

Title VII of the 1964 Civil Rights act makes it an ***unlawful*** employment practice for an employer to "discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race . . . ." *42 U.S.C. 2000e-2(a)(1)*. Thus, any harassment Plaintiff is subjected to must have occurred "because of his race." *Vasquez v. County of Los Angeles, 349 F.3d 634, 642 (9th Cir. 2003)*; *Kortan v. State of Cal., 5 F. Supp. 2d 843, 850 (C.D. Cal. 1998)* ("[H]arassment must come because of the plaintiff's protected characteristic.").

Here, Plaintiff checked the box "Race" on his form Complaint, as well as in the DFEH charge, but does not explicitly identify what is his race. (ECF No. 1 at pp. 5, 19.) **[*6]** The Court notes from the demographic sheet appended to the Complaint that Plaintiff is African American-- a protected class. (Id. at p. 26.) However, the Court finds no allegation that Defendants acted as they did *because of* Plaintiff's race. (See Id.) Instead, the bulk of Plaintiff's narrative concerns an apparent safety dispute between Plaintiff and an employee of XL Construction. (See Id.) This, of course, does not fall under the purview of Title VII. See, e.g., *Mayes v. Kaiser Found. Hosps., 917 F. Supp. 2d 1074, 1079 (E.D. Cal. 2013)* ("Although plaintiff describes some of the events leading to his termination, he provides no meaningful detail suggesting the termination was because of his race[.]"). Thus, Plaintiff's discrimination claim must be dismissed.

Further, at the January 30 hearing, the Court asked Plaintiff about the facts underlying his Title VII claims. Plaintiff stated he "wanted to reserve those issues for discovery," and did not otherwise elaborate on the facts. Plaintiff's responses give the Court pause as to whether to allow amendment, but given his pro se status, amendment will be permitted. Moving forward, Plaintiff must include in his complaint plausible facts that allows the court to reasonably infer that Defendants are liable for any alleged **[*7]** race discrimination. *Iqbal, 556 U.S. at 678*. The Court notes that Plaintiff's Complaint includes an allegation of harassment. (See ECF No. 1 at p. 9.) If Plaintiff chooses to amend this claim to focus on this allegation, he should mind the pleading standards for Title VII discrimination claims. See *O'Bard-Honorato v. O'Rourke, 2019 U.S. Dist. LEXIS 169196, 2019 WL 4451234, at *4 (C.D. Cal. Apr. 24, 2019)* ("To allege a prima facie claim of discrimination based on race under Title VII, a plaintiff must allege sufficient facts showing that [he] (1) belongs to a protected class, (2) was performing [his] job satisfactorily, (3) sustained an adverse employment action, and (4) similarly situated individuals outside the protected class were treated more favorably.") (quoting *McDonnell Douglas Corp v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668)*; *Rohm v. Homer, 367 F. Supp. 2d 1278, 1285-86 (N.D. Cal. 2005)* ("To establish a prima facie hostile work environment claim under Title VII . . . a plaintiff must show that '(1) [he] was 'subjected to verbal or physical conduct' because of [his] race, (2) 'the conduct was unwelcome,' and (3) 'the conduct was sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive work environment.'") (quoting *Manatt v. Bank of America, NA, 339 F.3d 792, 798 (9th Cir. 2003)*. Further, Title VII only makes an employer liable, not the individual employees--including upper—level management. See *Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993)* ("Title VII limits liability to employers [and not] **[*8]** individual employees"). Plaintiff is advised of his responsibilities to under *Rule 11* to only make assertions for which there is a factual basis.[5]

II. Plaintiff may amend his *retaliation* claim--but only after considering the Court's cautionary note.

Plaintiff lists a "***Retaliation***" claim on his form Complaint, which Defendants challenge on failure to exhaust grounds. See *42 U.S.C. § 2000e-16(c)*; *Sommatino v. U.S., 255 F.3d 704, 707 (9th Cir. 2001)*.

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[5] *Federal Rule of Civil Procedure 11* states:

> "By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> > (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
> >
> > ...
> >
> > (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery[.]"

However, the Ninth Circuit instructs that "[a]dministrative charges are to be construed with utmost liberality since they are made by those unschooled in the technicalities **[*9]** of formal pleading." *B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1100 (9th Cir. 2002)*. Given that Plaintiff raised a race discrimination issue with the DFEH and was granted a right to sue letter, it is reasonable to assume the DFEH's investigation would have included a related race—based ***retaliation*** charge. See *Vasquez v. County of Los Angeles, 349 F.3d 634, 645 (9th Cir. 2003)* (finding the plaintiff had exhausted his administrative remedies with regard to ***retaliation*** by his supervisor because, "[w]hile the EEOC charge does not contain the relevant legal theory of ***retaliation***, it does contain the relevant factual allegations."). The right—to—sue form provided by DFEH allows a charging party to check a box--which Plaintiff did--indicating he was "[d]enied a work environment free of discrimination and/or ***retaliation***." Further, the facts indicate that Plaintiff was effectively suspended because of the incident, indicating some causal connection. Simply, the ***retaliation*** claim probably rises or falls with the discrimination claim, and the undersigned will not take up Defendants' argument to dismiss the ***retaliation*** claim on exhaustion grounds.

However, as with the discrimination claim, the Complaint falls short of federal pleading standards for a ***retaliation*** claim. "To establish a prima facie case of ***retaliation***, [plaintiff] **[*10]** must show that he undertook a protected activity under Title VII, his employer subjected him to an adverse employment action, and there is a causal link between those two events." *Reynaga v. Roseburg Forest Prods., 847 F.3d 678, 693 (9th Cir. 2017)*. Key to any prima facie case is an allegation that the plaintiff's protected activity demonstrates he objected to an act prohibited by Title VII, such as race or sex discrimination. See *42 U.S.C. 2000e-3(a)*. ("It shall be an ***unlawful*** employment practice for an employer to discriminate against [an] employee . . . because he has opposed any practice made an ***unlawful*** employment practice by this subchapter . . . .").

Here, Plaintiff fails to provide facts showing that he undertook a protected activity. The Complaint states that Plaintiff told his supervisor he was leaving work due to a co—worker's allegedly-hazardous acts, and was subsequently suspended. The text messages appended to Plaintiff's Complaint corroborates this alleged fact--that Plaintiff's accusations made to his supervisors concerning his co—worker's unsafe acts. (See ECF No. 1 at pp. 28-36.) Thus, the core of Plaintiff's alleged "protected activity" concerns a workplace-safety issue and not, as the check-box on Plaintiff's form Complaint indicates, race discrimination. **[*11]** Workplace safety is not a protected activity under Title VII, requiring the claim to be dismissed. See, e.g., Martinez v. Marmaxx Grp., 2010 WL 11579688, at *2 (D. Nev. June 7, 2010) ("[Plaintiff] claims [defendant] fired him because he complained that Rocha had been harassing him and because he reported Rocha for violating [OSHA]. [Plaintiff] does not allege, as is required under Title VII, that [defendant] terminated him for complaining that [defendant] had discriminated against him or an fellow employee based upon race, color, religion, sex, or national origin."); *Padilla v. Bechtel Const. Co., 2007 U.S. Dist. LEXIS 30835, 2007 WL 1219737, at *6 (D. Ariz. Apr. 25, 2007)* ("[N]o ***retaliation*** claim exists under Title VII for an employer's refusal to rehire an employee for reporting safety violations to the EEOC. Elimination of safety violations in employment does not 'fairly fall within the protection of Title VII to sustain a claim of ***unlawful retaliation***.'").

Given the Court's liberal treatment of pro se pleadings, and the "utmost liberality" command from the Ninth Circuit regarding exhaustion, Plaintiff should have an opportunity to amend the ***retaliation*** claim. However, Plaintiff is strongly cautioned that representations made in pleadings must have a factual basis. See *Fed. R. Civ. P. 11* (footnote 5, above); see also *Local Rule 110* (noting that a party's failure to comply with the rules **[*12]** or order of the court "may be grounds for imposition by the Court of any and all sanctions," including monetary sanctions up through terminating sanctions) Thus, if Plaintiff has no other evidence to show he complained to his supervisors about any race—based discrimination prior to being suspended in March 2019, he should not include a ***retaliation*** claim in his First Amended Complaint. See, e.g., *Learned v. City of Bellevue, 860 F.2d 928, 932 (9th Cir. 1988)* (affirming dismissal of ***retaliation*** claim because the plaintiff "did not allege that he ever opposed any discrimination based upon race, color, religion, sex, or national origin.")

III. Plaintiff's "Equal Pay Act" and "Whistleblower Protection Act" claims should be dismissed as frivolous.

Plaintiff alleges a violation of the "Equal Pay Act." (See ECF No. 1 at p. 4.) It appears Plaintiff was intending to assert a claim concerning the differential in pay between what SHC initially told him ($35/hour) and what he agreed to ($30/hour). (Id. at p. 8.) However, as

Defendant notes, the Equal Pay Act concerns sex discrimination, which is not at issue here. See *29 U.S.C. § 206* ("No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, **[*13]** between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex . . . ."). Thus, Plaintiff's "Equal Pay Act" claim should be dismissed as a legally frivolous claim. See *Cook v. Peter Kiewit Sons Co., 775 F.2d 1030, 1035 (9th Cir. 1985)* ("Under the substantiality doctrine, the district court lacks subject matter jurisdiction when the question presented is too insubstantial to consider.") (citing *Hagans v. Lavine, 415 U.S. 528, 536-39, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974)*); see also *Apple v. Glenn, 183 F.3d 477, 479 (6th Cir. 1999)* ("a district court may, at any time, sua sponte dismiss a complaint for lack of subject matter jurisdiction pursuant to *Rule 12(b)(1) of the Federal Rules of Civil Procedure* when the allegations of a complaint are totally implausible, attenuated, unsubstantial, frivolous, devoid of merit, or no longer open to discussion.").

The same conclusion holds true for Plaintiff's listing of a "Whistleblower Protection Act" claim. Plaintiff does not cite a source of law, nor does he provide any facts concerning any whistleblowing--leaving Defendants and the Court at a loss as to the basis for Plaintiff's claim. Thus, this claim should also be dismissed as frivolous. See *Cook, 775 F.2d at 1035*.

Given the frivolity of these claims, the Court recommends that they be dismissed with prejudice--that leave to amend not be granted. **[*14]**

Conclusion — General principles regarding amendment of the complaint

First, nothing in this order requires Plaintiff to file a first amended complaint. If Plaintiff determines that he is unable to amend his complaint to state a viable claim in accordance with his obligations under *Federal Rule of Civil Procedure 11*, he may alternatively file a notice of voluntary dismissal of his claims without prejudice pursuant to *Federal Rule of Civil Procedure 41(a)(1)(A)(i)*.

However, if Plaintiff elects to proceed with this action in federal court, he is encouraged to familiarize himself with this court's Local Rules[6] and the Federal Rules of Civil Procedure. Although the Court is sympathetic to the difficulties faced by pro se litigants in litigating their cases in federal court, and liberally construes their pleadings, pro se litigants are expected to comply with all procedural rules and court orders. Further, any amended complaint shall:

i. be captioned "First Amended Complaint";
ii. set forth his various claims in separate sections and clearly identify which Defendants are allegedly at fault for each claim (e.g., Claim I against Defendant X, Claim II against Defendant Y);
iii. under each section, list the factual allegations supporting that particular claim;

iv. include a general **[*15]** background facts section to orient the reader only as necessary;
v. include his statements for jurisdiction, venue, and relief sought as is necessary;
vi. address any other pleading deficiencies outlined above; and
vii. be filed within 21 days after the district judge has issued an order on these findings and recommendations.

Plaintiff is informed that the Court cannot refer to a prior complaint or other filing in order to make Plaintiff's amended complaint complete. *Local Rule 220* requires that an amended complaint be complete in itself without reference to any prior pleading. As a general rule, an amended complaint supersedes the original complaint, and once the amended complaint is filed, the original complaint no longer serves any function in the case.

Finally, these findings and recommendations apply to Defendant XL, who (it appears) has not yet been served with process. "A District Court may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where claims against such defendants are integrally related." *Silverton v. Dep't of Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981)*. "Such a dismissal may be made without notice where the [plaintiffs] cannot **[*16]** possibly win relief." *Omar v. Sea-Land Serv., Inc., 813 F.2d 986, 991 (9th Cir. 1987)*. The court's authority in this regard includes sua sponte dismissal as to defendants who have not been served and defendants who have not yet answered or appeared. *Columbia Steel Fabricators, Inc.*

[6] Available at: http://www.caed.uscourts.gov/caednew/index.cfm/rules/local-rules/

v. Ahlstrom Recovery, 44 F.3d 800, 802 (9th Cir. 1995) ("We have upheld dismissal with prejudice in favor of a party which had not yet appeared, on the basis of facts presented by other defendants which had appeared"); see also *Bach v. Mason, 190 F.R.D. 567, 571 (D. Idaho 1999)*; *Ricotta v. California, 4 F. Supp. 2d 961, 978-79 (S.D. Cal. 1998)*. Here, all Defendants are similarly situated, as the Court's logic is applicable to Defendant XL. Further, it appears all of Plaintiff's claims are integrally related, as the entire complaint pertains to the same dispute. (See, generally, ECF No. 1.) Therefore, dismissal is appropriate as to all Defendants.

RECOMMENDATIONS

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Defendants' motion to dismiss (ECF No. 11) be GRANTED;

2. Plaintiff be granted leave to amend his race discrimination and ***retaliation*** claims, as outlined above;

3. Plaintiff's "Equal Pay Act" and "Whistleblower Protection Act" claims be DISMISSED WITHOUT LEAVE TO AMEND;

4. Within 21 days of the district judge's order (which will come after the expiration of the objection period and after the final ruling by the district judge on these F&R's), Plaintiff be ordered file **[*17]** either (a) a first amended complaint or (b) a request for voluntary dismissal of the action without prejudice; and

5. Plaintiff be informed that failure to timely comply with these recommendations and the district court's order may result in dismissal of the action with prejudice pursuant to *Federal Rule of Civil Procedure 41(b)*.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of *28 U.S.C. § 636(b)(1)*. Within fourteen (14) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served on all parties and filed with the court within fourteen (14) days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998)*; *Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991)*.

Dated: January 31, 2020

/s/ Kendall J. Newman

KENDALL J. NEWMAN

UNITED STATES MAGISTRATE JUDGE

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Cooper v. Health

United States District Court for the District of Arizona

February 7, 2020, Decided; February 7, 2020, Filed

No. CV-18-00116-PHX-DGC

Reporter
2020 U.S. Dist. LEXIS 21209 *

Heather Cooper, Plaintiff, v. Dignity Health, doing business as St. Joseph's Hospital and Medical Center, Defendant.

Core Terms

essential function, accommodation, punctuality, reasonable accommodation, tardiness, termination, summary judgment, disability, arrive, interactive process, attendance, patient, start time, morning, asserts, unpaid, tasks, ***retaliation***, harassment, causation, surgeries, clocked, warning, hostile work environment claim, protected activity, ***retaliation*** claim, requests, pre-op, discrimination claim, qualified individual

Counsel: [*1] For Heather Cooper, Plaintiff: Chad Hunter Conelly, LEAD ATTORNEY, Molever Conelly PLLC, Scottsdale, AZ.

For Dignity Health, doing business as, St. Joseph's Hospital and Medical Center, Defendant: Lindsay Jo Fiore, LEAD ATTORNEY, Nicole Lynn Simmons, Quarles & Brady LLP - Phoenix, AZ, Phoenix, AZ.

Judges: David G. Campbell, Senior United States District Judge.

Opinion by: David G. Campbell

Opinion

WO

ORDER

Plaintiff Heather Cooper asserts *Americans with Disabilities Act ("ADA")* claims against Defendant Dignity Health. Doc. 1-1 at 4-21. Defendant moves for summary judgment on all claims, and Plaintiff cross moves for partial summary judgment on certain requests for an accommodation. Docs. 111, 118. The motions are fully briefed. Docs. 130, 131, 134. Plaintiff's request for oral argument is denied because it will not aid in the Court's decision. *See Fed. R. Civ. P. 78(b)*; *LRCiv 7.2(f)*. For reasons stated below, the Court will grant Defendant's motion and deny Plaintiff's cross-motion.[1]

I. Background.

The following facts are not genuinely disputed for purposes of summary judgment. Defendant owns and operates St. Joseph's Hospital and Medical Center. Plaintiff worked at St. Joseph's as an intraoperative neuromonitoring technologist ("IONM tech") from **[*2]** 2010 to late 2013. Doc. 1-1 at 5, 15.[2] IONM techs monitor nerve functioning of patients undergoing brain and spinal surgery. Docs. 112, 119 ¶¶ 1-3. Mornings were a particularly busy time for IONM techs because surgeries typically started at 7:30 a.m. *Id.* ¶¶ 8-9. The

[1] The Court apologizes to the parties for the delay in ruling on these motions. An unexpectedly large number of trials and motions, and one very large case (40 motions in limine and 9 *Daubert* motions), delayed the Court's attention to this matter.

[2] Citations are to page numbers attached to the top of pages by the Court's electronic filing system.

techs were expected to complete a set of pre-op tasks when they arrived in the morning, including changing into scrubs, getting the appropriate equipment, going to the operating room, and starting up their computers. *Id.* ¶ 8. Plaintiff's scheduled arrival time was 7:00 a.m. Doc. 1-1 at 5.

Defendant's Attendance and Punctuality Policy governed Plaintiff's employment. Docs. 112, 119 ¶ 13. The Policy required an employee to arrive at work on time and notify a manager of any absence or tardiness at least two hours before the shift. *Id.* ¶ 14. There was no acceptable amount of tardiness under the Policy, and four unscheduled tardies could subject the employee to corrective action, including termination. *Id.* ¶ 15.

In October 2011, Plaintiff received a corrective action for clocking in for work after 7:00 a.m. more than 70 times in the preceding four months. *Id.* ¶ 20. The corrective action explained that tardiness affects work for **[*3]** other IONM techs, pre-op tasks, and patient application. *Id.* It also notified Plaintiff of the expectation to be clocked in for work by 7:00 a.m. *Id.* Plaintiff received another corrective action in February 2012 because she had been tardy 40 times since the previous corrective action. *Id.* ¶ 22.

Plaintiff claims that she began experiencing panic attacks in August 2012 and was diagnosed with anxiety, depression, and panic, mood, and borderline personality disorders. Doc. 118 at 2. She took prescribed medications for these conditions during the remainder of her employment with Defendant. Docs. 112-1 at 74, 121-1 at 7. Plaintiff claims that the conditions and side-effects from the medications made it difficult for her to get ready for work in the morning. Doc. 118 at 6.

Plaintiff clocked in for work after 7:00 a.m. fifteen times in January 2013. Docs. 112, 119 ¶ 24. She received a written warning for her excessive tardiness on February 8, 2013. *Id.* ¶ 25. Plaintiff was warned that "[i]f she arrives and punches in at work any time after 7:00 a.m. following the presentation of this correction action . . . this may lead to termination of employment." *Id.* ¶ 26.

Concerned that her job was in jeopardy, **[*4]** Plaintiff discussed her medical problems with her immediate supervisor, Alonso Araux, and the IONM department manager, Rhonda Coates. *Id.* ¶ 27. Plaintiff also provided two doctor's notes, one of which stated that Plaintiff had attended an appointment at an entity named JFCS, and the other stating that Plaintiff "is involved with both counseling and psychiatric services" through JFCS. Doc. 112-3 at 5, 7. Plaintiff was granted leave under the *Federal Medical Leave Act ("FMLA")* between mid-February and late May 2013. Docs. 112, 119 ¶¶ 29-30, 33-36. The leave was intermittent. As Plaintiff explains in her reply in support of her cross-motion for summary judgment, her leave was "intermittent FMLA leave up to four days per month"; she "was using her FMLA leave as needed when she was sick in the mornings and she was not on continuous leave the entire time - she still had to report to work when she did not call in to take days off using her FMLA time." Doc. 134 at 4.

While on leave, Plaintiff asked Defendant's third-party human resources administrator, Matrix HR Management ("Matrix"), if she could use FMLA leave to arrive at work between 9:00 and 10:00 a.m. Docs. 112, 119 ¶ 37; Doc. 112-3 at **[*5]** 13-14. Matrix explained that the FMLA does not cover a late start time and that Plaintiff needed to ask Defendant's human resources department for an ADA accommodation. *Id.* Plaintiff returned to work in late May 2013 after exhausting her FMLA leave. Docs. 112, 119 ¶ 36.

On May 31, 2013, Plaintiff met with Coates and human resources consultant Jennifer Musegades and requested to be relieved from on-call shifts on Wednesday evenings so she could attend therapy sessions. *Id.* ¶ 39. During the meeting Musegades granted Plaintiff paid time off even though Plaintiff did not have a full day accrued. Doc. 121-1, ¶¶ 101-11. Musegades also suggested that Plaintiff could receive unpaid time off and provided her paperwork to request such an ADA accommodation. *Id.* ¶ 122. Plaintiff stated that she could not afford unpaid time off (*id.* ¶ 123) and did not complete the paperwork (Docs. 112, 119 ¶ 42).

A department-wide meeting took place on June 28, 2013, which Plaintiff attended. Docs. 112, 119 ¶ 44. Plaintiff and other IONM techs were told that they were expected to be clocked in for work by 6:45 a.m. with a six-minute grace period. *Id.* ¶ 45.

Plaintiff clocked in after 6:51 a.m. six times after the June **[*6]** 28 meeting, and received a written warning for tardiness on July 16. *Id.* ¶ 48. She received a final written warning for continued tardiness on August 7, and was again tardy on September 26 and October 2. *Id.* ¶ 53. She was placed on administrative leave on October 3. *Id.* ¶ 60.

On October 7, Plaintiff emailed Musegades requesting a late start time accommodation and informing Musegades that she was filing an EEOC charge. Doc. 119 at 16, ¶ 38. Plaintiff sent Musegades a letter two

days later requesting a 7:15 a.m. start time. Docs. 112, 119 ¶ 62. Musegades replied the same day, explaining that one of the essential functions of an IONM tech is to be at work at 6:45 a.m. to prepare for surgeries and that her request for a late start time would disrupt the department's operations. Doc. 112-5 at 2-3. Musegades discussed the request with Plaintiff in meetings on October 10 and 21. *Id.* ¶ 63. Defendant found the request unreasonable given the duties of the IONM tech position, particularly the pre-op work required before a patient was brought into the operating room. *Id.* ¶ 66; *see* Doc. 112-5 at 3. During the October 21 meeting, Defendant terminated Plaintiff's employment. Docs. 112, 119 ¶ 67.

Plaintiff **[*7]** filed a charge of discrimination with the EEOC after her termination. Doc. 1-1 at 16, ¶ 124. The EEOC found reasonable cause to believe that Defendant had violated the ADA. *Id.* ¶ 125; *see* Doc. 122-1 at 91-92. The EEOC issued a right to sue letter on September 18, 2017. Doc. 1-1 at 16, ¶ 126.

Plaintiff filed suit three months later. Doc. 1-1 at 4-20. The complaint asserts several violations of the ADA: discrimination based on Plaintiff's termination and Defendant's failure to engage in an interactive process and provide a reasonable accommodation, ***unlawful*** discharge, hostile work environment, and ***retaliation***. *Id.* at 16-19.

Defendant seeks summary judgment on each claim, arguing that: (1) the discrimination claim fails because Plaintiff could not perform an essential function of her job - namely, to arrive at work on time - and Plaintiff has no evidence that Defendant failed to engage in the interactive process or provide a reasonable accommodation; (2) the ***unlawful*** discharge claim is duplicative of the discrimination claim and fails for the same reasons; (3) the ***retaliation*** claim fails because no causal link exists between Plaintiff's protected activity and her termination; and (4) hostile work environment **[*8]** claims are not cognizable under the ADA, and Plaintiff impermissibly bases her claim on performance-based actions unconnected to her disability. Doc. 111 at 2, 7-17. Plaintiff seeks partial summary judgment on the discrimination claim with respect to the requests for a late start time accommodation made on May 7 and October 7, 2013. Doc. 118 at 4-6, 24-25.

II. Summary Judgment Standard.

Summary judgment is appropriate if the moving party shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Only disputes over facts that might affect the outcome of the suit will preclude summary judgment, and the disputed evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The evidence must be viewed in the light most favorable to the nonmoving party, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), and all justifiable inferences are drawn in that party's favor because "[c]redibility determinations, the weighing of evidence, and the drawing of inferences from the facts are jury functions," Anderson, 477 U.S. at 255.

III. Discrimination.

The ADA provides that no employer "shall discriminate against a qualified individual on the basis of disability in regard to . **[*9]** . . discharge of employees . . . and other terms, conditions, and privileges of employment." 42 U.S.C.A. § 12112(a). An employer engages in ***unlawful*** discrimination under the ADA by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability[.]" 42 U.S.C. § 12112(b)(5)(A); *see* Snapp v. United Transp. Union, 889 F.3d 1088, 1095 (9th Cir. 2018) ("The ADA treats the failure to provide a reasonable accommodation as an act of discrimination if the employee is a qualified individual[.]"). An employer has a duty to engage in an interactive process with a disabled individual to identify reasonable accommodations, *see* Dunlap v. Liberty Nat. Prods., Inc., 878 F.3d 794, 799 (9th Cir. 2017), and the failure to do so constitutes ***unlawful*** discrimination if a reasonable accommodation would have been possible, *see* Snapp, 889 F.3d at 1095.[3]

To establish an ADA discrimination claim, a plaintiff must show that (1) she is disabled; (2) she is a qualified individual, meaning she can perform the essential functions of her job; and (3) the defendant failed to provide a requested reasonable accommodation, failed

[3] "[T]here exists no stand-alone claim for failing to engage in the interactive process. Rather, discrimination results from denying an available and reasonable accommodation." Snapp, 889 F.3d at 1095.

to engage in an interactive process where a reasonable accommodation would have been possible, or terminated the plaintiff because of her disability. *See id.*; *Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996)*; *Sanders v. Arneson Prods., Inc., 91 F.3d 1351, 1353 (9th Cir. 1996)*; *Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1246 (9th Cir. 1999)*; *Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1090 (9th Cir. 2002)*.[4]

A. Failure to Provide a Late Start Time Accommodation.

Plaintiff **[*10]** claims that Defendant discriminated against her because of her disability by failing to provide a late start time accommodation. Doc. 1-1 at 7, 10, 12-13, 16-18. Defendant asserts that punctuality is an essential function of the IONM tech position that Plaintiff was not able to perform. Doc. 111 at 7. The Court agrees with Defendant.

The ADA defines "qualified individual" as an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds[.]" *42 U.S.C. § 12111(8)*; *see 29 C.F.R. § 1630.2(m)*; *Kennedy, 90 F.3d at 1481*. The term "essential functions" means the "fundamental job duties" and not the "marginal functions of the position." *29 C.F.R. § 1630.2(n)(1)*. "[T]he ADA and implementing regulations direct fact finders to consider . . . 'the employer's judgment as to what functions of a job are essential[.]'" *Bates v. United Parcel Serv., Inc., 511 F.3d 974, 991 (9th Cir. 2007)* (quoting *42 U.S.C. § 12111(8)*); *see 29 C.F.R. § 1630.2(n)(3)(i)*. Other factors to be considered include written job descriptions, the consequences of not requiring the employee to perform the function, and the work experience of incumbents in similar jobs. *See Bates, 511 F.3d at 991*; *29 C.F.R. § 1630.2(n)(3)(ii)-(vii)*. Defendant has the burden of production in establishing what job functions of the IONM position are essential, "as 'much of the information which determines **[*11]** those essential functions lies uniquely with [Defendant].'" *Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1237 (9th Cir. 2012)* (quoting *Bates, 511 F.3d at 991*).

Defendant notes that the IONM department is a "teamwork" environment, accessible 24 hours a day, in which IONM techs work onsite with other medical professionals and interact with patients. Docs. 112, 119 ¶ 2; *see Samper, 675 F.3d at 1237* (explaining that regular and reliable attendance is an essential function where the job requires the employee to work "as part of a team," in "face-to-face interaction with clients and other employees," or "with items and equipment that are on site") (citations omitted); *Hill v. City of Phoenix, 162 F. Supp. 3d 918, 924 (D. Ariz. 2016)* (same). The morning is a particularly busy and critical time for IONM techs because they have to complete various pre-op tasks before the 7:30 a.m. surgeries could begin. *Id.* ¶¶ 8-9. The proper completion of these tasks is important because patient safety is the department's paramount concern. *Id.* ¶ 2. Coates has explained that IONM techs are required to be punctual because the department never wants to be the reason a surgery is delayed or patient care is compromised. Doc. 112-1 at 111, 124, 160-61.

Defendant's written punctuality policy and disciplinary actions against Plaintiff for tardiness show that Defendant places a high priority **[*12]** on punctuality. *See Earl v. Mervyns, Inc., 207 F.3d 1361, 1366 (11th Cir. 2000)* (the defendant "placed a high priority on punctuality [where its] policy handbook contained a detailed punctuality policy and [it] implemented a comprehensive system of warnings and reprimands for violations of the policy"); *Hartwell v. Spencer, No. 5:16CV141-MW/MJF, 2018 U.S. Dist. LEXIS 233291, 2018 WL 8807152, at *2 (N.D. Fla. Sept. 24, 2018)* (the fire department "place[d] a very high priority on punctuality" given its detailed punctuality policy and disciplinary process for violations). Defendant's Attendance and Punctuality Policy make clear that IONM techs are expected to arrive for work on time in order to "provide continuity of patient care and efficient operations[.]" Docs. 112, 119 ¶ 13; *see* Doc. 112-2 at 32. Plaintiff's corrective actions explained that her excessive tardiness was "affecting work for other technologists, case set up, pre-op work, and patient application." Docs. 112, 119 ¶ 20; *see* Doc. 112-2 at 89, 92. The initial warning Plaintiff received makes clear that "[e]xcessive tardiness affects [Plaintiff's] work performance, morale of other staff employees, and patient care." Docs. 112, 119 ¶ 25; *see* Doc. 112-3 at 2.

The meeting on June 28, 2013 was held to clarify the department's policy on tardiness. Doc. 112-3 at 44. Each attendee, **[*13]** including Plaintiff, was specifically advised that "the expectation is that you are clocked in

[4] Defendant does not dispute that Plaintiff was a disabled person within the meaning of the ADA and had the "requisite skill, experience, [and] education" for the [IONM tech] position." *29 C.F.R. § 1630.2(m)*.

by 6:45 a.m. for your scheduled work shift." *Id.* The final warning Plaintiff received in July 2013 reiterated that the "[s]tart of the shift for IONM [techs] is 6:45 a.m." Docs. 112, 119 ¶ 49; *see* Doc. 112-4 at 2.

Araux testified that he had difficulty finding IONM techs in the morning and often did not have techs available at 7:00 a.m. when he needed to make schedule changes. Doc. 112-2 at 18-21. The transition to a 6:45 a.m. start was intended to ensure the techs could assemble in Araux's office by 7:00 a.m. *Id.* at 20. Coates testified that she changed the start time to 6:45 a.m. because "every morning [was] so overwhelming for the techs" and they "were having so much difficulty getting everything up and running in the morning." Doc. 112, 119 ¶ 46. Plaintiff's termination review document states that the 6:45 a.m. start time "was an operational need based on readiness of equipment and people prior to surgical start times." Doc. 112-4 at 19.

Plaintiff disputes none of this evidence. *See* Doc. 119 at 1-8.[5] Instead, Plaintiff asserts that Defendant's attempt to link her tardiness to patient safety is disingenuous **[*14]** because Plaintiff was always able to complete her pre-op tasks before patients were brought into the operating room. Doc. 118 at 11-13. But this says nothing about the effect of Plaintiff's tardiness on the morale of other IONM techs (*see* Docs. 112 ¶ 25) and the need for techs to be present at 7:00 a.m. to accommodate schedule changes and organize the department's work. And Plaintiff does not otherwise rebut Defendant's evidence showing that tardiness could compromise patient safety. *See* Samper, 675 F.3d at 1238 ("[T]he common-sense notion that on-site regular attendance is an essential job function could hardly be more illustrative than in the context of a neo-natal nurse"). An IONM tech's morning tasks included: (1) clocking in for work, (2) changing into sterile clothes, (3) checking an electronic screen with the day's schedule, (4) talking to Araux about any schedule changes or other issues, (5) going to the closet to get the cart with the tech's computer and equipment, (6) taking the cart into the operating room, and (7) making sure the computer and patient stimulators were working properly. Docs. 112-1 at 104-06, 112-2 at 19-20, 119 at 12. The parties dispute whether these tasks typically take 15 or **[*15]** 30 minutes to complete (Docs. 111 at 9, 118 at 11), but Plaintiff acknowledges that there were "exceptions" to these tasks depending on a surgery's complexity. Docs. 118 at 12, 119 at 18. Defendant reasonably could conclude in its professional judgment that allowing Plaintiff to clock in for work only 15 minutes before brain and spinal surgeries - and rushing to complete her pre-op tasks - could compromise patient safety and the efficient and effective operation of the IONM department. Doc. 131 at 5; *see* Samper, 675 F.3d at 1238-39 ("The 24-hour hospital unit setting . . . affords a particularly compelling context in which to defer to rational staffing judgments by hospital employers based on the genuine necessities of the hospital business.") (citation omitted).

Plaintiff asserts that Araux was lax on when IONM techs needed to arrive in the morning (Doc. 118 at 10), but the disciplinary actions Plaintiff received clearly show that Coates - the IONM department manager - took tardiness seriously. Indeed, Coates held the department-wide meeting on June 28, 2013 to "reiterate [the] department policy on attendance and tardies." Doc. 112-3 at 44; *see also* Nadler v. Harvey, No. 06-12692, 2007 U.S. App. LEXIS 20272, 2007 WL 2404705, at *7 (11th Cir. 2007) (an employer's past tolerance of tardiness does not negate **[*16]** evidence that punctuality is an essential function).

Plaintiff claims that the differential discipline she received after the June 28 meeting shows that punctuality was not an essential function. Doc. 118 at 10-11. Plaintiff notes that other IONM techs were late multiple times after the meeting and were not terminated, but admits that two of the techs received verbal warnings and the other tech received a write-up. *Id.*; *see* Docs. 119 at 17, 112-5 at 11. Defendant "was under no obligation to give [Plaintiff] a free pass" for her excessive tardiness even if other techs were not terminated for occasional tardiness. Samper, 675 F.3d at 1240. Moreover, regular punctuality could still be an essential job function even if Defendant did not enforce a strict no-tolerance policy. *See id.* (rejecting the argument that allowing a certain number of unplanned absences means that the employer could accommodate unlimited absences because "this approach ignores recognition of employer needs and would gut reasonable attendance policies").

Regular punctuality may not be an essential function where the job "can be performed off site or deferred until a later day[,]" Samper, 675 F.3d at 1239, but Plaintiff's job required her to be at the hospital and prepared **[*17]** for neurosurgeries by 7:30 a.m. As in *Samper*, Plaintiff's

[5] Plaintiff believes that the start time may have been changed due to her disability and accommodation requests, but admits that she has no specific knowledge as to why the change was actually made. Docs. 112, 119 ¶ 47; *see* Doc. 112-1 at 17.

"job unites the trinity of requirements that make regular on-site presence necessary for regular performance: teamwork, face-to-face interaction with patients . . ., and working with medical equipment." *675 F.3d at 1238*. Thus, even construed in Plaintiff's favor, the undisputed facts show that punctuality was an essential function of the IONM tech position. As the Ninth Circuit noted in *Samper*, "a majority of circuits have endorsed the proposition that in those jobs where performance requires attendance at the job, irregular attendance compromises essential job functions." *675 F.3d 1237-38* (citing 13 cases from seven circuits); *see also Albright v. Trustees of Univ. of Pa., No. CV 19-00149, 2019 U.S. Dist. LEXIS 180654, 2019 WL 5290541, at *6 (E.D. Pa. Oct. 18, 2019)* (punctuality was an essential function because the plaintiff "works in the healthcare industry and . . . must arrive to work predictably and promptly in order to care for scheduled patients"); *Hartwell, 2018 U.S. Dist. LEXIS 233291, 2018 WL 8807152, at *3* ("In addition to the fire department's policy, the nature of Plaintiff's job provides further support for the conclusion that not only punctuality, but strict punctuality is an essential function of [the] job."); *Colonna v. UPMC Hamot, No. 1:16-CV-0053 (BJR), 2017 U.S. Dist. LEXIS 155827, 2017 WL 4235937, at *10 (W.D. Pa. Sept. 25, 2017)* ("Punctuality is an essential **[*18]** function for an employee like Plaintiff, whose presence in the office is vital to process patients who are arriving in the morning."); *Barnhart v. Regions Hosp., No. CIV. 12-2089 DWF/FLN, 2014 U.S. Dist. LEXIS 5249, 2014 WL 258578, at *8 (D. Minn. Jan. 23, 2014)* ("attendance and punctuality were essential functions" of the plaintiff's position as a neurosurgery scheduling specialist and her "tardiness impacted her co-workers and the department"); *Johnson v. Children's Hosp. of Phila., No. CIV. A. 94-5698, 1995 U.S. Dist. LEXIS 7743, 1995 WL 338497, at *2 (E.D. Pa. June 5, 1995)* (the plaintiff could not perform essential functions of his position as an aide in the radiology department where he frequently showed up late to work).

Plaintiff asserts that even if punctuality is an essential function, this does not end the inquiry because an employee is qualified under the ADA if she can perform the essential function with a reasonable accommodation. Doc. 118 at 13. But Plaintiff has not shown that her requested accommodation - a late start time - was reasonable. Plaintiff "essentially asks for a reasonable accommodation that exempts her from an essential function," an "approach [that] would eviscerate any attendance policy[.]" *Samper, 675 F.3d at 1240*. As many courts have recognized, "if punctuality is an essential function, then [Plaintiff's] request for exemption from the tardy policy is not, as a matter of law, a reasonable **[*19]** accommodation." *Beem v. Providence Health & Servs., No. 10-CV-0037-TOR, 2012 U.S. Dist. LEXIS 62991, 2012 WL 1579492, at *4 (E.D. Wash. May 4, 2012)* (citing *Samper*); *see also Cripe v. City of San Jose, 261 F.3d 877, 884 (9th Cir. 2001)* ("If a disabled person cannot perform a job's 'essential functions' . . . then the ADA's employment protections do not apply."); *Earl, 207 F.3d at 1367* ("A request to arrive at work at any time, without reprimand, would in essence require [the defendant] to change the essential functions of [the] job, and thus is not a request for a reasonable accommodation."); *Barron v. Sch. Bd. of Hillsborough Cty., 3 F. Supp. 3d 1323, 1330 (M.D. Fla. 2014)* (a request to arrive late "is not a reasonable accommodation because it would change the essential functions of a job that requires punctual attendance"); *Holmes v. Fulton Cty. Sch. Dist., No. 1:06-CV-2556-CC-AJB, 2007 U.S. Dist. LEXIS 104867, 2007 WL 9650147, at *38 (N.D. Ga. Dec. 24, 2007)* ("[T]he proposed accommodation of allowing Plaintiff to arrive late is not a reasonable accommodation because it would eliminate the essential function of punctuality").

In short, Plaintiff's discrimination claim fails because punctuality was an essential job function that she could not perform, and a late start time was not a reasonable accommodation. *See Samper, 675 F.3d at 1241* (affirming summary judgment and noting that "[a]n employer need not provide accommodations that compromise performance quality - to require a hospital to do so could, quite literally, be fatal"). **[*20]** The Court will grant summary judgment on this claim.

B. The Interactive Process and Plaintiff's Termination.

"'Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations' that will enable the employee to perform her job duties." *Dunlap, 878 F.3d at 799* (quoting *Humphrey, 239 F.3d at 1137*). Through this process, "the employer and employee can come to understand the employee's abilities and limitations, the employer's needs for various positions, and a possible middle ground for accommodating the employee." *Snapp, 889 F.3d at 1095*; *see Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1111-16 (9th Cir. 2000)* (the ADA requires employers to engage in an interactive process because it "is the key mechanism for facilitating

the integration of disabled employees into the work place"), *vacated on other grounds by U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 406, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002)*. An employer that fails to engage in the interactive process in good faith "will face liability 'if a reasonable accommodation would have been possible.'" *Snapp, 889 F.3d at 1095* (quoting *Barnett, 228 F.3d at 1116*); *see* 29 C.F.R. § Pt. 1630, App. § 1630.9 (describing the interactive process and the importance of finding a reasonable accommodation if possible).

Plaintiff claims that Defendant failed to engage **[*21]** in an interactive process to determine whether Plaintiff's disability reasonably could be accommodated. Doc. 1-1 at 17. The Court does not agree.

When Plaintiff raised her health issues in January and February 2013 and provided two notes confirming that she was receiving counseling and mental health treatment, she was granted FMLA leave. The leave was intermittent, allowing Plaintiff to use her leave as needed when she was unable to work on particular days. Doc. 134 at 4.

Shortly after Plaintiff exhausted her FMLA leave, she met with Coates and Musegades and asked to be relieved from on-call shifts on Wednesday evenings so she could attend therapy sessions. Docs. 112, 119 ¶ 39. She asserts that she also requested during this meeting that she be allowed to report to work up to 15 minutes late. Doc. 121-1, ¶ 115. During the meeting, Musegades granted Plaintiff additional paid time off even though she did not have a full day accrued. *Id.* ¶¶ 101-111. Plaintiff took the paid time off. Doc. 112-3 at 33. Musegades also suggested that Plaintiff could receive unpaid time off and provided her paperwork for an ADA accommodation. Doc. 121-1, ¶ 122. Plaintiff stated that she could not afford unpaid **[*22]** time off (*id.* ¶ 123) and did not complete the paperwork (Docs. 112, 119 ¶ 42).

The Court cannot conclude that Defendant failed to engage in the interactive process when it facilitated her FMLA leave, agreed that it could be intermittent and used only on days when she was ill, afforded her paid time off when the FMLA leave was exhausted, offered her additional unpaid time off, and provided her with an ADA form to complete so she could qualify for the unpaid time off. Plaintiff attempts to parse the events in this case and Defendant's responses during specific conversations, asserting that Defendant failed in various ways to engage in the interactive process during those events. But each event identified by Plaintiff concerned the same issue - Plaintiff's tardiness and the medical cause she identified. In response to this issue, it is undisputed that Defendant afforded Plaintiff intermittent FMLA leave, unearned paid time off, and unpaid time off.

Plaintiff argues that Defendant did not accommodate her condition by permitting her to arrive late, which is true, but the Court has already concluded that punctual attendance was an essential function of Plaintiff's job. As noted above, Defendant **[*23]** was not required to compromise this essential function. *Samper, 675 F.3d at 1240* (Plaintiff "essentially asks for a reasonable accommodation that exempts her from an essential function"); *Cripe, 261 F.3d at 884*) ("If a disabled person cannot perform a job's 'essential functions' . . . then the ADA's employment protections do not apply."); *Earl, 207 F.3d at 1367* ("A request to arrive at work at any time, without reprimand, would in essence require [the defendant] to change the essential functions of [the] job, and thus is not a request for a reasonable accommodation."); *Barron, 3 F. Supp. 3d at 1330* (a request to arrive late "is not a reasonable accommodation because it would change the essential functions of a job that requires punctual attendance"); *Beem, 2012 U.S. Dist. LEXIS 62991, 2012 WL 1579492, at *4* ("*Samper* clearly stands for the proposition that if punctuality is an essential function, then [Plaintiff's] request for exemption from the tardy policy is not, as a matter of law, a reasonable accommodation."); *Holmes, 2007 U.S. Dist. LEXIS 104867, 2007 WL 9650147, at *38* ("[T]he proposed accommodation of allowing Plaintiff to arrive late is not a reasonable accommodation because it would eliminate the essential function of punctuality").

The Court cannot conclude that Plaintiff's atomized focus on specific conversations is sufficient to show that Defendant discriminated against her by failing **[*24]** to engage in the interactive process. Defendant offered at least three meaningful accommodations - intermittent FMLA, unearned paid time off, and unpaid time off - and was unable to officially sanction her late arrivals without compromising an essential function of her job. The primary purpose of the "interactive process is to identify *reasonable* accommodations that will permit a disabled employee to remain with the company." *EEOC v. ValleyLife, No. CV-15-00340-PHX-GMS, 2017 U.S. Dist. LEXIS 7558, 2017 WL 227878, at *7 (D. Ariz. Jan. 19, 2017)* (emphasis added). An employer does not fail to engage in that process by failing to offer an unreasonable accommodation. *See Moore v. Computer*

Assoc. Int'l, Inc., 653 F. Supp. 2d 955, 964 (D. Ariz. 2009) (the ADA does not guarantee an employee an accommodation of his or her choosing, only a reasonable one).[6]

C. Plaintiff's Motion for Partial Summary Judgment.

Plaintiff seeks summary judgment with respect to the requests for accommodation she made to Matrix on May 7, 2013, and to Musegades on October 7, 2013. Doc. 118 at 4-6, 24-25. Plaintiff notes that after emailing Matrix about using FMLA leave to arrive at work between 9:00 and 10:00 a.m., no one discussed her limitations or potential accommodations. *Id.* at 24. But Defendant's Personal Leave Policy makes clear that Matrix cannot approve ADA requests absent approval **[*25]** from management and the human resources department (Doc. 122-1 at 78), and Matrix advised Plaintiff to seek a schedule change from her manager or the human resources department (Docs. 119 ¶ 37, 112-1 at 58).

With respect to the October 7 request, Plaintiff admits that Musegades asked her "questions about her disability, problems in the morning, and need for a slightly-late clock-in time[.]" Doc. 118 at 20; *see* Docs. 112, 119 ¶ 63. She asserts, however, that Musegades "did not go far enough" with the interactive process on that occasion. Doc. 118 at 20. As discussed above, the Court finds that Defendant's offered accommodations satisfied the interactive process and that Plaintiff cannot prevail by focusing on whether one employee's comments on a specific occasion went "far enough." The ADA is not a mandatory script for every conversation, deviation from which results in employer liability. As the Ninth Circuit has observed, "there exists no stand-alone claim for failing to engage in the interactive process. Rather, discrimination results from denying an available and reasonable accommodation." Snapp, 889 F.3d at 1095. Defendant offered Plaintiff at least three reasonable accommodations and did not violate **[*26]** the ADA by refusing to compromise an essential function of the job.

[6] The Ninth Circuit has held "that if an employer fails to engage in good faith in the interactive process, the burden at the summary-judgment phase shifts to the employer to prove the unavailability of a reasonable accommodation." Snapp, 889 F.3d at 1095. Because Plaintiff's evidence is insufficient for a reasonable jury to find that Defendant failed to engage in the interactive process in good faith, the burden does not shift and the Court need not address whether Defendant has met it.

IV. *Unlawful* Discharge.

Plaintiff does not dispute that her ***unlawful*** discharge claim (Doc. 1-1 at 18-19) is duplicative of her ADA discrimination claim (*see* Doc. 111 at 7 n.6). The Court accordingly will grant summary judgment on the ***unlawful*** discharge claim.

V. *Retaliation*.

"To establish a prima facie case of ***retaliation*** under the ADA, an employee must show that: (1) he or she engaged in a protected activity; (2) suffered an adverse employment action; and (3) there was a causal link between the two." Pardi v. Kaiser Found. Hosps., 389 F.3d 840, 849 (9th Cir. 2004); *see* 42 U.S.C. § 12203(a). If the plaintiff makes a prima facie case of ***retaliation***, "[t]he burden then shifts to the employer to provide a legitimate, [nonretaliatory] reason for the adverse employment action." Curley v. City of N. Las Vegas, 772 F.3d 629, 632 (9th Cir. 2014). "If the employer does so, then the burden shifts back to the employee to prove that the reason given by the employer was pretextual" *Id.*; *see Brenneise v. San Diego Unified Sch. Dist., 806 F.3d 451, 472-73 (9th Cir. 2015)* ("We apply the Title VII burden-shifting framework, as established in *McDonnell Douglas*[,] to ***retaliation*** claims under the ADA.") (citations omitted).

Plaintiff alleges that her requests for accommodation and notice of filing an EEOC charge constitute protected activity and Defendant took adverse **[*27]** actions by changing her start time, placing her on administrative leave, and terminating her employment. Doc. 118 at 21-22; *see* Doc. 1-1 at 18. Defendant argues that summary judgment is warranted because Plaintiff cannot show a causal link between the protected activity and any adverse action. Doc. 111 at 15-16. Plaintiff counters that the temporal proximity between the events is sufficient to preclude summary judgment. Doc. 118 at 15.

Causation may be inferred based on the temporal proximity between the protected activity and the alleged ***retaliation***, *see* Manatt v. Bank of America, NA, 339 F.3d 792, 802 (9th Cir. 2003), but the connection in time must be "very close," Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001). This Circuit has "required temporal proximity of less than three months between the protected activity and the adverse employment action for the employee to establish causation based on timing alone." Mahoe v.

Operating Eng'rs Local Union No. 3, No. CIV. 13-00186 HG-BMK, 2014 U.S. Dist. LEXIS 165944, 2014 WL 6685812, at *8 (D. Haw. Nov. 25, 2014) (citing Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987)); *see* Miller v. Fairchild Indus., 885 F.2d 498, 505 (9th Cir. 1989) (two months sufficient); Serlin v. Alexander Dawson Sch., LLC, 656 F. App'x 853, 856 (9th Cir. 2016) (three months too long); Brown v. Dep't of Public Safety, 446 Fed. App'x. 70, 73 (9th Cir. 2011) (five months too long); Pickens v. Astrue, 252 F. App'x 795, 797 n.2 (9th Cir. 2007) (same); Vasquez v. County of L.A., 349 F.3d 634, 646 (9th Cir. 2003) (thirteen months too long); *see also* Adusumilli v. City of Chicago, 164 F.3d 353, 363 (7th Cir. 1998) (eight months too long).

Plaintiff alleges that when she received her first write-up for tardiness in January 2013, she informed Coates and Araux about her medical conditions and requested **[*28]** a reasonable accommodation to deal with her disability. Doc. 1-1 at 7. But Plaintiff was not placed on administrative leave and terminated until October. An inference of causation based on the timing of these events "is not possible . . . because approximately nine months lapsed between the date of [Plaintiff's accommodation request] and [Defendant's] alleged adverse [actions]." Manatt, 339 F.3d at 802.

Plaintiff was terminated less than two weeks after notifying Musegades that she was filing an EEOC charge (Doc. 119 at 16), but Defendant had started the process for terminating Plaintiff before she provided notice of the EEOC charge on October 7, 2013. The termination review document dated October 4, 2013 makes clear that the reason for the proposed termination was Plaintiff's repeated violations of the punctuality policy. Doc. 112-4 at 18. Because the termination process began before Plaintiff provided notice of the EEOC charge, the termination "cannot be said to have been in ***retaliation*** for [this] protected activit[y]." Hargrow v. Fed. Express Corp., No. 03-0642-PHX-DGC, 2006 U.S. Dist. LEXIS 4187, 2006 WL 269958, at *6 (D. Ariz. Feb. 2, 2006).

Because the start time change occurred more than five months after Plaintiff first requested an accommodation (Doc. 112 ¶¶ 44-45), the temporal **[*29]** proximity is not sufficient to create an inference of causation. *See* Yartzoff, 809 F.2d at 1376; Serlin, 656 F. App'x at 856; Brown, 446 Fed. App'x. at 73. Moreover, Plaintiff presents no evidence showing that Defendant's stated reason for the change - to allow IONM techs enough time to prepare for surgeries (Doc. 112 ¶ 46) - is mere pretext for ***retaliation***.

Plaintiff asserts that ***retaliation*** need only be a "motivating factor" for the adverse action (Doc. 118 at 14), but this Circuit has rejected the motivating factor test in favor of a "but-for causation" standard for ADA ***retaliation*** claims. Murray v. Mayo Clinic, 934 F.3d 1101, 1107 (9th Cir. 2019); *see also* Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013) ("Title VII ***retaliation*** claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e-2(m)."). "[T]he stronger 'but-for causation' standard serves to close the door on employees seeking to file . . . ***retaliation*** claims by disallowing an employee, who perceives his or her own impending termination, to 'shield against [those] imminent consequences' by pursuing some form of protected activity." Shaninga v. St. Luke's Med. Ctr. LP, No. CV-14-02475-PHX-GMS, 2016 U.S. Dist. LEXIS 49131, 2016 WL 1408289, at *11 (D. Ariz. Apr. 11, 2016) (quoting Drottz v. Park Electrochemical Corp., No. CV 11-1596-PHX-JAT, 2013 U.S. Dist. LEXIS 167178, 2013 WL 6157858, at *15 (D. Ariz. Nov. 25, 2013)); *see also* Brooks v. City of San Mateo, 229 F.3d 917, 917 (9th Cir. 2000) (recognizing a concern that "employers will be paralyzed into inaction once an employee has **[*30]** lodged a complaint under Title VII, making such a complaint tantamount to a 'get out of jail free' card for employees engaged in job misconduct").

The Court will grant summary judgment on Plaintiff's ***retaliation*** claim.

VI. Hostile Work Environment.

To establish a hostile work environment claim, Plaintiff must show that "(1) she is a qualified individual with disability; (2) she suffered from unwelcome harassment; (3) the harassment was based on her disability or a request for accommodation; (4) the harassment was sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive working environment; and (5) Defendant[] knew or should have known of the harassment and failed to take prompt remedial action." Vitchayanonda v. Shulkin, No. ED CV 17-0349 FMO (SPX), 2019 U.S. Dist. LEXIS 163724, 2019 WL 4282905, at *10 (C.D. Cal. Mar. 29, 2019) (citations omitted). "When determining whether an environment was sufficiently hostile or abusive, courts examine all of the circumstances, including the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating, and whether it unreasonably interfered with an employee's

work performance." *Crowley v. Wal-Mart Stores, No. CV 16-00293 SOM/RLP, 2018 U.S. Dist. LEXIS 154952, 2018 WL 4345251, at *8 (D. Haw. Sept. 11, 2018)* (citing *Faragher v. City of Boca Raton, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)*); *see Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)* (an abusive working environment **[*31]** exists when "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment'") (quoting *Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65-67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)*); *Orio v. Dal Glob. Servs., LLC, No. 14-00023, 2016 WL 5400197, at *16 (D. Guam Sept. 26, 2016)* ("Like a hostile work environment claim based on sex, race, or nationality, a sufficiently severe or pervasive hostile work environment based on disability presents a high bar.").

Plaintiff presents the same evidence to support her hostile work environment claim that she relies on for her discrimination and ***retaliation*** claims - the discipline for excessive tardiness, the start time change, the denial of a reasonable accommodation, and her administrative leave and termination. Doc. 118 at 23. But those actions are not sufficiently harassing or abusive to support a hostile work environment claim under the ADA. Plaintiff cannot prevail when "the behavior on which [she] primarily relies consists of employment decisions with which she disagreed, not physical or verbal conduct of a harassing nature." *Keller-McIntyre v. S.F. State Univ., No. C-06-3209 MMC, 2007 U.S. Dist. LEXIS 21490, 2007 WL 776126, at *13 (N.D. Cal. Mar. 12, 2007)*. Even construing the evidence in Plaintiff's favor, no jury reasonably could find **[*32]** that Plaintiff was subjected to "a discriminatorily hostile or abusive environment." *Meirhofer v. Smith's Food & Drug Ctrs., Inc., 415 Fed. App'x 806, 807 (9th Cir. 2011)* (quoting *Harris, 510 U.S. at 21*); *see Mallard v. Battelle Energy All., LLC, No. 4:12-CV-00587-BLW, 2013 U.S. Dist. LEXIS 80506, 2013 WL 2458620, at *9 (D. Idaho June 6, 2013)* (finding that the conduct the plaintiff endured over a five month period - forced unpaid leave, physical and psychiatric exams, the threat of termination, a requested return-to-work form, and a performance improvement plan - "falls far short of the severe, pervasive harassment needed to support a hostile work environment claim"); *Linder v. Potter, No. CV-05-0062-FVS, 2009 U.S. Dist. LEXIS 72941, 2009 WL 2595552, at *12 (E.D. Wash. Aug. 18, 2009)* (plaintiff failed to show that his employer subjected him to a hostile work environment by "denying his request for continued sick leave, declaring him AWOL after he properly requested additional sick leave, summoning him to an investigative interview[,] and denying his request for a reasonable accommodation"); *Wynes v. Kaiser Permanente Hosps., 936 F. Supp. 2d 1171, 1186 (E.D. Cal. 2013)* (plaintiff's "dissatisfaction with how Kaiser accommodated her disability . . . does not give rise to a claim for hostile work environment harassment"). The Court will grant summary judgment on the hostile work environment claim.[7]

IT IS ORDERED:

1. Defendant's motion for summary judgment (Doc. 111) is **granted**.

2. Plaintiff's cross-motion (Doc. 118) is **denied**.

[*33] 3. The Clerk shall enter judgment in accordance with this order and terminate this case.

Dated this 7th day of February, 2020.

/s/ David G. Campbell

David G. Campbell

Senior United States District Judge

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[7] Given this ruling, the Court need not decide whether the Ninth Circuit recognizes a hostile work environment claim under the ADA. *See* Doc. 111 at 17 (citing *Meirhofer, 415 Fed. App'x at 807*).

Hill v. Goodfellow Top Grade

United States District Court for the Northern District of California

February 11, 2020, Decided; February 11, 2020, Filed

Case No. 18-cv-01474-HSG

Reporter
2020 U.S. Dist. LEXIS 23536 *

TRINA HILL, Plaintiff, v. GOODFELLOW TOP GRADE, Defendant.

Prior History: *Hill v. Goodfellow Top Grade, 2018 U.S. Dist. LEXIS 142071 (N.D. Cal., Aug. 21, 2018)*

Core Terms

protected activity, matter of law, harassment, flaggers, severe, adverse employment action, sexual harassment, flagging, jobsite, no evidence, pervasive, ***retaliation*** claim, phallic-shaped, ***retaliation***, suspension, causation, hostile, one-day, sexual, causal link, gate, renew a motion, retaliatory, inferred, measures, hole, co-worker's, respiratory, offensive, replacing

Counsel: **[*1]** Trina Hill, Plaintiff, Pro se, Baypoint, CA.

For Goodfellow Top Grade, Defendant: Allison Lauren Shrallow, Joseph Richard Lordan, LEAD ATTORNEYS, Lewis Brisbois Bisgaard & Smith LLP, San Francisco, CA.

Judges: HAYWOOD S. GILLIAM, JR., United States District Judge.

Opinion by: HAYWOOD S. GILLIAM, JR.

Opinion

ORDER ON RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Re: Dkt. No. 172

Pending before the Court is Defendant's renewed motion for judgment as a matter of law under *Federal Rule of Civil Procedure 50(b)*. Dkt. No. 172 ("Mot."). Having carefully considered the papers submitted and oral arguments, the Court **GRANTS IN PART and DENIES IN PART** Defendant's motion.

I. BACKGROUND

A. Plaintiff's Role at Goodfellow

Plaintiff Trina Hill started working for Defendant Goodfellow Top Grade Construction, LLC ("Goodfellow" or "Top Grade") on May 9, 2017. Dkt. No. 154 ("Trial Tr. Vol. 1") at 124:16-17. Goodfellow was one of the subcontractors working for Clark Construction, the general contractor, to construct the Chase Center in San Francisco, California. *See id.* at 124:3-125:7. Plaintiff is listed with her union as a "general laborer," a role which entails flagging, shoveling, digging, and "a variety of tasks under labor." *Id.* at 121:17-122:2; Tr. Ex. 4. She primarily **[*2]** works at construction sites. Trial Tr. Vol. 1 at 117:12-13.

Around December 2013, Plaintiff's left lung collapsed and had to be partially removed. *Id.* at 118:14-119:1. As a result of her lung condition, Plaintiff was not capable

of performing "general labor physical work" anymore. *Id.* at 119:5-11. Therefore, though her official title was still "general laborer," she was registered with her union for "flagging jobs only." *Id.* at 116:1-4. Flagging jobs involve directing traffic. *Id.* at 116:5-11. Plaintiff testified that she explained her lung condition to Leonard Garcia, her supervisor at Goodfellow, on June 28, 2017. *Id.* at 132:16-24.

B. July 13, 2017 Incident with Phallic-Shaped Object and Michael Bounds

On the morning of July 13, 2017, Plaintiff and her colleague, Diana Monroe, discovered a phallic-shaped object at the gate where they worked. *Id.* at 139:15-140:1. The object was not there the night before when Plaintiff departed the worksite around 7:00 p.m. Dkt. No. 151 ("Trial Tr. Vol. 2") at 271:5-272:4. The gate was not locked, and Plaintiff does not know who placed the object there. *Id.* at 272:8-274:1.

Because Ms. Monroe and Plaintiff were the only women working at that gate, Plaintiff **[*3]** felt disrespected upon seeing that object. *Id.* at 141:16-21. She asked Michael Bounds, an employee of another subcontractor, if he placed the object there, and he responded by "lift[ing] up his shirt and pull[ing] his pants down and expos[ing]" himself indecently to Plaintiff. *Id.* at 141:22-142:6. Immediately after, Ms. Monroe reported the Mr. Bounds incident to Justin Porter, the "on-site, on-care health and safety provider." *Id.* at 142:25-143:6. Mr. Porter told Plaintiff to "immediately go report it on the seventh floor to the general contractor, Clark Construction." *Id.* Plaintiff reported the incident to Steve Humphrey, head of safety at Clark Construction. *Id.* at 143:7-22. Mr. Humphrey called Goodfellow and according to Plaintiff, he "didn't offer them a choice but to remove Mr. Bounds from the jobsite." Trial Tr. Vol. 1 at 145:16-146:4. As a result, Mr. Bounds was "immediately terminated." *Id.*

At the direction of Prentiss Jackson, another Clark Construction employee, Plaintiff submitted a statement describing the incident, which Mr. Jackson forwarded to Goodfellow on July 19, 2017. *Id.* at 144:2-21; Trial. Ex. 14. Plaintiff testified that Mr. Jackson removed the phallic-shaped object. **[*4]** Trial Tr. Vol. 2 at 274:17-18.

C. Statewide Flaggers

Plaintiff testified that on September 5, 2017, Mr. Garcia informed her that Clark Construction "had made a decision to bring in eight non-African American flaggers to replace eight African American local hires." Trial Tr. Vol. 1 at 146:21-147:6. These flaggers were from Statewide. Trial Tr. Vol. 2 at 174:22-175:24. In response to the "Statewide flaggers being brought in," Plaintiff set up a meeting with Mr. Humphrey for the following day, September 6, 2017, at 10:00 a.m. *Id.* at 175:24-176:5. At the meeting, Mr. Humphrey told Plaintiff that she "would be staying on for the whole duration of the job, flagging." *Id.* at 178:15-21. After the meeting, Plaintiff ran into Justin Kim and Sean Lennan from Goodfellow and discussed her respiratory issues and the "type of problems I was having with my body." *Id.* at 180:21-181:17.

D. September 18, 2017 Incident with Maurice Haskell

Plaintiff was working with a co-worker named Maurice Haskell on September 18, 2017. *Id.* at 182:24-183:4. She and Mr. Haskell were both flagging at their respective gates when they simultaneously let their traffic go, almost causing a collision. *Id.* at 183:14-184:5. Plaintiff **[*5]** and Mr. Haskell started arguing, which escalated with Mr. Haskell calling her a gender-linked derogatory term ("b----") and threatening Plaintiff and her family. *Id.* at 185:9-23. Plaintiff testified that she spoke to Mr. Garcia, who told Plaintiff to move to the "middle of the jobsite." *Id.* at 185:24-15. Plaintiff expressed to Mr. Garcia her health concerns with moving to that location, given that the area had a lot of dust, and asked Mr. Garcia why he was not asking Mr. Haskell to move. *Id.* at 186:16-187:19. Mr. Garcia responded, "Trina, that's not your gate. Either you can get your things and move to the middle or you can leave the jobsite." *Id.* at 187:20-22. Plaintiff gathered her things and proceeded to leave the jobsite. *Id.* at 188:1-5.

After Plaintiff left the jobsite, Mr. Garcia started to investigate the altercation between Plaintiff and Mr. Haskell. Dkt. No. 159 ("Trial Tr. Vol. 3") at 415:23-416:4. He called Mr. Lennan to assist in the investigation and they interviewed Mr. Haskell and other workers who witnessed the dispute. *Id.* at 416:5-16. As a result of Defendant's investigation, approximately three days after the incident, Defendant gave Mr. Haskell a verbal "Coach to **[*6]** Correct," informing him that it was "wrong of him to be using inappropriate language on the jobsite directed at other employees, including the word 'b----.'" *Id.* at 417:14-19, 488:11-21.

E. Plaintiff's Coach to Correct and One-Day Suspension

Plaintiff testified that after her incident with Mr. Haskell but before Plaintiff could leave the jobsite, a Goodfellow supervisor stopped her and told her not to leave, as there was going to be a meeting. Trial Tr. Vol. 2 at 188:8-18. During the meeting, Mr. Lennan issued a written "Coach to Correct Notice" to Plaintiff and suspended her for a day. *Id.* at 189:6-11; Trial Ex. 125. Plaintiff was told that she was being suspended for a day because she was insubordinate and "harsh" with Mr. Garcia. Trial Tr. Vol. 2 at 189:6-123.

After she received the Coach to Correct with the one-day suspension, Plaintiff sought an appointment with a doctor, because she was "overwhelmed with anxiety at this point. It was just one thing after the other with this company." *Id.* at 194:3-12. The doctor's note indicated that Plaintiff would be unable to work from "9/20/17 to 12/20/17." Trial Ex. 111. Plaintiff went back to work against her doctor's recommendation, because **[*7]** she needed to provide for herself and her family. Trial Tr. Vol. 2 at 197:21-24. Plaintiff testified that she disagreed with Defendant's characterization of her behavior and felt that the Coach to Correct and one-day suspension were a "retaliatory tactic," and thus she did not return to work for Goodfellow. *Id.* at 195:22-196:24. Instead, she proceeded to work for other construction companies. *Id.*

F. Procedural Background

Plaintiff filed this action against Defendant on March 6, 2018, alleging the following claims under *Title VII of the Civil Rights Act of 1962, 42 U.S.C. § 2000e, et seq.*: (1) discrimination on the basis of race; (2) discrimination on the basis of sex; (3) harassment on the basis of race; (4) harassment on the basis of sex; and (5) ***retaliation***. Dkt. No. 1. The parties proceeded to trial, which started on September 10, 2019. At the close of Plaintiff's case, Defendant filed a motion for judgment as a matter of law. Dkt. No. 153. The Court deferred ruling on the motion.[1] Following a six-day trial, the jury returned a verdict in favor of Defendant on the race discrimination, sex discrimination, and race harassment claims, but found in favor of Plaintiff on the sexual harassment and ***retaliation*** claims. **[*8]** Dkt. Nos. 162, 166. The jury awarded Plaintiff a total of $18,750 in compensatory damages ($11,250 for the sexual harassment claim and $7,500 for the ***retaliation*** claim). Dkt. No. 162.

The Court entered final judgment on September 24, 2019. Dkt. No. 171. Defendant timely filed its renewed motion for judgment as matter of law.

II. LEGAL STANDARD

"[A] party must make a *Rule 50(a)* motion for judgment as a matter of law before a case is submitted to the jury. If the judge denies or defers ruling on the motion, and if the jury then returns a verdict against the moving party, the party may renew its motion under *Rule 50(b)*." *Equal Emp't Opportunity Comm'n v. Go Daddy Software, Inc., 581 F.3d 951, 961 (9th Cir. 2009)*. In considering a renewed motion for judgment as a matter of law, a court must uphold the jury's verdict if "substantial evidence" supports the jury's conclusion. *Johnson v. Paradise Valley Unified Sch. Dist., 251 F.3d 1222, 1227 (9th Cir. 2001)*. "Substantial evidence is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion from the same evidence." *Id.* The Court must "view all the evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in the favor of the nonmover, and disregard all evidence favorable to the moving party that the jury is not required to believe." *Castro v. Cnty. of Los Angeles, 797 F.3d 654, 662-63 (9th Cir. 2015)*. A court should **[*9]** only grant a *Rule 50(b)* motion if, after construing all evidence in the light most favorable to the nonmoving party, the record "permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Id.* (internal quotations omitted).

III. DISCUSSION

Defendant moves for judgment as a matter of law with respect to the sexual harassment and ***retaliation*** claims. The Court addresses each of the claims in turn.

A. Sexual Harassment

Title VII prohibits sex discrimination, including sexual harassment, in employment. *Little v. Windermere Relocation, Inc., 301 F.3d 958, 966 (9th Cir. 2002)*. When evaluating a claim for sexual harassment based on a hostile work environment, the court must determine "two things: whether the plaintiff has established that he or she was subjected to a hostile work environment, and whether the employer is liable for the harassment that caused the environment." *Id.* To establish that plaintiff was subjected to a hostile work environment, the

[1] Under *Rule 50(b)*, the Court "submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." *Fed. R. Civ. P. 50(b)*.

plaintiff must show that: (1) she or he was subjected to verbal or physical conduct of a sexual nature; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of her or his employment and create an abusive working environment. *Ellison v. Brady, 924 F.2d 872, 875-76 (9th Cir. 1991)*. To **[*10]** be actionable, the Supreme Court has held that a "sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive." *Faragher v. City of Boca Raton, 524 U.S. 775, 787, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)*. "When assessing the objective portion of a plaintiff's claim, [the court] assume[s] the perspective of the reasonable victim." *Id.* (citation omitted). Hostility must be measured based on the totality of the circumstances. *Fuller v. City of Oakland, Cal., 47 F.3d 1522, 1527 (9th Cir. 1995)*.

"When harassment by co-workers is at issue, the employer's conduct is reviewed for negligence." *Nichols v. Azteca Rest. Enterprises, Inc., 256 F.3d 864, 875 (9th Cir. 2001)* (citing *Ellison, 924 F.2d at 881*). "An employer is liable for a co-worker's sexual harassment only if, after the employer learns of the alleged conduct, he fails to take adequate remedial measures." *Yamaguchi v. U.S. Dep't of the Air Force, 109 F.3d 1475, 1483 (9th Cir. 1997)*. The remedial measures must be "reasonably calculated to end the harassment." *Dawson v. Entek Int'l, 630 F.3d 928, 940 (9th Cir. 2011)* (citations and quotations omitted). The reasonableness of the remedial measures depends on their ability to: (1) "stop harassment by the person who engaged in the harassment;" and (2) "persuade potential harassers to refrain from ***unlawful*** conduct." *Id.* Remedial measures may include some form of disciplinary action "proportionate[ ] to the seriousness of the offense." *Id. at 940-41* (citation and quotations omitted and alterations in original). **[*11]** Even if the harassment independently ceases, inaction "constitutes a ratification of past harassment." *Id. at 941*.

Plaintiff's sexual harassment claim rests on the incidents that Plaintiff testified occurred on July 13, 2017 (concerning the phallic-shaped object placed at the worksite and Mr. Bounds exposing his behind), and the incident with Mr. Haskell on September 18, 2017. Defendant argues that it is entitled to judgment as a matter of law because "three alleged incidents over the course of Plaintiff's four month employment are not sufficiently severe or pervasive." Dkt. No. 174 ("Reply") at 4.[2] Further, Defendant argues it took appropriate remedial action in response to any alleged sexual misconduct. Mot. at 10-14.[3]

i. Severe or Pervasive

To determine whether there was substantial evidence that the unwelcome conduct was severe or pervasive enough to constitute a hostile working environment, the Court considers the totality of the circumstances. *See Fuller, 47 F.3d at 1527*. The Supreme Court has listed "frequency, severity and level of interference with work performance among the factors particularly relevant to the inquiry." *Brooks v. City of San Mateo, 229 F.3d 917, 924 (9th Cir. 2000)* (citing *Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)*). "'[S]imple teasing,' offhand comments, **[*12]** and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and

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[2] Defendant raised this argument for the first time in its reply brief. Although arguments not raised by a party in its opening brief are ordinarily deemed waived, *see Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999)*, the Court may consider new arguments raised in a reply brief "only if the adverse party is given an opportunity to respond." *Banga v. First USA, NA, 29 F. Supp. 3d 1270, 1276 (N.D. Cal. 2014)* (citations omitted). At the Court's direction, *see* Dkt. No. 172, Plaintiff filed her sur-reply addressing this specific argument, *see* Dkt. No. 181.

[3] Defendant appears to suggest that sexual harassment claims based on a hostile environment are subject to a *McDonnell-Douglas* burden-shifting framework, with the plaintiff having to first establish a "*prima facie*" case before the burden then shifts to the defendant to prove it took appropriate remedial actions. But the Court does not find that the caselaw supports this burden-shifting approach. Instead, the plaintiff must first establish that the alleged misconduct created a hostile environment. *Nichols, 256 F.3d at 875*. Then, depending on the circumstances, plaintiff must also show that there is a basis for holding the employer liable for the harassment, either under a theory of vicarious liability or negligence. *Id.* ("The relevant standards and burdens pertaining to employer liability vary with the circumstances. When harassment by co-workers is at issue, the employer's conduct is reviewed for negligence. When harassment by a supervisor is at issue, an employer is vicariously liable, subject to a potential affirmative defense." (citations omitted)). The Court does not read these cases to suggest that it is the employer's burden to prove it took remedial actions, but rather Plaintiff's burden to prove that the employer should be liable for the acts of its employees (in other words, why those remedial actions were not reasonable).

conditions of employment.'" *Faragher, 524 U.S. at 788* (citations omitted). "The required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." *Brooks, 229 F.3d at 926*.

Here, the unwelcome conduct amounted to three incidents that happened on July 13 and September 18, 2017, two of which involved different actors (one of whom was not an employee of Goodfellow, based on the evidence presented), and one of which involved an act by an unknown person. Further, Plaintiff presented no evidence connecting any of the events to each other. In short, there was no evidence of a "sustained campaign of harassing conducted directed at Plaintiff." *See Ellison, 924 F.2d at 873-75*; *cf. Nichols, 256 F.3d at 873* (finding a sustained campaign of taunts where co-workers'"habitually called [the plaintiff] sexually derogatory names, referred to him with the female gender, and taunted him for behaving like a woman"). Because this is not a case in which Plaintiff was subjected to a "sustained campaign" of harassment directed at her, the Court must analyze whether, as a matter of law, a reasonable victim would find these three **[*13]** disparate incidents to be sufficiently severe or pervasive to alter the terms of her employment and create an abusive environment.

The Ninth Circuit has held that for a single incident to "support a hostile work environment claim, the incident must be extremely severe." *Brooks, 229 F.3d at 926* (citing EEOC Policy Guide). The Court does not question that Ms. Hill subjectively believed that "these three distinct incidents in just three months" were humiliating and offensive to her. *See* Dkt. No. 181 ("Sur-Reply") at 1. But the Court does not find that these three disparate incidents were so objectively severe or pervasive as to create an abusive working environment and alter the terms of her employment when measured against the well-settled legal standard. While the Court does not condone Mr. Bounds' or Mr. Haskell's behavior, as a matter of law, these three isolated incidents did not rise to the level of severity the Ninth Circuit has found necessary to establish a hostile working environment. *Compare Little, 301 F.3d at 967* ("Here, in contrast to the single instance of fondling in *Brooks*, Little was victimized by three violent rapes.") *with Westendorf v. W. Coast Contractors of Nevada, Inc., 712 F.3d 417, 419-22 (9th Cir. 2013)* (finding as a matter of law in affirming grant of summary judgment that a co-worker's "crude **[*14]** and offensive remarks," which included directing profanity at the plaintiff, making offensive comments about breast sizes, tampons, and sexual activity, and telling plaintiff that she had to "clean the trailer while wearing a French maid's costume (or maid's uniform)" did not rise to the level required to find the "sexual harassment [ ] sufficiently severe or pervasive").

Accordingly, the Court finds that even viewing the facts established at trial in the light most favorable to Plaintiff, the three isolated incidents were not severe and pervasive so as to support a finding that Defendant was liable for sexual harassment under relevant Ninth Circuit caselaw. The totality of the record demonstrates that the record "permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *See Castro, 797 F.3d at 662-63*.

B. *Retaliation*

Title VII makes it ***unlawful*** for an employer to retaliate against an employee because the employee has taken action to enforce rights protected under Title VII. *Miller v. Fairchild Indus., Inc., 797 F.2d 727, 730 (9th Cir. 1986)*. To prove a *prima facie* case for ***retaliation***, a plaintiff must show: (1) that she engaged in a protected activity; (2) she was subsequently subjected to an adverse employment action; and (3) a causal link **[*15]** exists between the protected activity and the employer's action. *Dawson, 630 F.3d at 936* (citation omitted). "The causal link can be inferred from circumstantial evidence such as the employer's knowledge of the protected activities and the proximity in time between the protected activity and the adverse action." *Id.* (citation omitted). "[O]nly non-trivial employment actions that would deter reasonable employees from complaining about Title VII violations will constitute actionable ***retaliation***." *Reynaga v. Roseburg Forest Prods., 847 F.3d 678, 693 (9th Cir. 2017)* (quoting *Brooks, 229 F.3d at 928*). If a plaintiff establishes a *prima facie* case of ***unlawful retaliation***, then the burden shifts to the defendant to offer evidence "that the challenged action was taken for legitimate, non-discriminatory reasons." *Id.* (citation omitted). If the defendant provides a legitimate explanation, the burden of production shifts back to plaintiff to show that the defendant's explanation is pretextual. *Id.* (citation omitted).

"An employee engages in protected activity when she opposes an employment practice that either violates Title VII or that the employee reasonably believes violates that law." *Westendorf, 712 F.3d at 422*. Plaintiff alleges that she engaged in the following protected activities: (1) reporting the July 13, 2017 incident

with **[*16]** the phallic-shaped object and Mr. Bounds; (2) complaining about Defendant replacing local African-American flaggers by Statewide; and (3) complaining about the September 18, 2017 incident with Mr. Haskell. According to Plaintiff, she suffered three adverse employment actions as a result of engaging in the protected activities: (1) on September 6, 2017, Mr. Garcia attempted to walk her to the bottom of the excavation site, known as "the hole," despite knowing that she had concerns about doing dust control because of her respiratory issues; (2) on September 18, 2017, Mr. Garcia directed Plaintiff to move towards the top of the hole or leave the jobsite; and (3) on September 18, 2017, Defendant issued her a Coach to Correct with a one-day suspension.[4]

Defendant contends that it is entitled to judgment as a matter of law as to the ***retaliation*** claim because: (1) with the exception of reporting the July 13 incident, Plaintiff does not establish she engaged in protected activity; (2) Plaintiff cannot show causation; and (3) Plaintiff fails to present evidence that Defendant's explanation for the adverse employment action was pretextual. Mot. at 14-16. The Court addresses whether each activity **[*17]** was a protected activity and if so, whether there was sufficient evidence of a causal connection between any protected activity and the adverse employment actions.

i. Statewide Flaggers

The Court finds that there was insufficient evidence at trial to establish that Plaintiff engaged in a protected activity with respect to the Statewide flaggers. The evidence showed that Plaintiff set up a meeting with Mr. Humphrey from Clark on September 6 at 10:00 a.m. to discuss Statewide flaggers temporarily replacing Goodfellow flaggers. Trial Tr. Vol. 2 at 175:24-176:5. Before that meeting, she talked to Mr. Garcia and reminded him "about her respiratory issues," "collapsed lung surgery," and that she "was dispatched for flagging only." *Id.* at 176:8-17. Mr. Garcia said he would discuss it with Mr. Lennan. *Id.* at 176:18-21. No evidence showed that she mentioned to Mr. Garcia any concern about Statewide flaggers being brought in based on a discriminatory motive.

At the meeting with Mr. Humphrey, Plaintiff recalls:

> Mr. Humphrey assured me that I would be staying on for the whole duration of the job, flagging. That once Goodfellow Top Grade left,
>
> I would be moved over up under Clark, which was the general **[*18]** contractor, and continue for the duration of the job.

Trial Tr. Vol. 2 at 178:15-21. After the meeting, Plaintiff ran into Mr. Kim and Mr. Lennan and had a discussion with them about the problems she was facing. *Id.* at 180:21-181:17. Specifically, Plaintiff testified that:

> A: The discussion was based on me — well, they started off apologizing, Mr. Lennan saying that he didn't know — he wasn't aware of my respiratory issues.
>
> ... He told me that nobody was trying to compromise my position or nor was my position going to be compromised because of anybody else because I explained — I said, you know, my — my job performance and my work performance should be based on whatever I do, not because of what somebody else's actions was. We had a discussion. I told him that it was all overwhelming. That my job and my livelihood was being toyed with. It was just too much. ... I explained to him the type of problems I was having with my body and just let them know that, you know, it was too much. ... Mr. Lennan told me to go home, get some rest, and to report back the next morning for work as usual.

Trial Tr. Vol. 2 at 180:18-181:17.

The trial record thus did not establish that Plaintiff engaged in a protected **[*19]** activity with respect to the Statewide flaggers. Critically, the protected activity on which the alleged ***retaliation*** is based must be activity prohibited by Title VII. But the evidence showed that the subject of Plaintiff's discussion with Mr. Humphrey (who worked for Clark) was Plaintiff's flagging role. There is no evidence that she discussed her concern that the decision to bring in Statewide was racially motivated. And even assuming Plaintiff expressed concerns to Mr.

[4] Defendant argues that ordering Plaintiff to perform work at the hole does not constitute an adverse employment action in the ***retaliation*** context. Reply at 14. But the Court finds that considering all the circumstances and viewing the evidence in the light most favorable to Plaintiff, there was adequate evidence that Defendant knew about her respiratory condition and that Defendant materially altered the conditions of her employment by trying to put her in a less favorable assignment. *Cf.* Steiner v. Showboat Operating Co., 25 F.3d 1459, 1465 (9th Cir. 1994) ("We note in addition that the transfer is just barely—if at all—characterizable as 'adverse' employment action: Steiner was not demoted, or put in a worse job, or given any additional responsibilities. In fact, at first she even claimed to enjoy the day shift.").

Humphrey about non-African-American flaggers replacing African-American flaggers, there is no evidence that she then articulated this concern to Goodfellow. Absent such evidence, it is not reasonable to infer, as Plaintiff urges, that she repeated any complaint to Mr. Lennan and Mr. Kim, especially when the evidence that did come in at trial shows that she discussed concerns only about her respiratory health with them. The record thus reflected a complaint about Plaintiff having to perform duties outside of flagging because of the new Statewide flaggers, not a complaint that the Statewide flaggers were replacing the Goodfellow flaggers for a discriminatory purpose. The required nexus to a potential Title VII violation **[*20]** was not present here, and Ms. Hill thus failed to make a *prima facie* showing of protected activity for purposes of this ***retaliation*** claim.

ii. July 13 Incident with Mr. Bounds and Phallic-Shaped Object

Defendant does not dispute that the July 13 complaint regarding Mr. Bounds and the phallic-shaped object was a protected activity, but argues that there was no evidence of a causal link between this incident and any adverse employment action. Mot. at 15.

To prove causation, the plaintiff must show that "her protected conduct was a but-for cause—but not necessarily the only cause—of her [adverse employment action]. *Westendorf, 712 F.3d at 422* (citation omitted). "Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." *Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987)*. The Ninth Circuit has held that in some cases, "causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity." *Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir. 2002)*. In order to support an inference of retaliatory motive, "the [adverse action] **[*21]** must have occurred 'fairly soon after the employee's protected expression.'" *Id.* (citation and quotations omitted). While there is no *per se* rule as to what constitutes "fairly soon," the Ninth Circuit has recognized that "a nearly 18-month lapse between protected activity and an adverse employment action is simply too long, by itself, to give rise to an inference of causation." *Id.*

Here, Plaintiff failed to show a causal link between her July 13 protected activity and Mr. Garcia's actions in attempting to place her close to the "hole" on September 6 and September 18. Nothing in the testimony or the exhibits suggested that Mr. Garcia had knowledge that Plaintiff complained about the phallic-shaped object and Mr. Bounds. There was no evidence that Mr. Jackson forwarded Plaintiff's statement to Mr. Garcia, or emailed his own summary of events to Mr. Garcia. Trial Ex. 14; Trial Ex. 118. Accordingly, there was insufficient evidence that a retaliatory motive contributed to Mr. Garcia's actions on September 6 and 18.

However, with respect to the September 18 Coach to Correct with one-day suspension, based on the totality of the record, a reasonable jury could have determined that Plaintiff's **[*22]** July 13 complaint led to the imposition of the Coach to Correct with one-day suspension. Mr. Lennan, who issued and signed the Coach to Correct, was aware of Plaintiff's July 13 complaint. Trial Ex. 118; Trial Ex. 125; Trial Tr. Vol. 3 at 471:17-472:9. And while the Court acknowledges that the temporal gap of almost two months could weigh against a finding of causation, it cannot say that as a matter of law this timing negated the possibility of causation. In some cases, a three-month time difference has been found not to defeat the possibility of a causal link between the protected activity and adverse employment action. *Yartzoff, 809 F.2d at 1376*; *see also Miller v. Fairchild Indus., Inc., 885 F.2d 498, 505 (9th Cir. 1989)* (holding that discharges 42 and 59 days after the protected activity were sufficient to infer causation). Based on the evidence that Mr. Lennan knew about the July 13 complaint and was the supervisor who issued the Coach to Correct, as well as the evidence that the Coach to Correct came approximately two months after the protected activity, a reasonable jury could have inferred a retaliatory motive (even though other inferences also would have been consistent with the evidence).

Defendant also contends that it had a legitimate business reason for issuing **[*23]** Plaintiff a Coach to Correct and one-day suspension, and that Plaintiff failed to present any evidence of pretext. Mot. at 16. The Ninth Circuit has held that "evidence of pretext can take many forms," including "the manner in which the plaintiff was treated by [her] employer during [her employment]," the "timing of the [adverse employment action]," and the "disparity in punishment" between the plaintiff and those who did not engage in the protected activity. *See Reynaga, 847 F.3d at 695*. Mr. Lennan testified that he

issued the Coach to Correct because Plaintiff was insubordinate, as she walked away from Mr. Garcia and abandoned her post. Trial Tr. Vol. 3 at 464:2-11. But Plaintiff presented evidence that before she complained about sexual harassment, she did not have any trouble with her supervisors, and they praised her for her flagging work. Trial Tr. Vol. 1 at 123:2-11; *see* *Westendorf, 712 F.3d at 423* (finding that plaintiff's "*prima facie* case and related inferences might well support a finding of pretext, especially since she had no record of insubordination until she complained about sexual harassment"). Further, Plaintiff received a one-day suspension, whereas Mr. Haskell received a verbal warning. *See* Trial Tr. Vol. 2 at 189:6-24. **[*24]**

The Court recognizes that the circumstantial evidence of retaliatory motive presented at trial was not particularly strong, and that the jury could have drawn other conclusions from that evidence. But given the substantial deference the Court must afford the verdict, it finds that Plaintiff presented sufficient evidence from which the jury could reasonably find that the reason for her Coach to Correct was pretextual, meaning that judgment as a matter of law is not warranted on this ground.

iii. September 18 Incident with Mr. Haskell

With respect to the September 18 incident, Defendant argues that there is no evidence establishing that Plaintiff actually told Mr. Garcia that Mr. Haskell called her the gender-linked profane term before walking her down the hole. The Court agrees. Plaintiff testified that she reported the collision incident to Mr. Garcia:

> Q: Ms. Hill, without saying what Maurice Haskell said at that time, was there a safety incident that you observed with Maurice Haskell that day?
> A: Yes. Because there was no communication between myself and Mr. Haskell, I left my traffic go. He let his traffic go, and there was almost a collision.
> ...
>
> Q: Ms. Hill, did you report this incident **[*25]** to someone?
> A: Yes, I did. ... I told Mr. Garcia.
> ...
> Q: And what — what did you tell Mr. Garcia at that time? ... Without going into what Mr. Haskell had said to you, what did you tell him, Mr. Garcia, at that time?
> A: I told him that Mr. Haskell was being childish and immature and wasn't communicating with me and that there was almost a collision.
> Q: What was Mr. Garcia's response to that?
> A: His response, that was — that part of the conversation I was trying keep out the rest — was a part of when I had to call after the things that was said [sic], so I don't know how I'm supposed to bring that in.

Trial Tr. Vol. 2 at 183:14-184:24. Plaintiff then testified about the altercation between herself and Mr. Haskell, and that Mr. Haskell said the following to her:

> 'B----, you go in the hole,' and then he went on to threaten myself and my family and told me I could call my N----, I could call my nephew, I could call whoever, and I said, 'I'm going to call your immediate' -- ' I'm going to call your immediate foreman.'

Id. at 185:19-186:2. When she spoke to Mr. Garcia, Mr. Garcia "said that he would be coming over to the gate where we were at." *Id.* at 186:1-4. Once Mr. Garcia arrived at the gate, **[*26]** "[h]e told me to gather my things and move to the middle of the jobsite," towards the "top of the black hole." *Id.* at 186:5-11.

While there is ample evidence that Plaintiff told Mr. Garcia about her altercation with Mr. Haskell, there is no evidence that she specifically told Mr. Garcia that Mr. Haskell called her a "b----," which is the claimed protected activity, before Mr. Garcia told Plaintiff to go to the middle of the jobsite. During oral argument, when pressed to point to what in the trial record established that Plaintiff reported this specific complaint to Mr. Garcia, Plaintiff's counsel could not do so. Instead, Plaintiff's counsel argued that Plaintiff initially did not testify that she reported Mr. Haskell's use of the offensive epithet to Mr. Garcia because that would necessarily have required her to testify as to what Mr. Haskell said and Plaintiff was afraid that would be hearsay. But to adopt this attorney argument would be to simply presume the truth of the proposition to be proved: that Plaintiff reported the "b----" comment and would have so testified at trial but for her purported fear of providing hearsay testimony.

While there was insufficient evidence of a causal **[*27]** link between Mr. Garcia's action and Plaintiff's reporting of the offensive epithet, the same cannot be said for the September 18 Coach to Correct. Mr. Lennan testified that he had Plaintiff file a witness statement, which he sent to Human Resources "immediately after the incident." Trial Tr. Vol. 3 at 458:23-460:10, 483:13-484:4. The witness statement reports that Mr. Haskell

had called Ms. Hill the derogatory term, Trial Ex. 122, and Mr. Lennan, on the same day, issued her a Coach to Correct, Trial Ex. 125 and Trial Tr. Vol. 3 at 471:17-472:9. Given that the Coach to Correct "follow[ed] on the heels of protected activity," there was sufficient evidence from which the jury could find the required causal link between the Coach to Correct and Plaintiff's reporting of the epithet. *See* *Villiarimo, 281 F.3d at 1065*. And for the same reasons discussed above, a reasonable jury could find that Defendant's proffered reason for the Coach to Correct was pretextual.

* * *

The standard for granting a renewed motion for judgment as a matter of law is high, and the Court must draw all reasonable inferences in favor of upholding the jury's verdict. The totality of the record demonstrates that the jury need not "have relied only **[*28]** on speculation to reach its verdict" with respect to Plaintiff's ***retaliation*** claim. *See* *Lakeside-Scott v. Multnomah Cnty., 556 F.3d 797, 803 (9th Cir. 2009)*. Under this deferential standard, judgment as a matter of law thus is not warranted as to Plaintiffs' ***retaliation*** claim, because a reasonable jury could find that the September 18, 2017 Coach to Correct was in ***retaliation*** for her July 13 and September 18 complaints.

IV. CONCLUSION

The Court **GRANTS** Defendant's renewed motion for judgment as a matter of law with respect to the sexual harassment claim, but **DENIES** the motion with respect to the ***retaliation*** claim. The Court **DIRECTS** the parties to file by February 19, 2020 a joint proposed revised form of judgment consistent with this order.

IT IS SO ORDERED.

Dated: 2/11/2020

/s/ Haywood S. Gilliam, Jr.

HAYWOOD S. GILLIAM, JR.

United States District Judge

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Epic Sys. Corp. v. Lewis

Supreme Court of the United States

October 2, 2017, Argued[*]; May 21, 2018, Decided

Nos. 16-285, 16-300, 16-307.

[*] Together with No. 16-300, *Ernst & Young LLP et al.* v. *Morris et al.*, on certiorari to the United States Court of Appeals for the Ninth Circuit, and No. 16-307, *National Labor Relations Board* v. *Murphy Oil USA, Inc., et al.*, on certiorari to the United States Court of Appeals for the Fifth Circuit.

Reporter
138 S. Ct. 1612 *; 200 L. Ed. 2d 889 **; 2018 U.S. LEXIS 3086 ***; 86 U.S.L.W. 4297; 168 Lab. Cas. (CCH) P11,091; 211 L.R.R.M. 3061; 27 Wage & Hour Cas. 2d (BNA) 1197; 27 Fla. L. Weekly Fed. S 255; 2018 WL 2292444

EPIC SYSTEMS CORPORATION, Petitioner (No. 16-285) v. JACOB LEWIS

Prior History: [*1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 2015 U.S. App. LEXIS 18673 (5th Cir., Oct. 26, 2015)
Morris v. Ernst & Young, LLP, 834 F.3d 975, 2016 U.S. App. LEXIS 15638 (9th Cir. Cal., Aug. 22, 2016)
Lewis v. Epic Sys. Corp., 823 F.3d 1147, 2016 U.S. App. LEXIS 9638 (7th Cir. Wis., May 26, 2016)

Disposition: *No. 16-285, 823 F. 3d 1147*, and *No. 16-300, 834 F. 3d 975*, reversed and remanded; *No. 16-307, 808 F. 3d 1013*, affirmed.

Core Terms

arbitration, employees, arbitration agreement, cases, collective action, courts, rights, concerted activity, terms, contracts, class action, join, waivers, saving clause, proceedings, individualized, parties, provisions, disputes, mutual aid, decisions, workplace, collective bargaining, collective-litigation, federal court, Relations, deference, concerted, conditions, quotation

Case Summary

Overview

HOLDINGS: [1]-The arbitration agreements between employers and employees that called for individualized proceedings were to be enforced as written where *9 U.S.C.S. § 2* did not save the employees' defense that the contracts were unenforceable just because they required bilateral arbitration, and nothing in *29 U.S.C.S. § 157* expressed approval or disapproval of arbitration or mentioned class or collective action procedures; [2]-The NLRB's opinion suggesting that the *NLRA* displaced the Arbitration Act was not due Chevron deference as it had interpreted a statute that it did not administer, i.e., the FAA, the Executive Branch had offered competing interpretations of the *NLRA*, and the statutory construction canon against reading conflicts into statutes resolved the issue.

Outcome
Judgments in two cases reversed, judgment in third case affirmed; 5-4 decision, 1 concurrence, 1 dissent.

LexisNexis® Headnotes

Business & Corporate
Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN1 **Federal Arbitration Act, Arbitration Agreements**

In the *Federal Arbitration Act*, Congress has instructed

federal courts to enforce arbitration agreements according to their terms, including terms providing for individualized proceedings.

Governments > Legislation > Interpretation

HN2[] Legislation, Interpretation

It is the court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN3[] Federal Arbitration Act, Arbitration Agreements

By its terms, the saving clause of the *Federal Arbitration Act* allows courts to refuse to enforce arbitration agreements upon such grounds as exist at law or in equity for the revocation of any contract. *9 U.S.C.S. § 2*.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN4[] Federal Arbitration Act, Arbitration Agreements

The saving clause of the *Federal Arbitration Act*, *9 U.S.C.S. § 2*, recognizes only defenses that apply to any contract. In this way the clause establishes a sort of equal-treatment rule for arbitration contracts. The clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability. At the same time, the clause offers no refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. Under judicial precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Contracts Law > Defenses > General Overview

HN5[] Federal Arbitration Act, Arbitration Agreements

Courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent. Just as judicial antagonism toward arbitration before the *Federal Arbitration Act's* enactment manifested itself in a great variety of devices and formulas declaring arbitration against public policy, the Concepcion analysis teaches that courts must be alert to new devices and formulas that would achieve much the same result today. And a rule seeking to declare individualized arbitration proceedings off limits is just such a device.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Contracts Law > Defenses > Illegal Bargains

HN6[] Federal Arbitration Act, Arbitration Agreements

Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable just because it requires bilateral arbitration is a different creature. A defense of that kind, judicial precedent says, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability.

Governments > Courts > Judicial Precedent

HN7[] Courts, Judicial Precedent

The law of precedent teaches that like cases should generally be treated alike.

Evidence > Burdens of Proof > Allocation

Governments > Legislation > Interpretation

HN8 **Burdens of Proof, Allocation**

When confronted with two Acts of Congress allegedly touching on the same topic, a court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both. A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow. The intention must be clear and manifest. And in approaching a claimed conflict, courts come armed with the strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Arbitration Awards

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

HN9 **Federal Arbitration Act, Arbitration Agreements**

Section 7, 29 U.S.C.S. § 157, focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Federal Arbitration Act, let alone accomplish that much clearly and manifestly, as judicial precedents demand.

Governments > Legislation > Interpretation

HN10 **Legislation, Interpretation**

Where a more general term follows more specific terms in a statutory list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words.

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

HN11 **Collective Bargaining & Labor Relations, Protected Activities**

As used in 29 U.S.C.S. § 157, the term "other concerted activities" should, like the terms that precede it, serve to protect things employees just do for themselves in the course of exercising their right to free association in the workplace, rather than the highly regulated, courtroom-bound activities of class and joint litigation. None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

Governments > Legislation > Interpretation

HN12 **Legislation, Interpretation**

The usual rule is that Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions; it does not, one might say, hide elephants in mouseholes.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN13 **Federal Arbitration Act, Arbitration Agreements**

Even a statute's express provision for collective legal actions does not necessarily mean that it precludes individual attempts at conciliation through arbitration. And judicial precedent stresses that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Federal Arbitration Act.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > General

Overview

HN14[] Federal Arbitration Act, Arbitration Agreements

Nothing in judicial precedent indicates that the National Labor Relations Act guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Federal Arbitration Act.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN15[] Standards of Review, Deference to Agency Statutory Interpretation

On no account might the United States Supreme Court agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN16[] Standards of Review, Deference to Agency Statutory Interpretation

Chevron deference is not due unless a court, employing traditional tools of statutory construction, is left with an unresolved ambiguity.

Governments > Legislation > Interpretation

HN17[] Legislation, Interpretation

The canon against reading conflicts into statutes is a traditional tool of statutory construction.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN18[] Standards of Review, Deference to Agency Statutory Interpretation

Where the canons of statutory construction supply an answer, Chevron deference leaves the stage.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN19[] Federal Arbitration Act, Arbitration Agreements

Judicial precedent clearly teaches that a contract defense conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures is inconsistent with the Federal Arbitration Act and its saving clause.

Lawyers' Edition Display

Decision

[889]** Employees who entered with employers into contract providing for individualized arbitration proceedings to resolve employment disputes between parties were not entitled to litigate Fair Labor Standards Act (29 U.S.C.S. § 201 et seq.) or related state-law claims through class or collective actions in federal court.

Summary

Overview: HOLDINGS: [1]-The arbitration agreements between employers and employees that called for individualized proceedings were to be enforced as written where 9 U.S.C.S. § 2 did not save the employees' defense that the contracts were unenforceable just because they required bilateral arbitration, and nothing in 29 U.S.C.S. § 157 expressed approval or disapproval of arbitration or mentioned class or collective action procedures; [2]-The NLRB's opinion suggesting that the NLRA displaced the Arbitration Act was not due Chevron deference as it had interpreted a statute that it did not administer, **[**890]** i.e., the FAA, the Executive Branch had offered competing interpretations of the NLRA, and the statutory construction canon against reading conflicts into statutes resolved the issue.

Outcome: Judgments in two cases reversed, judgment in third case affirmed; 5-4 decision, 1 concurrence, 1 dissent.

Headnotes

Arbitration 11 > INDIVIDUALIZED PROCEEDINGS > Headnote:
LEdHN1.[] 1.

In the Federal Arbitration Act (*9 U.S.C.S. § 1 et seq.*), Congress has instructed federal courts to enforce arbitration agreements according to their terms, including terms providing for individualized proceedings. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Statutes 135 > HARMONIZING STATUTES > Headnote:
LEdHN2.[] 2.

It is the court's duty to interpret Congress' statutes as a harmonious whole rather than at war with one another. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Arbitration 13 > AGREEMENT -- REFUSAL TO ENFORCE > Headnote:
LEdHN3.[] 3.

By its terms, the saving clause of the Federal Arbitration Act allows courts to refuse to enforce arbitration agreements upon such grounds as exist at law or in equity for the revocation of any contract. *9 U.S.C.S. § 2*. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Arbitration 2.3Arbitration 5 > CONTRACT LAW -- VALIDITY OF AGREEMENT > Headnote:
LEdHN4.[] 4.

The saving clause of the Federal Arbitration Act (*9 U.S.C.S. § 2*) recognizes only defenses that apply to any contract. In this way the clause establishes a sort of equal-treatment rule for arbitration contracts. The clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability. At the same time, the clause offers no refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. Under judicial precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[891]**

Arbitration 11 > NONCONSENSUAL CLASSWIDE PROCEDURES > Headnote:
LEdHN5.[] 5.

Courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent. Just as judicial antagonism toward arbitration before the Federal Arbitration Act's (*9 U.S.C.S. § 1 et seq.*) enactment manifested itself in a great variety of devices and formulas declaring arbitration against public policy, the Concepcion analysis teaches that courts must be alert to new devices and formulas that would achieve much the same result today. And a rule seeking to declare individualized arbitration proceedings off limits is just such a device. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Arbitration 5 > VALIDITY OF CONTRACT > Headnote:
LEdHN6.[] 6.

Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable just because it requires bilateral arbitration is a different creature. A defense of that kind, judicial precedent says, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Courts 766 > PRECEDENT > Headnote:
LEdHN7.[] 7.

The law of precedent teaches that like cases should generally be treated alike. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Statutes 229 > DISPLACEMENT OF OTHER STATUTE -- CONGRESSIONAL INTENTION > Headnote:
LEdHN8.[] 8.

When confronted with two Acts of Congress allegedly touching on the same topic, a court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both. A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow. The intention must be clear and manifest. And in approaching a claimed conflict, courts come armed with the strong presumption that repeals by implication are disfavored and that Congress will specifically address pre-existing law when it wishes to suspend its normal operations in a later statute. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Labor 125 > COLLECTIVE BARGAINING -- ARBITRATION > Headnote:
LEdHN9.[] 9.

Section 7 (29 U.S.C.S. § 157) focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Federal Arbitration Act (9 U.S.C.S. § 1 et seq.), let alone accomplish that much clearly and manifestly, as judicial precedents demand. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Statutes 173 > GENERAL AND SPECIFIC TERMS > Headnote:
LEdHN10.[] 10.

Where a more general term follows more specific terms in a statutory list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[892]**

Labor 9 > CONCERTED ACTIVITIES -- EMPLOYEE RIGHTS > Headnote:
LEdHN11.[] 11.

As used in 29 U.S.C.S. § 157, the term "other concerted activities" should, like the terms that precede it, serve to protect things employees just do for themselves in the course of exercising their right to free association in the workplace, rather than the highly regulated, courtroom-bound activities of class and joint litigation. None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Statutes 123.5 > ALTERATION OF REGULATORY SCHEME > Headnote:
LEdHN12.[] 12.

The usual rule is that Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions; it does not, one might say, hide elephants in mouseholes. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Arbitration 2.1 > COLLECTIVE ACTIONS -- DISPLACEMENT OF ARBITRATION > Headnote:
LEdHN13.[] 13.

Even a statute's express provision for collective legal actions does not necessarily mean that it precludes individual attempts at conciliation through arbitration. And judicial precedent stresses that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Federal Arbitration Act (*9 U.S.C.S. § 1 et seq.*). (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Arbitration 2.1Labor 20 > CLASS AND COLLECTIVE ACTION > Headnote:
LEdHN14. 14.

Nothing in judicial precedent indicates that the National Labor Relations Act (*29 U.S.C.S. § 151 et seq.*) guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Federal Arbitration Act (*9 U.S.C.S. § 1 et seq.*). (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Constitutional Law 55 > DELEGATION OF AUTHORITY TO ADMINISTRATIVE AGENCY > Headnote:
LEdHN15. 15.

On no account might the United States Supreme Court agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Administrative Law 276 > STATUTORY CONSTRUCTION -- JUDICIAL DEFERENCE > Headnote:
LEdHN16. 16.

Chevron deference is not due unless a court, employing traditional tools of statutory construction, is left with an unresolved ambiguity. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Statutes 135 > AVOIDING CONFLICTS > Headnote:
LEdHN17. 17.

The canon against reading conflicts into statutes is a traditional tool of statutory construction. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[893]**

Administrative Law 276 > STATUTORY CONSTRUCTION -- JUDICIAL DEFERENCE > Headnote:
LEdHN18. 18.

Where the canons of statutory construction supply an answer, Chevron deference leaves the stage. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Arbitration 5 > CLASSWIDE PROCEDURES -- ENFORCEABILITY > Headnote:
LEdHN19. 19.

Judicial precedent clearly teaches that a contract defense conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures is inconsistent with the Federal Arbitration Act (*9 U.S.C.S. § 1 et seq.*) and its saving clause. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Syllabus

[*1616] [894]** In each of these cases, an employer and employee entered into a contract providing for individualized arbitration proceedings to resolve employment disputes between the parties. Each employee nonetheless sought to litigate *Fair Labor Standards Act* and related state law claims through class or collective actions in federal court. Although the *Federal Arbitration Act* generally requires courts to enforce arbitration agreements as written, the employees argued that its “saving clause” removes this obligation if an arbitration agreement violates some

other federal law and that, by requiring individualized proceedings, the agreements here violated the National Labor Relations Act. The employers countered that the Arbitration Act protects agreements requiring arbitration from judicial interference and that neither the saving clause nor the NLRA demands a different conclusion. Until recently, courts as well as the National Labor Relations Board's general counsel agreed that such arbitration agreements are enforceable. In 2012, however, the Board ruled that the NLRA effectively **[***2]** nullifies the Arbitration Act in cases like these, and since then other courts have either agreed with or deferred to the Board's position.

Held:

Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise. Pp. ___ - ___, 200 L. Ed. 2d, at 898-911.

(a) The Arbitration Act requires courts to enforce agreements to arbitrate, including the terms of arbitration the parties select. See 9 U. S. C. §§2, 3, 4. These emphatic directions would seem to resolve any argument here. The Act's saving clause--which allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," §2-recognizes only " 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' " AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742, not defenses targeting arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration," id., at 344, 131 S. Ct. 1740, 179 L. Ed. 2d 742. By challenging the agreements precisely because they require individualized arbitration instead of class or collective proceedings, the employees seek to interfere with one of these fundamental attributes. **[***3]** Pp. ___ - ___, 200 L. Ed. 2d, at 898-901.

(b) The employees also mistakenly claim that, even if the Arbitration Act normally requires enforcement of arbitration agreements like theirs, the NLRA overrides that guidance and renders their agreements unlawful yet. When confronted with two Acts allegedly touching on the same topic, this Court must strive "to give effect to both." **[*1617]** Morton v. Mancari, 417 U. S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290. To prevail, the employees must show a " 'clear and manifest' " congressional intention to displace one Act with another. *Ibid*. There is a "stron[g] presum[ption]" that disfavors repeals by implication and that "Congress will specifically address" **[**895]** preexisting law before suspending the law's normal operations in a later statute. United States v. Fausto, 484 U. S. 439, 452, 453, 108 S. Ct. 668, 98 L. Ed. 2d 830.

The employees ask the Court to infer that class and collective actions are "concerted activities" protected by §7 of the NLRA, which guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . ., and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U. S. C. §157. But §7 focuses on the right to organize unions and bargain collectively. It does not mention class or collective action procedures or even hint at a clear and manifest wish to **[***4]** displace the Arbitration Act. It is unlikely that Congress wished to confer a right to class or collective actions in §7, since those procedures were hardly known when the NLRA was adopted in 1935. Because the catchall term "other concerted activities for the purpose of . . . other mutual aid or protection" appears at the end of a detailed list of activities, it should be understood to protect the same kind of things, *i.e.,* things employees do for themselves in the course of exercising their right to free association in the workplace.

The NLRA's structure points to the same conclusion. After speaking of various "concerted activities" in §7, the statute establishes a detailed regulatory regime applicable to each item on the list, but gives no hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Nor is it at all obvious what rules should govern on such essential issues as opt-out and opt-in procedures, notice to class members, and class certification standards. Telling too is the fact that Congress has shown that it knows exactly how to specify certain dispute resolution procedures, cf., *e.g.,* 29 U. S. C. §§216(b), 626, or to override the Arbitration Act, **[***5]** see, *e.g.,* 15 U. S. C. §1226(a)(2), but Congress has done nothing like that in the NLRA.

The employees suggest that the NLRA does not discuss class and collective action procedures because it means to confer a right to use *existing* procedures provided by statute or rule, but the NLRA does not say even that much. And if employees do take existing rules as they find them, they must take them subject to those rules' inherent limitations, including the principle that parties may depart from them in favor of individualized

arbitration.

In another contextual clue, the employees' underlying causes of action arise not under the NLRA but under the Fair Labor Standards Act, which permits the sort of collective action the employees wish to pursue here. Yet they do not suggest that the FLSA displaces the Arbitration Act, presumably because the Court has held that an identical collective action scheme does not prohibit individualized arbitration proceedings, see Gilmer v. Interstate/Johnson Lane Corp., 500 U. S. 20, 32, 111 S. Ct. 1647, 114 L. Ed. 2d 26. The employees' theory also runs afoul of the rule that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," Whitman v. American Trucking Assns., Inc., 531 U. S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1, as it would allow a catchall term in the NLRA to dictate **[**896]** the particulars of dispute resolution **[***6]** procedures in Article III courts or arbitration proceedings--matters that are usually left to, *e.g.,* the Federal Rules of Civil Procedure, the **[*1618]** Arbitration Act, and the FLSA. Nor does the employees' invocation of the Norris-LaGuardia Act, a predecessor of the NLRA, help their argument. That statute declares unenforceable contracts in conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U. S. C. §102, and just as under the NLRA, that policy does not conflict with Congress's directions favoring arbitration.

Precedent confirms the Court's reading. The Court has rejected many efforts to manufacture conflicts between the Arbitration Act and other federal statutes, see, *e.g.* American Express Co. v. Italian Colors Restaurant, 570 U. S. 228, 133 S. Ct. 2304, 186 L. Ed. 2d 417; and its §7 cases have generally involved efforts related to organizing and collective bargaining in the workplace, not the treatment of class or collective action procedures in court or arbitration, see, *e.g.,* NLRB v. Washington Aluminum Co., 370 U. S. 9, 82 S. Ct. 1099, 8 L. Ed. 2d 298.

Finally, the employees cannot expect deference under Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694, because *Chevron*'s essential premises are missing. The Board sought not to interpret just the NLRA, "which it administers," id., at 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694, but to interpret that statute in a way that limits the **[***7]** work of the Arbitration Act, which the agency does not administer. The Board and the Solicitor General also dispute the NLRA's meaning, articulating no single position on which the Executive Branch might be held "accountable to the people." Id., at 865, 104 S. Ct. 2778, 81 L. Ed. 2d 694. And after "employing traditional tools of statutory construction," id., at 843, n. 9, 104 S. Ct. 2778, 81 L. Ed. 2d 694, including the canon against reading conflicts into statutes, there is no unresolved ambiguity for the Board to address. Pp. ___ - ___, 200 L. Ed. 2d, at 901-909.

No. 16-285, 823 F. 3d 1147, and No. 16-300, 834 F. 3d 975, reversed and remanded; No. 16-307, 808 F. 3d 1013, affirmed.

Counsel: Paul D. Clement argued the cause for petitioners in Nos. 16-285 & 16-300.

Jeffrey B. Wall argued the cause for the United States, as amicus curiae, by special leave of court, supporting the petitioners in Nos. 16-285 and 16-300 and respondents in No. 16-307.

Richard F. Griffin, Jr. argued the cause for petitioner, acting as respondent, in No. 16-307.

Daniel R. Ortiz argued the cause for respondents in Nos. 16-285 & 16-300.

Judges: Gorsuch, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, and Alito, JJ., joined. Thomas, J., filed a concurring opinion. Ginsburg, J., filed a dissenting opinion, in which Breyer, Sotomayor, and Kagan, JJ., joined.

Opinion by: GORSUCH

Opinion

Justice **Gorsuch** delivered the opinion of the Court.

[*1619] Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. ***HN1***[↑] ***LEdHN[1]***[↑] [1] **[**897]** In the *Federal Arbitration Act*, **[***8]** Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the *National Labor Relations Act (NLRA)* offers a conflicting command. ***HN2***[↑] ***LEdHN[2]***[↑] [2] It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another. And abiding that duty here leads to an unmistakable conclusion. The *NLRA* secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the *NLRA*—and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the *NLRA* have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful.

I

The three cases before us differ in detail but not in substance. Take *Ernst & Young LLP* v. *Morris*. There Ernst & Young and one of its junior accountants, Stephen Morris, entered into an **[***9]** agreement providing that they would arbitrate any disputes that might arise between them. The agreement stated that the employee could choose the arbitration provider and that the arbitrator could "grant any relief that could be granted by . . . a court" in the relevant jurisdiction. App. in **[*1620]** No. 16-300, p. 43. The agreement also specified individualized arbitration, with claims "pertaining to different [e]mployees [to] be heard in separate proceedings." *Id.,* at 44.

After his employment ended, and despite having agreed to arbitrate claims against the firm, Mr. Morris sued Ernst & Young in federal court. He alleged that the firm had misclassified its junior accountants as professional employees and violated the federal *Fair Labor Standards Act (FLSA)* and California law by paying them salaries without overtime pay. Although the arbitration agreement provided for individualized proceedings, Mr. Morris sought to litigate the federal claim on behalf of a nationwide class under the *FLSA's* collective action provision, *29 U. S. C. §216(b)*. He sought to pursue the state law claim as a class action under *Federal Rule of Civil Procedure 23*.

Ernst & Young replied with a motion to compel arbitration. The district court granted the request, but the Ninth Circuit reversed **[***10]** this judgment. *834 F. 3d 975 (2016)*. The Ninth Circuit recognized that the Arbitration Act generally requires courts to enforce arbitration agreements as written. But the court reasoned that the statute's "saving clause," see *9 U. S. C. §2*, removes this obligation if an arbitration agreement violates some other federal law. And the court concluded that an agreement requiring individualized arbitration proceedings violates the *NLRA* by barring employees from engaging in the "concerted activit[y]," *29 U. S. C. §157*, of pursuing claims as a class or collective action.

Judge Ikuta dissented. In her view, the Arbitration Act protected the arbitration **[**898]** agreement from judicial interference and nothing in the Act's saving clause suggested otherwise. Neither, she concluded, did the *NLRA* demand a different result. Rather, that statute focuses on protecting unionization and collective bargaining in the workplace, not on guaranteeing class or collective action procedures in disputes before judges or arbitrators.

Although the Arbitration Act and the *NLRA* have long coexisted—they date from 1925 and 1935, respectively—the suggestion they might conflict is something quite new. Until a couple of years ago, courts more or less agreed that arbitration agreements **[***11]** like those before us must be enforced according to their terms. See, *e.g., Owen v. Bristol Care, Inc., 702 F. 3d 1050 (CA8 2013)*; *Sutherland v. Ernst & Young LLP, 726 F. 3d 290 (CA2 2013)*;*D. R. Horton, Inc. v. NLRB, 737 F. 3d 344 (CA5 2013)*; *Iskanian v. CLS Transp. Los Angeles, LLC, 59 Cal. 4th 348, 173 Cal. Rptr. 3d 289, 327 P. 3d 129 (2014)*; *Tallman v. Eighth Jud. Dist. Court, 359 P. 3d 113 (2015)*; *808 F. 3d 1013 (CA5 2015)* (case below in No. 16-307).

The National Labor Relations Board's general counsel expressed much the same view in 2010. Remarking that employees and employers "can benefit from the relative simplicity and informality of resolving claims before

arbitrators," the general counsel opined that the validity of such agreements "does not involve consideration of the policies of the National Labor Relations Act." Memorandum GC 10-06, pp. 2, 5 (June 16, 2010).

But recently things have shifted. In 2012, the Board—for the first time in the 77 years since the NLRA's adoption—asserted that the NLRA effectively nullifies the Arbitration Act in cases like ours. D. R. Horton, Inc., 357 N. L. R. B. 2277. Initially, this agency decision received a cool reception in court. See D. R. Horton, 737 F. 3d, at 355-362. In the last two years, though, some circuits have either agreed with the Board's conclusion or **[*1621]** thought themselves obliged to defer to it under Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). See 823 F. 3d 1147 (CA7 2016) (case below in No. 16-285); 834 F. 3d 975 (case below in No. 16-300); NLRB v. Alt. Entm't, Inc., 858 F.3d 393 (CA6 2017). More recently still, the disagreement has grown as the Executive has disavowed the Board's (most recent) position, and the Solicitor General and the Board have offered us battling **[***12]** briefs about the law's meaning. We granted certiorari to clear the confusion. *580 U. S. ___, 137 S. Ct. 809, 196 L. Ed. 2d 595 (2017)*.

II

We begin with the Arbitration Act and the question of its saving clause.

Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration. No doubt there was much to that perception. Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes. Scherk v. Alberto-Culver Co., 417 U. S. 506, 510, n. 4, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974). But in Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, **[**899]** and often cheaper resolutions for everyone involved. Id., at 511, 94 S. Ct. 2449, 41 L. Ed. 2d 270. So Congress directed courts to abandon their hostility and instead treat arbitration agreements as "valid, irrevocable, and enforceable." 9 U. S. C. §2. The Act, this Court has said, establishes "a liberal federal policy favoring arbitration agreements." Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U. S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U. S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)*); see id., at 404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (discussing "the plain meaning of the statute" and "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

Not only did Congress require courts to respect and enforce agreements to arbitrate; **[***13]** it also specifically directed them to respect and enforce the parties' chosen arbitration procedures. See §3 (providing for a stay of litigation pending arbitration "in accordance with the terms of the agreement"); §4 (providing for "an order directing that . . . arbitration proceed in the manner provided for in such agreement"). Indeed, we have often observed that the Arbitration Act requires courts "rigorously" to "enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted." American Express Co. v. Italian Colors Restaurant, 570 U. S. 228, 233, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013) (some emphasis added; citations, internal quotation marks, and brackets omitted).

On first blush, these emphatic directions would seem to resolve any argument under the Arbitration Act. The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely. See AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011); Italian Colors, supra; DIRECTV, Inc. v. Imburgia, 577 U. S. ___, 136 S. Ct. 463, 193 L. Ed. 2d 365 (2015). You might wonder if the balance Congress struck in 1925 between arbitration **[*1622]** and litigation **[***14]** should be revisited in light of more contemporary developments. You might even ask if the Act was good policy when enacted. But all the same you might find it difficult to see how to avoid the statute's application.

Still, the employees suggest the Arbitration Act's saving clause creates an exception for cases like theirs. ***HN3***[⬆] ***LEdHN[3]***[⬆] [3] By its terms, the saving clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." §2. That provision applies here, the employees tell us, because the NLRA renders their particular class and collective action waivers illegal. In their view, illegality under the NLRA is a "ground" that "exists at law . . . for the revocation" of their arbitration

agreements, at least to the extent those agreements prohibit class or collective action proceedings.

[900]** The problem with this line of argument is fundamental. Put to the side the question whether the saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes. See *834 F. 3d, at 991-992, 997* (Ikuta, J., dissenting). Put to the side the question of what it takes to qualify as a ground for "revocation" of a **[***15]** contract. See *Concepcion, supra, at 352-355, 131 S. Ct. 1740, 179 L. Ed. 2d 742* (Thomas, J., concurring); *post, at 1-2, 200 L. Ed. 2d, at 911-912* (Thomas, J., concurring). Put to the side for the moment, too, even the question whether the *NLRA* actually renders class and collective action waivers illegal. Assuming (but not granting) the employees could satisfactorily answer all those questions, the saving clause still can't save their cause.

It can't because ***HN4***[↑] ***LEdHN[4]***[↑] [4] the saving clause recognizes only defenses that apply to "any" contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts. *Kindred Nursing Centers L. P. v. Clark, 581 U. S. ___, ___, 137 S. Ct. 1421, 197 L. Ed. 2d 806, 812 (2017)*. The clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Concepcion, 563 U. S., at 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742*. At the same time, the clause offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Ibid.* Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration." *Id., at 344, 131 S. Ct. 1740, 179 L. Ed. 2d 742*; see *Kindred Nursing, supra, at ___, 137 S. Ct. 1421, 197 L. Ed. 2d 806, 814*.

This is where the employees' argument stumbles. They don't suggest that their arbitration agreements were extracted, **[***16]** say, by an act of fraud or duress or in some other unconscionable way that would render *any* contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes.

We know this much because of *Concepcion*. There this Court faced a state law defense that prohibited as unconscionable class action waivers in consumer contracts. The Court readily acknowledged that the defense formally applied in both the litigation and the arbitration context. *563 U. S., at 338, 341, 131 S. Ct. 1740, 179 L. Ed. 2d 742*. But, the Court held, the defense failed to qualify for protection under the saving clause because it interfered with a fundamental attribute of arbitration all the same. It **[*1623]** did so by effectively permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration. This "fundamental" change to the traditional arbitration process, the Court said, would "sacrific[e] the principal advantage of arbitration—its informality—and **[***17]** mak[e] the process slower, more costly, and more likely to generate procedural **[**901]** morass than final judgment." *Id., at 347, 348, 131 S. Ct. 1740, 179 L. Ed. 2d 742*. Not least, *Concepcion* noted, arbitrators would have to decide whether the named class representatives are sufficiently representative and typical of the class; what kind of notice, opportunity to be heard, and right to opt out absent class members should enjoy; and how discovery should be altered in light of the classwide nature of the proceedings. *Ibid.* All of which would take much time and effort, and introduce new risks and costs for both sides. *Ibid.* In the Court's judgment, the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.

Of course, *Concepcion* has its limits. The Court recognized that parties remain free to alter arbitration procedures to suit their tastes, and in recent years some parties have sometimes chosen to arbitrate on a classwide basis. *Id., at 351, 131 S. Ct. 1740, 179 L. Ed. 2d 742*. But *Concepcion*'s essential insight remains: ***HN5***[↑] ***LEdHN[5]***[↑] [5] courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without **[***18]** the parties' consent. *Id., at 344-351, 131 S. Ct. 1740, 179 L. Ed. 2d 742*; see also *Stolt-Nielsen S. A. v. AnimalFeeds Int'l , 559 U.S. 662, 684-687, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)*. Just as judicial antagonism toward arbitration before the Arbitration Act's enactment "manifested itself in a great variety of devices and formulas declaring arbitration against public policy," *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today. *563 U. S., at 342, 131 S.*

Ct. 1740, 179 L. Ed. 2d 742 (internal quotation marks omitted). And a rule seeking to declare individualized arbitration proceedings off limits is, the Court held, just such a device.

The employees' efforts to distinguish *Concepcion* fall short. They note that their putative NLRA defense would render an agreement "illegal" as a matter of federal statutory law rather than "unconscionable" as a matter of state common law. But we don't see how that distinction makes any difference in light of *Concepion*'s rationale and rule. **HN6**[↑] **LEdHN[6]**[↑] [6] Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable *just because it requires bilateral arbitration* is a different creature. A defense of that kind, *Concepcion* tells us, is one that **[***19]** impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. **HN7**[↑] **LEdHN[7]**[↑] [7] The law of precedent teaches that like cases should generally be treated alike, and appropriate respect for that principle means the Arbitration Act's saving clause can no more save the defense at issue in these cases than it did the defense at issue in *Concepcion*. At the end of our encounter with the Arbitration Act, then, it appears just as it did at the beginning: a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us.

III

But that's not the end of it. Even if the Arbitration Act normally requires **[**902]** us to **[*1624]** enforce arbitration agreements like theirs, the employees reply that the NLRA overrides that guidance in these cases and commands us to hold their agreements unlawful yet.

This argument faces a stout uphill climb. **HN8**[↑] **LEdHN[8]**[↑] [8] When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "'to give effect to both.'" Morton v. Mancari, 417 U. S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy **[***20]** burden of showing "'a clearly expressed congressional intention'" that such a result should follow. Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 515 U. S. 528, 533, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995). The intention must be "'clear and manifest.'" Morton, supra, at 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290. And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute. United States v. Fausto, 484 U. S. 439, 452, 453, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988).

These rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.

Seeking to demonstrate an irreconcilable statutory conflict even in light of these demanding standards, the employees point to Section 7 of the NLRA. That provision guarantees workers

> "the right to self-organization, to form, join, or assist labor **[***21]** organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §157.

From this language, the employees ask us to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs.

But that much inference is more than this Court may make. **HN9**[↑] **LEdHN[9]**[↑] [9] Section 7 focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. Cf. 14 Penn Plaza LLC v. Pyett, 556 U. S. 247, 256-260, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009). But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.

Neither should any of this come as a surprise. The notion that Section 7 confers a right to class or collective **[**903]** actions seems pretty unlikely when you recall that procedures like that were hardly known when the

NLRA was adopted in 1935. Federal Rule of Civil Procedure 23 didn't create the modern class action until 1966; class arbitration didn't emerge until later still; and even the Fair Labor Standards Act's collective **[***22]** action provision postdated Section 7 by years. See Rule 23-Class **[*1625]** Actions, 28 U. S. C. App., p. 1258 (1964 ed., Supp. II); 52 Stat. 1069; Concepcion, 563 U. S., at 349, 131 S. Ct. 1740, 179 L. Ed. 2d 742; see also Califano v. Yamasaki, 442 U. S. 682, 700-701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979) (noting that the "usual rule" then was litigation "conducted by and on behalf of individual named parties only"). And while some forms of group litigation existed even in 1935, see 823 F. 3d, at 1154, Section 7's failure to mention them only reinforces that the statute doesn't speak to such procedures.

A close look at the employees' best evidence of a potential conflict turns out to reveal no conflict at all. The employees direct our attention to the term "other concerted activities for the purpose of . . . other mutual aid or protection." This catchall term, they say, can be read to include class and collective legal actions. But the term appears at the end of a detailed list of activities speaking of "self-organization," "form[ing], join[ing], or assist[ing] labor organizations," and "bargain[ing] collectively." 29 U. S. C. §157. And **HN10**[↑] **LEdHN[10]**[↑] [10] where, as here, a more general term follows more specific terms in a list, the general term is usually understood to "'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" Circuit City Stores, Inc. v. Adams, 532 U. S. 105, 115, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001) (discussing *ejusdem generis* canon); National Assn. of Mfrs. v. Department of Defense, 583 U. S. ___, ___, 138 S. Ct. 617, 199 L. Ed. 2d 501 (2018). All of which suggests that **HN11**[↑] **LEdHN[11]**[↑] [11] the term "other concerted activities" **[***23]** should, like the terms that precede it, serve to protect things employees "just do" for themselves in the course of exercising their right to free association in the workplace, rather than "the highly regulated, courtroom-bound 'activities' of class and joint litigation." Alternative Entertainment, 858 F. 3d, at 414-415 (Sutton, J., concurring in part and dissenting in part) (emphasis deleted). None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

The NLRA's broader structure underscores the point. After speaking of various "concerted activities" in Section 7, Congress proceeded to establish a regulatory regime applicable to each of them. The NLRA provides rules for the recognition of exclusive bargaining representatives, 29 U. S. C. §159, explains employees' and employers' obligation to bargain collectively, §158(d), and conscribes certain labor organization practices, §§158(a)(3), (b). The NLRA also touches on other concerted activities closely related to organization and collective bargaining, such as **[***24]** picketing, §158(b)(7), and strikes, §163. It even sets rules for adjudicatory proceedings **[**904]** under the NLRA itself. §§160, 161. Many of these provisions were part of the original NLRA in 1935, see 49 Stat. 449, while others were added later. But missing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Without some comparably specific guidance, it's not at all obvious what procedures Section 7 might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? What notice might be owed to absent class members? What standards would govern class certification? Should the same rules always apply or should they vary based on the nature of the suit? Nothing in the NLRA even whispers to us on any of these essential questions. And it is hard to fathom **[*1626]** why Congress would take such care to regulate all the other matters mentioned in Section 7 yet remain mute about this matter alone—unless, of course, Section 7 doesn't speak to class and collective action procedures in the first place.

Telling, too, is the fact that when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so. Congress **[***25]** has spoken often and clearly to the procedures for resolving "actions," "claims," "charges," and "cases" in statute after statute. *E.g.,* 29 U. S. C. §§216(b), 626; 42 U. S. C. §§2000e-5(b), (f)(3)-(5). Congress has likewise shown that it knows how to override the Arbitration Act when it wishes—by explaining, for example, that, "[n]otwithstanding any other provision of law, . . . arbitration may be used . . . only if" certain conditions are met, 15 U. S. C. §1226(a)(2); or that "[n]o predispute arbitration agreement shall be valid or enforceable" in other circumstances, 7 U. S. C. §26(n)(2); 12 U. S. C. §5567(d)(2); or that requiring a party to arbitrate is "unlawful" in other circumstances yet, 10 U. S. C. §987(e)(3). The fact that we have nothing like that here is further evidence that Section 7 does nothing to address the question of class and collective actions.

In response, the employees offer this slight reply. They suggest that the NLRA doesn't discuss any particular class and collective action procedures because it merely confers a right to use *existing* procedures provided by statute or rule, "on the same terms as [they are] made available to everyone else." Brief for Respondent in No. 16-285, p. 53, n. 10. But of course the NLRA doesn't say even that much. And, besides, if the parties really take existing class and collective action rules as they **[***26]** find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures of their own design.

Still another contextual clue yields the same message. The employees' underlying causes of action involve their wages and arise not under the NLRA but under an entirely different statute, the Fair Labor Standards Act. The FLSA allows employees to sue on behalf of "themselves and other employees similarly situated," 29 U. S. C. §216(b), and it's precisely this sort of collective action the employees before us wish to pursue. Yet they do not offer the seemingly more natural suggestion that the FLSA **[**905]** overcomes the Arbitration Act to permit their class and collective actions. Why not? Presumably because this Court held decades ago that an identical collective action scheme (in fact, one borrowed from the FLSA) does *not* displace the Arbitration Act or prohibit individualized arbitration proceedings. Gilmer v. Interstate/Johnson Lane Corp., 500 U. S. 20, 32, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) (discussing Age **Discrimination** in Employment Act). In fact, it turns out that "[e]very circuit to consider the question" has held that the FLSA allows agreements for individualized arbitration. **[***27]** Alternative Entertainment, 858 F. 3d, at 413 (opinion of Sutton, J.) (collecting cases). Faced with that obstacle, the employees are left to cast about elsewhere for help. And so they have cast in this direction, suggesting that one statute (the NLRA) steps in to dictate the procedures for claims under a different statute (the FLSA), and thereby overrides the commands of yet a third statute (the Arbitration Act). It's a sort of interpretive triple bank shot, and just stating the theory is enough to raise a judicial eyebrow.

Perhaps worse still, the employees' theory runs afoul of **HN12**[⬆] **LEdHN[12]**[⬆] [12] the usual rule that Congress "does not alter the fundamental **[*1627]** details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." Whitman v. American Trucking Assns., Inc., 531 U. S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). Union organization and collective bargaining in the workplace are the bread and butter of the NLRA, while the particulars of dispute resolution procedures in Article III courts or arbitration proceedings are usually left to other statutes and rules—not least the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA. It's more than a little doubtful that Congress would have tucked into the mousehole of Section 7's catchall term an elephant that tramples the **[***28]** work done by these other laws; flattens the parties' contracted-for dispute resolution procedures; and seats the Board as supreme superintendent of claims arising under a statute it doesn't even administer.

Nor does it help to fold yet another statute into the mix. At points, the employees suggest that the Norris-LaGuardia Act, a precursor of the NLRA, also renders their arbitration agreements unenforceable. But the Norris-LaGuardia Act adds nothing here. It declares "[un]enforceable" contracts that conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §§102, 103. That is the same policy the NLRA advances and, as we've seen, it does not conflict with Congress's statutory directions favoring arbitration. See also Boys Markets, Inc. v. Retail Clerks, 398 U. S. 235, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970) (holding that the Norris-LaGuardia Act's anti-injunction provisions do not bar enforcement of arbitration agreements).

What all these textual and contextual clues indicate, our precedents confirm. In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save **[***29]** one temporary exception since **[**906]** overruled), with statutes ranging from the Sherman and Clayton Acts to the Age **Discrimination** in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act. Italian Colors, 570 U. S. 228, 133 S. Ct. 2304, 186 L. Ed. 2d 417; Gilmer, 500 U. S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26; CompuCredit Corp. v. Greenwood, 565 U. S. 95, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U. S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989) (overruling Wilko v. Swan, 346 U. S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953)); Shearson/American Express Inc. v. McMahon, 482 U.

S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987). Throughout, we have made clear that **HN13**[] **LEdHN[13]**[] [13] even a statute's express provision for collective legal actions does not necessarily mean that it precludes "'individual attempts at conciliation'" through arbitration. Gilmer, supra, at 32, 111 S. Ct. 1647, 114 L. Ed. 2d 26. And we've stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act. CompuCredit, supra, at 103-104, 132 S. Ct. 665, 181 L. Ed. 2d 586; McMahon, supra, at 227, 107 S. Ct. 2332, 96 L. Ed. 2d 185; Italian Colors, supra, at 234, 133 S. Ct. 2304, 186 L. Ed. 2d 417. Given so much precedent pointing so strongly in one direction, we do not see how we might faithfully turn the other way here.

Consider a few examples. In *Italian Colors*, this Court refused to find a conflict between the Arbitration Act and the Sherman Act because the Sherman Act **[*1628]** (just like the NLRA) made "no mention of class actions" and was adopted before Rule 23 introduced its exception to the "usual rule" of "individual" dispute resolution. 570 U. S., at 234, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (internal quotation marks omitted). **[***30]** In *Gilmer*, this Court "had no qualms in enforcing a class waiver in an arbitration agreement even though" the Age **Discrimination** in Employment Act "expressly permitted collective legal actions." Italian Colors, supra, at 237, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (citing Gilmer, supra, at 32, 111 S. Ct. 1647, 114 L. Ed. 2d 26). And in *CompuCredit*, this Court refused to find a conflict even though the *Credit Repair Organizations Act* expressly provided a "right to sue," "repeated[ly]" used the words "action " and "court" and "class action," and even declared "[a]ny waiver" of the rights it provided to be "void." 565 U. S., at 99-100, 132 S. Ct. 665, 181 L. Ed. 2d 586 (internal quotation marks omitted). If all the statutes in all those cases did not provide a congressional command sufficient to displace the Arbitration Act, we cannot imagine how we might hold that the NLRA alone and for the first time does so today.

The employees rejoin that our precedential story is complicated by some of this Court's cases interpreting Section 7 itself. But, as it turns out, this Court's Section 7 cases have usually involved just what you would expect from the statute's plain language: efforts by employees related to organizing and collective bargaining in the workplace, not the treatment of class or collective actions in court or arbitration proceedings. See, *e.g.*, NLRB **[**907]** v. Washington Aluminum Co., 370 U. S. 9, 82 S. Ct. 1099, 8 L. Ed. 2d 298 (1962) (walkout to protest workplace conditions); **[***31]** NLRB v. Granite State Joint Board, 409 U.S. 213, 93 S. Ct. 385, 34 L. Ed. 2d 422 (1972) (resignation from union and refusal to strike); NLRB v. J. Weingarten, Inc., 420 U. S. 251, 95 S. Ct. 959, 43 L. Ed. 2d 171 (1975) (request for union representation at disciplinary interview). Neither do the two cases the employees cite prove otherwise. In Eastex, Inc. v. NLRB, 437 U. S. 556, 558, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978), we simply addressed the question whether a union's distribution of a newsletter in the workplace qualified as a protected concerted activity. We held it did, noting that it was "undisputed that the union undertook the distribution in order to boost its support and improve its bargaining position in upcoming contract negotiations," all part of the union's "'continuing organizational efforts.'" Id., at 575, and n. 24, 98 S. Ct. 2505, 57 L. Ed. 2d 428. In NLRB v. City Disposal Systems, Inc., 465 U. S. 822, 831-832, 104 S. Ct. 1505, 79 L. Ed. 2d 839 (1984), we held only that an employee's assertion of a right under a collective bargaining agreement was protected, reasoning that the collective bargaining "process—beginning with the organization of the union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity." **HN14**[] **LEdHN[14]**[] [14] Nothing in our cases indicates that the NLRA guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Arbitration Act.

That leaves **[***32]** the employees to try to make something of our dicta. The employees point to a line in *Eastex* observing that "it has been held" by other courts and the Board "that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." 437 U. S., at 565-566, 98 S. Ct. 2505, 57 L. Ed. 2d 428; see also Brief for National Labor Relations Board in No. 16-307, p. 15 (citing similar Board decisions). But even on its own **[*1629]** terms, this dicta about the holdings of other bodies does not purport to discuss what *procedures* an employee might be entitled to in litigation or arbitration. Instead this passage at most suggests only that "resort to administrative and judicial forums" isn't "entirely unprotected." Id., at 566, 98 S. Ct. 2505, 57 L. Ed. 2d 428. Indeed, the Court proceeded to explain that it did not intend to "address . . . the question of what may constitute 'concerted' activities in this [litigation] context." Ibid., n. 15, 98 S. Ct. 2505, 57 L. Ed. 2d 428. So even the employees' dicta, when viewed

fairly and fully, doesn't suggest that individualized dispute resolution procedures might be insufficient and collective procedures might be mandatory. Neither should this come as a surprise given that not **[***33]** a single one of the lower court or Board decisions *Eastex* discussed went so far as to hold that Section 7 guarantees a right to class or collective action procedures. As we've seen, the Board did not purport to discover that right until 2012, and no federal appellate court accepted it until 2016. See D. R. Horton, 357 N. L. R. B. 2277; 823 F. 3d 1147 (case below in No. 16-285).

[908]** With so much against them in the statute and our precedent, the employees end by seeking shelter in *Chevron*. Even if this Court doesn't see what they see in Section 7, the employees say we must rule for them anyway because of the deference this Court owes to an administrative agency's interpretation of the law. To be sure, the employees do not wish us to defer to the general counsel's judgment in 2010 that the NLRA and the Arbitration Act coexist peaceably; they wish us to defer instead to the Board's 2012 opinion suggesting the NLRA displaces the Arbitration Act. No party to these cases has asked us to reconsider *Chevron* deference. Cf. *SAS Institute Inc. v. Iancu, 138 S. Ct. 1348, 200 L. Ed. 2d 695*. But even under *Chevron*'s terms, no deference is due. To show why, it suffices to outline just a few of the most obvious reasons.

The *Chevron* Court justified deference on the premise that a statutory ambiguity represents an "implicit" delegation **[***34]** to an agency to interpret a "statute which it administers." 467 U. S., at 841, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694. Here, though, the Board hasn't just sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And ***HN15***[↑] ***LEdHN[15]***[↑] [15] on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. One of *Chevron*'s essential premises is simply missing here.

It's easy, too, to see why the "reconciliation" of distinct statutory regimes "is a matter for the courts," not agencies. Gordon v. New York Stock Exchange, Inc., 422 U. S. 659, 685-686, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975). An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—effectively "'bootstrap[ping] itself into an area in which it has no jurisdiction.'" Adams Fruit Co. v. Barrett, 494 U. S. 638, 650, 110 S. Ct. 1384, 108 L. Ed. 2d 585 (1990). All of which threatens to undo rather than honor legislative intentions. To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment. See Hoffman Plastic Compounds, Inc. v. NLRB, 535 U. S. 137, 144, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002) (noting that this Court has "never deferred to the Board's remedial preferences where such **[***35]** preferences potentially trench upon federal statutes and policies unrelated to the NLRA").

[*1630] Another justification the *Chevron* Court offered for deference is that "policy choices" should be left to Executive Branch officials "directly accountable to the people." 467 U. S., at 865, 104 S. Ct. 2778, 81 L. Ed. 2d 694. But here the Executive seems of two minds, for we have received competing briefs from the Board and from the United States (through the Solicitor General) disputing the meaning of the NLRA. And whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it **[**909]** might be held accountable. See Hemel & Nielson, *Chevron* Step One-and-a-Half, 84 U. Chi. L. Rev. 757, 808 (2017) ("If the theory undergirding *Chevron* is that voters should be the judges of the executive branch's policy choices, then presumably the executive branch should have to take ownership of those policy choices so that voters know whom to blame (and to credit)"). In these circumstances, we will not defer.

Finally, the *Chevron* Court explained that ***HN16***[↑] ***LEdHN[16]***[↑] [16] deference is not due unless a "court, employing traditional tools of statutory construction," **[***36]** is left with an unresolved ambiguity. 467 U. S., at 843, n. 9,104 S. Ct. 2778, 81 L. Ed. 2d 694. And that too is missing: ***HN17***[↑] ***LEdHN[17]***[↑] [17] the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle. ***HN18***[↑] ***LEdHN[18]***[↑] [18] Where, as here, the canons supply an answer, "*Chevron* leaves the stage." Alternative Entertainment, 858 F. 3d, at 417 (opinion of Sutton, J.).

IV

The dissent sees things a little bit differently. In its view, today's decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy

judgments. The dissent even suggests we have resurrected the long-dead "yellow dog" contract. Post, at 3-17, 30, 200 L. Ed. 2d, at 913-921, 930 (opinion of Ginsburg, J.). But like most apocalyptic warnings, this one proves a false alarm. Cf. L. Tribe, American Constitutional Law 435 (1978) ("'*Lochnerizing*' has become so much an epithet that the very use of the label may obscure attempts at understanding").

Our decision does nothing to override Congress's policy judgments. As the dissent recognizes, the legislative policy embodied in the NLRA is aimed at "safeguard[ing], first and foremost, workers' rights to join unions and to engage in collective bargaining." Post, at 8, 200 L. Ed. 2d, at 916. Those rights stand every bit **[***37]** as strong today as they did yesterday. And rather than revive "yellow dog" contracts against union organizing that the NLRA outlawed back in 1935, today's decision merely declines to read into the NLRA a novel right to class action procedures that the Board's own general counsel disclaimed as recently as 2010.

Instead of overriding Congress's policy judgments, today's decision seeks to honor them. This much the dissent surely knows. Shortly after invoking the specter of *Lochner*, it turns around and criticizes the Court for trying *too hard* to abide the Arbitration Act's "'liberal federal policy favoring arbitration agreements,'" Howsam v. Dean Witter Reynolds, Inc., 537 U. S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002), saying we "'ski'" too far down the "'slippery slope'" of this Court's arbitration precedent, post, at 23, 200 L. Ed. 2d, at 925. But the dissent's real complaint lies with the mountain of precedent itself. The dissent spends page after page relitigating our Arbitration Act precedents, rehashing arguments this Court has heard and rejected many times in many cases that no party **[*1631]** has asked us to revisit. Compare post, at 18-23, 26, 200 L. Ed. 2d, at 922-925, 927 (criticizing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U. S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985), Gilmer, 500 U. S. 20, 111 S. Ct. ***[**910]*** 1647, 114 L. Ed. 2d 26, Circuit City, 532 U. S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234, Concepcion, 563 U. S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742, Italian Colors, 570 U. S. 228, 133 S. Ct. 2304, 186 L. Ed. 2d 417, and CompuCredit, 565 U. S. 95, 132 S. Ct. 665, 181 L. Ed. 2d 586), with Mitsubishi, supra, at 645-650, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (Stevens, J., dissenting), Gilmer, supra, at 36, 39-43, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (Stevens, J., dissenting), Circuit City, supra, at 124-129, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (Stevens, J., dissenting), Concepcion, supra, at 357-367, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (Breyer, J., dissenting), Italian Colors, supra, at 240-253, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (Kagan, **[***38]** J., dissenting), and CompuCredit, supra, at 116-117, 132 S. Ct. 665, 181 L. Ed. 2d 586 (Ginsburg, J., dissenting).

When at last it reaches the question of applying our precedent, the dissent offers little, and understandably so. ***HN19***[↑] ***LEdHN[19]***[↑] [19] Our precedent clearly teaches that a contract defense "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" is inconsistent with the Arbitration Act and its saving clause. Concepcion, supra, at 336, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (opinion of the Court). And that, of course, is exactly what the employees' proffered defense seeks to do.

Nor is the dissent's reading of the NLRA any more available to us than its reading of the Arbitration Act. The dissent imposes a vast construction on Section 7's language. Post, at 9, 200 L. Ed. 2d, at 916. But a statute's meaning does not always "turn solely" on the broadest imaginable "definitions of its component words." Yates v. United States, 574 U. S. ___, ___, 135 S. Ct. 1074, 191 L. Ed. 2d 64, 76 (2015) (plurality opinion). Linguistic and statutory context also matter. We have offered an extensive explanation why those clues support our reading today. By contrast, the dissent rests its interpretation on legislative history. Post, at 3-5, 200 L. Ed. 2d, at 913-915; see also post, at 19-21, 200 L. Ed. 2d, at 923-924. But legislative history is not the law. "It is the business of Congress to sum up its own debates in its legislation," and once it enacts a statute **[***39]** "'[w]e do not inquire what the legislature meant; we ask only what the statute means.'" Schwegmann Brothers v. Calvert Distillers Corp., 341 U. S. 384, 396, 397, 71 S. Ct. 745, 95 L. Ed. 1035, 60 Ohio Law Abs. 81 (1951) (Jackson, J., concurring) (quoting Justice Holmes). Besides, when it comes to the legislative history here, it seems Congress "did not discuss the right to file class or consolidated claims against employers." D. R. Horton, 737 F. 3d, at 361. So the dissent seeks instead to divine messages from congressional commentary directed to different questions altogether—a project that threatens to "substitute [the Court] for the Congress." Schwegmann, supra, at 396, 71 S. Ct. 745, 95 L. Ed. 1035, 60 Ohio Law Abs. 81.

Nor do the problems end there. The dissent proceeds to argue that its expansive reading of the NLRA conflicts with and should prevail over the Arbitration Act. The NLRA leaves the Arbitration Act without force, the

dissent says, because it provides the more "pinpointed" direction. Post, at 25, 200 L. Ed. 2d, at 927. Even taken on its own terms, though, this argument quickly faces trouble. The dissent says the NLRA is the more specific provision because it supposedly **[**911]** "speaks directly to group action by employees," while the Arbitration Act doesn't speak to such actions. *Ibid.* But the question before us is whether courts must enforce particular arbitration agreements according to their terms. And it's the Arbitration Act that speaks directly **[***40]** to the enforceability of arbitration agreements, **[*1632]** while the NLRA doesn't mention arbitration at all. So if forced to choose between the two, we might well say the Arbitration Act offers the more on-point instruction. Of course, there is no need to make that call because, as our precedents demand, we have sought and found a persuasive interpretation that gives effect to all of Congress's work, not just the parts we might prefer.

Ultimately, the dissent retreats to policy arguments. It argues that we should read a class and collective action right into the NLRA to promote the enforcement of wage and hour laws. Post, at 26-30, 200 L. Ed. 2d, at 927-929. But it's altogether unclear why the dissent expects to find such a right in the NLRA rather than in statutes like the FLSA that actually regulate wages and hours. Or why we should read the NLRA as mandating the availability of class or collective actions when the FLSA expressly authorizes them yet allows parties to contract for bilateral arbitration instead. 29 U. S. C. §216(b); Gilmer, supra, at 32, 111 S. Ct. 1647, 114 L. Ed. 2d 26. While the dissent is no doubt right that class actions can enhance enforcement by "spread[ing] the costs of litigation," post, at 9, 200 L. Ed. 2d, at 917, it's also well known that they can unfairly "plac[e] pressure on the defendant to settle even unmeritorious **[***41]** claims," Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co., 559 U. S. 393, 445, n. 3, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010) (Ginsburg, J., dissenting). The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested. Just recently, for example, one federal agency banned individualized arbitration agreements it blamed for underenforcement of certain laws, only to see Congress respond by immediately repealing that rule. See 82 Fed. Reg. 33210 (2017) (cited post, at 28, n. 15, 200 L. Ed. 2d, at 928); *Pub. L. 115-74, 131 Stat. 1243*. This Court is not free to substitute its preferred economic policies for those chosen by the people's representatives. *That*, we had always understood, was *Lochner*'s sin.

*

The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies. The judgments in *Epic*, No. 16-285, and *Ernst & Young*, **[***42]** No. 16-300, are reversed, and the cases are remanded for further proceedings consistent with this opinion. The judgment in *Murphy Oil*, No. 16-307, is affirmed.

So ordered.

Concur by: THOMAS

Concur

[912]** Justice **Thomas**, concurring.

I join the Court's opinion in full. I write separately to add that the employees also cannot prevail under the plain meaning of the Federal Arbitration Act. The Act declares arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2. As I have previously explained, grounds for revocation of a contract are those that concern "'the formation of the arbitration agreement.'" American Express Co. v. Italian Colors Restaurant, 570 U. S. 228, 239, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013) (concurring opinion) (quoting **[*1633]** AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 353, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (Thomas, J., concurring)). The employees argue, among other things, that the class waivers in their arbitration agreements are unenforceable because the National Labor Relations Act makes those waivers illegal. But illegality is a public-policy defense. See *Restatement (Second) of Contracts §§178-179* (1979); McMullen v. Hoffman, 174 U. S. 639, 669-670, 19 S. Ct. 839, 43 L. Ed. 1117 (1899). Because "[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made," the saving clause does not apply here.

Concepcion, supra, at 357, 131 S. Ct. 1740, 179 L. Ed. 2d 742. For this reason, and the reasons in the Court's opinion, the employees' arbitration **[***43]** agreements must be enforced according to their terms.

Dissent by: GINSBURG

Dissent

Justice **Ginsburg**, with whom Justice **Breyer**, Justice **Sotomayor**, and Justice **Kagan** join, dissenting.

The employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the *Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. §201 et seq.*, and analogous state laws. Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone. See Ruan, What's Left To Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers, *2012 Mich. St. L. Rev. 1103, 1118-1119* (Ruan). But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. See *id., at 1108-1111*. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind. The question presented: Does the *Federal Arbitration Act* (Arbitration Act or FAA), *9 U. S. C. §1 et seq.*, permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the *National Labor Relations Act (NLRA)* **[***44]** , *29 U. S. C. §151 et seq.*, "to engage in . . . concerted activities" for their "mutual aid or protection"? *§157*. The answer should be a resounding "No."

In the *NLRA* and its forerunner, the *Norris-LaGuardia Act* (NLGA), *29 U. S. C. §101 et seq.*, Congress acted on an acute awareness: For workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers. **[**913]** A single employee, Congress understood, is disarmed in dealing with an employer. See *NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, 33-34, 57 S. Ct. 615, 81 L. Ed. 893 (1937)*. The Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA and the *NLRA*, and ignores the destructive consequences of diminishing the right of employees "to band together in confronting an employer." *NLRB v. City Disposal Systems, Inc., 465 U. S. 822, 835, 104 S. Ct. 1505, 79 L. Ed. 2d 839 (1984)*. Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order.

To explain why the Court's decision is egregiously wrong, I first refer to the extreme imbalance once prevalent in our Nation's workplaces, and Congress' aim in the NLGA and the *NLRA* to place employers and employees on a more equal footing. I then explain why the Arbitration Act, sensibly read, does **[***45]** not shrink the *NLRA's* protective sphere.

I

It was once the dominant view of this Court that "[t]he right of a person to sell **[*1634]** his labor upon such terms as he deems proper is . . . the same as the right of the purchaser of labor to prescribe [working] conditions." *Adair v. United States, 208 U. S. 161, 174, 28 S. Ct. 277, 52 L. Ed. 436, 5 Ohio L. Rep. 605 (1908)* (invalidating federal law prohibiting interstate railroad employers from discharging or discriminating against employees based on their membership in labor organizations); accord *Coppage v. Kansas, 236 U. S. 1, 26, 35 S. Ct. 240, 59 L. Ed. 441 (1915)* (invalidating state law prohibiting employers from requiring employees, as a condition of employment, to refrain or withdraw from union membership).

The NLGA and the *NLRA* operate on a different premise, that employees must have the capacity to act collectively in order to match their employers' clout in setting terms and conditions of employment. For decades, the Court's decisions have reflected that understanding. See *Jones & Laughlin Steel, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893* (upholding the *NLRA* against employer assault); cf. *United States v. Darby, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941)* (upholding the *FLSA*).

A

The end of the 19th century and beginning of the 20th was a tumultuous era in the history of our Nation's labor relations. Under economic conditions then prevailing, workers often had to accept employment on whatever terms employers dictated. See 75 Cong. Rec. 4502 **[***46]** (1932). Aiming to secure better pay,

shorter workdays, and safer workplaces, workers increasingly sought to band together to make their demands effective. See *ibid.*; H. Millis & E. Brown, From the *Wagner Act* to Taft-Hartley: A Study of National Labor Policy and Labor Relations 7-8 (1950).

Employers, in turn, engaged in a variety of tactics to hinder workers' efforts to act in concert for their mutual benefit. See J. Seidman, The Yellow Dog Contract 11 (1932). Notable among such devices was the "yellow-dog contract." Such agreements, **[**914]** which employers required employees to sign as a condition of employment, typically commanded employees to abstain from joining labor unions. See *id.,* at 11, 56. Many of the employer-designed agreements cast an even wider net, "proscrib[ing] all manner of concerted activities." Finkin, The Meaning and Contemporary Vitality of the Norris-LaGuardia Act, 93 Neb. L. Rev. 6, 16 (2014); see Seidman, *supra*, at 59-60, 65-66. As a prominent United States Senator observed, contracts of the yellow-dog genre rendered the "laboring man . . . absolutely helpless" by "waiv[ing] his right . . . to free association" and by requiring that he "singly present any grievance he has." 75 Cong. Rec. 4504 (remarks of Sen. Norris).

Early legislative efforts to protect workers' **[***47]** rights to band together were unavailing. See, *e.g.,* Coppage, 236 U. S., at 26, 35 S. Ct. 240, 59 L. Ed. 441; Frankfurter & Greene, Legislation Affecting Labor Injunctions, 38 Yale L. J. 879, 889-890 (1929). Courts, including this one, invalidated the legislation based on then-ascendant notions about employers' and employees' constitutional right to "liberty of contract." See Coppage, 236 U. S., at 26, 35 S. Ct. 240, 59 L. Ed. 441; Frankfurter & Greene, *supra,* at 890-891. While stating that legislatures could curtail contractual "liberty" in the interest of public health, safety, and the general welfare, courts placed outside those bounds legislative action to redress the bargaining power imbalance workers faced. See Coppage, 236 U. S., at 16-19, 35 S. Ct. 240, 59 L. Ed. 441.

In the 1930's, legislative efforts to safeguard vulnerable workers found more receptive audiences. As the Great Depression shifted political winds further in favor of worker-protective laws, Congress passed two statutes aimed at protecting **[*1635]** employees' associational rights. First, in 1932, Congress passed the NLGA, which regulates the employer-employee relationship indirectly. Section 2 of the Act declares:

> "Whereas . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives **[***48]** of his own choosing, . . . and that he shall be free from the interference, restraint, or coercion of employers . . . in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §102.

Section 3 provides that federal courts shall not enforce "any . . . undertaking or promise in conflict with the public policy declared in [§2]." §103. [1] In adopting these provisions, Congress sought to render ineffective employer-imposed contracts proscribing employees' **[**915]** concerted activity of any and every kind. See 75 Cong. Rec. 4504-4505 (remarks of Sen. Norris) ("[o]ne of the objects" of the NLGA was to "outlaw" yellow-dog contracts); Finkin, *supra,* at 16 (contracts prohibiting "all manner of concerted activities apart from union membership or support . . . were understood to be 'yellow dog' contracts"). While banning court enforcement of contracts proscribing concerted action by employees, the NLGA did not directly prohibit coercive employer practices.

But Congress did so three years later, in 1935, when it enacted the NLRA. Relevant here, §7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor **[***49]** organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*." 29 U. S. C. §157 (emphasis added). Section 8(a)(1) safeguards those rights by making it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§7]." §158(a)(1). To oversee the Act's guarantees, the Act established the National Labor Relations Board (Board or NLRB), an independent regulatory agency empowered to administer "labor policy for the Nation." San Diego Building Trades

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[1] Other provisions of the NLGA further rein in federal-court authority to disturb employees' concerted activities. See, *e.g.,* 29 U. S. C. §104(d) (federal courts lack jurisdiction to enjoin a person from "aiding any person participating or interested in any labor dispute who is being proceeded against in, or [who] is prosecuting, any action or suit in any court of the United States or of any State").

Council v. Garmon, 359 U. S. 236, 242, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959); see *29 U. S. C. §160*.

Unlike earlier legislative efforts, the NLGA and the *NLRA* had staying power. When a case challenging the *NLRA's* constitutionality made its way here, the Court, in retreat from its *Lochner*-era contractual-"liberty" decisions, upheld the Act as a permissible exercise of legislative authority. See *Jones & Laughlin Steel, 301 U. S., at 33-34, 57 S. Ct. 615, 81 L. Ed. 893*. The Court recognized that employees have a "fundamental right" to join together to advance their common interests and that Congress, in lieu of "ignor[ing]" that right, had elected to "safeguard" it. *Ibid.*

B

Despite the *NLRA's* prohibitions, the employers in the cases now before the Court required their employees **[***50]** to sign **[*1636]** contracts stipulating to submission of wage and hours claims to binding arbitration, and to do so only one-by-one. [2] When employees subsequently filed wage and hours claims in federal court and sought to invoke the collective-litigation procedures provided for in the *FLSA* and Federal **[**916]** Rules of Civil Procedure, [3] the employers moved to compel individual arbitration. The Arbitration Act, in their view, requires courts to enforce their take-it-or-leave-it arbitration agreements as written, including the collective-litigation abstinence demanded therein.

In resisting enforcement of the group-action foreclosures, the employees involved in this litigation do not urge that they must have access to a judicial forum. [4] They argue only that the *NLRA* prohibits their employers from denying them the right to pursue work-related claims in concert in any forum. If they may be stopped by employer-dictated terms from pursuing collective procedures in court, they maintain, they must at least have access to similar procedures in an arbitral forum.

C

Although the *NLRA* safeguards, first and foremost, workers' rights to join unions and to engage in collective bargaining, the statute speaks **[***51]** more embracively. In addition to protecting employees' rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing," the Act protects employees' rights "to engage in *other* concerted activities for the purpose of . . . mutual aid or protection." *29 U. S. C. §157* (emphasis added); see, *e.g., NLRB v. Washington Aluminum Co., 370 U. S. 9, 14-15, 82 S. Ct. 1099, 8 L. Ed. 2d 298 (1962)* (*§7* protected unorganized employees when they walked off the job to protest cold working conditions). See also 1 J. Higgins, The Developing *Labor Law 209 (6th ed. 2012)* ("*Section 7* protects not only union-related activity but also 'other concerted **[*1637]** activities . . . for mutual aid or protection.'"); 1 N. Lareau, Labor and Employment Law §1.01[1], p. 1-2 (2017) ("*Section 7* extended to employees three federally protected rights: (1) the right to form and join unions; (2) the right to bargain collectively (negotiate) with employers about terms and conditions of employment;

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[2] The Court's opinion opens with the question: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?" *Ante, at 1, 200 L. Ed. 2d, at 896*. Were the "agreements" genuinely bilateral? Petitioner Epic Systems Corporation e-mailed its employees an arbitration agreement requiring resolution of wage and hours claims by individual arbitration. The agreement provided that if the employees "continue[d] to work at Epic," they would "be deemed to have accepted th[e] Agreement." App. to Pet. for Cert. in No. 16-285, p. 30a. Ernst & Young similarly e-mailed its employees an arbitration agreement, which stated that the employees' continued employment would indicate their assent to the agreement's terms. See App. in No. 16-300, p. 37. Epic's and Ernst & Young's employees thus faced a Hobson's choice: accept arbitration on their employer's terms or give up their jobs.

[3] The *FLSA* establishes an opt-in collective-litigation procedure for employees seeking to recover unpaid wages and overtime pay. See *29 U. S. C. §216(b)*. In particular, it authorizes "one or more employees" to maintain an action "in behalf of himself or themselves and other employees similarly situated." *Ibid.* "Similarly situated" employees may become parties to an *FLSA* collective action (and may share in the recovery) only if they file written notices of consent to be joined as parties. *Ibid*. The Federal Rules of Civil Procedure provide two collective-litigation procedures relevant here. First, *Rule 20(a)* permits individuals to join as plaintiffs in a single action if they assert claims arising out of the same transaction or occurrence and their claims involve common questions of law or fact. Second, *Rule 23* establishes an opt-out class-action procedure, pursuant to which "[o]ne or more members of a class" may bring an action on behalf of the entire class if specified prerequisites are met.

[4] Notably, one employer specified that if the provisions confining employees to individual proceedings are "unenforceable," "any claim brought on a class, collective, or representative action basis must be filed in . . . court." App. to Pet. for Cert. in No. 16-285, at 35a.

and (3) the right to work in concert with another employee or employees to achieve employment-related goals." (emphasis added)).

Suits to enforce workplace rights collectively fit comfortably under the umbrella "concerted activities for the purpose of . . . mutual aid or protection." 29 U. S. C. §157. "Concerted" means "[p]lanned or **[***52]** accomplished together; combined." American Heritage Dictionary 381 (5th ed. 2011). **[**917]** "Mutual" means "reciprocal." *Id.,* at 1163. When employees meet the requirements for litigation of shared legal claims in joint, collective, and class proceedings, the litigation of their claims is undoubtedly "accomplished together." By joining hands in litigation, workers can spread the costs of litigation and reduce the risk of employer retaliation. See infra, at 27-28, 200 L. Ed. 2d, at 928.

Recognizing employees' right to engage in collective employment litigation and shielding that right from employer blockage are firmly rooted in the NLRA's design. Congress expressed its intent, when it enacted the NLRA, to "protec[t] the exercise by workers of full freedom of association," thereby remedying "[t]he inequality of bargaining power" workers faced. 29 U. S. C. §151; see, *e.g.,* Eastex, Inc. v. NLRB, 437 U. S. 556, 567, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978) (the Act's policy is "to protect the right of workers to act together to better their working conditions" (internal quotation marks omitted)); City Disposal, 465 U. S., at 835, 104 S. Ct. 1505, 79 L. Ed. 2d 839 ("[I]n enacting §7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."). See also supra, at 5-6, 200 L. Ed. 2d, at 914-915. There can be no serious **[***53]** doubt that collective litigation is one way workers may associate with one another to improve their lot.

Since the Act's earliest days, the Board and federal courts have understood §7's "concerted activities" clause to protect myriad ways in which employees may join together to advance their shared interests. For example, the Board and federal courts have affirmed that the Act shields employees from employer interference when they participate in concerted appeals to the media, *e.g.,* NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F. 2d 503, 505-506 (CA2 1942), legislative bodies, *e.g.,* Bethlehem Shipbuilding Corp. v. NLRB, 114 F. 2d 930, 937 (CA1 1940), and government agencies, *e.g.,* Moss Planing Mill Co., 103 N. L. R. B. 414, 418-419, enf'd, 206 F. 2d 557 (CA4 1953). "The 74th Congress," this Court has noted, "knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." Eastex, 437 U. S., at 565, 98 S. Ct. 2505, 57 L. Ed. 2d 428.

Crucially important here, for over 75 years, the Board has held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment. See, *e.g.,* Spandsco Oil and Royalty Co., 42 N. L. R. B. 942, 948-949 (1942) (three employees' joint filing of FLSA suit ranked as concerted activity protected by the NLRA); *Poultrymen's* Service Corp., 41 N. L. R. B. 444, 460-463, and n. 28 (1942) (same with respect to employee's filing of **[*1638]** FLSA suit on behalf of himself and **[***54]** others similarly situated), enf'd, 138 F. 2d 204 (CA3 1943); Sarkes Tarzian, Inc., 149 N. L. R. B. 147, 149, 153 (1964) (same with respect to employees' filing class libel suit); United Parcel Service, Inc., 252 N. L. R. B. 1015, 1018 (1980) (same with respect to employee's filing class action regarding break times), enf'd, **[**918]** 677 F. 2d 421 (CA6 1982); Harco Trucking, LLC, 344 N. L. R. B. 478, 478-479 (2005) (same with respect to employee's maintaining class action regarding wages). For decades, federal courts have endorsed the Board's view, comprehending that "the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by §7." Leviton Mfg. Co. v. NLRB, 486 F. 2d 686, 689 (CA1 1973); see, *e.g.,* Brady v. NFL, 644 F.3d 661, 673 (CA8 2011) (similar). [5] The

[5] The Court cites, as purported evidence of contrary agency precedent, a 2010 "Guideline Memorandum" that the NLRB's then-General Counsel issued to his staff. See ante, at 4, 19, 22, 200 L. Ed. 2d, at 898, 907, 909. The General Counsel appeared to conclude that employees have a §7 right to file collective suits, but that employers can nonetheless require employees to sign arbitration agreements waiving the right to maintain such suits. See Memorandum GC 10-06, p. 7 (June 16, 2010). The memorandum sought to address what the General Counsel viewed as tension between longstanding precedent recognizing a §7 right to pursue collective employment litigation and more recent court decisions broadly construing the FAA. The memorandum did not bind the Board, and the Board never adopted the memorandum's position as its own. See D. R. Horton, 357 N. L. R. B. 2277, 2282 (2012), enf. denied in relevant part, 737 F. 3d 344 (CA5 2013); Tr. of Oral Arg. 41. Indeed, shortly after the General Counsel issued the memorandum, the Board rejected its analysis, finding that it conflicted with Board precedent, rested on erroneous factual

Court pays scant heed to this longstanding line of decisions. [6]

D

In face of the NLRA's text, history, purposes, and longstanding construction, the Court nevertheless concludes that collective proceedings do not fall within the scope of §7. None of the Court's reasons for diminishing §7 should carry the day.

1

The Court relies principally on the *ejusdem generis* canon. See ante, at 12, 200 L. Ed. 2d, at 903. Observing that §7's "other concerted activities" clause "appears at the end of a detailed list of activities," the Court says the clause should be read to "embrace" only activities "similar in nature" to those set forth first in the list, *ibid.* (internal quotation marks omitted), *i.e.,* "'self-organization,' 'form[ing], join[ing], or assist[ing] labor **[***55]** organizations,' and 'bargain[ing] collectively,'" *ibid.* The Court concludes that §7 should, therefore, be read to protect "things employees 'just do' for themselves." *Ibid.* (quoting NLRB v. Alternative Entertainment, Inc., 858 F. 3d 393, 415 (CA6 2017) (Sutton, J., concurring in part and dissenting in part); emphasis deleted). It is far from apparent why joining hands in litigation would not qualify as "things employees just do for themselves." In any event, there is no sound reason to employ the *ejusdem generis* canon to narrow §7's protections in the manner the Court suggests.

[*1639] The *ejusdem generis* canon may serve as a useful guide where it is doubtful Congress intended statutory words or phrases to have the broad scope their ordinary meaning conveys. **[**919]** See Russell Motor Car Co. v. United States, 261 U. S. 514, 519, 43 S. Ct. 428, 67 L. Ed. 778, 58 Ct. Cl. 708 (1923). Courts must take care, however, not to deploy the canon to undermine Congress' efforts to draft encompassing legislation. See United States v. Powell, 423 U. S. 87, 90, 96 S. Ct. 316, 46 L. Ed. 2d 228 (1975) ("[W]e would be justified in narrowing the statute only if such a narrow reading was supported by evidence of congressional intent over and above the language of the statute."). Nothing suggests that Congress envisioned a cramped construction of the NLRA. Quite the opposite, Congress expressed an embracive purpose in enacting the legislation, *i.e.,* to "protec[t] the exercise by workers of full freedom of **[***56]** association." 29 U. S. C. §151; see supra, at 9, 200 L. Ed. 2d, at 916.

2

In search of a statutory hook to support its application of the *ejusdem generis* canon, the Court turns to the NLRA's "structure." Ante, at 12, 200 L. Ed. 2d, at 903. Citing a handful of provisions that touch upon unionization, collective bargaining, picketing, and strikes, the Court asserts that the NLRA "establish[es] a regulatory regime" governing each of the activities protected by §7. Ante, at 12-13, 200 L. Ed. 2d, at 903-904. That regime, the Court says, offers "specific guidance" and "rules" regulating each protected activity. Ante, at 13, 200 L. Ed. 2d, at 903. Observing that none of the NLRA's provisions explicitly regulates employees' resort to collective litigation, the Court insists that "it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in [§7] yet remain mute about this matter alone—unless, of course, [§7] doesn't speak to class and collective action procedures in the first place." *Ibid.*

This argument is conspicuously flawed. When Congress enacted the NLRA in 1935, the only §7 activity Congress addressed with any specificity was employees' selection of collective-bargaining representatives. See 49 Stat. 453. The Act did not offer "specific guidance" about employees' rights to "form, join, or assist labor organizations." **[***57]** Nor did it set forth "specific guidance" for any activity falling within §7's "other concerted activities" clause. The only provision that touched upon an activity falling within that clause stated: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." *Id.,* at 457. That provision hardly offered "specific guidance" regarding employees' right to strike.

Without much in the original Act to support its "structure" argument, the Court cites several provisions that Congress added later, in response to particular concerns. Compare 49 Stat. 449-457 with 61 Stat. 142-143 (1947) (adding §8(d) to provide guidance regarding employees' and employers' collective-bargaining obligations); 61 Stat. 141-142 (amending §8(a) and

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premises, "defie[d] logic," and was internally incoherent. D. R. Horton, 357 N. L. R. B., at 2282-2283.

[6] In 2012, the Board held that employer-imposed contracts barring group litigation in any forum—arbitral or judicial—are unlawful. D. R. Horton, 357 N. L. R. B. 2277. In so ruling, the Board simply applied its precedents recognizing that (1) employees have a §7 right to engage in collective employment litigation and (2) employers cannot lawfully require employees to sign away their §7 rights. See id., at 2278, 2280. It broke no new ground. But cf. ante, at 2, 19, 200 L. Ed. 2d, at 896, 907.

adding §8(b) to proscribe specified labor organization practices); 73 Stat. 544 (1959) (adding §8(b)(7) to place restrictions on labor organizations' right to picket employers). It is difficult to comprehend why Congress' later inclusion of specific guidance regarding some of the activities protected by §7 sheds any light on Congress' initial conception of §7's scope.

But even if each of the provisions the Court cites had been included in the original Act, they still would provide **[**920]** little support for the Court's conclusion. For **[***58]** going on 80 years now, the Board and federal courts—including this one—have understood §7 to protect numerous activities **[*1640]** for which the Act provides no "specific" regulatory guidance. See *supra, at 9-10, 200 L. Ed. 2d, at 916-918*.

3

In a related argument, the Court maintains that the NLRA does not "even whispe[r]" about the "rules [that] should govern the adjudication of class or collective actions in court or arbitration." *Ante, at 13, 200 L. Ed. 2d, at 903*. The employees here involved, of course, do not look to the NLRA for the procedures enabling them to vindicate their employment rights in arbitral or judicial forums. They assert that the Act establishes their right to act in concert using existing, generally available procedures, see *supra, at 7, n. 3, 200 L. Ed. 2d, at 916*, and to do so free from employer interference. The FLSA and the Federal Rules on joinder and class actions provide the procedures pursuant to which the employees may ally to pursue shared legal claims. Their employers cannot lawfully cut off their access to those procedures, they urge, without according them access to similar procedures in arbitral forums. See, *e.g.,* American Arbitration Assn., Supplementary Rules for Class Arbitrations (2011).

To the employees' argument, the Court replies: If the employees "really take existing **[***59]** class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures." *Ante, at 14, 200 L. Ed. 2d, at 904*. The freedom to depart asserted by the Court, as already underscored, is entirely one sided. See *supra, at 2-5, 200 L. Ed. 2d, at 913-915*. Once again, the Court ignores the reality that sparked the NLRA's passage: Forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers. That is the very reason why the NLRA secures against employer interference employees' right to act in concert for their "mutual aid or protection." *29 U. S. C. §§151, 157, 158*.

4

Further attempting to sow doubt about §7's scope, the Court asserts that class and collective procedures were "hardly known when the NLRA was adopted in 1935." *Ante, at 11, 200 L. Ed. 2d, at 903*. In particular, the Court notes, the FLSA's collective-litigation procedure postdated §7 "by years" and Rule 23 "didn't create the modern class action until 1966." *Ibid.*

First, one may ask, is there any reason to suppose that Congress intended **[***60]** to protect employees' right to act in concert using only those procedures and forums available in 1935? Congress framed §7 in broad terms, "entrust[ing]" the Board with "responsibility to adapt the Act to changing patterns of industrial life." *NLRB v. J. Weingarten, Inc., 420 U. S. 251, 266, 95 S. Ct. 959, 43 L. Ed. 2d 171 (1975)*; see *Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998)* ("[T]he fact that a statute can be applied in situations not expressly anticipated **[**921]** by Congress does not demonstrate ambiguity. It demonstrates breadth." (internal quotation marks omitted)). With fidelity to Congress' aim, the Board and federal courts have recognized that the NLRA shields employees from employer interference when they, *e.g.,* join together to file complaints with administrative agencies, even if those agencies did not exist in 1935. See, *e.g., Wray Electric Contracting, Inc., 210 N. L. R. B. 757, 762 (1974)* (the NLRA protects concerted filing of complaint with the Occupational Safety and Health Administration).

Moreover, the Court paints an ahistorical picture. As Judge Wood, writing for the Seventh Circuit, cogently explained, **[*1641]** the FLSA's collective-litigation procedure and the modern class action were "not written on a clean slate." *823 F. 3d 1147, 1154 (2016)*. By 1935, permissive joinder was scarcely uncommon in courts of equity. See 7 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1651 (3d ed. 2001). Nor were representative **[***61]** and class suits novelties. Indeed, their origins trace back to medieval times. See S. Yeazell, From Medieval Group Litigation to the Modern Class Action 38 (1987). And beyond question, "[c]lass suits long have been a part of American jurisprudence." 7A Wright, *supra*, §1751, at 12

(3d ed. 2005); see Supreme Tribe of Ben-Hur v. Cauble, 255 U. S. 356, 363, 41 S. Ct. 338, 65 L. Ed. 673 (1921). See also Brief for Constitutional Accountability Center as *Amicus Curiae* 5-16 (describing group litigation's "rich history"). Early instances of joint proceedings include cases in which employees allied to sue an employer. *E.g.,* Gorley v. Louisville, 65 S.W. 844, 23 Ky. L. Rptr. 1782 (1901) (suit to recover wages brought by ten members of city police force on behalf of themselves and other officers); Guiliano v. Daniel O'Connell's Sons, 105 Conn. 695, 136 A. 677 (1927) (suit by two employees to recover for injuries sustained while residing in housing provided by their employer). It takes no imagination, then, to comprehend that Congress, when it enacted the NLRA, likely meant to protect employees' joining together to engage in collective litigation. [7]

E

Because I would hold that employees' §7 rights include the right to pursue collective litigation regarding their wages and hours, I would further hold that the employer-dictated collective-litigation stoppers, *i.e.,* "waivers," are unlawful. As earlier recounted, **[***62]** see supra, at 6, 200 L. Ed. 2d, at 915, §8(a)(1) makes it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce" employees in the exercise of their §7 rights. 29 U. S. C. §158(a)(1). Beyond genuine dispute, an employer "interfere[s] with" and "restrain[s]" employees in the exercise of their §7 rights by mandating that they prospectively renounce those rights in **[**922]** individual employment agreements. [8] The law could hardly be otherwise: Employees' rights to band together to meet their employers' superior strength would be worth precious little if employers could condition employment on workers signing away those rights. See National Licorice Co. v. NLRB, 309 U. S. 350, 364, 60 S. Ct. 569, 84 L. Ed. 799 (1940). Properly assessed, then, the "waivers" rank as unfair labor practices outlawed by the NLRA, and therefore unenforceable in court. See Kaiser Steel Corp. v. Mullins, 455 U. S. 72, 77, 102 S. Ct. 851, 70 L. Ed. 2d 833 (1982) ("[O]ur cases leave no doubt that illegal promises will not be enforced in cases controlled by **[*1642]** the federal law."). [9]

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[7] The Court additionally suggests that something must be amiss because the employees turn to the NLRA, rather than the FLSA, to resist enforcement of the collective-litigation waivers. See ante, at 14-15, 200 L. Ed. 2d, at 904-905. But the employees' reliance on the NLRA is hardly a reason to "raise a judicial eyebrow." Ante, at 15, 200 L. Ed. 2d, at 905. The NLRA's guiding purpose is to protect employees' rights to work together when addressing shared workplace grievances of whatever kind.

[8] See, *e.g.,* Bethany Medical Center, 328 N. L. R. B. 1094, 1105-1106 (1999) (holding employer violated §8(a)(1) by conditioning employees' rehiring on the surrender of their right to engage in future walkouts); Mandel Security Bureau Inc., 202 N. L. R. B. 117, 119, 122 (1973) (holding employer violated §8(a)(1) by conditioning employee's reinstatement to former position on agreement that employee would refrain from filing charges with the Board and from circulating work-related petitions, and, instead, would "mind his own business").

[9] I would similarly hold that the NLGA renders the collective-litigation waivers unenforceable. That Act declares it the public policy of the United States that workers "shall be free from the interference, restraint, or coercion of employers" when they engage in "concerted activities" for their "mutual aid or protection." 29 U. S. C. §102; see supra, at 5, 200 L. Ed. 2d, at 914. Section 3 provides that federal courts shall not enforce any "promise in conflict with the [Act's] policy." §103. Because employer-extracted collective-litigation waivers interfere with employees' ability to engage in "concerted activities" for their "mutual aid or protection," see supra, at 8-11, 200 L. Ed. 2d, at 916-918, the arm-twisted waivers collide with the NLGA's stated policy; thus, no federal court should enforce them. See Finkin, The Meaning and Contemporary Vitality of the Norris-LaGuardia Act, 93 Neb. L. Rev. 6 (2014).

Boys Markets, Inc. v. Retail Clerks, 398 U. S. 235, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970), provides no support for the Court's contrary conclusion. See ante, at 16, 200 L. Ed. 2d, at 905. In *Boys Markets*, an employer and a union had entered into a collective-bargaining agreement, which provided that labor disputes would be resolved through arbitration and that the union would not engage in strikes, pickets, or boycotts during the life of the agreement. 398 U. S., at 238-239, 90 S. Ct. 1583, 26 L. Ed. 2d 199. When a dispute later arose, the union bypassed arbitration and called a strike. Id., at 239, 90 S. Ct. 1583, 26 L. Ed. 2d 199. The question presented: Whether a federal district court could enjoin the strike and order the parties to arbitrate their dispute. The case required the Court to reconcile the NLGA's limitations on federal courts' authority to enjoin employees' concerted activities, see 29 U. S. C. §104, with §301(a) of the Labor Management Relations Act, 1947, which grants federal courts the power to enforce collective-bargaining agreements, see 29 U. S. C. §185(a). The Court concluded that permitting district courts to enforce no-strike and arbitration provisions in collective-bargaining agreements would encourage employers to enter into such agreements, thereby furthering federal labor policy. 398 U. S., at 252-253, 90 S. Ct. 1583, 26 L. Ed. 2d 199. That case has little relevance here. It did not consider the enforceability of arbitration provisions that require employees to arbitrate

II

Today's decision rests largely on the Court's finding in the Arbitration Act "emphatic directions" to enforce arbitration agreements according to their terms, including collective-litigation prohibitions. *Ante, at 6, 200 L. Ed. 2d, at 899*. Nothing in the FAA or this Court's case law, however, requires subordination of the *NLRA's* protections. Before addressing the interaction between the **[***63]** two laws, I briefly recall the FAA's history and the domain for which that Act was designed.

[923]** A

1

Prior to 1925, American courts routinely declined to order specific performance of arbitration agreements. See Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 270 (1926). Growing backlogs in the courts, which delayed the resolution of commercial disputes, prompted the business community to seek legislation enabling merchants to enter into binding arbitration agreements. See *id.,* at 265. The business community's aim was to secure to merchants an expeditious, economical means of resolving their disputes. See *ibid.* The American Bar Association's Committee on Commerce, Trade and Commercial Law took up the reins in 1921, drafting the legislation Congress enacted, with relatively few changes, four years later. See Committee on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application, 11 A. B. A. J. 153 (1925).

The legislative hearings and debate leading up to the FAA's passage evidence **[*1643]** Congress' aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes. See, *e.g.,* 65 Cong. Rec. 11080 (1924) (remarks of Rep. Mills) ("This bill provides that where **[***64]** there are commercial contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract."); Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. (1924) (Joint Hearings) (consistently focusing on the need for binding arbitration of commercial disputes). [10]

The FAA's legislative history also shows that Congress did not intend the statute to apply to arbitration provisions in employment contracts. In brief, when the legislation was introduced, organized labor voiced concern. See Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923) (Hearing). Herbert Hoover, then Secretary of Commerce, suggested that if there were "objection[s]" to including "workers' contracts in the law's scheme," Congress could amend the legislation to say: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." *Id.,* at 14. Congress adopted Secretary Hoover's suggestion virtually verbatim in *§1* of the **[***65]** Act, see Joint Hearings 2; *9 U. S. C. §1*, and labor expressed **[**924]** no further opposition, see H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). [11]

Congress, it bears repetition, envisioned application of the Arbitration Act to voluntary, negotiated agreements. See, *e.g.,* 65 Cong. Rec. 1931 (remarks of Rep. Graham) (the FAA provides an "opportunity to enforce . . . an agreement to arbitrate, when voluntarily placed in the document by the parties to it"). Congress never endorsed a policy favoring arbitration where one party sets the terms of an agreement while the other is left to "take it or leave it." Hearing 9 (remarks of Sen. Walsh)

disputes only one-by-one. Nor did it consider the enforceability of arbitration provisions that an employer has unilaterally imposed on employees, as opposed to provisions negotiated through collective-bargaining processes in which employees can leverage their collective strength.

[10] American Bar Association member Julius H. Cohen, credited with drafting the legislation, wrote shortly after the FAA's passage that the law was designed to provide a means of dispute resolution "particularly adapted to the settlement of commercial disputes." Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 279 (1926). Arbitration, he and a colleague explained, is "peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like." *Id.,* at 281. "It has a place also," they noted, "in the determination of the simpler questions of law" that "arise out of th[e] daily relations between merchants, [for example,] the passage of title, [and] the existence of warranties." *Ibid.*

[11] For fuller discussion of Congress' intent to exclude employment contracts from the FAA's scope, see *Circuit City Stores, Inc. v. Adams, 532 U. S. 105, 124-129, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001)* (Stevens, J., dissenting).

(internal quotation marks omitted); see *Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U. S. 395, 403, n. 9, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)* ("We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See §1.").

2

In recent decades, this Court has veered away from Congress' intent simply to afford merchants a speedy and economical means of resolving commercial disputes. See Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, **[*1644]** 74 Wash. U. L. Q. 637, 644-674 (1996) (tracing the Court's evolving interpretation of the **[***66]** FAA's scope). In 1983, the Court declared, for the first time in the FAA's then 58-year history, that the FAA evinces a "liberal federal policy favoring arbitration." Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U. S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) (involving an arbitration agreement between a hospital and a construction contractor). Soon thereafter, the Court ruled, in a series of cases, that the FAA requires enforcement of agreements to arbitrate not only contract claims, but statutory claims as well. *E.g.,* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U. S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985); Shearson/American Express Inc. v. McMahon, 482 U. S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987). Further, in 1991, the Court concluded in Gilmer v. Interstate/Johnson Lane Corp., 500 U. S. 20, 23, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991), that the FAA requires enforcement of agreements to arbitrate claims arising under the Age ***Discrimination*** in Employment Act of 1967, a workplace antidiscrimination statute. Then, in 2001, the Court ruled in Circuit City Stores, Inc. v. Adams, 532 U. S. 105, 109, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001), that the Arbitration Act's exemption for employment contracts should be construed narrowly, to exclude from the Act's scope only transportation workers' contracts.

Employers have availed themselves of the opportunity opened by court decisions expansively interpreting the Arbitration Act. Few employers imposed arbitration agreements on their employees in the early 1990's. After *Gilmer* and *Circuit City*, however, employers' exaction of arbitration clauses in employment contracts grew steadily. See, *e.g.,* Economic **[***67]** Policy Institute (EPI), A. Colvin, The **[**925]** Growing Use of Mandatory Arbitration 1-2, 4 (Sept. 27, 2017), available at https://www.epi.org/files/pdf/135056.pdf (All Internet materials as visited May 18, 2018) (data indicate only 2.1% of nonunionized companies imposed mandatory arbitration agreements on their employees in 1992, but 53.9% do today). Moreover, in response to subsequent decisions addressing class arbitration, [12] employers have increasingly included in their arbitration agreements express group-action waivers. See Ruan 1129; Colvin, supra, at 6, 200 L. Ed. 2d, at 915 (estimating that 23.1% of nonunionized employees are now subject to express class-action waivers in mandatory arbitration agreements). It is, therefore, this Court's exorbitant application of the FAA—stretching it far beyond contractual disputes between merchants—that led the NLRB to confront, for the first time in 2012, the precise question **[*1645]** whether employers can use arbitration agreements to insulate themselves from collective employment litigation. See D. R. Horton, 357 N. L. R. B. 2277 (2012), enf. denied in relevant part, 737 F. 3d 344 (CA5 2013). Compare ante, at 3-4, 200 L. Ed. 2d, at 897-898 (suggesting the Board broke new ground in 2012 when it concluded that the NLRA prohibits employer-imposed arbitration agreements that mandate individual arbitration) with supra, at 10-11, 200 L. Ed. 2d, at 917-918 (NLRB decisions recognizing **[***68]** a §7 right to engage in collective employment litigation), and supra, at 17, n. 8, 200 L. Ed. 2d, at 922 (NLRB decisions finding employer-dictated waivers of §7 rights unlawful).

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[12] In Green Tree Financial Corp. v. Bazzle, 539 U. S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003), a plurality suggested arbitration might proceed on a class basis where not expressly precluded by an agreement. After *Bazzle*, companies increasingly placed explicit collective-litigation waivers in consumer and employee arbitration agreements. See Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373, 409-410 (2005). In AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), and American Express Co. v. Italian Colors Restaurant, 570 U. S. 228, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013), the Court held enforceable class-action waivers in the arbitration agreements at issue in those cases. No surprise, the number of companies incorporating express class-action waivers in consumer and employee arbitration agreements spiked. See 2017 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation 29 (2017), available at https://www.classactionsurvey.com/pdf/2017-class-action-survey.pdf (reporting that 16.1% of surveyed companies' arbitration agreements expressly precluded class actions in 2012, but 30.2% did so in 2016).

As I see it, in relatively recent years, the Court's Arbitration Act decisions have taken many wrong turns. Yet, even accepting the Court's decisions as they are, nothing compels the destructive result the Court reaches today. Cf. R. Bork, The Tempting of America 169 (1990) ("Judges . . . live on the slippery slope of analogies; they are not supposed to ski it to the bottom.").

B

Through the Arbitration Act, Congress sought "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint, 388 U. S., at 404, n. 12, 87 S. Ct. 1801, 18 L. Ed. 2d 1270*. Congress thus provided in §2 of the FAA that the terms of a written arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." **[**926]** 9 U. S. C. §2 (emphasis added). Pursuant to this "saving clause," arbitration agreements and terms may be invalidated based on "generally applicable contract defenses, such as fraud, duress, or unconscionability." Doctor's Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996); see ante, at 7, 200 L. Ed. 2d, at 900.

Illegality is a traditional, generally applicable contract defense. See 5 R. Lord, Williston on Contracts §12.1 (4th ed. 2009) **[***69]** . "[A]uthorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." Kaiser Steel, 455 U. S., at 77, 102 S. Ct. 851, 70 L. Ed. 2d 833 (quoting McMullen v. Hoffman, 174 U. S. 639, 654, 19 S. Ct. 839, 43 L. Ed. 1117 (1899)). For the reasons stated supra, at 8-17, 200 L. Ed. 2d, at 916-921, I would hold that the arbitration agreements' employer-dictated collective-litigation waivers are unlawful. By declining to enforce those adhesive waivers, courts would place them on the same footing as any other contract provision incompatible with controlling federal law. The FAA's saving clause can thus achieve harmonization of the FAA and the NLRA without undermining federal labor policy.

The Court urges that our case law—most forcibly, AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)—rules out reconciliation of the NLRA and the FAA through the latter's saving clause. See ante, at 6-9, 200 L. Ed. 2d, at 899-901. I disagree. True, the Court's Arbitration Act decisions establish that the saving clause "offers no refuge" for defenses that discriminate against arbitration, "either by name or by more subtle methods." Ante, at 7, 200 L. Ed. 2d, at 900. The Court, therefore, has rejected saving clause salvage where state courts have invoked generally applicable contract defenses to discriminate "covertly" against arbitration. Kindred Nursing Centers L.P. v. Clark, 581 U. S. ___, ___, 137 S. Ct. 1421, 197 L. Ed. 2d 806, 809 (2017). In *Concepcion*, the Court held that the saving clause **[***70]** did not spare the California Supreme Court's invocation of unconscionability doctrine to establish a rule blocking enforcement of class-action waivers in adhesive consumer **[*1646]** contracts. 563 U. S., at 341-344, 346-352, 131 S. Ct. 1740, 179 L. Ed. 2d 742. Class proceedings, the Court said, would "sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment." Id., at 348, 131 S. Ct. 1740, 179 L. Ed. 2d 742. Accordingly, the Court concluded, the California Supreme Court's rule, though derived from unconscionability doctrine, impermissibly disfavored arbitration, and therefore could not stand. Id., at 346-352, 131 S. Ct. 1740, 179 L. Ed. 2d 742.

Here, however, the Court is not asked to apply a generally applicable contract defense to generate a rule discriminating against arbitration. At issue is application of the ordinarily superseding rule that "illegal promises will not be enforced," Kaiser Steel, 455 U. S., at 77, 102 S. Ct. 851, 70 L. Ed. 2d 833, to invalidate arbitration provisions at odds with the NLRA, a pathmarking federal statute. That statute neither discriminates against arbitration on its face, **[**927]** nor by covert operation. It requires invalidation of *all* employer-imposed contractual provisions prospectively waiving employees' §7 rights. See supra, at 17, and n. 8, 200 L. Ed. 2d, at 922; cf. Kindred Nursing Centers, 581 U. S., at ___, n. 2, 137 S. Ct. 1421, 197 L. Ed. 2d 806, 813, n. 2) (States may enforce generally applicable rules so long **[***71]** as they do not "single out arbitration" for disfavored treatment).

C

Even assuming that the FAA and the NLRA were inharmonious, the NLRA should control. Enacted later in time, the NLRA should qualify as "an implied repeal" of the FAA, to the extent of any genuine conflict. See Posadas v. National City Bank, 296 U. S. 497, 503, 56 S. Ct. 349, 80 L. Ed. 351 (1936). Moreover, the NLRA should prevail as the more pinpointed, subject-matter specific legislation, given that it speaks directly to group action by employees to improve the terms and

conditions of their employment. See *Radzanower v. Touche Ross & Co., 426 U. S. 148, 153, 96 S. Ct. 1989, 48 L. Ed. 2d 540 (1976)* ("a specific statute" generally "will not be controlled or nullified by a general one" (internal quotation marks omitted)). [13]

Citing statutory examples, the Court asserts that when Congress wants to override the FAA, it does so expressly. See *ante, at 13-14, 200 L. Ed. 2d, at 903-905*. The statutes the Court cites, however, are of recent vintage. [14] Each was enacted during the time this Court's decisions increasingly alerted Congress that it would be wise to leave not the slightest room for doubt if it wants to secure access to a judicial forum or to provide a green light for group litigation before an arbitrator or court. See *CompuCredit Corp. v. Greenwood, 565 U. S. 95, 116, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012)* (Ginsburg, J., dissenting). The Congress that drafted the *NLRA* in 1935 was scarcely on similar alert.

[*72]** III

The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers. See generally Sternlight, Disarming Employees: **[*1647]** How American Employers Are Using Mandatory Arbitration To Deprive Workers of Legal Protections, *80 Brooklyn L. Rev. 1309 (2015)*.

The probable impact on wage and hours claims of the kind asserted in the cases now before the Court is all too evident. Violations of minimum-wage and overtime laws are widespread. See Ruan 1109-1111; A. Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 11-16, 21-22 (2009). One study estimated that in Chicago, Los Angeles, and New York City alone, low-wage workers lose nearly $3 billion in legally owed wages each **[**928]** year. *Id.*, at 6. The U. S. Department of Labor, state labor departments, and state attorneys general can uncover and obtain recoveries for some violations. See EPI, B. Meixell & R. Eisenbrey, An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year 2 (2014), available at *https://www.epi.org/files/2014/wage-theft.pdf*. Because of their limited resources, however, government agencies must rely on private parties to take a lead role in enforcing **[***73]** wage and hours laws. See Brief for State of Maryland et al. as *Amici Curiae* 29-33; Glover, The Structural Role of Private Enforcement Mechanisms in Public Law, *53 Wm. & Mary L. Rev. 1137, 1150-1151 (2012)* (Department of Labor investigates fewer than 1% of *FLSA*-covered employers each year).

If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen. Expenses entailed in mounting individual claims will often far outweigh potential recoveries. See *id., at 1184-1185* (because "the *FLSA* systematically tends to generate low-value claims," "mechanisms that facilitate the economics of claiming are required"); *Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 552 (SDNY 2011)* (finding that an employee utilizing Ernst & Young's arbitration program would likely have to spend $200,000 to recover only $1,867.02 in overtime pay and an equivalent amount in liquidated damages); cf. Resnik, Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, *124 Yale L. J. 2804, 2904 (2015)* (analyzing available data from the consumer context to conclude that "private enforcement of small-value claims depends on collective, rather than individual, action"); *Amchem Products, Inc. v. Windsor, 521 U. S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (class actions help "overcome the problem that small **[***74]** recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights" (internal quotation marks omitted)). [15]

Fear of retaliation may also deter potential claimants from seeking redress alone. See, *e.g.,* Ruan 1119-1121;

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[13] Enacted, as was the *NLRA*, after passage of the FAA, the NLGA also qualifies as a statute more specific than the FAA. Indeed, the NLGA expressly addresses the enforceability of contract provisions that interfere with employees' ability to engage in concerted activities. See *supra, at 17, n. 9, 200 L. Ed. 2d, at 922*. Moreover, the NLGA contains an express repeal provision, which provides that "[a]ll acts and parts of acts in conflict with [the Act's] provisions . . . are repealed." *29 U. S. C. §115*.

[14] See 116 Stat. 1836 (2002); 120 Stat. 2267 (2006); 124 Stat. 1746 (2010); 124 Stat. 2035 (2010).

[15] Based on a 2015 study, the Bureau of Consumer Financial Protection found that "pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief." *82 Fed. Reg. 33210 (2017)*.

Bernhardt, *supra*, at 3, 24-25. Further inhibiting single-file claims is the slim relief obtainable, even of the injunctive kind. See *Califano v. Yamasaki, 442 U. S. 682, 702, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)* ("[T]he scope of injunctive relief is dictated by the extent of the violation established."). The upshot: Employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit **[*1648]** balance of underpaying workers tips heavily in favor of skirting legal obligations.

In stark contrast to today's decision, [16] the Court has repeatedly recognized the centrality of group action **[**929]** to the effective enforcement of antidiscrimination statutes. With Court approbation, concerted legal actions have played a critical role in enforcing prohibitions against workplace ***discrimination*** based on race, ***sex***, and other protected characteristics. See, *e.g.*, *Griggs v. Duke Power Co., 401 U. S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971)*; *Automobile Workers v. Johnson Controls, Inc., 499 U. S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991)*. In this context, the Court has comprehended that government entities charged with enforcing antidiscrimination **[***75]** statutes are unlikely to be funded at levels that could even begin to compensate for a significant dropoff in private enforcement efforts. See *Newman v. Piggie Park Enterprises, Inc., 390 U. S. 400, 401, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968)* (*per curiam*) ("When the *Civil Rights Act of 1964* was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."). That reality, as just noted, holds true for enforcement of wage and hours laws. See *supra, at 27, 200 L. Ed. 2d, at 927*.

I do not read the Court's opinion to place in jeopardy ***discrimination*** complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a groupwide basis, see Brief for NAACP Legal Defense & Educational Fund, Inc., et al. as *Amici Curiae* 19-25, which some courts have concluded cannot be maintained by solo complainants, see, *e.g.*, *Chin v. Port Auth. of N. Y. & N. J., 685 F. 3d 135, 147 (CA2 2012)* (pattern-or-practice method of proving race ***discrimination*** is unavailable in non-class actions). It would be grossly exorbitant to read the FAA to devastate *Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e et seq.*, and other laws enacted to eliminate, root and branch, class-based employment ***discrimination***, see *Albemarle Paper Co. v. Moody, 422 U. S. 405, 417, 421, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975)*. With fidelity to the Legislature's will, the Court could hardly **[***76]** hold otherwise.

I note, finally, that individual arbitration of employee complaints can give rise to anomalous results. Arbitration agreements often include provisions requiring that outcomes be kept confidential or barring arbitrators from giving prior proceedings precedential effect. See, *e.g.,* App. to Pet. for Cert. in No. 16-285, p. 34a (Epic's agreement); App. in No. 16-300, p. 46 (Ernst & Young's agreement). As a result, arbitrators may render conflicting awards in cases involving similarly situated employees—even employees working for the same employer. Arbitrators may resolve differently such questions as whether certain jobs are exempt from overtime laws. Cf. *Encino Motorcars, LLC v. Navarro, ante, p. ___, 138 S. Ct. 1134, 200 L. Ed. 2d 433* (Court divides on whether "service advisors" are exempt from overtime-pay requirements). With confidentiality and no-precedential-value provisions operative, irreconcilable answers would remain unchecked.

***

If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come **[**930]** from Congress. It is the **[*1649]** result of take-it-or-leave-it labor contracts **[***77]** harking back to the type called "yellow dog," and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their "mutual aid or protection." Accordingly, I would reverse the judgment of the Fifth Circuit in No. 16-307 and affirm the judgments of the Seventh and Ninth Circuits in Nos. 16-285 and 16-300.

References

9 U.S.C.S. § 2; *29 U.S.C.S. §§157*, *201 et seq.*

31 Moore's Federal Practice § 903.10 (Matthew Bender 3d ed.)

[16] The Court observes that class actions can be abused, see *ante, at 24, 200 L. Ed. 2d, at 911*, but under its interpretation, even two employees would be stopped from proceeding together.

L Ed Digest, Arbitration § 11; Labor § 125

L Ed Index, Arbitration and Award

Supreme Court's construction and application of *Rule 23 of Federal Rules of Civil Procedure*, concerning class actions. *144 L. Ed. 2d 889*.

What kinds of contracts containing arbitration agreements are subject to stay and enforcement provisions of *§§1-4* and *8* of Federal Arbitration Act (FAA) (*9 U.S.C.S. §§1-4* and *8*, and similar predecessor provisions)--Supreme Court cases. *130 L. Ed. 2d 1189*.

Validity, under Federal Constitution, of arbitration statutes--Supreme Court cases. *87 L. Ed. 2d 787*.

Supreme Court's application of the rules of ejusdem generis and noscitur a sociis. *46 L. Ed. 2d 879*.

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Spring Case Review – Torts

March 11, 2020

Leslie Hayes, Deputy Attorney General – Civil Litigation Division

Disclaimer: The opinions of this presentation are those of the presenter and not those of the Office of Attorney General.

The following summaries are provided by the Idaho Supreme Court.

Verity v. USA Today, Docket No. 45530: The Idaho Supreme Court reversed and remanded a district court's ruling in a defamation by implication case. The case arose by permissive appeal and presented a case of first impression regarding whether the tort of defamation by implication exists in Idaho. Respondent James Verity was a school teacher in Oregon who lost his teaching license after engaging in an inappropriate relationship with an eighteen-year-old female student, whom he coached at the local high school. He eventually obtained a teaching license in Idaho, and began teaching shortly thereafter. When he was forced to resign his teaching job in Idaho after USA TODAY, KTVB, KGW, Tami Tremblay, and Stephen Reilly published articles and broadcast news reports describing Verity's misdeeds, he and his wife Sarahna Verity filed a lawsuit alleging defamation by implication. The district court denied the media defendants' motion for summary judgment and ruled that despite the actual truth of the statements, reasonable minds could find that the media impliedly defamed the Veritys. The media appealed that decision as a permissive appeal under Idaho Appellate Rule 12. In a unanimous decision, the Idaho Supreme Court established the elements for a defamation by implication case in Idaho. The Court held that Verity is not a public official or public figure and that a reasonable jury could find that KGW impliedly defamed Verity about having a sexual relationship with a minor. The Court ordered that the counts against all remaining defendants be dismissed and remanded the case to the district court for further action.

Eller v. Idaho State Police Docket Nos. 45698 & 45699: The Supreme Court affirmed in part and vacated in part a judgment entered in the district court. The Court affirmed the district court's evidentiary holdings and its finding that Eller participated in protected activities under the Whistleblower Act, but the Court vacated the district court's ruling capping Eller's damages under the Idaho Tort Claims Act. The Court held that the Whistleblower Act supplants the Idaho Tort Claims Act; thus, the district court incorrectly applied the Tort Claims Act and capped Eller's non-economic damages. The Court remanded the case for a partial new trial to determine Eller's non-economic damages solely under the Whistleblower Act.

Yu v. Idaho State University, Docket. No. 46364: The Supreme Court affirmed the dismissal of plaintiff Yu's claims for untimeliness because they were barred by applicable statutes of limitation. Yu was dismissed from Idaho State University's doctoral program for clinical psychology on October 2, 2013. He subsequently filed a lawsuit in the U.S. District Court for the District of Idaho alleging violations of Title VI of the Civil Rights Act, deprivation of constitutional rights under 42 U.S.C. section 1983, negligent infliction of emotional distress, and breach of contract. Most of these claims were dismissed from the federal district court because the Eleventh Amendment provided ISU with immunity from suit and Yu failed to name any state officials in his complaint. Yu then filed the dismissed claims in state court. However,

because Yu brought the claims roughly four and a half years after his injury occurred, his claims were untimely and barred by the applicable statutes of limitation for his federal 42 U.S.C. section 1983 claims (two years) and implied contract claims (four years).

Dodge v. Bonners Ferry Police Department Docket No. 46696: In this appeal, the Idaho Supreme Court affirmed the Boundary County district court's dismissal of Shane R. and Christine L. Dodges' tort claim against the Bonners Ferry Police Department, Sergeant William Cowell, and Office Brandon Blackmore. The Court held that dismissal of the Dodges' tort claim was proper because they failed to file notice of a tort claim with the police department or the city within the 180-days period as is required by the Idaho Tort Claims Act. While the Dodges argued the act of filing a complaint in district court was sufficient to provide notice of their tort claim to the police department, the Court disagreed. The Court also held that the district court did not abuse its discretion in denying the Dodges' motion for a continuance because the district court recognized the Dodges would not be able to remedy their failure to file notice of a tort claim, even if given additional time. Accordingly, the Court affirmed the district court's order dismissing the Dodges' tort claim.

D.A.F. v. Lieteau Docket No. 46026: This case involved the question of whether a person bringing a tort claim against a governmental entity for alleged child abuse must comply with the notice requirements of the Idaho Tort Claims Act. In this case, seven individuals (who will collectively be referred to as the Juveniles) filed suit in district court alleging that they had been sexually abused while they were minors in the custody of the Idaho Department of Juvenile Corrections. In its ruling on summary judgment, the district court found that the Juveniles' claims based on Idaho Code section 6-1701 were not barred by the notice requirements of the Idaho Tort Claims Act thus allowing the claims based on that section to proceed. The Idaho Department of Juvenile Corrections and its employees moved for permission to appeal, which was granted. The Idaho Supreme Court held that because of the plain language of the ITCA, the notice requirement applies to claims based on tort actions in child abuse cases. Accordingly, the Court reversed the district court's decision and remanded the case for further proceedings consistent with the opinion.

Raymond v. ISP, Docket No. 46272: The Idaho Supreme Court reversed the district court's dismissal of Raymond's complaint for tortious interference with a prospective civil action and, consistent with prior decisions of this Court, explicitly adopted the tort of intentional interference with a prospective civil action by spoliation of evidence by a third party. The Court vacated the district court's judgment in favor of ISP and remanded for further proceedings. No attorney fees were awarded. Costs awarded to Raymond as the prevailing party.

Berrett v. Clark County School District No. 161, Docket No. 46354: After their terminations, Ryan and Lanie Berrett ("the Berretts") sued their former employer, Clark County School District No. 161 (the "School District"), alleging that both of their terminations were in retaliation for Ryan Berrett reporting a building code violation to the School District's board of trustees. The district court granted the School District's motion for summary judgment, finding that Ryan Berrett did not engage in a protected activity under the Whistleblower Act, and that Idaho's public policy does not extend to protect Lanie Berrett in a termination in violation of public policy claim. The Supreme Court affirmed in part and reversed in part. The Court affirmed the district court's order granting the School District summary judgment on Lanie Berrett's wrongful termination claim, but reversed the district court's order granting summary judgment on Ryan Berrett's Whistleblower Act claim. The Court held that Lanie Berrett's wrongful termination claim

was precluded by the Whistleblower Act. Further, the Court held that Ryan Berrett presented genuine issues of material fact sufficient to prevent the district court from granting summary judgment on his Whistleblower Act claim.

Lamont Bair Enterprises, Inc. v. City of Idaho Falls, Docket No. 45819: Lamont Bair Enterprises initiated this lawsuit against the City of Idaho Falls (the City) after a broken water main cracked the cement floor and flooded the basement of the company's rental property. Lamont Bair Enterprises alleged the City neglected its water pipes and failed to maintain its water system in a reasonably safe condition. The district court ruled the City was immune from liability under the Idaho Tort Claims Act's (ITCA) discretionary function exception and granted the City summary judgment. Lamont Bair Enterprises appealed, arguing that the ITCA's discretionary function exception does not apply where a city has a duty to maintain its water pipes in a reasonably safe condition. The Supreme Court affirmed the district court's order granting the City summary judgment, holding that the City's plan to replace its aging water pipes qualified as a discretionary function. Costs were awarded to the City as the prevailing party.

Ciccarello v. Davies Case No. 46340: The Idaho Supreme Court affirmed the district court's decision granting summary judgment against Mark Ciccarello in his legal malpractice action. Ciccarello appealed a decision by the district court granting summary judgment in favor of Respondents Jeffrey Bo Davies and Marcus, Christian, Hardee & Davies, LLP ("MCHD"). After determining that Ciccarello had not timely proffered the requisite expert testimony, by affidavit or declaration, to establish a genuine issue of material fact in a legal malpractice action, the district court granted summary judgment in favor of Davies and MCHD. On appeal, Ciccarello argued that expert testimony was not required to oppose the motions for summary judgment because there were other genuine issues of material fact. Ciccarello further argued that the district court abused its discretion in failing to consider expert declarations he filed after the summary judgment hearing. The Idaho Supreme Court determined that Ciccarello was required to oppose the motion for summary judgment with an expert affidavit or declaration, and that the district court did not abuse its discretion in refusing to consider the declarations that were untimely filed. Accordingly, the Idaho Supreme Court affirmed the final judgment of the district court.

Shubert v. Ada County, Docket No. 46403: This case involved a permissive appeal brought by Michael Lojek, former Ada County Chief Public Defender Alan Trimming, and Ada County (the Ada County Defendants). Natalie Shubert brought a negligence action against the Ada County Defendants, alleging that a series of errors unlawfully kept her on probation, resulting in her incarceration. In denying the Ada County Defendants' motion for summary judgment, the district court held that public defenders are not entitled to common law quasi-judicial immunity from civil malpractice liability, and two provisions of the Idaho Tort Claims Act (ITCA) do not exempt public defenders from civil malpractice liability. The Idaho Supreme Court granted the Ada County Defendants' permissive appeal. The Idaho Supreme Court affirmed the district court's order and remanded the case to the district court for further proceedings. First, the Court held that public defenders are not entitled to quasi-judicial immunity from civil malpractice liability. Second, the Court held that two provisions of the ITCA do not immunize the Ada County Defendants from civil liability. The Court held that Idaho Code section 6-904(1), the discretionary function exception, does not apply to the challenged conduct in this case. Further, the Court held that Idaho Code section 6-904A(2) does not immunize the Ada County Defendants from civil liability because Shubert was not lawfully "on probation" for the purposes of the statute. Third, the Court held that represented criminal defendants are not presumed to recognize legal errors in their court documents.

Nelson v. Kaufman Docket No. 46027: This case arises from a negligence claim brought by Amey Nelson (Nelson) against Stefani Kaufman (Kaufman), Idaho Falls Anytime Fitness, and AT Fitness, LLC. Nelson was using a weight machine at Idaho Falls Anytime Fitness under the direction of Kaufman, a personal trainer, when Nelson injured a metacarpal bone in her hand. Nelson filed suit alleging that Kaufman had improperly instructed her on the machine's use, which caused her injury. The district court granted summary judgment in favor of Kaufman, holding that Kaufman was an express or apparent agent of Anytime Fitness and therefore released from liability under the terms of the Member Assumption of Risk and Release form Nelson signed when she joined the gym. Nelson unsuccessfully moved for reconsideration. On appeal, the Idaho Supreme Court held that the district court erred in granting summary judgment in favor of Kaufman on the basis that Kaufman was an express agent of Anytime Fitness. The Idaho Supreme Court also held that the district court erred by applying the apparent agency doctrine to release Kaufman from liability under the terms of the Membership Agreement. Accordingly, the Idaho Supreme Court reversed the district court's grant of summary judgment in favor of Kaufman, vacated the judgment entered against Nelson, and remanded the case for further proceedings.

Eldridge v. West, Turpin & Summit Docket No. 45214: This case involved a permissive appeal brought by Phillip and Marcia Eldridge in a medical malpractice action brought by them against Dr. Gregory West (West), Lance Turpin, PA-C (Turpin), and Summit Orthopaedics Specialists, PLLC (Summit). The Eldridges allege that Phillip became infected with Methicillin-Resistant Staphylococcus Aureus (MRSA) as a result of malpractice committed by West, Turpin, and agents of Summit. The Eldridges claim West and Turpin breached the standard of care that was due them and as a result, sustained damages. The district court granted various motions, including a motion to dismiss certain causes of action against West, Turpin, and Summit, as well as a motion for summary judgment brought by Turpin and Summit, and a motion for partial summary judgment brought by West. The Idaho Supreme Court vacated the orders by the district court and remanded the case for further proceedings. First, the Supreme Court held that Idaho's Medical Malpractice Act does not supplant common law causes of action relating to malpractice; instead, if the cause of action alleges damages that arise out of the "account of the provision of or failure to provide health care," a plaintiff must comply with the evidentiary requirements set forth in Idaho Code sections 6-1012 and 6-1013. Second, the Supreme Court held that the district court erred in refusing to strike portions of West's first affidavit and Turpin's affidavit because the affidavits were conclusory. Third, the Supreme Court held that the district court abused its discretion in precluding the Eldridges from putting on evidence of proof of damages after April 24, 2013. Finally, The Supreme Court held that the district court erred in limiting the Eldridges' presentation of damages to the amounts that were actually paid, rather than the amounts billed by the medical care providers. Instead, the jury should be presented with the amount billed by the medical care provider, and then after the jury enters an award, if any, the district court may offset the jury award by any analogous collateral source.

~Annual Case Law Review~ Environmental & Natural Resources Law

4TH DISTRICT BAR ASSOCIATION

MARCH 11, 2020

Introduction & Overview

- **Rick Grisel** – Deputy Attorney General, Natural Resources Division
- Clean Water Act
  - WOTUS rulemaking and associated litigation
  - *Maui* update
  - Suction dredge mining
  - Wetlands delineations
- Clean Air Act
- Endangered Species Act
- Water Law

Federal Water Pollution Control Act (aka the Clean Water Act)

33 U.S.C. § 1251 et seq.

Regulates "discharges" to "Waters of the US" (WOTUS) from "point sources"

- § 301 - Discharge Prohibition
  - "discharge" of
  - "any pollutant" by
  - "any person"
  - from any "point source"
  - to "**waters of the United States**"

Federal Water Pollution Control Act (aka the Clean Water Act)

33 U.S.C. § 1251 et seq.

Implemented by EPA and Army Corps of Engineers

Definitions & Interpretations

- EPA/Corps promulgated rules
  - E.g. 40 C.F.R. § 122.2
- Interpretive cases
  - *Riverside-Bayview* (1985)(upheld wetlands adjacent to WOTUS & tributaries)
  - *SWANCC* (2001) (invalidating Migratory Bird Rule)
  - *Rapanos* (2006) (plurality—Kennedy controls per *Marks*)
    - Scalia "continuous surface connection" vs.
    - Kennedy "significant nexus"
- Guidance – 2008 post-*Rapanos*
- Ambiguity remained, and Roberts' *Rapanos* concurrence called for rulemaking to clarify

Clean Water Act (CWA) - Battle Lines

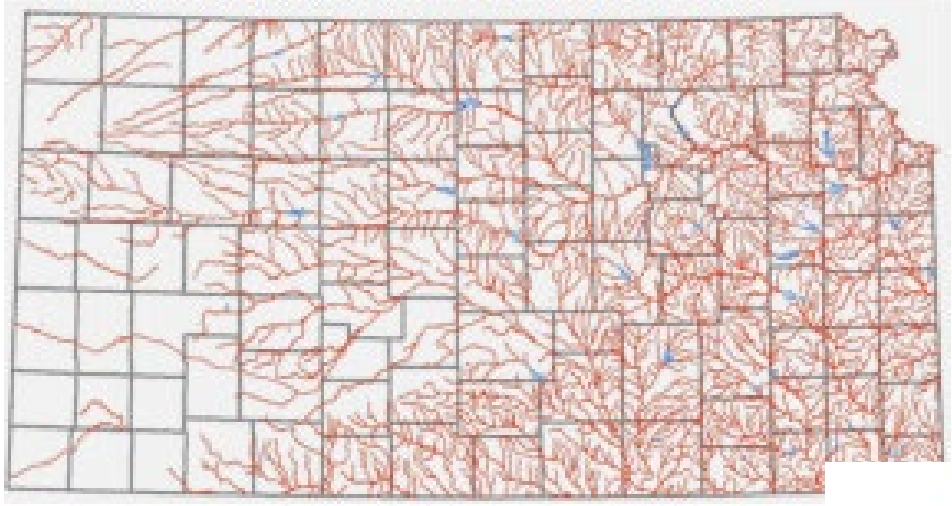
WOTUS = fundamental to CWA jurisdiction; ***undefined***

1) What waters are WOTUS?

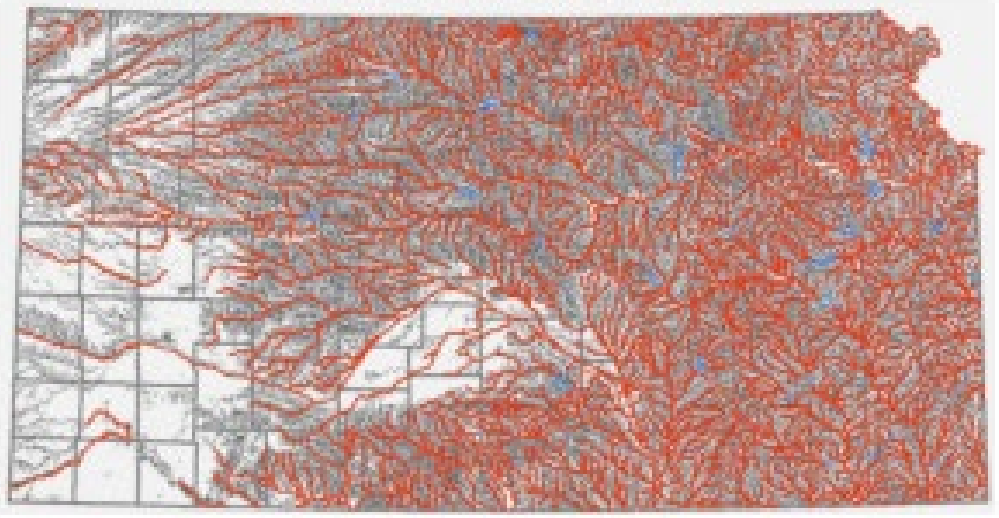
2) How attenuated can discharges reaching WOTUS be to trigger CWA liability?

2015 Clean Water Rule

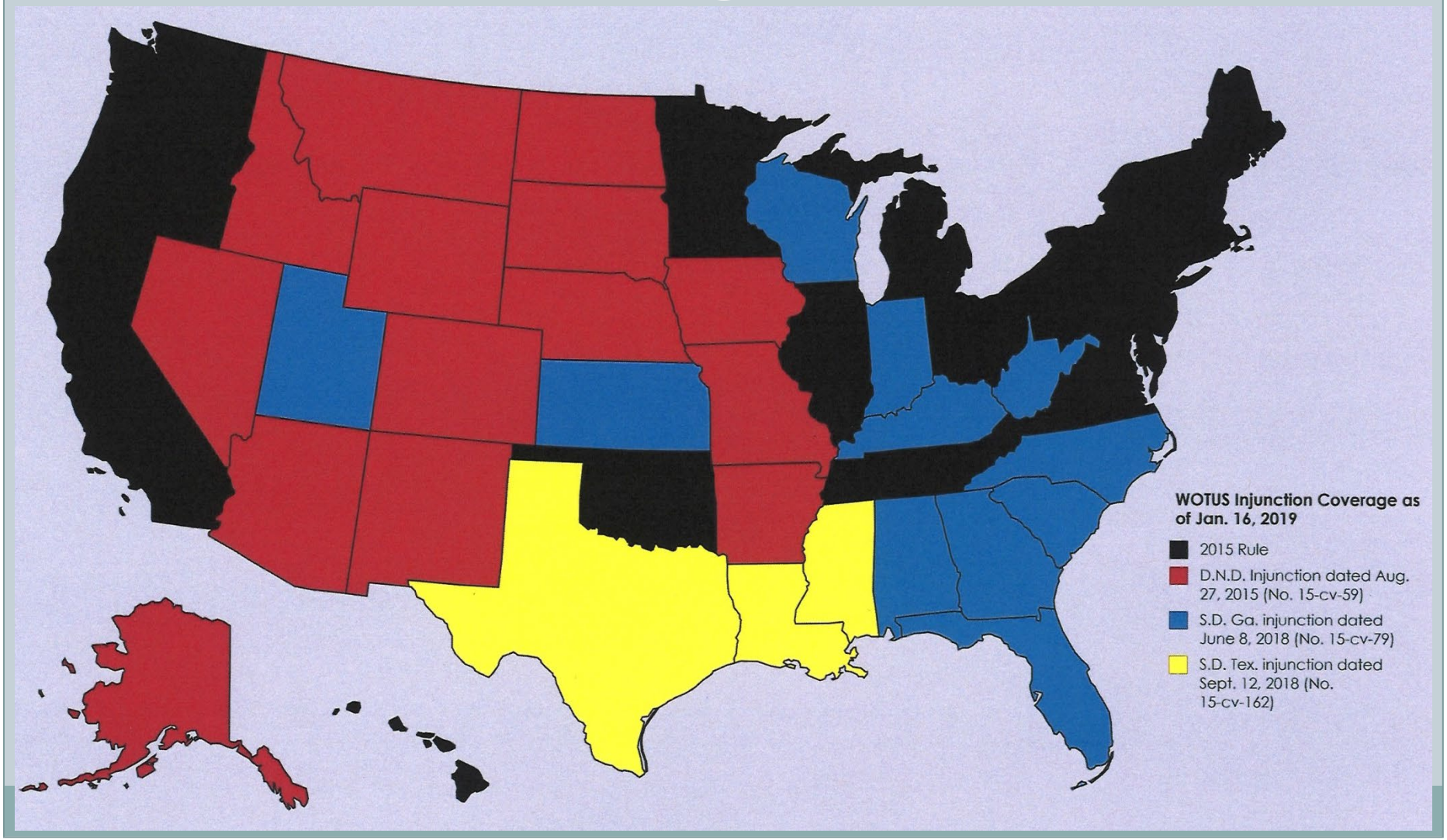
Currently Designated WOTUS in Kansas



Additional WOTUS in Kansas



2015 Clean Water Rule



Genesis

- **EO 13778** (Feb. 28, 2017)—directed EPA/Corps to engage in rulemaking to revise or rescind 2015 Rule
  - interpret "navigable waters" consistent with Scalia's *Rapanos* opinion
  - 2 steps: "**Repeal**" and "**Replace**"

STEP I "Repeal" Rule
84 FR 56626 (Oct. 22, 2019)

1. Repeals 2015 Clean Water Rule under the Obama administration
2. Importantly: *recodifies the pre-2015 regulatory regime* (1986 regs + "2008 *Rapanos* Guidance")
3. Repeal has been challenged—*no injunctions*
4. **National uniformity**
5. [Idaho was never under anything but 2008 *Rapanos* Guidance (injunction under *North Dakota et al., v. EPA, et al.*, Civil No. 3:15-cv-00059-DLH-ARS (N.D. Dist. Aug. 27, 2015)

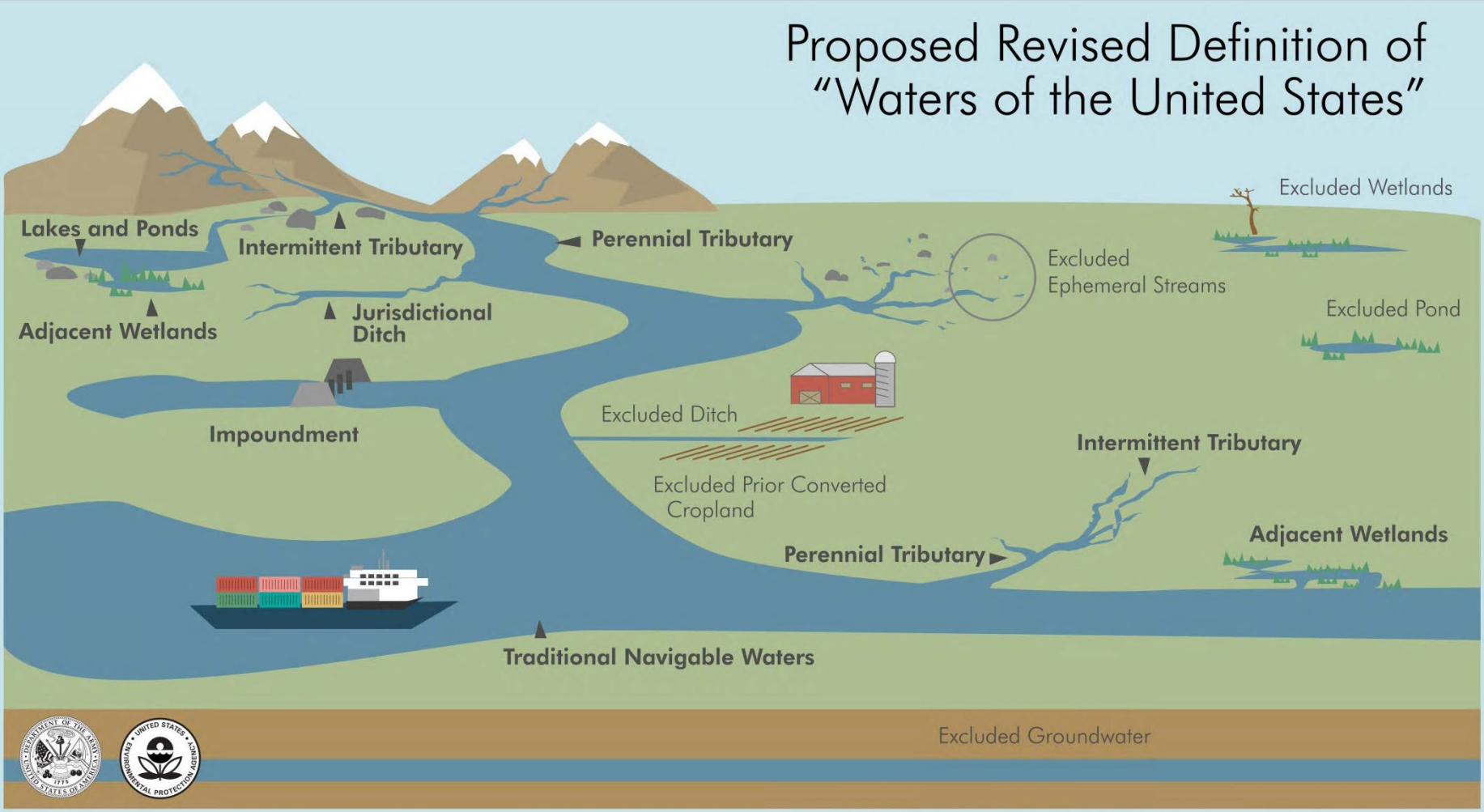
STEP II "Replacement" Rule
Revised Definition of WOTUS

- Traditional Navigable Waters (TNWs)
- Perennial and "Intermittent" tributaries of TNWs
- Lakes, ponds connected to (i) and (ii) and impoundments of (i) and (ii)
- Adjacent wetlands (requires continuous surface connection)
- Draft Rule received 793,298 comments
- Final Rule released Jan. 23, 2020 (not yet published)
- 340-page preamble - available at: https://www.epa.gov/sites/production/files/2020-01/documents/navigable_waters_protection_rule_prepbulication.pdf

The Definitions are Very Important

- Tributary – flows in a typical year
- Adjacent Wetland – requires surface connection
- Intermittent – requires continuous flow during certain times of the year and more than in direct response to precipitation
- Ephemeral – surface flow or pooling only in direct response to precipitation
- Typical Year – normal periodic range for geographic area on a rolling 30-year average
- Snowpack

WOTUS Proposed Rule



* For illustrative purposes only. Proposed jurisdictional waters in **bold**.

After all of that…

- Idaho = **status quo** (foreseeable future)
- 2008 *Rapanos* Guidance
- Going forward:
  - 2015 Clean Water Rule?
  - Replacement Rule?
  - New administration?

Battle Lines

WOTUS = fundamental to CWA jurisdiction

1) What waters are WOTUS?

2) How attenuated can discharges reaching WOTUS be to trigger CWA liability?

Discharges via Groundwater

- Can point source **discharge *through groundwater* to WOTUS give rise to CWA liability**?

- If so, what are the **distance and temporal restrictions**?
- How far and long can the pollutants travel through groundwater and still be CWA-jurisdictional?

Hawai'i Wildlife Fund v. County of Maui, 881 F.3d 754 (9th Cir. 2018)

- Maui Cty. Wastewater Treatment Plant—processes 4 mgd, operates 4 injection wells
- Wells inject treated wastewater into groundwater
- Tracer dyes establish discharge from 2 wells eventually enters Pacific
- District Court: CWA liability for unpermitted discharges to WOTUS via groundwater conduit (24 F.Supp.3d 980) (D. Haw. May 2014)

Hawai'i Wildlife Fund v. County of Maui, 881 F.3d 754 (9th Cir. 2018)

Affirmed:

1) **point source** discharge;
2) pollutants **fairly traceable** from point source to WOTUS ("functional equivalent" of direct discharge); and
3) pollutant additions are **more than *de minimis***

Hawai'i Wildlife Fund v. County of Maui

- SCOTUS granted cert (Feb. 19, 2019) and heard oral argument (Oct. 7, 2019) on one question presented:

  Whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

- **Opinion by end of session** (Jun. 2020)

Idaho Implications

Importance of these CWA developments for Idaho, and potentially for any of your clients who conduct activities that could impact water—such as manufacturing, agriculture, or land development—is difficult to overstate

- Re-use & land applications
- Municipal and industrial wastewater lagoons/ponds
- Aquifer recharge
- Septic tanks?

Suction Dredge Mining

Idaho Conservation League v. Poe, Case No. 1:18-cv-353-REB (D. Idaho Sept. 30, 2019)

Suction Dredge Mining
Idaho Conservation League v. Poe, Case No. 1:18-cv-353-REB (D. Idaho Sept. 30, 2019)

- involves vacuuming up streambed material, filtering it, then returning leftovers
- completely in-stream (i.e. typically no water or material leaves the waterbody during this process)
- EPA argument: meets all statutory elements, incl. "addition" of pollutants (e.g. sediment/turbidity)
- Mr. Poe: no merits arguments yet, but expect
  - "water transfer"
  - "incidental fallback"

Suction Dredge Mining

Idaho Conservation League v. Poe, Case No. 1:18-cv-353-REB (D. Idaho Sept. 30, 2019)

- EPA provides "general permit" coverage for suction dredging in Idaho (disallowed in certain sensitive areas, such as the S.F. Clearwater where Mr. Poe was operating)
- Cf. *Rybachek v. EPA*, 904 F.2d 1276, 1285, 1286 (9th Cir. 1990) (re-suspension of streambed material can count as "addition" and "discharge" within the meaning of the CWA)
- *See also E. Or. Mining Ass'n v. Or. DEQ*, 365 Or. 313 (July 25, 2019)—have Oregon Supreme Court held that suction dredge mining triggered CWA permitting requirements. (petitioned for cert pending with SCOTUS

Sackett v. EPA
2:08-cv-00185 (D. Idaho Mar. 31, 2019)

- "Wetland": vegetation, soils, and hydrology
- Wetlands adjacent to traditional navigable waters are WOTUS
- .63 acre parcel in a residential subdivision near Priest Lake; road separates Sackett property from wetlands and lake
- Land prep for home building; all necessary Bonner County permits
- EPA said work occurring in jurisdictional wetland and ordered stoppage
- Sacketts appealing the wetlands delineation

Sackett v. EPA
2:08-cv-00185 (D. Idaho Mar. 31, 2019)
(appealed to 9th Cir.,)

Holding: for EPA; wetlands delineation supported in the record

Current disposition: on appeal to the 9th Circuit (No. 19-35469); early briefing stage

Water Law

- *McInturff v. Shippy*
- *Eagle Creek Irrigation Co.*

Water Law Fundamentals

- The citizens of Idaho own the water resources within the State (∴ "**usufruct**")
- Water rights are **real property**
- A water right is created and maintained by **controlling** water and placing it to a "**beneficial use**"
- Idaho recognizes most water use as beneficial, so long as it is not wasteful
- **Water rights required for all appropriations** other than domestic ground water and instream stock water

Water Law Fundamentals – Type of Right

- Two paths: Constitutional and Statutory
- Unrecorded
  - Constitutional/Grandfather
    - Surface water
      - Idaho Code § 42-201 (1971)
    - Ground water
      - Idaho Code § 42-229 (1963)
  - *De minimis*
    - Idaho Code § 42-111(a), (b)
- Recorded
  - Adjudicated
  - Permitted, ***Licensed***
- ***Permit is not a perfected right***

McInturff v. Shippy
In re CSRBA 49576
165 Idaho 489 (2019)

CSRBA = Coeur d'Alene-Spokane River Basin Adjudication

St. Maries Wild Rice Growers→leased land from Robinson's

Landowner's objection to determination of water right ownership during licensing process was impermissible collateral attack

Pre-*Shippy* IDWR Policy

- IC §§ 42-248(1) & 42-1409(6) do not give IDWR authority to change legal ownership
- IDWR only has authority to *record* a change in ownership that has already occurred through proper conveyance
- IC § 42-248(3) does not require IDWR send notice of the change

Post-*Shippy*

- An ownership change through IDWR is no longer merely a change in record…it is a legal proceeding
- IDWR has authority to decline to change ownership
- IDWR required to provide notice of change to owner of record
- Big change here…lots of open questions

Other notes from *Shippy*…

- Generally appurtenant, but lessees and other non-owners can create rights where diverted and put to beneficial use
- Where tenants are not acting as landowner's agent, tenants use does not accrue to the landowner
- ***finality is paramount* in water law**

Eagle Creek Irrigation Co., Inc., v. A.C. & C.E. Investments Inc. and Lee & Nancy Enright
165 Idaho 467 (August 27, 2019)

- Eagle Creek is *mutual irrigation* company, not for-profit commercial ditch company
- Thus, operates to provide water at-cost to members = "general appurtenancy"
- **Need to examine governing org docs on questions of appurtenancy of water rights**
  - cf. general rule that rights run with land unless expressly reserved in the deed

Eagle Creek

- Water rights are real property
- The purchaser of a water right receives no greater right than the seller could convey at the time of sale
- ***Important to know how water rights work for real estate transactions***

Weyerhaeuser v. U.S. Fish & Wildlife Service, 139 S. Ct. 361 (2018) (aka the "dusky gopher frog" case)

- 1,544 acres in Louisiana
- endangered dusky gopher frog not present in the area
- property would not currently support frog
- 5th Cir. upheld Service's determination that was "critical habitat"

Holding: area must be "habitat" before it can be "critical habitat"; remanded to interpret the meaning of "habitat"

Weyerhauser

- 5th Cir. remanded to District Ct. on "habitat" interpretive question (2019)
- Settled without judicial interpretation of "habitat"
- Takeaway: more potential arguments for land deals, commercial activity, and federal leasing or permitting

Changes to ESA Regulations
50 CFR 424

Listing, Delisting, or Reclassifying species

- "foreseeable future"
- standard for listing and delisting is same
- no impacts in classification decisions

Criteria for Designating Critical Habitat

- Unoccupied; physical or biological features

Clean Air Act

EPA previous position was that once trigger major source regulations for hazardous air pollutants (HAPs), you're always subject to them

Now: ~~"Once in, always in"~~ (Proposed Rule, 84 Fed. Reg. 36304 (July 26, 2019)).

Questions?

SPRING CASE REVIEW - ENVIRONMENTAL & NATURAL RESOURCES

Rick Grisel--Deputy Attorney General, Natural Resources Division

March 11, 2020

Rick graduated from Lewis & Clark Law School with a Certificate in Environmental & Natural Resources Law and a research focus in energy law. His educational and professional experience includes energy, administrative, environmental, and natural resources law; water law; employment and tort defense; business law and commercial contracts; and land use, property transactions, and construction law. He currently serves as Deputy Attorney General in the Natural Resources Division of the Idaho Office of the Attorney General with a focus on transactional practice, agency enforcements, litigation, rulemaking, and other matters of state administrative and natural resources law.

Rick presents the following materials and accompanying talk only in his individual capacity as an active member of the Idaho 4th District Bar Association—nothing in this document or his oral presentation represents the position or opinion of the Idaho Attorney General's Office.

CLEAN WATER ACT

Hawai'i Wildlife Fund v. Cty. of Maui, 886 F.3d 737 (9th Cir. 2018)

The U.S. Supreme Court granted cert on this 9th Cir. decision (*Cty. of Maui, HI v. Hawai'i Wildlife Fund, et al.*, --- S.Ct. ----, 2019 WL 659786 (2019)). Oral argument was heard in October 2019, and a decision is expected by the end of June 2020 on the question of whether point source discharges of pollutants that reach jurisdictional surface waters *through groundwater* trigger CWA liability.

Background & Facts:
Environmental groups sued County of Maui (*Hawai'i Wildlife Fund v. Cty. of Maui*, 24 F.Supp.3d 980 (D. Hawai'i May 2014)) alleging that it violated the Clean Water Act (CWA) when treated sanitary effluent it injected into four underground injection wells traveled through groundwater to the Pacific Ocean. These wells operate under permits that authorize injection of treated wastewater underground pursuant to the federal Safe Drinking Water Act. The results of a tracer dye test performed by EPA, as well as other federal and state agencies, showed that 84 days after the dye was injected into two of the county's four wells, the dye emerged from seeps along the ocean floor a half-mile away. Maui county's treated sanitary wastewater reportedly represented one out of every seven gallons of groundwater that entered the ocean near the wastewater treatment plant.

Legal Claim(s):
Plaintiffs allege that because the injected wastewater reached the Pacific Ocean, the county discharged pollutants from a point source to waters of the United States (WOTUS) without a permit or exemption, thus violating the CWA. The county argued that ground water is per se non-jurisdictional under the CWA, thereby cutting off liability. Nevertheless, the county claimed, under other case law (primarily *Rapanos* and another 9th Cir. case called *Healdsburg*) insufficient hydrologic connectivity exists to give rise to CWA liability under the facts of their case. Lastly, under such a necessarily fact-intensive inquiry, Maui argued that the court should defer to EPA's expert determination.

Holding(s)/Disposition:
The Ninth Circuit affirmed the district court's decision finding the county liable for an unauthorized discharge under the CWA. Although it disagreed with the district court and held that groundwater is neither a point source nor a "water of the United States," the Ninth Circuit found the county liable under the CWA because (1) it discharged pollutants from a point source, (2) the pollutants "are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water," and (3) more than a *de minimis* amount of pollutants reached the navigable water.

Virtually contemporaneous with the Ninth Circuit decision, the Fourth Circuit similarly held that leaked gasoline from a broken pipeline (i.e. a "point source") through groundwater to a nearby river WOTUS will support a claim under the CWA where the plaintiff establishes a hydrological connection. *See Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018). By contrast, however, the Sixth Circuit issued a pair of decisions in 2018 under very similar facts expressly rejecting the "hydrologic connection" theory of the Ninth and Fourth Circuits and holding instead that indirect discharges to a WOTUS via groundwater are non-jurisdictional under the CWA. *See Ky. Waterways Alliance v. Ky. Utilities Co.*, 905 F.3d 925 (6th Cir. 2018) and *Tenn. Clean Water Network v. Tenn. Valley Authority*, 905 F.3d 436 (6th Cir. 2018). The SCOTUS *Maui* decision is expected to serve as a review of the issues decided in these cases as well, though the issue of migrating pollutants after discharge has ceased may persist as an open question.

Sackett v. EPA, Case No. 2:08-cv-00185 (D. Idaho Mar. 31, 2019) (being appealed to 9th Cir., No. 19-35469)

Michael and Chantell Sackett purchased a .63 acre vacant parcel in a residential subdivision near Priest Lake, Idaho, obtained all necessary Bonner County permits, and prepared to build a home by removing unsuitable material and placing sand and gravel on the lot to create a stable grade. EPA asserted the property contained regulated wetlands and thus also required a Clean Water Act § 404 permit prior to the land preparation activities. EPA issued a compliance order requiring the

Sackett's to cease work. The Sacketts appealed EPA's order. The federal district court in Idaho dismissed the appeal for lack of subject matter jurisdiction (CWA precludes judicial review of administrative orders) and the 9th Circuit affirmed, but the U.S. Supreme Court reversed on the grounds that the compliance order was a "final agency action" appropriate for APA review (132 S.Ct. 1367). The Idaho federal district court took up the substantive question on remand.

CWA §§ 301 and 404 work conjunctively to require a permit for the discharge of dredged or fill material to "wetlands." "Wetlands," in turn, are defined as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 40 CFR 328.3. Under well-established CWA law, any wetland "adjacent to a traditional navigable body of water"—like Priest Lake—is considered to be "waters of the United States."

The Sacketts' property is on part of what was once a large wetlands complex called the Kalispell Bay Fen leading from Priest Lake. Today, a road divides the wetlands, and the Sacketts' property is across the road from the rest of the wetlands and the lake. The property is similarly within 30 feet of a stream running to the lake but again is separated from the stream by a road.

The Sacketts argue their property is not adjacent to Priest Lake and the other wetlands because it is separated by dry land, a road, and a developed residential neighborhood, thus their development did not trigger the § 404 permit requirement. EPA contends the wetlands on the Sacketts' property were protected despite the road. Current regulations in place since 1987 protect wetlands separated from larger waterways by roads or man-made barriers, if they have surface or shallow subsurface water connections, and if the two waterways are "reasonably close so as to support a science-based inference of an ecological interconnection."

Based on this, EPA concluded that the Sackett's lot contained, in part, "wetlands." The Sackett's dispute this delineation, claiming that EPA did not properly follow a central EPA guidance document called the 1987 USACE's Wetland Delineation Manual. The 1987 Manual outlines vegetative, soils, and hydrological indicia for wetland delineations under normal circumstances, and other alternative methods where land has been altered by recent human activities.

Holding: EPA properly interpreted and applied the 1987 Manual; wetlands delineation was sufficiently supported in the administrative record
Current disposition: on appeal to the 9th Circuit; early briefing stage.

Idaho Conservation League v. Poe, Case No. 1:18-cv-353-REB (D. Idaho Sept. 30, 2019)

ICL filed a citizen's suit under § 505 of the CWA, alleging discharge without a permit. CWA § 301 prohibits the non-exempted discharge of pollutants from a point source to "waters of the United States" except in compliance with § 402, which requires a permit for such discharge. ICL alleged that Mr. Shannon Poe repeatedly discharged sediment pollution while suction dredge mining in the South Fork Clearwater River in 2015, 2016, and 2018.

Suction dredging involves vacuuming up stream or river bed material, filtering it to capture any valuable minerals, and then returning the water and any unfiltered material to the waterbody. This activity typically occurs completely in-stream (i.e. no water or material leaves the waterbody during this process).

The defendant submitted a Motion to Dismiss alleging Plaintiff lacks of Article III standing and notice deficiencies. That motion has been denied, and the case is moving forward.

Though we do not know yet what Mr. Poe will argue on the merits, there are typically two standard arguments. First, suction dredgers contend that this activity is exempt from the CWA as a "water transfer": discharges from a waterbody, back into that same waterbody, is not an "addition of pollutants" within the meaning of the Act (so long as the water is not subjected to any intervening industrial, municipal, or commercial use. *See* 73 Fed. Reg. 33697 (June 13, 2008). A second common argument is that suction dredge activities constitute "incidental fallback" (i.e. a net withdrawal, not an addition of material), and should thus be exempt from the CWA. *See Nat'l Mining Ass'n v. US Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998). So far, the 9th Circuit has held that re-suspension of streambed material can count as addition of a pollutant and placer mining can result in "discharge" within the meaning of the CWA. *See Rybachek v. EPA*, 904 F.2d 1276, 1285, 1286 (9th Cir. 1990).

This is a case to watch to see if any further clarifications come from the 9th Circuit on these issues, particularly given the extent of judicial appointments under Trump administration since 2017.

The defendants in a similar case—*E. Oregon Mining Ass'n, et al. v. Dept. of Envt'l Quality*, et al., 365 Or. 313 (July 25, 2019)—have petitioned for cert with the U.S. Supreme Court after the Oregon Supreme Court held that suction dredge mining triggered CWA permitting requirements. That cert petition can be found at https://www.supremecourt.gov/DocketPDF/19/19-839/127403/20200103112446607_KITCHAR%20v.%20DEQ%20CERT%20PET%20-%20FINAL.pdf.

WATER LAW

Douglas McInturff & Darcy McInturff v. Jeffrey C. Shippy, 165 Idaho 489 (2019)
IN RE: CSRBA CASE NO. 49576, Subcase No. 91-7094

After a succession of rice growing companies (lessees of land) and changes in ownership of their leased property on which growing operations were sited, a water rights dispute arose between the landowner and the lessees putting water from the St. Joe River to beneficial use.

The IDWR-issued license at issue described the water right as "appurtenant to the described place of use." The landowner (Shippy) argues that the water right is appurtenant to his land, while the current rice grower tenants (McInturffs) contend that the right was developed and owned by their predecessors in interest and now belongs to them by virtue of their having purchased the interest.

Tenants filed notice of claim within the Coeur d'Alene-Spokane River Basin Adjudication (CSRBA), and Director of the Idaho Department of Water Resources (IDWR) recommended that both tenants and landowner be recognized as owners of license granting water right to grow and harvest wild rice on landowner's property. Tenants filed an objection, and a Special Master issued a report and partial decree naming tenants as owner of the license. The Fifth Judicial District Court adopted the decree, and landowner Shippy appealed.

Holdings:

- District court affirmed
- Landowner's objection to determination of ownership of water right made during licensing process was impermissible collateral attack on license;
- License recognized bifurcation between ownership of the land and ownership of water right used on that land, and thus, license did not vest ownership of the water right with the landowner;
- Tenants were not acting as landowner's agent when they put water to beneficial use, and thus, landowner failed to put water to beneficial use, which was fatal to its claim of ownership;
- Landowner failed to exhaust its administrative remedies before objecting to change in ownership of water license made by Director

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Eagle Creek Irrigation Co., Inc., v. A.C. & C.E. Investments Inc. and Lee P. Enright & Nancy K. Enright, 165 Idaho 467 (August 27, 2019)

Investment company purchased 15 acres located within mutual irrigation company's boundaries. The prior property owners owned 15 shares of irrigation company stock, authorizing the holder to divert 30 cfs of water. The investment company claims the 15 shares passed as an appurtenance to the property. The Fifth District Court agreed with investment company that the shares were conveyed as an appurtenance. The irrigation company appealed.

The Idaho Supreme Court reversed and held in favor of the irrigation company. Key to the Court's rationale was the distinction between a mutual irrigation company and a commercial ditch company. A mutual irrigation company is formed expressly for the purpose of furnishing water to shareholders—thus, the defining feature of the mutual irrigation corporation is that it operates to supply and transport water, at cost (not for profit or hire), for the lands of its members. By contrast, a commercial ditch company holds water rights for profit. Accordingly, the Court explained, a mutual irrigation company cannot be forced to deliver water other than to its stockholders.

This gives rise to a legal fiction the Court termed a "general appurtenancy," whereby the at-cost water-delivery organization's water right is decreed with a "generally described place of use" (as opposed to typical water rights are decreed as appurtenant to specific tracts of land). Landowners served by irritation districts do not hold individual water rights in connection with their service. Water-delivery entities are permitted to move water around their permissible place of use without complying with the statutory transfer requirements; no amount of water is tied to a specific tract of land without a more precise assignment.

ENDANGERED SPECIES ACT

Weyerhaeuser v. U.S. Fish & Wildlife Service, 139 S. Ct. 361 (2018) (aka the "dusky gopher frog case")

The U.S. Fish & Wildlife Service (FWS) designated private land as critical habitat for the dusky gopher frog. This designation would have required the landowners to take a variety of actions including replacing existing trees with different species, halting timber management activities, and allowing the land to be managed and populated with frogs. Landowners challenged the designation because the frog did not live on the land and several actions would have been required to make the land habitable for the frog. The key legal question is thus whether the ESA allows a critical habitat designation where the land is not

currently a habitat or essential to species conservation, and whether this designation subject to judicial review.

The federal district court granted summary judgment to the FWS, and the Fifth Circuit affirmed. However, the Supreme Court held 8-0 to vacate and remand, instructing the Fifth Circuit to first interpret the term "habitat" before assessing the "critical habitat" designations. On remand to the District Court, the parties settled the case by consent decree, leaving the key statutory term "habitat" undefined.

CLEAN AIR ACT

The federal Clean Air Act, 42 U.S.C. 7401 et seq., regulates air emissions from stationary and mobile sources for the protection of public health and the environment. One key area of potential human harm is hazardous air pollutants, or HAPs—EPA has developed a list of 187 these toxic substances. Sources emitting (or having the potential to emit) 10 tons per year or more of any HAP or 25 tons per year or more of any combination of HAPs trigger the National Emission Standards for Hazardous Air Pollutants (NESHAP) "major source" regulations.

In May of 1995, EPA issued a memorandum interpreting § 112 of the CAA to mean that, once NESHAP major source status is triggered, a facility must permanently comply with MACT (maximum achievable control technology) control standard (i.e. "once in, always in"). This meant more stringent (and expensive) HAP controls on a permanent basis, but it also disincentivized facilities from installing new control equipment or making upgrades since they could not be relieved from MACT even if they reduced their HAP emissions back below the regulatory thresholds.

In June 2019, EPA published a proposed rule to abrogate the NESHAP "once in, always in" policy: a major source which takes an enforceable limit on its potential to emit HAPs and take measures to reduce HAP emissions below the applicable threshold would now be eligible to receive "area source" status, subject to less rigorous standards. *See* 84 Fed. Reg. 36304 (July 26, 2019).

Despite the issuance of a proposed rule, there is some question as to whether EPA must undergo rulemaking to effectuate a policy reversal contained entirely in memorandum, or whether EPA can simply begin to implement this new regulatory approach. This is a key policy development to watch, and most expect litigation upon implementation or publication of a final rule.

Fourth District Bar 2020 Spring Case Review
Civil Procedure and Evidence

James K. Dickinson
Ada County Prosecutor's Office

I. Civil Procedure

A. Civil Procedure Rules

Idaho Appellate Rules. Effective January 24, 2019, a number of appellate rules were updated to delete requirements for more than one copy of motions, briefs, and original petitions, as well as binding of briefs, when these are submitted in paper format by filers who are not required to file electronically. The paper copy is scanned into the Odyssey system.

Rules 24 and 27 were also amended to reflect that, even when the appellant is paper filing the appeal, the transcript and record will be in electronic format for the Supreme Court. The parties may still request a hard copy, electronic copy, or both.

Idaho Rules for Electronic Filing and Service. Now that all counties are on Odyssey, the Rule on Electronic Filing and Service has become a more manageable set of rules, the "Idaho Rules for Electronic Filing and Service." There is some slight re-organization along with a few substantive additions and amendments, which are outlined below.

Rule 1. Applicability of These Rules. This new rule addresses the applicability of the rules and is similar to language that was contained in the order adopting the Electronic Filing and Service Rule.

Rule 3. Official Court Record. This new rule clarifies that the electronic record is the official court record, which includes documents that have been submitted in paper format and then scanned in by the court.

Rule 5. Exceptions to Electronic Filing of Documents. The rule allows for conventional filing of certain documents and has a new subsection on exceptions for filings by law enforcement.

Rule 8. Party Information. There is a new requirement that the filer must identify the filing party's attorney of record if represented by an attorney.

Rule 12. Time of Filing. The amendment clarifies that, for purposes of filing by electronic transmission, a "day" begins at 12:01 a.m. and ends at midnight in the time zone where the court is located on the day the document must be filed.

Rule 15. Privacy Protections for Filings Made with the Court. This rule on redaction of personal data identifiers has been revised. Previously the subsection on exceptions to the redaction requirement stated the redaction requirement did not apply to documents that are required by statute or rule to include personal data identifiers. That statement has been removed because it is exactly when these identifiers are needed that privacy protections and redaction come into play.

The rule now reads that personal data identifiers should not be included in any document filed with the court unless such inclusion is required by the court, by statute or court rule, or is material to the proceedings. If they are necessary, they must be redacted and the filer must then comply with the subsection on options when personal identifiers are necessary. The options subsection still begins with the phrase: "A party filing a redacted document need not also file an unredacted version of the document," and an example of this might be a document that references a minor by initials but no reference list or unredacted version is needed by the court. It then states that, where inclusion of the unredacted personal data identifiers is required by the court, by statute or court rule, or is material to the proceedings in a document that is open to the public, the party must choose the most appropriate of two options, which are the same options that currently appear in the I.R.C.P. 2.6 and I.R.F.L.P. 218 and were in the previous electronic filing rule. Option one is to file a reference list identifying the redacted information. The reference list is exempt from public disclosure. Option two is to file an unredacted copy with the redacted copy. The unredacted copy is exempt from public disclosure.

Thus, it is up to the filer to decide the best way to get the needed unredacted information to the court and the parties. This will likely depend upon the type of document filed. In most instances a reference list is the easiest and most appropriate. A minor's full name or a financial account number or a birth date can be redacted and a reference list filed with the court setting forth the minor's full name or the full account number or the full date of birth. However, in other circumstances, the appropriate option may be to file a redacted and an unredacted copy of the document. Regardless of which option is selected, the filer must file the exempt from public disclosure document as a separate pdf as required by what is now Rule 6. In addition, the section on sanctions for knowingly violating this rule on privacy protections has been expanded.

Rule 16. Privacy protection in Orders, Judgments, and Decrees. Like the parties, the court must refrain from including personal data identifiers if possible. This does not apply to documents that are exempt from public disclosure under I.C.A.R. 32. However, there are times that unredacted personal identifiers are needed in a document that is public. The rule clarifies that when the unredacted personal data identifiers are required by statute or court rule, or are material to the proceedings and must be included in an order, judgment, or decree that is open to the public, then the unredacted document will be *protected* from public access. This is not the same as the document being exempt from public disclosure under I.C.A.R. 32, because Rule 16 also states that a redacted copy must be prepared and available to the public upon request.

Rule 20. Appeals to the Supreme Court. The references to sections of the appellate rules that do not apply when electronically filing in the Supreme Court were deleted based on the amendments to the Idaho Appellate Rules.

Idaho Rules of Civil Procedure. The Civil Rules Advisory Committee is chaired by Justice Robyn Brody.

Rule 4. Summons. Subsection 4(b)(2), time limit for service, governs the time in which a plaintiff must serve a summons after filing a complaint. The reference to six months has been replaced with 182 days so that the timing is more exact. It also follows the practice of using seven-day increments to track time.

Rule 2.6. Privacy Protections for Filings Made with the Court. The current rule was repealed and a new rule adopted that reads the same as Idaho Rule of Electronic Filing and Service 15 so that those persons who are not required to electronically file documents have the same responsibility to redact the same identifiers.

Idaho Rules of Family Law Procedure. The Children and Families in the Courts Committee is chaired by Judge Diane Walker. The Child Support Guidelines Advisory Committee is chaired by Judge Todd Garbett.

Several rules were amended to conform dates to seven day increments in accord with the Idaho Civil Rules of Procedure. These include Rule 112, on appearance and withdrawal of counsel, Rule 211 on intervention, Rule 502 on Defenses and Objections, Rule 505 on summary judgments, and Rule 704 on final pre-trial procedure.

Rule 120. Dismissal of Inactive Cases. The amended rule is similar to I.R.C.P. 41(e) in that it reduces the time frame for dismissal of inactive cases to 90 days instead of six months and provides the case "may" be dismissed for inactivity instead of "shall" be dismissed. In addition, the amendment deletes the reference to the summons not being served so that it is clear that a Rule 120 dismissal is for no action in the case after service has taken place. Notice is always given before a dismissal pursuant to this rule and the parties have a chance to respond and let the court know the status of the case.

Rule 126. Child Support Guidelines. Several amendments were made to this rule. First the language in Section (J)(4) was amended from a maximum combined Guidelines income of $300,000 to $440,000. The language in Section (L) on "expression of child support" was also amended to change "Order" to "Judgment" and to require that the judgment state the due date for support. In addition, citations have been corrected in the form "Affidavit Verifying Income".

Rule 201. Commencement of Action. Subsection D of the rule has been amended to include a petition for legal separation and to provide provisions for seeking judgment on "unpaid child support or spousal maintenance or any other payments ordered", as well as reimbursement of other expenses ordered to be paid by the parties. If the petition to obtain a money judgment is initiated in an action currently pending, the Petition for Money Judgment may now be served as provided in Rule 205.C., unless the court orders personal service. There is also a provision to allow for an expedited case as directed by the court.

Rule 204. Service on Opposing Party or Additional Parties of Initial Pleadings. Subsection B governs the time limit for service of the summons for initial pleadings. Like I.R.C.P. 4, the

reference to six months has been replaced with 182 days so that the timing is more exact and so that it follows the practice of using seven-day increments to track time.

Rule 212. Signing of Pleadings, Motions, and Other Papers. The amendment mandates that a written certification or declaration be submitted electronically.

Rule 218. Privacy Protection for Filings Made with the Court. The current rule was repealed and a new rule adopted that reads the same as Idaho Rule of Electronic Filing and Service 15 so that those persons who are not required to electronically file documents have the same responsibility to redact the same identifiers.

Rule 711. Subpoenas. The rule has been amended to conform to Idaho Rule of Civil Procedure 45 for interstate subpoenas, dispositions and discovery.

Rule 719. Parenting Time Evaluation. The section on Qualification of Evaluator has been amended to require a minimum of a master's degree and the evaluator must possess the same or similar qualifications, expertise and trainings as outlined in the Association of Family and Conciliation Courts Model Standards of Practice for Child Custody Evaluations which can be found in the rule.

Idaho Court Administrative Rules.

Rule 32. Records of the Judicial Department. With electronic filing the goal is to one day have public documents available online. With this in mind, the pretrial risk assessment and the

B. Civil Procedure Cases

ACKERSCHOTT v. MOUNTAIN VIEW HOSPITAL, 2020 WL 579190, Supreme Court of Idaho, February 6, 2020

Background: Patient, who sustained injury leading to paraplegia, and his wife filed medical malpractice action against urgent care facility. The Seventh Judicial District Court, Bonneville County, Dane Watkins, J., entered judgment on jury verdict in favor of plaintiffs, reduced jury award from $7,958,113.67 in total damages to $6,575,354.58 based on statutory cap on noneconomic damages, denied hospital's motion for judgment notwithstanding the verdict (JNOV), or in the alternative, a new trial, 2018 WL 8577916, and denied plaintiffs' motion to alter or amend the judgment. Hospital appealed, and plaintiffs cross-appealed.

3. The district court did not abuse its discretion in failing to grant Redicare JNOV or a new trial.

"When based on IRCP 50(b), a motion for [judgment notwithstanding the verdict] is treated as a delayed motion for a directed verdict and the standard for both is the same." *SilverWing at Sandpoint, LLC v. Bonner Cty.*, 164 Idaho 786, 794, 435 P.3d 1106, 1114 (2019) (quoting *Quick v. Crane*, 111 Idaho 759, 763, 727 P.2d 1187, 1191 (1986)). "In reviewing a decision to grant or deny a motion for directed verdict or a judgment notwithstanding the verdict, this Court applies

the same standard as that applied by the trial court when originally ruling on the motion." *Alexander v. Stibal*, 161 Idaho 253, 259, 385 P.3d 431, 437 (2016) (quoting *Waterman v. Nationwide Mut. Ins. Co.*, 146 Idaho 667, 672, 201 P.3d 640, 645 (2009)).

"The decision by a trial court to grant or deny a motion for a new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of a clear and manifest abuse of discretion." *Litke v. Munkhoff*, 163 Idaho 627, 632, 417 P.3d 224, 229 (2018) (quoting *Barnett v. Eagle Helicopters, Inc.*, 123 Idaho 361, 363, 848 P.2d 419, 421 (1993)). Thus, this Court reviews a motion for a new trial under IRCP 59(a) for abuse of discretion. *Id*.

> When this Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry requires consideration of *four* essential elements. Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.

Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

In applying the legal standard of Rule 50(b), the district court properly denied Redicare a JNOV on the question of comparative fault, for the reasons set forth above. In ruling on Redicare's motion for a new trial, the district court correctly perceived the issue as one of discretion. As we have set forth, the district court acted within the outer boundaries of its discretion as it recognized the applicable standards and legal principles. It correctly applied those legal principles and acted consistently with them as it explained controlling precedent establishing when an expert is necessary to prove proximate cause. Finally, the district court reached its decision by an exercise of reason after comparing the facts here to *Easterling* and *Sheridan* and ultimately concluding the facts to be more similar to those of *Easterling* due to the complex nature of Shane's injury. The district court therefore did not abuse its discretion in denying Redicare's motion for a new trial.

Redicare argues that IRCP 59(e) imposes strict deadlines that divest the district court of jurisdiction if not adhered to. Rule 59(e) permits a party to file a motion to alter or amend a judgment. The rule states "[a] motion to alter or amend the judgment must be filed and served no later than 14 days after entry of the judgment." *Id.* Rule 2.2(b)(3) prohibits the district court from extending the time requirements of Rule 59(e). This is echoed by case law. *See Wheeler v. McIntrye*, 100 Idaho 286, 289, 596 P.2d 798, 801 (1979)("The 'Motion to Alter Judgment' was brought under Rule 59(e), and was likewise subject to the strict 1[4] day requirement of Rule 59. Since the motion was not filed within 1[4] days of entry of judgment, the court had no power to grant the requested relief.").

The motion to alter or amend the judgment was filed on June 14, 2018, one day later than the deadline imposed by IRCP 59(e). Seeing that district courts lack power to extend deadlines imposed by IRCP 59(e), it was improper for the district court to rule on the motion. Although the parties entered into a stipulation that specifically retained the right of the Ackerschotts to challenge the constitutionality of the cap on noneconomic damages, "[p]arties cannot confer jurisdiction upon the court by stipulation, agreement, or estoppel." *H & V Eng'g, Inc. v. Idaho State Bd. of*

Prof'l Engr's and Land Surveyors, 113 Idaho 646, 648, 747 P.2d 55, 57 (1987). Therefore, we hold the district court lacked subject matter jurisdiction to rule on the motion to alter or amend the judgment. As a result, we decline to reach the merits of the Ackerschotts' argument over the constitutionality of the cap on noneconomic damages imposed by Idaho Code section 6-1603.

BRAUNER v. AHC OF BOISE, 2020 WL 543812, Supreme Court of Idaho, February 4, 2020

This case involves a suit for medical malpractice brought by Leila Brauner against AHC of Boise, dba Aspen Transitional Rehab (Aspen). The claim arose out of Aspen's delay in sending Brauner to the hospital following her knee replacement surgery, which was a substantial factor resulting in the amputation of Brauner's right leg at the mid-thigh. After a trial, the jury entered a verdict in favor of Brauner and awarded her $2,265,204 in damages. Aspen appeals alleging that various pre-trial and post-trial rulings were in error and resulted in an unsustainable judgment. For the reasons set out, we affirm.

2. The district court did not err when it denied Aspen's motion to strike Cook's February 2018 Report as untimely.

Aspen alleges that the district court erred when it failed to strike Cook's February 2018 Report. Aspen contends that the report was "grossly late, there was no substantial justification for the lateness, and the lateness was harmful."

Brauner argues that while it is true that the report was filed on the eve of trial, the late filing was both harmless and substantially justified. Further, Brauner noted that she had an obligation to update her initial disclosure if portions of her expert's opinions had been rejected or altered in some manner.

Although I.R.C.P. 16(a)(3) states that deadlines set in the scheduling order "must not be modified except by leave of the court on a showing of good cause or by stipulation of all the parties and approval of the court[,]" the Idaho Rules of Civil Procedure also anticipate supplemental disclosures. For example, I.R.C.P. 26(e)(2) provides "[a] party must supplement in a timely manner ... the subject matter on which the [expert witness] is expected to testify, and the substance of the person's testimony."

Failure to supplement, if required, permits the district court to exclude the expert's testimony. I.R.C.P. 26(e)(3). Additionally, I.R.C.P. 37(c)(1) allows a district court to impose sanctions for failure to disclose or supplement. That rule states,

> [i]f a party fails to supplement discovery responses when required or fails to comply with a disclosure requirement ordered by the court pursuant to a Rule 16 scheduling ... order, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, *unless the failure was substantially justified or is harmless.*

I.R.C.P. 37(c)(1) (italics added).

Here, although the district court provided little reasoning on the record for its ruling, the late supplementation of Cook's report was both substantially justified and harmless. Brauner disclosed Cook's January 2017 Report on November 6, 2017. As the report was disclosed on the date that was agreed upon between the parties, the report was timely.[4] The report set forth claimed damages that totaled $1,366,749 ($547,850 in past medical expenses and $818,899 in future expenses). Cook's supplemental February 2018 Report lowered the total claimed damages to $1,132,602 ($298,125 in past medical expenses and $834,477 in future expenses).

The admission of the February 2018 Report was harmless. The supplemental report *reduced* Brauner's total damages sought by $234,147. It is unclear why Aspen would have wanted Cook's February 2018 Report stricken as it would have left Aspen dealing with the timely January 2017 Report, which claimed $234,147 more in damages. As a result, Aspen was not harmed by the admission of Cook's February 2018 Report. In fact, Aspen benefited from the late report.

Further, Cook's disclosure on February 12, 2018, was substantially justified. The Idaho Rules of Civil Procedure require a party to update and supplement its expert disclosures or risk exclusion of the expert at trial. I.R.C.P. 26(e)(2); *Edmunds v. Kraner*, 142 Idaho 867, 874, 136 P.3d 338, 345 (2006) ("Idaho law specifically contemplates that expert testimony can change after the initial disclosure."). This Court has held that Rule 26 "unambiguously imposes a continuing duty to supplement responses to discovery with respect to the substance and subject matter of an expert's testimony where the initial responses have been rejected, modified, expanded upon or otherwise altered in some manner." *Clark v. Klein*, 137 Idaho 154, 157, 45 P.3d 810, 813 (2002) (quotation omitted).

It is undisputed that Cook's February 2018 Report was disclosed on the eve of trial, after Cook was deposed. While it can be problematic to have an expert's report filed on the eve of trial, Cook's January 2017 Report required revision because Judge Moody ruled that Brauner had to limit her requested medical expenses to those actually *paid* as opposed to those *billed*.

Accordingly, the district court did not abuse its discretion because Cook's late disclosure was necessitated by Judge Moody's ruling. In addition, and importantly from the standpoint of harmlessness, Aspen benefited from the changes in the report because the damages sought were *reduced*.

MIA KIM VIG and TOMMY VIG v. SARAH JANE GERDES, 2020 WL 402493, Court of Appeals of Idaho, January 24, 2020

Mia Kim Vig and Tommy Vig appeal from the district court's final judgment of dismissal. Specifically, the Vigs argue the district court erred when it granted Sarah Jane Gerdes's motion to dismiss ("motion for summary judgment") and denied the Vigs' motion for summary judgment and motion to amend. Because the Vigs failed to establish a claim of defamation per se, the district court properly granted Gerdes's motion for summary judgment. We therefore affirm the district court's judgment of dismissal.

Gerdes wrote a book entitled "Sue Kim of the Kim Sisters, The Authorized Biography." The book was an account of Sue Kim, who was a member of the Kim Sisters musical group. Mia Kim, who was also a member of the Kim Sisters, and her husband, Tommy, sued Gerdes for defamation resulting from publication of the book.

The Vigs' complaint alleged libel, defamation, intentional infliction of emotional distress, and intentional interference with prospective economic advantage. However, the Vigs did not identify any specific monetary amount of damage in their complaint. Instead, the Vigs explained the contents of the book were libel per se, and as such, the Vigs' claim was "actionable without further proof of fact or damages." The complaint listed the following general damages: the lack of invitations to perform in Korea; the damage to their reputation as human beings and performers; and the damage to their reputation for honesty and integrity, their standing in the entertainment community, and present and future employment.

Gerdes filed an answer to the Vigs' complaint. The Vigs subsequently withdrew the claims of intentional infliction of emotional distress and intentional interference with prospective economic advantage, and the same day, the Vigs filed a motion for summary judgment.[3] The Vigs served Gerdes by mail with two separate requests for admission. Gerdes failed to respond to the requests. The Vigs also filed a motion to amend complaint, seeking leave to add a claim of fraud. In addition, the Vigs submitted a notice to the court which indicated they served Gerdes with three sets of requests for admission.

The district court ultimately held that Gerdes was properly served with the first two sets of requests for admission and because she failed to respond, the requests were deemed admitted pursuant to Idaho Rule of Civil Procedure 36(a)(4).

Gerdes sought to dismiss the suit and filed a motion summary judgment along with a memorandum in support of the motion for summary judgment. In her motion, Gerdes argued she did not defame plaintiffs because the statements were not actionable either as generally defamatory or defamatory per se statements; the Vigs were public figures; and truth is an absolute defense to an allegation of defamation. Gerdes further asserted that because the Vigs had not pleaded or established an actionable claim, the complaint should be dismissed. Various other pretrial motions were filed by both parties. The district court held a hearing on three motions: the Vigs' motion for summary judgment, the Vigs' motion to amend complaint, and Gerdes's motion for summary judgment. The district court issued a memorandum decision and order denying the Vigs' motion for summary judgment, denying the Vigs' motion to amend complaint, and granting Gerdes's motion for summary judgment. The district court entered a judgment of dismissal and found the Vigs did not establish a general defamation claim. The district court did not address whether the Vigs had established a defamation per se claim. The Vigs timely appeal.

CICCARELLO v. DAVIES, 2019 WL 7043516, Supreme Court of Idaho, December 23, 2019, Petition for Rehearing Denied: February 10, 2020

Background: Client brought legal malpractice action against attorney and attorney's law firm, alleging that attorney was negligent in his representation of client with respect to the sale of client's

business. The Fourth Judicial District Court, Ada County, Peter Barton, J., granted attorney and law firm's motion for summary judgment, then denied client's motion for reconsideration and his motion for relief from the order granting summary judgment. Client appealed.

Mark Ciccarello and Baus Investment Group, LLC, appeal a decision by the district court granting summary judgment in favor of Respondents Jeffrey Bo Davies and Marcus, Christian, Hardee & Davies, LLP ("MCHD"). The district court ruled that Ciccarello's case lacked the requisite expert testimony to establish a genuine issue of material fact as to legal malpractice. We affirm.

In February 2012, Mark Ciccarello formed a company named F.E.M. Distribution, LLC, ("F.E.M.") for the purpose of marketing and selling a product line called "Lotus Electronic Cigarettes."

In 2013, Ciccarello faced federal criminal charges related to his operation of another business that sold and marketed synthetic cannabinoids. As a result of the federal charges, some of F.E.M.'s assets were seized by the federal government. To prevent further seizure of F.E.M.'s remaining assets, Ciccarello contacted attorney Jeffrey Bo Davies, who had previously represented Ciccarello in various business and personal matters.

Ciccarello and Davies discussed options for safeguarding F.E.M.'s assets, which included the possible sale of F.E.M. to another company. These discussions included several possibilities for structuring the sale, should one occur. A Washington investment group showed interest in F.E.M. and began negotiations with Davies and Ciccarello, but the sale was never completed.

Shortly thereafter, Davies drafted documents to form two new companies, Vapor Investors, LLC ("Vapor"), and Baus Investment Group, LLC ("Baus"), which collectively owned Lotus Vaping Technologies, LLC ("Lotus"). Vapor had a 55% ownership interest in Lotus, and Baus had a 45% ownership interest. Davies put together a group of investors who each held varying percentages of ownership interests in Vapor and Baus. The members of Vapor and Baus orally agreed with Ciccarello that he would receive $2 million and a majority ownership interest in Baus in exchange for the sale of F.E.M.'s assets to Lotus.

Because the other investors were concerned about Ciccarello's pending federal criminal charges, the members agreed that Bob Henry would temporarily hold Ciccarello's shares until the federal charges were resolved. However, everyone understood the shares in Bob Henry's name actually belonged to Ciccarello. F.E.M. was then sold to Lotus for the purchase price of $50,000. Simultaneously, Ciccarello and a representative of Lotus executed an Independent Contractor Agreement ("ICA"), drafted by Davies, that provided for 16 years of $10,000 monthly installment payments (close to $2 million total) to be paid to Ciccarello for his services to Lotus as an independent contractor. This agreement also contained a termination provision allowing Lotus to stop making monthly payments to Ciccarello during any period of incarceration and allowing Lotus to terminate the agreement if certain conditions were met.

Following F.E.M.'s sale to Lotus, Ciccarello continued to act as CEO and manage operations. In January 2014, the federal government issued a letter stating it had no further interest in Ciccarello's involvement in Lotus. Soon thereafter, Ciccarello requested that his shares in Baus be returned and

that the sale documents be modified to reflect him as the owner of the Baus shares. However, this was never done. In June 2014, Ciccarello was incarcerated due to his federal criminal case. Lotus ceased making monthly payments to Ciccarello in July 2014 and never resumed payments. At some point in 2014, Ciccarello was also ousted from Lotus by its members and Bob Henry took over his role as CEO.

In April 2016, Ciccarello filed a verified complaint and demand for jury trial against Lotus, Vapor, Davies, Henry, and several other investors involved in the sale of F.E.M. to Lotus. The complaint sought recovery of damages Ciccarello alleged he suffered as a result of the structure of the sale and the conduct of Henry, Davies, and the investors following the sale. In the fall of 2016, Ciccarello moved for—and the district court granted—leave to amend his complaint to add MCHD as a party, as Davies was a partner in that law firm during the period the alleged damages arose. Ciccarello's claims against Davies and MCHD were negligence claims asserting legal malpractice. Ciccarello's claims against Lotus, Vapor, Henry, the other investors, and all other parties except Davies and MCHD were subsequently dismissed with prejudice pursuant to a stipulation for dismissal. Thus, the only remaining claims before the district court were Ciccarello's legal malpractice claims against Davies and MCHD.

On June 19, 2017, all parties stipulated to a scheduling order setting the case for trial on March 26, 2018, requiring that Ciccarello make his expert witness disclosures at least 150 days before trial, and make any additional expert witness disclosures in rebuttal of the defendants' expert disclosures at least 60 days before trial. On October 25, 2017, Ciccarello timely filed his expert witness disclosure, identifying attorney Brian C. Larsen as an expert witness who was expected to testify that: Davies drafted the F.E.M. sales documents in a way that was adverse to Ciccarello's interests; Davies' representation of Lotus in its purchase of F.E.M. from Ciccarello was a violation of "the applicable standard of care"; proceeding with his representation of Lotus in its purchase of F.E.M. from Ciccarello was also "a breach of the applicable standard of care"; Davies had a duty under Idaho Rule of Professional Conduct 1.9 not to represent Lotus because Ciccarello's interests were adverse to those of Lotus; Davies breached his duty under Idaho Rule of Professional Conduct 1.9 by failing to obtain Ciccarello's consent to represent Lotus in the sale; and, as a result of Davies' breach, Ciccarello suffered $2 million in damages.

Shortly after Ciccarello made his expert witness disclosure, Davies and MCHD moved for summary judgment. Respondents argued that even if Davies represented Ciccarello at the time of the F.E.M. sale, Davies was not negligent in his representation. Each party briefed the motion and Ciccarello also moved for leave to amend his complaint a second time to add a claim for punitive damages.

In its memorandum in support of its motion for summary judgment filed on November 20, 2017, MCHD argued that Ciccarello "ha[d] not proffered competent expert testimony establishing that [Davies] failed to meet the applicable standard of care ...." In their reply briefing filed on December 11, 2017, Davies and MCHD further refined their argument regarding the deficiency of Ciccarello's expert witness disclosures, explaining that Ciccarello was required to provide expert affidavits[1] under *Greenfield v. Smith*, 162 Idaho 246, 395 P.3d 1279 (2017) to establish a prima facie case of legal malpractice and survive summary judgment. The district court held a hearing on the motion for summary judgment on December 18, 2017. There, Davies and MCHD argued

that Ciccarello's expert witness disclosures were insufficient, and an affidavit previewing the expert's testimony was required. Ciccarello took the position that he did not need an expert affidavit to survive summary judgment and he would have his expert testify at trial. The district court then took the matter under advisement.

On January 24, 2018, Ciccarello filed a declaration of Brian C. Larsen, which he designated as a "rebuttal expert disclosure." The rebuttal expert disclosure explained that, in light of Davies and MCHD's expert disclosures, Brian C. Larsen was further expected to testify that: the Idaho Rules of Professional Conduct provide a standard of care that Davies was required to meet; Davies was in an attorney-client relationship with Ciccarello at all relevant periods of time; Davies had a duty to take necessary steps to ensure that the F.E.M. sale documents would be modified at a later time; and the sales documents played no part in asset protection.

The next day, on January 25, 2018, the district court granted Davies' and MCHD's motions for summary judgment. The district court ruled that, under *Greenfield*, expert testimony was required to overcome a motion for summary judgment on the issues of breach and proximate cause in a legal malpractice case. The district court explained that Ciccarello's expert needed to testify that a non-negligent attorney would have been able to negotiate better deal terms that would have resulted in a better outcome to overcome summary judgment on this issue. In light of this ruling, the district court denied Ciccarello's motion to amend his complaint to add punitive damages as moot.

Ciccarello moved for reconsideration of the court's summary-judgment ruling pursuant to Idaho Rule of Civil Procedure 11.2 and filed an additional declaration from his proposed expert in support of that motion. The additional declaration specifically provided that Ciccarello's expert would testify that Ciccarello "would have received better deal terms but for [Davies'] negligence." The district court denied the motion, holding that expert testimony was a necessary part of the prima facie case of legal malpractice and because Ciccarello did not provide sufficient expert testimony at the time of the summary-judgment motion, summary judgment was properly granted.

Then on May 7, 2018, Ciccarello moved for relief from the order granting summary judgment, pursuant to Idaho Rules of Civil Procedur**e** 60(b)(1) and 60(b)(6), arguing mistake and compelling circumstances justifying relief. The district court denied this motion, determining that a final judgment had not yet been entered, and that, in any event, there was no "mistake" of fact suitable for relief under Idaho Rule of Civil Procedure 60(b)(1), nor were there unique and compelling circumstances suitable for relief under Idaho Rule of Civil Procedure 60(b)(6). The district court also ruled that the later declarations of Ciccarello's expert were untimely for consideration at summary judgment. In accord with its prior decisions, the district court entered a final judgment dismissing all of Ciccarello's claims with prejudice on August 31, 2018. Ciccarello timely appealed.

As indicated by the district court, because the declarations provided by Ciccarello's experts were untimely for consideration at summary judgment per Idaho Rule of Civil Procedure 56(b)(2), it was not required to consider them in ruling on the motion for reconsideration. While this Court has explained that when considering a motion for reconsideration "the trial court should take into

account any new facts presented by the moving party that bear on the correctness of the order," *Int'l Real Estate Solutions, Inc., v. Arave*, 157 Idaho 816, 819, 340 P.3d 465, 468 (2014), this rule was not designed to allow parties to bypass timing rules or fail to conduct due diligence prior to a court's ruling. Rather, "[t]he purpose of a motion for reconsideration is to reexamine the correctness of an order." *Id.*

We cannot say that the district court abused its discretion in declining to consider Ciccarello's untimely expert declarations. The district court specifically stated that it had discretion regarding whether to consider the untimely expert declarations. It further explained that Ciccarello's opposition brief and supporting documents, which would include the affidavits required under *Greenfield*, were supposed to be filed at least 14 days before the hearing. Expressing concerns over the length of time it took Ciccarello to file the declarations ("more than 50 days late"), and reasoning that Ciccarello could have filed a motion for an extension of time under Idaho Rule of Civil Procedure 56(d), but chose not to, the district court declined to consider the untimely expert declarations. The district court's choice was not an abuse of discretion. Accordingly, we determine that the district court did not err in denying Ciccarello's motion for reconsideration.

C. The district court did not err in denying Ciccarello's Rule 60(b) Motion.

In denying Ciccarello's Rule 60(b) motion, the district court concluded that Ciccarello could not be granted relief because a final judgment had not yet been issued in the case. The district court also held that Ciccarello did not show mistakes suitable for relief under Rule 60(b)(1), nor did he show unique and compelling circumstances suitable for relief under Rule 60(b)(6).

This Court reviews a trial court's grant or denial of a Rule 60(b) motion for an abuse of discretion. *Berg v. Kendall*, 147 Idaho 571, 576, 212 P.3d 1001, 1006 (2009). As explained above, we apply the factors from *Lunneborg* when reviewing whether the district court abused its discretion. 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

Idaho Rule of Civil Procedure 60(b) provides in pertinent part:

> On motion and just terms, the court may relieve a party or its legal representative from a *final* judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> ...
> (6) any other reason that justifies relief.

I.R.C.P. 60(b) (emphasis added). "Any claim of mistake [under Rule 60(b)(1)] must be a mistake of fact and not a mistake of law." *PHH Mortg. v. Nickerson*, 160 Idaho 388, 397, 374 P.3d 551, 560 (2016) (quoting *Berg v. Kendall*, 147 Idaho 571, 576-77, 212 P.3d 1001, 1006-07 (2009)). Under Rule 60(b)(6), a court may grant relief only "upon a showing of unique and compelling circumstances justifying relief." *In Re SRBA Case No. 39576 Subase No. 37-00864*, 164 Idaho 241, 252, 429 P.3d 129, 140 (2018) (quoting *Miller v. Haller*,129 Idaho 345,

348, 924 P.2d 607, 610 (1996)). Accordingly, relief under Rule 60(b)(6) is infrequently granted. *Id.* (citing *Berg*, 147 Idaho at 578, 212 P.3d at 1008).

Here, the district court did not abuse its discretion in denying Ciccarello's Rule 60(b) motion. The "mistakes" Ciccarello alleges in support of his motion for relief were that he should have asked for an extension of time to file an expert affidavit and that he "was mistaken in proceeding with his Motion for Reconsideration." Ciccarello also alleged that the district court made mistakes by not taking his additional expert declarations into consideration when ruling on his motion for reconsideration and by not "substantively consider[ing] or rul[ing] on" his motion to reconsider. As the district court pointed out, the "mistakes" alleged by Ciccarello were not factual in nature. All four were legal mistakes, two allegedly made by Ciccarello, and two allegedly made by the district court. Therefore, Ciccarello alleged no mistake of fact upon which the district court could have granted relief under Rule 60(b)(1). Furthermore, failure to provide sufficient evidence establishing a prima facie case for legal malpractice is not the type of "unique and compelling circumstances" that justify relief under Rule 60(b)(6). As such, the district court did not abuse its discretion by denying Ciccarello's motion for relief under Rule 60(b).

STATE v. BETTWIESER, 2019 WL 6899557, Court of Appeals of Idaho, December 18, 2019

Martin H. Bettwieser appeals pro se from the district court's decision, on intermediate appeal, affirming his judgment of conviction for following too closely in violation of Idaho Code § 49-638. We affirm.

Bettwieser was driving a postal truck in stop-and-go traffic in Boise, Idaho, when a vehicle in front of him braked for traffic. Bettwieser did not stop in time and rear-ended the vehicle. An officer who arrived at the scene issued Bettwieser a citation for following too closely, and he pled not guilty.

Representing himself pro se, Bettwieser served a discovery request on the City of Boise on June 19, 2017. According to Bettwieser's affidavit, he reported to the magistrate court at a status conference on July 12 that he had not yet received the City's response to his discovery request. In an affidavit, Bettwieser attests the prosecutor responded indicating a response to Bettwieser's discovery request "existed"; the prosecutor did not have a copy of the response with him; and he would serve the response "again."

Thereafter, on July 18, Bettwieser filed a motion to dismiss the case as a sanction against the City for intentionally delaying its response to his discovery request. In support of his motion, Bettwieser filed his affidavit. The following day, on July 19, the magistrate court denied Bettwieser's motion by placing an electronically generated stamp on the motion stating "denied" for "insufficient grounds" and including the judge's initials.

The case proceeded to a court trial on September 21. Bettwieser testified at trial, as did the officer who issued Bettwieser a citation and the individual Bettwieser rear-ended. The magistrate court found Bettwieser guilty of following too closely and ordered him to pay a $90 fine. Bettwieser

timely filed an intermediate appeal to the district court, which affirmed the magistrate court's finding of guilt, and he appeals.

Footnotes

Bettwieser also challenges on appeal, for the first time, the City's refusal to respond to interrogatories he propounded. The rules of discovery do not provide for interrogatories related to infractions.

Bettwieser argues the Idaho Rules of Civil Procedure should apply to allow interrogatories. We do not need to consider the argument raised for the first time on appeal. See State v. Garcia-Rodriguez, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017) (noting appellate review is limited to arguments presented below).

Regardless, the Idaho Rules of Civil Procedure do not apply to infractions. Rather, the Idaho Infraction Rules govern the prosecution of infractions. Specifically, I.I.R. 1 states that "the Misdemeanor Criminal Rules shall apply to the processing of infraction citations and complaints to the extent they are not in conflict with these specific rules."

GORDEN v. U.S. BANK NAT'L ASSOC., 166 Idaho 105, Supreme Court of Idaho, December 18, 2019

Background: Mortgagor brought action to enjoin foreclosure sale after failed attempts at loan modification, naming various defendants including trustee of mortgage-backed security pool and loan servicer that acted as trustee's attorney-in-fact. The Fifth Judicial District Court, Blaine County, Jonathan Brody, J., dismissed action after converting motion to dismiss for failure to state a claim to one for summary judgment. Mortgagor appealed.

After Ellen Gittel Gordon (Gordon) defaulted on her mortgage, the loan servicer initiated nonjudicial foreclosure proceedings to sell her home at auction. Gordon submitted multiple loss mitigation applications and appeals in an attempt to keep her home but all were ultimately rejected. As a result, Gordon initiated the underlying action in district court to enjoin the foreclosure sale. Upon the filing of a motion to dismiss that was later converted to a motion for summary judgment, the district court dismissed Gordon's action and allowed the foreclosure sale to take place. Gordon timely appealed. For the reasons that follow, we affirm the district court's dismissal of Gordon's complaint.

On February 28, 2006, Gordon borrowed $1.44 million from Mortgage Select, a corporation organized and operating in the State of New York, to purchase a home in Ketchum, Idaho (the property). Gordon signed a promissory note to that effect (the note), which included an adjustable interest rate. Gordon's initial monthly payment was $7,050. The note was secured by a Deed of Trust (trust deed), also executed by Gordon on the same date. The trust deed identified Sun Valley Title Company as the trustee and Mortgage Electronic Registration Systems, Inc. (MERS), as Mortgage Select's successor and the beneficiary under the trust deed.

1. Granting the Lenders' motion to shorten time to hear their motion to dismiss was not an abuse of discretion.

Gordon contends that the district court abused its discretion by granting the Lenders' motion to shorten time and in hearing the converted motion to dismiss on April 4, 2017. Gordon argues that the district court abused its discretion by failing to consider both of her objections to the converted motion, which claimed notice had been untimely. The Lenders respond that the district court properly found good cause to grant their motion to shorten time as allowed by Rule 7(b)(3)(H) of the Idaho Rules of Civil Procedure. Even though the Lenders cite to the wrong rule for the district court's authority, the district court was authorized to shorten time under Rule 56(b)(3). As a result, the Lenders are correct that the district court did not abuse its discretion by shortening time.

> When a motion to dismiss under I.R.C.P. 12(b)(6) is converted into a motion for summary judgment, the parties must be given time specified under I.R.C.P. 56([b]) to present relevant materials to the court. The party moving for summary judgment must serve the motion, affidavits, and supporting brief at least twenty-eight days before the hearing, and the adverse party then must serve its affidavits within fourteen days of the hearing. *The court may shorten this time period for good cause.* Deciding whether to shorten time under Rule 56([b]) is subject to the court's discretion. *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker,* 133 Idaho 1, 6, 981 P.2d 236, 241 (1999).

Doe v. Idaho Dep't of Health & Welfare, 150 Idaho 491, 495, 248 P.3d 742, 746 (2011) (italics added) (citations omitted).

B. The district court correctly denied Gordon's requested injunction and appropriately granted summary judgment in favor of the Lenders.

This case has an unusual procedural background involving the Lenders' converted motion to dismiss on the one hand and Gordon's motion for a TRO that was treated as a motion for a preliminary injunction on the other. These two motions were addressed at the same hearing. Accordingly, we take this opportunity to clarify that the district court's granting of summary judgment properly addressed Gordon's arguments for injunctive relief and properly dismissed her claim.

Initially, Gordon's motion for a TRO was properly construed by the district court as a motion for a preliminary injunction. When Gordon filed her complaint with the district court on January 9, 2017, she moved for a TRO under Rule 65(b) of the Idaho Rules of Civil Procedure. Orders issued pursuant to Rule 65(b) are of short duration (no more than 14 days) because of their extraordinary procedural posture. *See* I.R.C.P. 65(b)(2). At the time, a foreclosure sale was scheduled to occur just two days after the hearing, on January 11, 2017; thus, a motion under Rule 65(b) was appropriate. However, the January 11, 2017, foreclosure sale was postponed by the Lenders. Two months later, on March 15, 2017, Gordon filed a memorandum supporting her motion for the TRO—the memorandum still claimed to be brought under Rule 65(b). However, the Lenders had notice of the requested injunction and were able to present arguments against it. Because the Lenders had been notified of Gordon's requested injunction and the district court held a contested

hearing on the matter, Gordon's motion for a TRO was properly characterized as a motion for a preliminary injunction under Rule 65(a). *See Wood v. Wood*, 96 Idaho 100, 101, 524 P.2d 1072, 1073 (1974) ("The function of [a temporary restraining] order is to preserve the status quo during the interim and until a hearing can be held after notice to the adverse party on the application for a preliminary injunction.").

1. The district court's summary judgment analysis implicitly addressed Gordon's preliminary injunction arguments.

Despite appropriately categorizing Gordon's motion as a request for a preliminary injunction, the district court analyzed a number of Gordon's arguments under the summary judgment standard. Due to the nature of the grounds for Gordon's proposed preliminary injunction, this was not error.

A party seeking a preliminary injunction bears "the burden of proving the right thereto ...." *Harris v. Cassia Cty.*, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984) (citing *Lawrence Warehouse Co. v. Rudio Lumber Co.*, 89 Idaho 389, 405 P.2d 634 (1965)). "Whether to grant or deny a preliminary injunction is a matter for the discretion of the trial court." *Brady v. City of Homedale*,130 Idaho 569, 572, 944 P.2d 704, 707 (1997) (citing *Harris*, 106 Idaho at 517, 681 P.2d at 992). A district court should grant a preliminary injunction "only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Id.* (quoting *Harris*, 106 Idaho at 518, 681 P.2d at 993).

Rule 65(e) enumerates the grounds upon which a district court may grant a preliminary injunction. I.R.C.P. 65(e). Gordon posited, below and on appeal, three substantive arguments to support her proposed injunction. All three arguments implicate subsection 65(e)(1). That section authorizes a district court to grant a preliminary injunction "when it appears by the complaint that the plaintiff is entitled to the relief demanded, and that relief, or any part of it, consists of restraining the commission or continuance of the acts complained of, either for a limited period or perpetually[.]" I.R.C.P. 65(e)(1). This Court, has announced the following rules regarding subsection (e)(1): The moving party must

> demonstrate that based on their complaint, they were entitled to the relief they demanded, and as such were likely to prevail at trial. The substantial likelihood of success necessary to demonstrate that ... [the moving party is] entitled to the relief ... demanded cannot exist where complex issues of law or fact exist which are not free from doubt.

Harris, 106 Idaho at 518, 681 P.2d at 993 (analyzing an earlier yet substantively identical version of Rule 65(e)(1)).

Accordingly, when an argument for a preliminary injunction is based on entitlement to the requested relief, such as the case is here, a sufficient showing by the party opposing the injunction that it is entitled to summary judgment necessarily defeats the moving party's ability to demonstrate the requisite likelihood of success. In other words, the legal effect of the district court's conclusion that the Lenders were entitled to summary judgment would unavoidably result in the rejection of Gordon's motion for a preliminary injunction. On appeal, we review the district

court's dismissal of Gordon's complaint under the summary judgment standard, with the understanding that such dismissal implicitly found Gordon's argument could not support the requested preliminary injunction.

2. The alleged postponement error was not a sufficient basis to delay the foreclosure sale.

In support of her effort to enjoin the foreclosure sale, Gordon argued that the Lenders failed to properly cry and postpone the foreclosure sale on February 9, 2017. The district court noted conflicting evidence in the matter and inferred that the postponement had been properly cried. Gordon continues to argue on appeal that the postponement was not properly cried and that the inference drawn by the district court was improper. The Lenders contend that the district court properly inferred that the foreclosure sale was postponed in accordance with Idaho Code section 45-1506(8). In the alternative, they argue that even if the postponement did not occur as determined by the district court, section 45-1508 does not allow Gordon to undo the later foreclosure sale. The Lenders argue that whatever transpired at the earlier postponement is immaterial given subsequent events. We agree.

Section 45-1506(8) establishes the relevant procedure for providing notice regarding postponement of a foreclosure sale. It reads, "The trustee may postpone the sale of the property upon request of the beneficiary by publicly announcing at the time and place originally fixed for the sale the postponement to a stated subsequent date and hour." I.C. § 45-1506(8). The purpose of section 1506(8) is to give a debtor notice that the sale date has been postponed so she may protect her interest in the property at the rescheduled sale. *See Black Diamond All., LLC. v. Kimball*, 148 Idaho 798, 801, 229 P.3d 1160, 1163 (2010).

There is no dispute that Gordon received notice of, and seemingly acquiesced to, the two later postponements—the final of which was pronounced by the district court. At the end of the day, Gordon had actual notice of the final sale.

Actual notice afforded her the protection contemplated by the legislature in Idaho Code section 45-1506(8). She was able to protect her interest in the property at the rescheduled sale. Accordingly, any alleged error occurring at the February 9, 2017, postponement was remedied through the later notices of and Gordon's apparent acquiescence to the later postponements because she was properly informed. *See Black Diamond*, 148 Idaho at 801, 229 P.3d at 1163.

The determination that Gordon's later acquiescence to the subsequent postponements remedied any alleged error in the postponement procedure is supported by Idaho Code section 45-1508. Section 45-1508 establishes when foreclosure sales become final despite defects in notice proceedings. That statute reads,

> FINALITY OF SALE. 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, and of any other person claiming by, through or under such persons and such persons shall have no right to redeem the property from the purchaser at the trustee's sale. The failure to give notice to any of such persons by mailing, personal service, posting or publication

> in accordance with section 45-1506, Idaho Code, shall not affect the validity of the sale as to persons so notified *nor as to any such persons having actual knowledge of the sale*. Furthermore, any failure to comply with the provisions of section 45-1506, Idaho Code, shall not affect the validity of a sale in favor of a purchaser in good faith for value at or after such sale, or any successor in interest thereof.

I.C. § 45-1508 (italics added). The Lenders claim that section 45-1508, along with *Spencer v. Jameson*, 147 Idaho 497, 211 P.3d 106 (2009), dictate that the completed foreclosure sale should not be invalidated or reversed—despite any alleged error in postponement or purported violation of section 45-1506(8). The Lenders are correct and *Spencer* is instructive.

Like the case at bar, the debtor in *Spencer* received proper notice of the initial foreclosure sale. *Spencer*, 147 Idaho at 500, 211 P.3d at 109. Also like this case, the sale in *Spencer* was alleged to have violated a separate subsection of 45-1506 not involving the service or publication of the initial notice; the lender had violated subsection (9) by placing a credit bid over the amount owed under the promissory note at the time of the foreclosure sale. *Id.* at 503, 211 P.3d at 112 (citing *Fed. Home Mortg. Corp. v. Appel*, 143 Idaho 42, 45, 137 P.3d 429, 432 (2006)). Despite this violation of section 45-1506(9), this Court interpreted section 45-1508 and found that the sale was final. *Id.* at 504, 211 P.3d at 113. We reasoned that it was not the legislature's intent to set aside a sale for a credit bid violation when no notice of a violation of service and publication under section 45-1506(2)-(6) had occurred and a separate remedy existed under section 45-1507 for the credit bid violation. *Id.* These two rationales remain valid here.

First, there is no dispute about the propriety of the initial notice of the foreclosure sale: service and publication under section 45-1506(2)-(6) were properly completed. Nor is there any dispute that Gordon received *actual* notice of the two later postponements—the latter of which was pronounced by the district court. Thus, Gordon had actual notice of the sale.

Second, and as noted, the subsequent uncontested postponements and actual notice of the sale rendered any initial failure to properly cry the February 9, 2017, postponement immaterial. These proper subsequent procedures remedied any prior problems with whatever transpired at the February 9, 2017, postponement. As a result, the completed foreclosure sale will not be undone merely because Gordon contends the postponement that occurred months before the sale was somehow improper. *See Spencer*, 147 Idaho at 503, 211 P.3d at 112. Accordingly, Gordon's argument that a postponement error occurred is not a basis to undo what was done. Because subsequent events rendered the earlier postponement immaterial, it was unnecessary for the district court to make a factual finding regarding the earlier postponement. It does not provide a basis to conclude the district court's rejection of Gordon's motion for a preliminary injunction was in error.

3. The Lenders' failure to record a power of attorney did not invalidate the foreclosure procedures, nor did it provide grounds to enjoin the sale.

On January 28, 2016, SPS (the loan servicer) executed an Appointment of Successor Trustee, appointing McMahon-Myhran as successor trustee under the trust deed. This appointment was recorded in Blaine County, Idaho, on February 8, 2016. SPS did so as U.S. Bank's attorney-in-fact. However, no power of attorney appointing SPS[5] as U.S. Bank's attorney-in-fact had been

previously recorded in Blaine County. Months later, McMahon-Myhran recorded the initial Notice of Default on August 31, 2016, and executed the Notice of Sale on September 6, 2016.

Gordon claims that Idaho Code section 55-806 required U.S. Bank to record a power of attorney in Blaine County, granting SPS the authority to act as the bank's attorney-in-fact when it appointed McMahon-Myhran; the bank failed to do so. Gordon thus contends that the failure to record the power of attorney violated Idaho Code section 55-806, thereby rendering SPS's appointment of McMahon-Myhran as trustee ineffectual. Gordon contends the ensuing sale was invalid because McMahon-Myhran did not have the requisite authority to effect the foreclosure procedures. The district court found the failure to record the power of attorney did not invalidate the sale, as such a prior recording was not required in this case. The district court was correct in its determination.

Our analysis begins with an interpretation of Idaho Code section 55-806. "Statutory interpretation begins with the literal language of the statute and provisions should not be read in isolation, but must be interpreted in the context of the entire document." *Hayes*, 159 Idaho at 170, 357 P.3d at 1278 (quotation marks and citation omitted). When interpreting statutes, the objective is to give effect to legislative intent, which should be derived from the whole act at issue. *Farmers Natl Bank v. Green River Dairy, LLC,* 155 Idaho 853, 856, 318 P.3d 622, 625 (2014) (citations omitted). A statute's title may be consulted for context when the statute is ambiguous or when the title's conformity to Article III, Section 16 of the Idaho Constitution is brought into question. *Federated Publ'ns, Inc. v. Idaho Bus. Review, Inc.*, 146 Idaho 207, 211, 192 P.3d 1031, 1035 (2008), *abrogated on other grounds by Verska v. Saint Alphonsus Reg'l Med. Ctr.,* 151 Idaho 889, 265 P.3d 502 (2011). As an extension of *Federated Publications, Inc.*, we find that the title of a statutory section may be consulted for context when the statute is otherwise unambiguous.[6]

Idaho Code section 55-806, which requires recordation of powers of attorney in certain circumstances, reads as follows: "POWER MUST BE RECORDED BEFORE CONVEYANCE BY ATTORNEY. An instrument executed by an attorney in fact must not be recorded until the power of attorney authorizing the execution of the instrument is filed for record in the same office." I.C. § 55-806. Although the language of this statute appears broad on its face, suggesting *any instrument* signed by an attorney-in-fact has to be preceded by a recorded power of attorney, the surrounding statutory sections, and the title of section 55-806, show this is not the case, and a prior recording was not required here.

There is no requirement to record a power of attorney if the document signed by the attorney-in-fact does not affect an interest in real property. First, section 55-801, of Chapter 8 titled "Recording Transfers," notes the type of instruments that are subject to the recording rules and may be recorded. I.C. § 55-801. It reads, "[a]ny instrument or judgment *affecting the title to or possession of real property* may be recorded under this chapter. " *Id.* (italics added). Second, the title of section 55-806 further demonstrates that a power of attorney need only be recorded prior to the "conveyance" by the attorney-in-fact. I.C. § 55-806 ("POWER MUST BE RECORDED BEFORE CONVEYANCE BY ATTORNEY."). Section 55-813 then defines conveyance: "The term 'conveyance' as used in this chapter, embraces every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged or encumbered, or by which the title to any real property may be affected, except wills." I.C. § 55-813. When read in conjunction, these

sections require only that a power of attorney be recorded before an attorney-in-fact executes an instrument that affects an estate or interest in real property.

Here, the instrument signed by the attorney-in-fact, SPS, merely names a new trustee under the trust deed. All that appointment did was change the identity of a previously established trustee—no interest in real property was altered in any way, as the trust deed already established the trustee's rights and duties. A mere change in what entity may perform those established duties did not affect any real property interests; therefore, section 55-806 was not implicated and no prior recording needed to occur.

Furthermore, the appointment was permitted under the trust deed itself and Idaho Code section 45-1504(2).

Moreover, "[t]he primary purpose of the recording statutes is to give notice to others that an interest is claimed in real property ...." *Matheson v. Harris*, 98 Idaho 758, 761, 572 P.2d 861, 864 (1977). Thus, the failure to record a power of attorney does not void a conveyance between the parties involved; it merely renders the recorded conveyance ineffectual as notice to subsequent purchasers. *See Hunt v. McDonald*, 65 Idaho 610, 149 P.2d 792 (1944) (analyzing the predecessor to I.C. § 55-806, section 54-806, I.C.A.); I.C. § 55-815. Accordingly, in recognizing that the purpose of recording instruments is to give subsequent purchasers notice, the United States District Court for the District of Idaho has twice held, in similar circumstances, that the appointment of a successor trustee by an attorney-in-fact, without a prior recorded power of attorney, was valid and did not undermine a foreclosure sale as to the original debtor. *Rheinschild Family Tr. v. Rankin*, No. 1:15-CV-00194-EJL, 2016 WL 1170945, at *8 (D. Idaho Mar. 24, 2016) ("[A]n appointment of successor trustee is legally valid between the parties to the appointment even if the power of attorney was not recorded." (citing *Purdy v. Bank of Am.*, No. 1:11-CV-00640-EJL, 2012 WL 4470938, *5 (D. Idaho 2012))).

In conclusion, the recording rule in section 55-806 does not apply to the appointment of a successor trustee in this case, and even if recording the power of attorney were required, the failure to do so would not invalidate the foreclosure sale as between Gordon and the beneficiary of the trust deed. Accordingly, this argument does not supply grounds for Gordon's injunctive relief, and the district court did not err in denying that relief.

4. <u>There are no genuine issues of material fact suggesting the Lenders violated federal law or engaged in dual tracking; thus, this allegation was an insufficient basis for enjoining the sale.</u>

Gordon's last ground for injunctive relief alleges that the Lenders violated federal law by engaging in dual tracking. The Lenders reply that they complied with all applicable federal regulations and that Gordon has failed to raise a genuine issue of material fact as it relates to the Lenders' compliance with federal law.

"A party asserting that a fact ... is genuinely disputed must support the assertion by ... citing to particular parts of materials in the record, ... or [by] showing that the materials cited do not establish the absence ... of a genuine dispute ...." I.R.C.P. 56(c)(1). Thus, "the party opposing summary judgment must bring to the trial court's attention evidence that may create a genuine

issue of material fact ...." *Beus v. Beus*, 151 Idaho 235, 239, 254 P.3d 1231, 1235 (2011) (citing *Esser Elec. v. Lost River Ballistics Techs., Inc.*,145 Idaho 912, 919, 188 P.3d 854, 861 (2008)). Mere conclusory allegations will not raise a genuine issue of material fact. *See Valiant Idaho, LLC v. VP Inc.*, 164 Idaho 314, 326, 429 P.3d 855, 867 (2018) (citing *Stafford v. Weaver*, 136 Idaho 223, 225, 31 P.3d 245, 247 (2001)).

Dual tracking, where a "lender actively pursues foreclosure while simultaneously considering the borrower for loss mitigation options[,]" is prohibited by section 1024.41(g) of title 12 of the Code of Federal Regulations. *Gresham*, 642 Fed. App'x at 359. While the district court quoted and seemingly analyzed section 1024.41(g), subsection (g) is not applicable here. Section 1024.41(g) states, in pertinent part,

> If a borrower submits a complete loss mitigation application[7] *after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process* but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale unless [one of the enumerated circumstances has occurred.]

12 C.F.R. § 1024.41(g) (italics added).

The facts of this case do not implicate subsection (g): Gordon's second loss mitigation application, which was denied based on her corrected income, was on September 15, 2015. The unrescinded Notice of Default was not filed until almost a year later on August 31, 2016, well after the completed, accurate loss mitigation application had been denied. Thus, the second (and only fully completed and accurate) loss mitigation application was not submitted "after a servicer ... made the first notice or filing required ... for any ... non-judicial foreclosures process ...." 12 C.F.R. § 1024.41(g).

Gordon's final (third) loss mitigation application, which was still open for review *after the filing of the notice* of default, does not implicate subsection (g) either. That application was never completed as required by subsection (g), nor was SPS even required to evaluate that latter application at all, since SPS evaluated Gordon's second loss mitigation application (which was denied) and Gordon had remained delinquent on her mortgage. 12 C.F.R. § 1024.41(i). Accordingly, no violation occurred regarding Gordon's final loss mitigation application, and subsection (g) is not applicable to it either.

However, 12 C.F.R. Section 1024.41(f), which bars dual tracking when an application is submitted *before* a notice of default is filed, does apply here. Even so, there is no evidence the Lenders failed to comply with subsection (f). The relevant portion of subsection (f) states,

> If a borrower submits a complete loss mitigation application ... *before a servicer has made the first notice or filing* required by applicable law for any judicial or non-judicial foreclosure process, a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:

> (i) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied[.]

12 C.F.R. § 1024.41(f)(2) (italics added). Accordingly, a loan servicer has complied with subsection (f) and is allowed to initiate foreclosure proceedings once it (1) gives proper notice under subsection (c)(1)(h) to the borrower that she is not eligible for any loss mitigation option but has the right to appeal, and (2) either gives the borrower notice that the appeal process was not applicable, the borrower fails to request an appeal within the notified time frame, or the appeal has been properly denied. *Id.*

Gordon contends SPS erred in denying her first modification application because it was rejected based on an incorrect income calculation, suggesting SPS may not have exercised reasonable diligence in obtaining correct income documentation. Specifically, she alleges that the Lenders violated 12 C.F.R. § 1024.35 by "ignoring" her notice of error. Gordon maintains SPS was required to conduct a "reasonable investigation" and was authorized to request documentation of Gordon's trust income when Gordon filed her first notice of error. 12 C.F.R. § 1024.35(e)(1)(i)(B) & (e)(2)(h). SPS did not do this at that time. However, this error was remedied by SPS in Gordon's second loss mitigation application, when Gordon's trust income was properly analyzed. If SPS had failed to acknowledge and rectify its failure to recognize Gordon's substantial trust income, SPS's failure would have provided a basis to enjoin the foreclosure process. 12 C.F.R. § 1024.35(e)(1)(i)(A). However, SPS corrected its oversight long before both the recording of the Notice of Default and foreclosure sale. Accordingly, this error did not amount to dual tracking.

Regarding Gordon's second loss mitigation application, SPS satisfied the first requirement of Section 1024.41(f) on September 15, 2015, by providing Gordon with written notice that she was not eligible for any loss mitigation options and that she could appeal the denial within thirty days. The second requirement was also satisfied because Gordon never requested an appeal of her second denial within thirty days. Although Gordon continued to correspond with SPS about the denial dated September 15, 2015, and appears to have requested a third loss mitigation application that was never completed and subsequently closed by SPS on December 7, 2016, she did not appeal the September 15, 2015, denial. As a result, the Lenders did not violate subsection (f) when they began foreclosure proceedings by recording the Notice of Default on August 31, 2016, over nine months after Gordon was required to have submitted her appeal.

Gordon did attempt to appeal the closure of her final application on January 5, 2017. However, this appeal was too little, too late, as far as the federal regulations were concerned. As noted, Gordon's final application was inapplicable for purposes of preventing the foreclosure sale because 12 C.F.R. § 1024.41(i) only required SPS to consider one completed loss mitigation application, which it did with her second application. Thus, Gordon had no right to appeal the closure of her incomplete loss mitigation application that SPS had no obligation to review in the first place. Consequently, Gordon has not raised a genuine issue of material fact suggesting the Lenders violated 12 C.F.R. § 1024.41.

Finally, Gordon claims that the district court's summary judgment must be vacated because it found dual tracking was legal in Idaho, which would amount to a violation of the Supremacy Clause, as dual tracking is prohibited by federal law. Although the district court cited the incorrect federal regulation, it nonetheless analyzed federal law and reached the correct conclusion, ensuring federal law applied in accordance with the Supremacy Clause.

In conclusion, all three of Gordon's arguments in support of her injunctive relief fail as a matter of law. The district court was therefore correct in granting summary judgment and dismissing her claim for injunctive relief.

KENWORTH SALES CO. v. SKINNER TRUCKING, INC., 165 Idaho 938, Supreme Court of Idaho, December 11, 2019

Background: Commercial truck dealer brought unjust enrichment action against customer, alleging that dealer sold three trucks to financing company for lease to customer, that customer later turned trucks in to dealer, and that customer was unjustly enriched when dealer paid past due lease payments and residual balance owed on customer's lease with financing company. Following bench trial, the Fifth Judicial District Court, Twin Falls County, Randy J. Stoker and Jon J. Shindurling, JJ., entered judgment for customer. Customer then moved for fees and costs and moved for reconsideration. The District Court denied motions. Parties each appealed.

This appeal concerns an unjust enrichment claim brought by Kenworth, a commercial truck dealer, against Skinner Trucking, one of its customers. Kenworth claims Skinner was unjustly enriched when Kenworth paid past due lease payments and the residual balance owed on Skinner's lease with GE Transportation Finance. The district court entered judgment for Skinner on the grounds that, as to the residual value of the trucks, Kenworth had not conferred a benefit on Skinner, and that as to both the residual value of the trucks and the past due lease payments, Kenworth was an "officious intermeddler" because it had voluntarily paid GE without request by Skinner and without a valid reason. In a subsequent order, the district court denied Skinner's request for attorney fees under Idaho Code sections 12-120(3) and 12-121. Kenworth timely appealed from the district court's judgment. Skinner timely appealed from the district court's order regarding costs and fees. The parties' appeals have been consolidated.

A. The officious intermeddler rule is not an affirmative defense.

The district court found that Kenworth's unjust enrichment claim failed because the company was an "officious intermeddler." Kenworth argues that the officious intermeddler rule is an affirmative defense, and because Skinner never pled or argued it until post-trial briefing, the district court should not have considered it. We hold that the officious intermeddler rule is not an affirmative defense.

Rule 8(c) of the Idaho Rul**es** of Civil Procedure provides that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense. ..." Black's Law Dictionary defines an "affirmative defense" as "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are

true." *Affirmative Defense*, Black's Law Dictionary (11th ed. 2019).The purpose of the rule is to alert the parties to the issues of fact which will be tried and to afford them an opportunity to present evidence to meet those defenses. *Williams v. Paxton*, 98 Idaho 155, 164, 559 P.2d 1123, 1132 (1976). The rule lists nineteen affirmative defenses. I.R.C.P. 8(c)(1). The officious intermeddler rule is not on the list. *See id.*

We have made it clear that Rule 8(c)'s list is not intended to be exhaustive. *See Garren v. Butigan*, 95 Idaho 355, 358, 509 P.2d 340, 343 (1973) (stating that Rule 8(c)'s listing of affirmative defenses "is not intended to be exhaustive or exclusive."). In fact, this Court has recognized a host of affirmative defenses that are not listed in the rule. *See, e.g.*, *Fuhriman v. State of Idaho, Dep't of Transp.*, 143 Idaho 800, 803, 153 P.3d 480, 483 (2007) (citing Black's Law Dictionary's definition of "affirmative defense" and holding that immunity through qualification as a statutory employer is an affirmative defense because even if all of the plaintiff's allegations were true, it would defeat the plaintiff's claim); *Seamans v. Maaco Auto Painting & Bodyworks*, 128 Idaho 747, 752, 918 P.2d 1192, 1197 (1996) (holding that in a worker's compensation case, an employee's willful intention to injure himself is an affirmative defense, in part because "[i]t seems unreasonable to believe that the legislature intended to shift to claimants the burden of proving a negative, that is, of disproving an intention to injure oneself"); *Keller Lorenz Co. v. Ins. Assocs. Corp.*, 98 Idaho 678, 681, 570 P.2d 1366, 1369 (1977)(holding that, in that case, the defense of an agent's immunity from personal liability on contracts entered into as an agent was an affirmative defense because it "depends upon proof of matters unrelated to the allegations in the complaint, matters which the plaintiff may not anticipate or be prepared to litigate without warning"); *Williams*, 98 Idaho at 164 n.1, 559 P.2d at 1132 n.1 (1976)(declining to hold that the issue of the constitutionality of a statute was waived because the constitutionality of a statute is "not ordinarily an issue upon which evidence must be presented at trial" or "about which [the plaintiff] must be forewarned in order to prepare evidence for trial"); *Bryan & Co. v. Kieckbusch*, 94 Idaho 116, 119, 482 P.2d 91, 94 (1971) (holding that impossibility of performance was an affirmative defense because it "raised new matter not alluded to in the complaint").

To determine whether the officious intermeddler rule constitutes an affirmative defense, we have to begin with the doctrine of unjust enrichment. We have long held that a prima facie case for unjust enrichment exists where: "(1) there was a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be *inequitable* for the defendant to retain the benefit without payment to the plaintiff for the value thereof." *Med. Recovery Servs., LLC v. Bonneville Billing & Collections, Inc.*, 157 Idaho 395, 398, 336 P.3d 802, 805 (2014) (citations omitted) (emphasis added). It is well understood that "[u]njust enrichment will not apply in the instance of an officious intermeddler." *Teton Peaks Inv. Co., LLC v. Ohme*, 146 Idaho 394, 398, 195 P.3d 1207, 1211 (2008). "The officious intermeddler rule essentially provides that a mere volunteer who, without request therefor, [sic] confers a benefit upon another is not entitled to restitution. This rule exists to protect persons who have had unsolicited 'benefits' thrust upon them." *Id.*

Kenworth acknowledges that Idaho courts have not explicitly held that the officious intermeddler rule constitutes an affirmative defense, but argues that they have treated it as such, citing to our decision in *Teton Peaks* and the Court of Appeals' decisions in *Curtis v. Becker*, 130 Idaho 378, 382, 941 P.2d 350, 354 (Ct. App. 1997) and *Chinchurreta v. Evergreen Management, Inc.*,

117 Idaho 591, 790 P.2d 372 (Ct. App. 1989). Kenworth argues that the discussion of the officious intermeddler rule in these cases occurs separately from the list of elements that a plaintiff must satisfy in order to prevail on an unjust enrichment claim. Therefore, the rule must be a separate affirmative defense. We disagree.

The officious intermeddler rule will defeat a plaintiff's claim, but this is true not because the rule is an affirmative defense, but rather because the voluntary nature of the payment bears directly on whether it would be inequitable for the defendant to retain the benefit of the payment. Stated differently, Kenworth had the burden of proving at trial circumstances which would make it inequitable for Skinner to benefit from Kenworth's payments to GE. This would require more than evidence of a voluntary payment. *See, e.g., Chinchurreta*, 117 Idaho at 593, 790 P.2d at 374 ("It is well settled that a person cannot—by way of set-off, counterclaim or direct action—recover money which he or she 'has voluntarily paid with full knowledge of all the facts, and without any fraud, duress or extortion, although no obligation to make such payment existed' ") (quoting *McEnroe v. Morgan*, 106 Idaho 326, 335, 678 P.2d 595, 604 (Ct.App. 1984)). A defendant who receives the benefit of a voluntary payment may be enriched, but he is not *unjustly* enriched. *See* Restatement (First) of Restitution § 2, cmt. a (1937). While Skinner did not invoke the officious intermeddler doctrine until its post-trial briefing, Kenworth understood that proving the equitable circumstances under which the purchase of the trucks was made was essential to its prima facie case. Kenworth's cry of trial by ambush is unjustified.

B. The district court did not err when it concluded that Kenworth was an officious intermeddler.

Kenworth asserts that even if this Court holds that the officious intermeddler rule is not an affirmative defense, the district court erred in applying it to the facts of this case. Kenworth argues that the district court incorrectly found that Kenworth had no valid reason for purchasing the trucks from GE because it ignored the reason that Kenworth gave: to keep Skinner, "a long-time customer," in business. Kenworth also disputes the district court's statement that there was "no indication that Skinner would continue to do business with [Kenworth]." Given the basis for the doctrine, we agree with the district court that merely keeping Skinner in business was not the kind of interest sufficient to avoid application of the officious intermeddler rule.

The term "officious intermeddler" first appeared in Idaho case law in the Court of Appeals' decision in *Chinchurreta v. Evergreen Management, Inc.*, 117 Idaho 591, 790 P.2d 372 (Ct. App. 1989). Explaining the basis for the rule, the Court of Appeals cited section 2of the First Restatement of Restitution which states that:

> A person who officiously confers a benefit upon another is not entitled to restitution therefor.

Restatement (First) of Restitution § 2 (1937). Comment "a" to this provision describes "officiousness" as unjustified interference in the affairs of others and explains that there must be a "valid reason" for conferring a benefit in order to prevail on a claim for unjust enrichment:

> *Officiousness means interference in the affairs of others not justified by the circumstances under which the interference takes place*. Policy ordinarily requires that a person who has conferred a benefit either by way of giving another services or by adding to the value of his land or by paying his debt or even by transferring property to him should not be permitted to require the other to pay therefor, unless the one conferring the benefit had a *valid reason* for so doing. A person is not required to deal with another unless he so desires and, ordinarily, a person should not be required to become an obligor unless he so desires.
>
> The principle stated in this Section is not a limitation of the general principle stated in § 1; where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched. The rule denying restitution to officious persons has the effect of penalizing those who thrust benefits upon others and protecting persons who have had benefits thrust upon them (see § 112).

Restatement (First) of Restitution § 2 (1937) (emphasis added). "Valid reasons" are found in comment "a" to section 112 and include mistake, fraud, coercion (caused by duress or the necessity of protecting the interest of the person who conferred the benefit), and an agreement with the person receiving the benefit. Restatement (First) of Restitution § 112, cmt. a (1937).

Compared to the types of interests listed in section 112, Kenworth's interest in the payment of Skinner's obligation to GE is too attenuated to constitute a "valid reason" to hold Kenworth liable for restitution: Kenworth was not protecting an interest in its own property, and it was not liable in any way to GE. Although Kenworth could be said to have been protecting its interest in future profits by ensuring that Skinner Trucking survived to continue as a Kenworth customer, but recovery for an incidental benefit to another party in pursuit of one's own financial advantage is specifically disallowed under Idaho precedent. *See Hettinga v. Sybrandy*, 126 Idaho 467, 471, 886 P.2d 772, 776 (1994)). Regardless, there was no evidence in the record suggesting that Skinner was a key client whose business was essential to Kenworth's economic viability. Moreover, several Kenworth employees specifically disclaimed any profit motive and there is substantial evidence to support the district court's determination that there was no evidence that Kenworth expected Skinner to continue doing business with them. Therefore, Kenworth's desire to keep Skinner in business was not an interest sufficient to relieve Kenworth of officious intermeddler status.

RENCHER/SUNDOWN LLC v. PEARSON, 165 Idaho 877, Supreme Court of Idaho, November 29, 2019

Background: Landlord filed action against tenant, alleging that he started a fire that damaged the apartment complex in which he lived. Tenant moved to dismiss for failure to timely serve complaint. The Seventh Judicial District Court, Bonneville County, Jon J. Shindurling, Senior Judge, granted tenant's motion and entered judgment dismissing case. Landlord appealed.

Holdings: The Supreme Court, Bevan, J., held that:

1. service by publication after expiration of time to serve complaint could not be considered in determining whether landlord demonstrated good cause for failing to timely serve complaint,
2. landlord failed to demonstrate good cause to timely serve complaint.

Affirmed.

This is an appeal from a district court's dismissal of Rencher/Sundown LLC's ("Sundown") complaint against Butch Pearson.

Sundown did not serve the complaint or summons within the six months required by Idaho Rule of Civil Procedure 4(b)(2) and Pearson moved to dismiss the complaint. The district court dismissed Sundown's complaint after finding Sundown could not show good cause for failure to timely serve. We affirm.

Pearson was a tenant in an apartment complex owned by Sundown. On May 25, 2017, Sundown filed a verified complaint against Pearson[2] alleging he started a fire that damaged the apartment complex about three years earlier on May 26, 2014. On October 21, 2017, Sundown allegedly tried to serve the summons and complaint on Pearson at his last known address, although there is no affidavit of service in the record to show any failed attempts at service. On November 28, 2017, a second summons was issued. Sundown then apparently engaged the Bingham County Sheriff to effect service, but any service attempts conducted by the Sheriff are likewise missing from the record.

Shortly before the second summons was issued, on November 22, 2017, Pearson filed for bankruptcy. Sundown was listed as a creditor in Pearson's bankruptcy filing. On February 26, 2018, the bankruptcy judge granted Pearson an order of discharge. Sundown was served with notice of the order of discharge, which contained Pearson's address.

On May 21, 2018—nearly one year after filing the original complaint—Sundown moved to serve Pearson by publication. The district court apparently granted the order on June 7, 2018; however, the district court's order was also not included in the record. On June 11, 2018, Pearson moved to dismiss for failure to serve the summons and complaint within the six-month time frame required under Rule 4(b)(2). Sundown opposed Pearson's motion, arguing that the court had given leave to effect service by publication and that Pearson's discharged obligations from the bankruptcy proceedings were limited to back rent owed, not for any costs associated with the fire damage. One day before the hearing, Sundown apparently filed an affidavit of service and proof of publication, although the affidavit of service and proof of publication are not included in the record.

On September 5, 2018, the parties appeared for a hearing on Pearson's motion to dismiss. At the hearing, the district court judge questioned Sundown about the inability to locate Pearson prior to the expiration of the six-month service period, particularly in light of the bankruptcy paperwork that listed Pearson's address. Sundown's attorney stated that he was not provided a copy of the bankruptcy documents, to which the judge responded:

> THE COURT: Well, apparently, your client received those. You state in your affidavit[3] that you contacted counsel that represented Mr. Pearson in the bankruptcy proceedings.
>
> And I assume that that was a result of your client having referred the issue to you as to the $1,500 to be discharged. And you say that your client said, Go ahead and let him discharge that.
>
> Well, they had to have received those documents prior to the expiration of the six months. And, in those documents, they listed — was listed Mr. Pearson's current address.
>
> Now, your client had notice prior to the expiration of the time for service of the place Mr. Pearson could be located and didn't - didn't act upon it.
>
> I know that's — you say they didn't refer that to you, but that's not what's at issue. What's at issue is what your client had.

When asked how Sundown's failure to provide all the documentation to its attorney constituted good cause, counsel for Sundown admitted "it [was] probably not good cause." Nevertheless, counsel maintained that he did try to serve Pearson prior to the expiration of the first summons, but those efforts failed because they could not find him. Sundown continued to allege with no supporting evidence that Pearson was evading service. The district court was not persuaded and granted Pearson's motion, reasoning that the burden was on Sundown to bring evidence constituting good cause for failure to timely serve and Sundown had not done so. On September 6, 2018, the court entered a judgment dismissing Sundown's case against Pearson with prejudice. Sundown timely appealed.

ISSUES ON APPEAL

1. Whether the district court erred when it dismissed Sundown's complaint against Pearson.
2. Whether either party is entitled to attorney fees on appeal.

The district court evaluated the evidence presented, but did not hold an evidentiary hearing. Thus, the summary judgment standard applies and the record should be liberally construed in the light most favorable to the non-moving party. *Hansen v. White,* 163 Idaho 851, 853, 420 P.3d 996, 998 (2018). Additionally, "[w]hen a party appealing an issue presents an incomplete record, this Court will presume that the absent portion supports the findings of the district court." *Id.* (quoting *Gibson v. Ada Cnty.*, 138 Idaho 787, 790, 69 P.3d 1048, 1051 (2003)).

As a threshold matter, the record on appeal is inadequate. Namely, there is no ****523*** evidence in the record that establishes what attempts were made by Sundown, or others on its behalf, to serve the summons and complaint. The record does not include the affidavits of service showing Sundown attempted service before the expiration of the six-month period, the motion or order

granting leave to serve by publication, or any documentation that would show the date that service by publication was actually completed. Because the record on appeal is incomplete, this Court must presume the record supports the findings of the district court. "It is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. In the absence of an adequate record on appeal to support the appellant's claims, we will not presume error." *Greenfield v. Smith*, 162 Idaho 246, 253, 395 P.3d 1279, 1286 (2017) (quoting *Belk v. Martin*, 136 Idaho 652, 661, 39 P.3d 592, 601 (2001)). Rather, "the missing portions of that record are to be presumed to support the action of the trial court." *Rutter v. McLaughlin*, 101 Idaho 292, 293, 612 P.2d 135, 136 (1980).

A. The district court did not err by dismissing Sundown's complaint because the order granting Sundown permission to serve by publication did not relieve the obligation to comply with Rule 4(b)(2).

Sundown argues the district court's order should be reversed because the court gave leave to Sundown to provide service by publication, which was effected prior to Pearson's motion to dismiss.

Idaho Rule of Civil Procedure 4(b)(2)requires service of the summons and complaint within six months of filing the complaint. If service is not accomplished within the time specified in Rule 4(b)(2), dismissal is mandatory unless good cause is demonstrated by the plaintiff for the failure to timely serve. *Elliott v. Verska,* 152 Idaho 280, 288, 271 P.3d 678, 686 (2012). "Whether or not the defendant promptly moves for dismissal under 4(a)(2)[4] is irrelevant to the issue of good cause for the plaintiff's failure to comply with that rule." *Id.* at 289, 271 P.3d at 687. "The inquiry into good cause must focus on the six-month time period from the filing of the complaint, and the trial court must consider the totality of the circumstances to determine whether the plaintiff had a legitimate reason for not serving the defendant within that period." *Hansen,* 163 Idaho at 853, 420 P.3d at 998 (internal quotation omitted).

"[T]he determination of whether good cause exists is a factual one." *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997). "The burden is on the party who failed to effect timely service to demonstrate good cause." *Martin v. Hoblit,* 133 Idaho 372, 375, 987 P.2d 284, 287 (1999). "Courts look to factors outside of the plaintiff's control including sudden illness, natural catastrophe, or evasion of service of process." *Harrison v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 145 Idaho 179, 183, 177 P.3d 393, 397 (2008) (internal citation omitted). In deciding whether there were circumstances beyond the plaintiff's control that justified the failure to serve the summons and complaint within the six-month period, the court must consider whether the plaintiff made diligent efforts to comply with the time restraints imposed by Rule 4(b)(2). *Martin,* 133 Idaho at 377, 987 P.2d at 289.

Sundown does not dispute that it failed to serve Pearson within the six-month timeframe after the complaint was filed. Instead, Sundown argues that because the hearing on Pearson's motion to dismiss was held after service by publication had been completed, the district court should have denied Pearson's motion to dismiss as moot.

Under Rule 4(b)(2):

> If a defendant is not served within 6 months after the complaint is filed, the court, on motion or on its own after 14 days' notice to the plaintiff, must dismiss the action without prejudice against that defendant. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

This Court has held, "[w]hen a rule is mandatory, rather than discretionary, the time at which dismissal is sought is irrelevant." *Telford v. Mart Produce, Inc.*, 130 Idaho 932, 935, 950 P.2d 1271, 1274 (1998). Moreover, this Court has determined that the relevant period to focus on is the six months following the filing of the complaint. *Sammis*, 130 Idaho at 346, 941 P.2d at 318. Thus, the issue is not the timing of the motion to dismiss hearing, as Sundown suggested; rather, it is Sundown's failure to effect service of process within the six-month period under Rule 4(b)(2). Here, the six-month period following the filing of the complaint was May 25, 2017 through November 27, 2017.[5] Sundown's motion for leave to serve by publication occurred in May 2018—six months after the expiration of the six-month service period. The district court's good cause inquiry does not extend this far. As the district court addressed at the hearing, the fact that the motion to serve by publication was granted did not relieve Sundown of its obligations to timely serve the complaint under Rule 4(b)(2).

The burden was on Sundown to demonstrate good cause for failure to timely effect service. *Martin*, 133 Idaho at 375, 987 P.2d at 287. In the six-month period, Sundown only tried to serve Pearson on one occasion, October 21, 2017. It appears that Sundown may have continued its attempts to serve Pearson after the six-month service period expired; however, it is unclear when any attempts were made due to the lack of documentation, i.e., Sundown provided no affidavits from counsel or a process server to indicate that service attempts were made or to suggest why those attempts failed. This Court is left to presume the district court properly found Sundown's failed service attempts did not amount to good cause. *Rutter*, 101 Idaho at 293, 612 P.2d at 136 ("the missing portions of that record are to be presumed to support the action of the trial court."). Further, in light of the fact that Sundown received Pearson's new address from the bankruptcy filings, Sundown's allegation that Pearson moved and deliberately left no forwarding address to evade service of process is not persuasive. The district court found no reason for Sundown's failure to timely serve the complaint before the expiration of the six months and dismissed all claims against Pearson with prejudice.

Under Rule 4(b) the district court needed to dismiss Sundown's complaint against Pearson *without* prejudice; however, the district court's error is ultimately harmless because at the time the judgment was entered the statute of limitations had expired. As such, Sundown would not have been able to refile even if the district court had dismissed the complaint without prejudice. Thus, the district court's decision is affirmed.

B. Sundown is denied attorney fees. Pearson is awarded attorney fees.

Sundown requests an award of costs and attorney fees under Idaho Code section 12-121 with no supporting argument; however, Sundown is not the prevailing party on appeal and thus has no right to attorney fees. Pearson also requests an award of attorney fees under Idaho Code sections 12-121, 12-123 and Rule 54(e)(1). Pearson maintains that attorney fees are proper because

Sundown's appeal was brought unreasonably and without foundation because of Sundown's failure to identify a specific error in the district court's decision. Pearson argues that Sundown is instead merely asking this Court to second-guess an unfavorable decision by the district court.

Attorney fees under Idaho Code section 12-121 may be awarded to the prevailing party when an appeal is brought frivolously, unreasonably, or without foundation. I.C. § 12-121. Idaho Code section 12-123 allows sanctions for "frivolous conduct." An award of attorney fees as a sanction for frivolous conduct must be made "at any time prior to the commencement of the trial in a civil action or within twenty-one (21) days after the entry of judgment in a civil action." I.C. § 12-123(2)(a). That said, "Section 12-123 does not apply on appeal to this Court." *Bird v. Bidwell*, 147 Idaho 350, 353, 209 P.3d 647, 650 (2009).

Given the inadequacy of Sundown's briefing in this case and because Sundown pursued this appeal without providing an adequate record, we hold that Sundown pursued this appeal in a manner that was frivolous and without foundation.

As a result, Pearson is awarded attorney fees under Idaho Code section 12-121.

CONCLUSION

The district court's dismissal of Sundown's complaint is affirmed. Costs and attorney fees on appeal awarded to Pearson.

ZEYEN v. POCATELLO/CHUBBUCK SCHOOL DIST. NO. 25, 165 Idaho 690, Supreme Court of Idaho, October 23, 2019

Background: Objector brought declaratory judgment action against school district, on behalf of all school children in district, alleging fees imposed by district were illegal and unconstitutional. The District Court, Bannock County, Robert C. Naftz, J., denied objector's motion for class certification and motion for leave to amend complaint. Objector appealed.

Holdings: The Supreme Court, Burdick, C.J., held that:

1. trial court acted within its discretion in denying motion to amend complaint, and
2. Educational Claims Act does not provide relief, including declaratory relief, for past violations of the constitution's Education Article; rather, Act provides for only present and prospective relief.

Affirmed.

This appeal arises from the Bannock County district court's order denying a motion for class certification and a motion for leave to amend the complaint. The named plaintiff ("Zeyen") seeks declaratory relief and recovery of damages from Pocatello/Chubbuck School District No. 25 on behalf of all students currently enrolled in the district and their guardians. Zeyen alleges that School District 25's practice of charging fees violates Article IX, section 1, of the Idaho Constitution (the "Education Article"). Zeyen first sought to certify the class to include all students within School District 25. Zeyen's later motion to amend sought to add a takings claim

under both the Idaho and U.S. Constitutions. The district court denied Zeyen's motion for class certification based on lack of standing and denied his motion to amend both as untimely and prejudicial to School District 25. Zeyen timely appeals.

In July 2016, Zeyen filed his original complaint on behalf of all K-12 school children in School District 25. Zeyen sought declaratory judgment that the fees imposed by School District 25 were "illegal and unconstitutional." Zeyen also requested the "reimbursement" or "refund" of the fees paid for the 2014-15 school year as well as the following years. Jurisdiction was proper, Zeyen contended, under the Education Article. Answering, School District 25 argued that jurisdiction should be under Idaho's Constitutionally Based Educational Claims Act ("Educational Claims Act" or "the Act") because the Education Article does not provide a private cause of action for damages. School District 25 also argued that Zeyen did not have standing and was not entitled to class certification. In November 2016, the court calendared the case for trial to take place in fall 2017 with motions to amend pleadings due on January 3, 2017.

In October 2016, Zeyen moved for class certification. A decision on that motion was delayed after a few events altered the course of proceedings. First, School District 25 claimed it stopped charging fees that were associated with academic credit beginning with the 2016-17 school year. Second, *Joki v. State* was on appeal to this Court. 162 Idaho 5, 394 P.3d 48, 6 (2017). This Court heard oral argument in the *Joki* case in January 2017 and took the case under advisement. A short time after, Zeyen moved to suspend proceedings until this Court issued a decision in *Joki*. The district court granted Zeyen's motion and vacated the trial dates.

This Court issued the *Joki* opinion in April 2017. *Id.* In August 2017, the district court held a status conference. Shortly thereafter, Zeyen filed, and the district court granted, a motion for leave to amend his complaint. The first amended complaint differed from the original complaint by asserting that Zeyen and the proposed class "have a right and standing to sue both as a constitutional claim under [the Education Article], and also, concurrently, as a claim under the Constitutionally Based Education Claims Act" based on this Court's decision in *Joki*.

A few months later, in October 2017, Zeyen moved for leave to amend his complaint a second time to plead a violation of the takings clause. The proposed complaint contained additional references to the takings clause in the Idaho and U.S. Constitutions as well as 42 U.S.C. § 1983. In support of his motion, Zeyen argued that he had a viable claim for an unlawful taking under this Court's recent decision in *Hill-Vu Mobile Home Park v. City of Pocatello,* 162 Idaho 588, 591, 402 P.3d 1041, 1044 (2017). He also asserted that the Educational Claims Act could not limit his Constitutional claims.

In January 2018, the district court heard argument on Zeyen's motion for leave to amend the First Amended Complaint and his motion to certify the class. The court orally denied the motion to amend the First Amended Complaint and took the class-certification issue under advisement. The court later issued an order denying the motion for class certification. In the accompanying memorandum decision, the court recited its reasoning for denying Zeyen's motion to amend the Amended Complaint, explaining that Zeyen's "undue delay" in asserting the takings claim would be "especially prejudicial" given "that discovery was concluded in accordance with the accelerated timeline" he had requested. As to class certification, the court ruled that Zeyen lacked standing to

pursue the class action. The court determined that the Educational Claims Act provides the sole mechanism for Zeyen to acquire standing under the Education Article. Because the Educational Claims Act does not address past wrongs or individual damages, the court ruled that Zeyen failed the typicality requirement for class-action standing because he lacked a redressable injury required for individual standing.

At Zeyen's request, the court certified the memorandum decision as a final appealable judgment under Rule 54(b) of the Idaho Rules of Civil Procedure, and Zeyen appealed. After his appeal was conditionally dismissed for lack of a partial judgment, the court entered a partial judgment denying the motion for class certification. This Court elected to treat the final partial judgment as a motion for permissive appeal and granted the motion.

ISSUES ON APPEAL

1. Did the district court abuse its discretion when it denied Zeyen's motion for leave to amend the first amended complaint?
2. Did the district court abuse its discretion when it denied Zeyen's motion for class certification for lack of standing?
3. Is Zeyen entitled to attorney's fees on appeal?

This Court reviews a trial court's decision to grant or deny a motion for class certification for an abuse of discretion. *BHA Investments, Inc. v. City of Boise,* 141 Idaho 168, 171, 108 P.3d 315, 318 (2004) (citing *Pope v. Intermountain Gas Co.,* 103 Idaho 217, 646 P.2d 988 (1982)). Likewise, this Court reviews a trial court's decision to grant or deny a motion to amend the pleadings for an abuse of discretion. *PHH Mortg. v. Nickerson,* 160 Idaho 388, 396, 374 P.3d 551, 559 (2016) (citing *Clark v. Olsen,* 110 Idaho 323, 326, 715 P.2d 993, 996 (1986)).

To determine whether a lower court has abused its discretion, this Court asks whether the trial court: "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life,*163 Idaho 856, 863, 421 P.3d 187, 194 (2018) (citing *Hull v. Giesler,* 163 Idaho 247, 250, 409 P.3d 827, 830 (2018)).

For questions of law, this Court applies a de novo standard of review. Questions of jurisdiction, statutory interpretation, and the interpretation and application of procedural rules are questions of law. *See Tucker v. State,* 162 Idaho 11, 17, 394 P.3d 54, 60 (2017) ("Jurisdictional issues, like standing, are questions of law, over which this Court exercises free review.") (quoting *Christian v. Mason,* 148 Idaho 149, 151, 219 P.3d 473, 475 (2009)); *Hayes v. City of Plummer,* 159 Idaho 168, 170, 357 P.3d 1276, 1278 (2015) ("The interpretation of a statute is a question of law that the Supreme Court reviews de novo."); *Smith v. Treasure Valley Seed Co.,* 161 Idaho 107, 109, 383 P.3d 1277, 1279 (2016) ("[T]he application of a procedural rule is a question of law on which we exercise free review.") (quoting *Zenner v. Holcomb,* 147 Idaho 444, 450, 210 P.3d 552, 558 (2009)).

For constitutional challenges, "every presumption is in favor of the constitutionality of the statute, and the burden of establishing the unconstitutionality of a statutory provision rests upon the challenger." *Osmunson v. State,* 135 Idaho 292, 294, 17 P.3d 236, 238 (2000) (citing *State v. Nelson,* 119 Idaho 444, 447, 807 P.2d 1282, 1285 (Ct. App. 1991)).

Although reasonable minds may differ on issues of school funding, this appeal presents two narrow, discrete procedural issues: (A) whether the district court erred in denying Zeyen's motion to amend the first amended complaint; and (B) whether the district court erred in denying Zeyen's motion to certify the class. For the reasons expressed below, we determine that the district court did not err in denying either motion.

A. The district court did not abuse its discretion when it denied Zeyen's motion to amend the complaint.

Zeyen contends that the district court abused its discretion when it denied his motion to amend his complaint to specifically identify the takings and due-process clauses of the Idaho and U.S. Constitution. The district court denied his motion on grounds of undue delay and prejudice to School District 25. To challenge undue delay, Zeyen argues that there was no scheduling order at the time, no court-imposed deadlines had passed, and no work had been completed on the merits. As for prejudice, Zeyen contends that the court would not have to reopen discovery because discovery on the merits was still ongoing. In view of the record, we determine that Zeyen has failed to show that the district court abused its discretion in denying ****30*** his motion for leave to amend the first amended complaint.

A motion for leave to amend the pleadings is governed by Rule 15(a) of the Idaho Rules of Civil Procedure. Rule 15(a) allows parties to amend the pleadings in three circumstances: (1) as a matter of right under certain circumstances; (2) with the opposing party's written consent; and (3) with leave of court. The purpose of Rule 15 is "to allow the best chance for each claim to be determined on its merits rather than on some procedural technicality" and "to relegate pleadings to the limited role of providing parties with notice of the nature of the pleader's claim and the facts that have been called into question." *Clark v. Olsen,* 110 Idaho 323, 326, 715 P.2d 993, 996 (1986). "In the absence of any apparent or declared reason ... the leave sought should, as the rules require, 'be freely given' " because an "outright refusal to grant the leave without any justifying reason appearing for the denial ... is merely [an] abuse of [ ] discretion and inconsistent with the spirit" of the Rules of Civil Procedure. *Id.* at 326, 715 P.2d at 996.

In *Clark v. Olsen,* this Court recognized some of the possible reasons that would justify denying a motion to amend the pleading. *Id.*at 326, 715 P.2d at 996. Originally set out in *Foman v. Davis* by the U.S. Supreme Court, those reasons are:

- Undue delay;
- Bad faith and dilatory motive on the part of the movant;
- Repeated failure to cure deficiencies by amendments previously allowed;
- Undue prejudice to the opposing party; and
- Futility.

Id. (citing 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). This Court has expanded on the *Foman* factors to note that "[t]imeliness alone is not a sufficient reason to deny a motion to amend." *DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 756, 331 P.3d 491, 498 (2014). Rather, "[t]imeliness is important in view of the *Foman* factors ...." *PHH Mortg. v. Nickerson*, 160 Idaho 388, 396, 374 P.3d 551, 559 (2016) (quoting *Carl H. Christensen Family Tr. v. Christensen*, 133 Idaho 866, 871, 993 P.2d 1197, 1202 (1999)).

Here, the district court first denied the motion to amend from the bench at the hearing:

> This motion for leave to file a Second Amended Complaint is interesting, and I recognize this is purely discretion on my part, and I have to look at that in that way, and I know, also, that I have to consider allowing amendments to be given freely and liberally—liberal grant to allow amendments to take place in Complaints, but it is subject to exceptions, undue delay, bad faith, repeated failure to cure deficiencies by the amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendments, and so I've been looking over my notes here with regard to that, and looking at the fact that I do have discretion with regard to this amendment, and looking at both arguments here, and the taking is a new cause of action ...
>
> The defendants have also argued that to allow the amendment by the plaintiffs the second time around would prejudice the defendant, because this could have been asserted, and this is one of the areas that I am concerned about, this could have been asserted at the time of the filing of the Complaint, and, now, there is going to be undue delay. Discovery has ended. There would be a requirement to have to reopen discovery to allow this to occur.
>
> I'm very hesitant to allow the amendment at this point in time .... I think based on my discretion and reviewing the briefing and argument here today, I'm going to deny the motion to amend for the second amendment in this Complaint, and take the rest of it under advisement.

The court also recited its reasoning for denying Zeyen's motion to amend in the memorandum decision:

> Among other concerns discussed at the hearing, this Court specifically observed that allowing [Zeyen] to amend [his complaint] a second time would unjustifiably prejudice [School District 25]. [Zeyen] could have asserted a takings cause of ***31*** action at the commencement of their litigation over two years ago. The undue delay in asserting such a claim at this late stage in the proceedings is especially prejudicial in light of the fact that discovery was concluded in accordance with the accelerated timeline requested by [Zeyen]. To allow [Zeyen] to amend their Complaint again would necessitate reopening discovery. Therefore, [Zeyen's] request to add a claim to this action would "complicate and delay the principal action and impose an unwarranted hardship" and undue prejudice on [School District 25].

Beginning with the first factor in the four-part *Lunneborg* standard, the district court expressly recognized that the decision to grant leave to amend was within its discretion. For the second factor, the court acted within the outer bounds of its discretion by acknowledging the liberal standard contained in I.R.C.P. 15 for granting leave, as well as the *Foman* factors that weigh against granting leave. Lastly, as will be detailed below, the district court "acted consistently with the legal standards applicable to the specific choices available to it" and "reached its decision by the exercise of reason" by adequately evaluating Zeyen's request in light of the *Foman* factors. *Lunneborg*, 163 Idaho at 863, 421 P.3d at 194.

The district court cited two justifying reasons for denying Zeyen's motion: undue delay and prejudice. Both reasons are supported by the record. First, Zeyen's delay was undue. Zeyen is correct to point out that the motion to amend was "timely" in the sense that the motion did not violate any court-imposed deadlines or affect a trial date because the court suspended all proceedings and vacated the 2017 trial dates to await this Court's decision in *Joki*. However, Zeyen conflates "timeliness" and "undue delay." These are separate concepts. *See Carl H. Christensen Family Tr.*, 133 Idaho at 871, 993 P.2d at 1202 ("The time between filing the original complaint and the amended complaint is not decisive ... Rather, timeliness is important in view of the *Foman* factors such as undue delay, bad faith, and prejudice to the opponent.").

The district court rested its decision on the "undue" nature of the delay, not timeliness. Zeyen's counsel conceded at the motion hearing that the failure to include the takings claim in the original complaint was due to lack of awareness:

> THE COURT: Mr. Huntley, one question with regard to your motion to amend. The argument has been put forth by the defendants here is that you could have brought this claim of action and this cause of action at the beginning of your lawsuit, and you didn't. Why not?
>
> MR. HUNTLEY: Very frankly, I didn't know about—that would be a taking, and I only became familiar with it when this *Pocatello Hill*[*-Vu*] case came up.

Yet, the *Hill-Vu Mobile Home Park v. City of Pocatello* decision did not establish new law. 162 Idaho 588, 402 P.3d 1041 (2017). Rather, when the *Hill-Vu* court determined that the City of Pocatello's charges to consumers constituted a taking without just compensation, the Court relied on prior cases to support the takings analysis. *Id.* at 593-94, 402 P.3d at 1046-47. Namely, the *Hill-Vu*court cited to *BHA Investments, Inc. v. City of Boise. Id.* (citing 141 Idaho 168, 108 P.3d 315 (2004)). There, this Court held that because Boise had no authority to charge a fee, its exaction of the fee constituted a taking of property under the United States and Idaho Constitutions. *BHA Investments,* 141 Idaho 168, 172, 108 P.3d 315, 319 (2004). So the basic premise of Zeyen's takings argument—that School District 25 was exacting fees without authority because the Idaho Constitution requires the education to be free—had a legal foundation before this Court issued *Hill-Vu.* As a result, the district court's undue-delay analysis is grounded in solid reasoning and meets the fourth prong of the *Lunneborg* standard.

The district court rested its second justification—prejudice to School District 25—on the fact that discovery would need to be reopened and that Zeyen had requested expedited discovery. On appeal, Zeyen contends that discovery on the merits was still ongoing, and that the parties agreed the expedited discovery "was limited to issues pertaining to class certification." School District 25 maintains that that discovery was not intended to be bifurcated and would need to be reopened if the motion was granted. The record offers little to help our analysis. When the case resumed after *Joki* was issued, Zeyen filed a case management plan with the Court. That plan was not included in the record. The court's discovery order and memorandum decision offer some clues as to its contents. The court's order states that depositions should be completed by the end of September 2017 and that Zeyen's renewed motion for class certification would be filed in November 2017. According to the memorandum decision, the plan withdrew Zeyen's petition to expand the class action beyond School District 25 and "requested an expedited discovery schedule, proposing that all discovery, including 'discovery depositions', be completed by the end of September 2017."

Zeyen points to his counsel's statement at the motion hearing that "neither one of us needs any more discovery. ..." However, later in the same hearing, the district court expressed its understanding that discovery had ended and would need to be reopened if the complaint was amended. School District 25 affirmed this understanding when asked by the court. Without more in the record to contradict the district court's understanding that granting leave would prejudice School District 25 based on Zeyen's request to expedite discovery, the justification stands. *See Hansen v. White,* 163 Idaho 851, 853, 420 P.3d 996, 998 (2018) ("When a party appealing an issue presents an incomplete record, this Court will presume that the absent portion supports the findings of the district court.") (quoting *Gibson v. Ada Cnty.,* 138 Idaho 787, 790, 69 P.3d 1048, 1051 (2003)). If discovery was bifurcated, Zeyen bears the responsibility to prove as much on appeal. *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010) ("This Court will not search the record on appeal for error.") (citing *Suits v. Idaho Bd. of Prof'l Discipline,* 138 Idaho 397, 400, 64 P.3d 323, 326 (2003)).

On balance, the district court acknowledged and applied the appropriate *Foman* factors in deciding whether to grant Zeyen's motion for leave to amend the complaint. Zeyen has failed to show that the district court abused its discretion by denying his second motion for leave to amend the complaint.

B. The district court did not abuse its discretion by denying Zeyen's motion for class certification for lack of standing.

Zeyen appeals from the denial of a motion for class certification. However, the dispute at issue is whether Zeyen had standing to bring his claim under the Educational Claims Act. In denying Zeyen's motion, the district court ruled that Zeyen failed to meet the redressability prong of the standing analysis. In the district court's view, Zeyen could only bring his claim under the Educational Claims Act, and because the Act did not provide for retrospective relief, Zeyen failed to demonstrate that he had standing to bring the claim on behalf of the proposed class. Zeyen argues that the Educational Claims Act allows for retrospective relief, and, if the Act doesn't allow for retrospective relief, then it unconstitutionally infringes on his right to be free from an unlawful taking. We find no error in the district court's interpretation of the Educational Claims Act. We

also decline to entertain Zeyen's constitutional argument because it was not considered by the district court and therefore, there is no adverse ruling to appeal.

1. The Educational Claims Act does not provide relief for past conduct.

Zeyen's claim arises from the Legislature's alleged failure to carry out its duty under the Education Article. As will be shown, this means that Zeyen's claim must be brought under the Educational Claims Act. Because the Act does not provide the relief sought by Zeyen, the district court did not err in determining that he lacked standing to bring his claim on behalf of the class.

Certification of a class action is governed by Rule 77 of the Idaho Rules of Civil Procedure. *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 324, 297 P.3d 1134, 1141 (2013). Those seeking to certify a class must first show that they have standing. *See Tucker v. State*, 162 Idaho 11, 19, 394 P.3d 54, 62 (2017). Idaho has adopted the constitutionally based federal justiciability standard. *ABC Agra, LLC v. Critical Access Grp., Inc.*, 156 Idaho 781, 783, 331 P.3d 523, 525 (2014) (citing *Davidson v. Wright*, 143 Idaho 616, 620, 151 P.3d 812, 816 (2006)). As a sub-category of justiciability, standing is a threshold determination that must be addressed before reaching the merits. *Martin v. Camas Cty. ex rel. Bd. Comm'rs,* 150 Idaho 508, 513, 248 P.3d 1243, 1248 (2011). That Idaho courts have the power to issue declaratory judgments does not alter the standing requirement. *ABC Agra, LLC.*,156 Idaho at 783, 331 P.3d at 525 ("[A]n actual or justiciable controversy is still a prerequisite to a declaratory judgment action; thus, courts are precluded from deciding cases which are purely hypothetical or advisory.' ") (quoting *Bettwieser v. N.Y. Irrigation Dist.*, 154 Idaho 317, 326, 297 P.3d 1134, 1143 (2013)).

For class actions, standing is met "if at least one named plaintiff satisfies the requirements of standing against every named defendant." *Tucker*, 162 Idaho at 19, 394 P.3d at 62. Under the traditional standing analysis, "the plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Id.* (internal quotations omitted). This appeal focuses on redressability. An injury can be redressed if the court can grant the relief sought by the plaintiff:

> Standing's redressability element ensures that a court has the ability to order the relief sought, which must create a substantial likelihood of remedying the harms alleged. Redressability requires a showing that "a favorable decision is likely to redress [the] injury, not that a favorable decision will inevitably redress [the] injury." However, it cannot be only speculative that a favorable decision will redress the injury.

Id. at 24, 394 P.3d at 67.

The Education Article sets out the Legislature's constitutional obligation to establish a system of public education:

> The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish

> and maintain a general, uniform and thorough system of public, free common schools.

Idaho Const. art. IX, § 1. "The legislature has chosen to fulfill its constitutional obligation by the establishment of local school districts to provide educational services and by granting the school districts the authority to raise and spend money for that purpose."*Osmunson v. State*, 135 Idaho 292, 296, 17 P.3d 236, 240 (2000); *see also* I.C. § 6-2203. While "the ultimate responsibility for fulfilling the legislature's constitutional duty cannot be delegated," it is "not unreasonable for the legislature to ... declare that allegations that the required educational services are not being furnished should first be addressed to the local school districts which have been given the responsibility and authority to provide those services." *Osmunson*, 135 Idaho at 296, 17 P.3d at 240. Under the Act, the "ultimate remedy to which the plaintiffs are entitled under the Education Article is the provision of constitutionally required educational services." *Id.* at 295, 17 P.3d at 239 (citing *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 850 P.2d 724 (1993)).

The Educational Claims Act outlines the exclusive procedures by which a citizen may challenge the Legislature's compliance with its Constitutional obligation. I.C. §§ 6-2202; 6-2205. The Act specifically limits standing: "Only patrons of the school district and the state, as parens patriae, have standing to bring an action to furnish constitutionally required education services." *Osmunson*, 135 Idaho at 294, 17 P.3d at 238. Reflecting the Legislature's delegation of its responsibility to the school districts, the Act requires the plaintiff to sue local school districts before allowing joinder of the Legislature or State. I.C. § 6-2205

In the initial proceeding, the district court sits as the finder of fact. I.C. § 6-2207. If the district court finds that the school district is providing all the constitutionally required services, then it "shall issue a declaratory judgment to that effect." I.C. § 6-2208. If the district court finds that the school district is ***34*** not providing constitutionally required educational services, the court must determine whether the school district is providing services that are not constitutionally required or is providing constitutionally required services inefficiently. I.C. § 6-2208(1). Then, if the court finds that the school district is not efficiently using its resources to furnish required services and those services could be provided with available resources if the school district were more efficient, the Act authorizes several alternative remedies—injunctive relief among them. I.C. §§ 6-2208(2)-2209.

For example, if the court determines that the available resources are insufficient to provide constitutionally required services, the court must also determine whether the school district is properly using its taxing authority. I.C. § 6-2208(3). If the district court finds that the school district is directing resources to areas which are not required under federal law or the Idaho Constitution, or if the school district is inefficiently managing its resources, the district court must give the plaintiff and the school district up to 35 days to negotiate a consent agreement. I.C. § 6-2209(2). If an agreement is reached, the court has the authority to accept, modify, or reject the consent agreement. *Id.* If a consent agreement is not reached or if the court rejects the consent agreement, then the court must give the school district up to 35 days to submit a plan for meeting the constitutional duty. I.C. § 6-2209(3). The court may accept, modify, or reject the proposed plan. *Id.*

The enforcement of these plans relies on the district court's power to issue orders. The Act provides the power in four separate subsections. First, the court "may enjoin the local school district from offering some or all of those services not federally mandated and not constitutionally required." I.C. § 6-2209(4)(a). Second, the court "may enjoin the local school district from offering some or all of the constitutionally required services in a manner that consumes more of the local district's resources than necessary." I.C. § 6-2209(4)(b). Third, if the school district has failed to impose levies to the full extent authorized by law, the court "may order the local school district to impose [the levies] in the maximum amount allowed by law without an election and to impose an educational necessity levy as authorized by this chapter." I.C. § 6-2209(4)(c). Lastly, the Act provides a catch-all power to the district court:

> If the district court finds that any other order or mandate would assist the local school district in providing constitutionally required educational services, the district court may issue any order that it determines would assist the local school district in providing constitutionally required educational services.

I.C. § 6-2209(4)(d). If the district court concludes that the school district could not offer all the federally and constitutionally required services—despite using funds efficiently and using its taxing authority to the maximum extent—only then may the district court add the State or the Legislature to the suit. I.C. § 6-2210(2).

Returning to the case at hand, the Act's procedural framework supports the district court's finding that the Act provides for only present and prospective relief. The Act provides standing only to the guardians of current and future students. The Act directs the court to inquire into the school district's current system of allocating funds. The Act's remedies are aimed at curing current funding deficiencies. Here, no order by the district court could remedy any current violations because School District 25 voluntarily ceased assessing the fees that Zeyen attacks.

Zeyen urges this Court to find that a district court has authority to order the reimbursement of past damages under the catch-all provision's power to impose "any order". I.C. § 6-2209(4)(d). Zeyen's proposed interpretation would be an upside-down reading of the power granted under the Act. The district court has the power to impose "any order *that it determines would assist the local school district in providing constitutionally required educational services*." I.C. § 6-2209(4)(d) (emphasis added). Practically speaking, ordering the school district to pay monetary restitution is a backwards way of accomplishing the statutory goal where the action must determine whether the school district has adequate resources, or is properly ***35*** allocating its resources. A necessary precursor to the "any order" power is a finding that the school district is providing non-essential services or is providing services inefficiently. I.C. § 6-2209(1). Since School District 25 no longer charges the fees, an inquiry to the past practices is prohibited. Under the statutory scheme, if the district court finds that the school district is currently providing all the constitutionally required services, it must issue a declaratory judgment to that effect and, presumably, conclude the proceedings. I.C. § 6-2208.

Contrary to Zeyen's assertion, the power to award past damages under the Educational Claims Act was not implicitly sanctioned by this Court in *Joki*, 162 Idaho at 10, 394 P.3d at 53. There, the two issues on appeal were whether the Act unconstitutionally altered Rule 77 of

the Idaho Rules of Civil Procedure and whether the plaintiff needed to comply with the Act's requirement that he first sue the school district before seeking reimbursement against the State for allegedly unconstitutional fees. *Id.* This Court merely noted that the plaintiffs claim for reimbursement of funds fell under the Act because the claim depended on the assumption that the fees violated the Education Article. *Id.* Similarly misplaced is Zeyen's reliance on *Osmunson v. State*, where this Court pointed out that the Educational Claims Act expands judicial power by providing remedies not known at common law. 135 Idaho at 298, 17 P.3d at 242. These statements were in response to the district court's finding that the Educational Claims Act's remedies violated the separation-of-powers provision of the Idaho Constitution. *Id.* This Court used section 6-2209(4)(d) as an example to show that a district court's powers were broadened in some respects, rather than limited. *Id.* These comments have no bearing on whether the Act allows a district court to award damages for past violations of the Education Article.

Lastly, Zeyen also claims that he has standing to pursue declaratory relief. The Act provides that the district court must issue declaratory relief only in the event the school is providing all the required services. Zeyen pursues a judgment declaring that School District 25's past practices were in violation of the Education Article. Again, Zeyen's sought-after relief is not provided by the plain terms of the Act.

In sum, the district court did not err in concluding that the Educational Claims Act does not provide relief for past violations of the Education Article.

2. Zeyen's constitutional argument is not properly presented on appeal because there is no adverse ruling by the district court.

Zeyen contends that if the Act cannot be construed to allow for retrospective relief, it must be struck down as unconstitutional for impermissibly limiting his ability to pursue a takings claim under the Idaho and U.S. Constitutions. The district court never addressed whether the Educational Claims Act impermissibly forecloses a takings action because Zeyen's motion for leave to amend the first amended complaint was denied. In both the original complaint and the first amended complaint, Zeyen exclusively sought relief under the Education Article and the Educational Claims Act. Even though Zeyen pleaded facts that could fit a takings claim, Zeyen failed to plead a short and plain statement of a takings cause of action thereby giving School District 25 notice that such a claim would be brought. As a byproduct of Zeyen's failure to adequately present the takings claim, he has failed to secure an adverse ruling. Without an adverse ruling, we will not review Zeyen's argument on appeal. *See Johnson v. Crossett*, 163 Idaho 200, 207, 408 P.3d 1272, 1279 (2018) ("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.") (citing *Saint Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP*, 148 Idaho 479, 491, 224 P.3d 1068, 1080 (2009)).

C. Zeyen is not entitled to attorney's fees on appeal.

Zeyen argues in his appellant's brief that he is entitled to attorney's fees on appeal under the private-attorney-general doctrine, under the common-fund doctrine, under 42 U.S.C. § 1988, or "under such other measure as the Court may deem appropriate." However, Zeyen retracts his request for attorney's fees in his reply brief: "Appellants suggest the issue of an award of attorney's

fees on appeal is premature at this time, and the issue should first be determined by the trial court at an appropriate stage of the proceedings." We accept this rescission and decline to award attorney's fees on appeal.

Even if Zeyen's request for attorney's fees has legal or factual foundation, Zeyen is correct that an attorney's fee award would be premature at this time because attorney's fees cannot be awarded before a final decision on the merits of the case. *See, e.g., Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.,* 128 Idaho 276, 285, 912 P.2d 644, 653 (1996) (stating that the factors used to determine whether the award attorney's fees under the private attorney general doctrine "indicate that there must be some resolution of the substantive issues before a decision on attorney fees can be reached."); *Wensman v. Farmers Ins. Co. of Idaho,* 134 Idaho 148, 151-52, 997 P.2d 609, 612-13 (2000) (stating that the "general rule" for the common fund doctrine is that the insured may retain costs and expenses "out of the fund recovered from the wrongdoer, after the payment of the policy ...."); 42 U.S.C. § 1988(b) ("In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, ... the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs ...."). This is a permissive appeal from an interlocutory order. No decision on the merits has been reached.

CONCLUSION

For the reasons stated above, we affirm the district court's denial of Zeyen's motion to certify the class and his motion for leave to amend the first amended complaint.

RAYMOND v. IDAHO STATE POLICE, 165 Idaho 682, Supreme Court of Idaho, October 18, 2019

Background: Motorist's personal representative brought action against county, police officer, and state police department, alleging claims including tortious interference with prospective civil action and, in alternative, tortious interference with prospective economic advantage. The District Court, Payette County, Christopher S. Nye, J., granted county's motion to dismiss tortious interference claims. Personal representative appealed.

Holdings: The Supreme Court, Bevan, J., held that:

1. Court would formally adopt the tort of intentional interference with a prospective civil action by spoliation of evidence by a third party, and
2. complaint satisfied relaxed notice pleading standard for notifying police department of such a claim.

Vacated and reversed.

II. Evidence

A. Idaho Rules of Evidence

No Change

B. Evidence Cases

BRAUNER v. AHC OF BOISE, 2020 WL 543812, Supreme Court of Idaho, February 4, 2020

Background: Patient brought medical malpractice action against rehabilitation center alleging that center's delay in sending patient to hospital following her knee replacement surgery was substantial factor resulting in amputation of patient's leg. The Fourth Judicial District Court, Ada County, Gerald Schroeder, J., entered judgment on jury verdict in favor of patient, which awarded her over $2.2 million in damages. Center appealed.

B. The district court did not commit reversible error when it allowed Moore to testify.

1. The district court did not abuse its discretion in allowing Moore to testify because the late disclosure was harmless.

Aspen next alleges that the district court abused its discretion when it allowed Moore to testify during Brauner's case-in-chief. During trial, Moore testified that an orthopedic surgeon would have been concerned by Brauner's condition on March 16 and 17, 2014. Moore testified that had Aspen notified him of Brauner's condition, he would have ordered that she be transferred to the emergency room. Had she been transported to the emergency room sooner, her leg would not have been amputated.

Brauner filed her disclosure of Moore on November 6, 2017. As noted above, this appears to be the date agreed upon by the parties. Brauner's disclosure of Moore stated, "Dr. Moore is a percipient witness who has not been retained to testify as an expert witness for [Brauner] in this case. Dr. Moore will testify in a manner consistent with his dictated medical notes and chart records relating to the care and treatment of [Brauner]."

Brauner amended her disclosure of Moore's expected testimony on November 9, 2017. The amended disclosure contained the same statement indicated above, but added that

> Dr. Moore will also testify at trial that had he been contacted following the nursing note entries on March 14, 2014, through March 17, 2014, more likely than not, he would have immediately referred [Brauner] to the emergency department. Dr. Moore will further testify at trial that the community standard of care in March of 2014 required immediate communication to the physician followed by immediate referral to the emergency department.

Aspen objected to Moore's testimony regarding what he would have done if he had been informed of Brauner's condition. At trial, Aspen's counsel stated that the objection was based on I.R.C.P. 26 and 16. The district court overruled Aspen's objection.

On appeal, Aspen alleges that the district court abused its discretion because it failed to apply the correct legal standards pursuant to I.R.C.P. 26. Aspen contends that Moore's direct expert testimony was untimely and insufficient under I.R.C.P. 26(b)(4)(A)(ii). Alternatively, Aspen argues that Brauner should have disclosed Moore as a retained expert witness, but failed to do so.

For non-retained experts, a party is required to disclose "a statement of the subject matter on which the witness is expected to present evidence under Rule 702, 703 or 705, Idaho Rules of Evidence, and a summary of the facts and opinions to which the witness is expected to testify." I.R.C.P. 26(b)(4)(A)(ii). The timing for these disclosures is set out in the district court's scheduling order. I.R.C.P. 16(a)(2)(B).

Brauner's disclosure of Moore satisfied the disclosure requirements of I.R.C.P. 26(b)(4)(A)(ii). Brauner's amended disclosures clearly identified the scope of Moore's testimony. The amended disclosure stated that Moore intended to testify "that had he been contacted following the nursing note entries on March 14, 2014, through March 17, 2014, more likely than not, he would have immediately referred [Brauner] to the emergency department." Accordingly, the content of disclosure was enough to satisfy the disclosure requirements under I.R.C.P. 26(b)(4)(A)(ii).

Aspen also argues that the November 9, 2017, disclosure was untimely. During the proceedings below, Aspen appeared to be acting on the assumption that the November 9 disclosures were untimely, and therefore irrelevant. In objecting to Moore's testimony, Aspen seems to ignore Brauner's November 9 disclosures. Instead, Aspen spends significant time in its trial briefing arguing that Brauner's inclusion of Moore as a *rebuttal witness* was inappropriate. Aspen argued that Moore's rebuttal testimony regarding the community standard of care was only relevant in Brauner's case in chief. Accordingly, Aspen contended that Moore's testimony regarding the community standard of care should have been excluded because it was not properly disclosed. However, Moore's rebuttal disclosure was materially identical to the November 9 disclosure. The district court denied Aspen's objection because Moore's testimony was properly disclosed as a witness for Brauner's case in chief on November 9, 2017.

Notably, Moore was not called as a rebuttal witness. Accordingly, we review whether the district court erred in not excluding Moore's testimony because the November 9, 2017, disclosure was untimely. I.R.C.P. 37(c)(1) grants a court discretion to impose sanctions, including exclusion of the expert's testimony, for violations of a Rule 16 scheduling only when the violation is neither "substantially justified nor harmless."

As noted above, it was never clearly articulated to the district court that Aspen was objecting to Moore's testimony as improperly disclosed under I.R.C.P. 26 as it relates to the November 9, 2017, disclosure. Further, it is true that the November 9, 2017, disclosure was filed after the parties' agreed upon deadline of November 6, 2017. However, the untimely disclosure of Moore was harmless. The date of the amended disclosure, November 9, 2017, was the next business day after November 6, 2017. It cannot be said that Aspen was prejudiced by this late disclosure, as the late disclosure was available to Aspen prior to Moore's deposition and well in advance of trial. As a result, Aspen was able to prepare an adequate defense to any testimony by Moore regarding what he would have done had he been informed of Brauner's condition. Accordingly, the district court

did not abuse its discretion in allowing Moore to testify because the untimely disclosure by one business day was harmless.

Aspen contends it was treated differently than Brauner because Aspen had a witness excluded for untimely disclosure, but Brauner was allowed to have Moore testify even though his testimony was arguably untimely. It is true that Aspen's expert, Dr. Titcomb, was excluded while Brauner's expert, Moore, was not. However, there is an explanation for the district court's disparate treatment of these witnesses. Brauner specifically filed a pre-trial motion to exclude Titcomb. By contrast, Aspen submitted a trial brief that devoted a section to its concerns regarding Moore's disclosure as a rebuttal witness. While Aspen objected to Moore's testimony and disclosures during his deposition on January 18, 2018, it was only brought to the district court's attention during Moore's testimony *at trial*, rather than through any pretrial motion. In addition, Moore was a percipient witness, who was a named defendant until shortly before trial. It could not have come as a surprise to Aspen that Moore would testify. On the other hand, Titcomb was retained to testify about life expectancy and other damage issues. Regardless, given the important differences between Moore and Titcomb, the district court did not abuse its discretion in overruling Aspen's objections. Accordingly, we affirm the district court's decision to allow Moore to testify.

Idaho Rule of Evidence 408 prohibits evidence of compromises when offered "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction[.]" However, the rule does not prohibit the admission of compromises if offered for another purpose "such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." I.R.E. 408(b). Settlement agreements may be introduced to impeach or prove bias. *Id.*; *Davidson v. Beco Corp.*, 114 Idaho 107, 109, 753 P.2d 1253, 1255 (1987).

Under I.R.E. 408, if a settlement agreement is offered for a purpose other than "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction" then there is no prohibition on the admission of the settlement agreement. I.R.E. 408(b). Instead, the district court must analyze the evidence under I.R.E. 403 to determine whether the evidence's "probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." I.R.E. 403.

The district court abused its discretion when it refused to admit the fact of a settlement agreement because it articulated and applied the wrong standard. *See Crowley*, 145 Idaho at 513, 181 P.3d at 439. Here, Aspen offered the settlement as evidence of Moore's bias and to impeach his credibility. As this is an accepted use of evidence of a settlement agreement, the district court should have engaged in a Rule 403 analysis. Instead, the district court focused on the actual content and language of the settlement agreement to determine its admissibility. The district court stated, "I find within its terms nothing that either encourages or discourages testimony by this witness." However, this was not the proper analysis. Generally, the content of the agreement is only relevant if the agreement is a "Mary Carter Agreement." Accordingly, the district court abused its discretion when it excluded evidence of the settlement agreement.

"Idaho courts are to 'disregard all errors and defects that do not affect any party's substantial rights.' " *Matter of Doe*, 163 Idaho 565, 571, 416 P.3d 937, 943 (2018) (quoting I.R.C.P. 61). "Consequently, because an appellant can only prevail if the claimed error affected a substantial right, the appellant must present some argument that a substantial right was implicated." *Id.* (quoting *Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 18, 278 P.3d 415, 420 (2012)).

Here, any abuse of discretion did not affect Aspen's substantial rights. Based on the theories upon which the case was tried, we cannot conclude that Aspen's substantial rights were affected. There were many things that Aspen could have done but did not at trial. First, Aspen could have resisted Moore's dismissal from the case. Aspen apparently expected to defend the case jointly with Moore. However, when Moore settled, Aspen was seemingly caught unprepared to attribute comparative negligence to its former codefendant. Second, once Moore was dismissed from the case, Aspen could have asked for a continuance or to have Moore placed back on the verdict. It did neither. However, without Moore on the verdict, Aspen did not have the ability to attribute comparative negligence to Moore. Moore's comparative negligence was irrelevant to the case that Aspen tried. Viewing the record from our vantage point, it appears the district court was attempting to limit the presentation of evidence to the pleadings. Because Moore was no longer a party to the case and Aspen never sought to attribute comparative negligence to Moore or have him named on the verdict, we conclude the district court did not commit reversible error in its ruling regarding Moore's settlement with Brauner. Accordingly, exclusion of the settlement agreement did not affect Aspen's ability to defend its case because Moore was no longer a party.

Although the district court abused its discretion by refusing to admit the fact of the settlement agreement's existence by failing to apply the appropriate test, any error was harmless and did not affect Aspen's substantial rights. As a result, we find no reversible error and affirm the district court's decision to exclude evidence of the settlement agreement.

STATE v. KAGARICE, 2020 WL 218843, Court of Appeals of Idaho, January 10, 2020

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. John T. Mitchell, District Judge. Hon. James D. Combo, Magistrate.

Decision of the district court, on intermediate appeal reversing the magistrate court's order dismissing the case, affirmed; and case remanded.

Footnotes

1. The State appealed from the magistrate court's decision to the district court pursuant to Idaho Criminal Rule 54. The State requested the preparation of the transcript and the entire clerk's record for the appeal. In its notice of settling the transcript on appeal, the clerk notified the parties that the transcript, the clerk's record, and any exhibits admitted at trial were filed with the district court pursuant to I.C.R. 54. Idaho Criminal Rule 54(h) states that "the clerk's record is the official court file of the criminal proceeding appealed to the district court, including any minute entries or orders together with the exhibits offered or admitted." Alternatively, on order of the

magistrate court, a certified copy of the official file may be filed with the district court, with the magistrate court retaining the original file. I.C.R. 54(h). The clerk's notice is unclear whether the entire magistrate court file became the appellate record or whether some compilation of documents was filed as the record. No such compilation appears as part of this Court's appellate record.

Here, the district court took judicial notice of records, exhibits, or transcripts from the magistrate court file pursuant to Idaho Rule of Evidence 201. If the entire magistrate court file comprised the record on appeal to the district court, it is unclear why the district court would take judicial notice of documents already in the record. If there was a record filed with the district court that did not include the documents of which the district court took judicial notice, the district court erred, because an appellate court cannot consider items outside of the record on appeal. *Rizzo v. State Farm Insurance Company*, 155 Idaho 75, 80, 305 P.3d 519, 524 (2013).

STATE v. MEYER, 2019 WL 6769604, Court of Appeals of Idaho, December 12, 2019

Rachael Louise Meyer appeals from her judgment of conviction for trafficking in heroin. Meyer argues that the district court erred in denying her motion to suppress, erred in a number of evidentiary rulings, and abused its discretion at sentencing. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Meyer was a passenger in a vehicle that was stopped by Officer Claiborn for failure to signal. The driver acknowledged that he did not signal and consented to a search of the vehicle. A canine officer asked Meyer and the driver to step out of the vehicle. While waiting, Meyer asked Officer Claiborn if Meyer could retrieve a lighter from her purse, which was still in the vehicle. Officer Claiborn told Meyer that she could retrieve it if he was allowed to perform a quick search because he was concerned she could be trying to retrieve a knife. Meyer confirmed, "so if you search it then I can have a lighter?" After Officer Claiborn agreed, Meyer attempted to get the purse but was stopped and told to stay by the vehicle. Officer Claiborn retrieved the purse and searched it on the hood of his patrol car. He noted the size of the bag as being quite large. Inside the bag was a smaller bag which contained a large amount of heroin. Meyer was placed in handcuffs and issued *Miranda* warnings. While sitting in the patrol car, Meyer noticed a small bag of methamphetamine on the floor of the patrol car that did not belong to her. She was charged by information with trafficking in heroin.

Meyer filed a motion to suppress the evidence found in her purse, arguing the search exceeded the scope of her consent. The district court denied the motion following a hearing. At trial, the district court affirmed its pretrial decision to prevent any questioning regarding the methamphetamine in the patrol car. The court determined the methamphetamine would only be marginally relevant, would confuse the jury, and be a waste of time. Over Meyer's objection, the court also determined the State could introduce evidence of the other items found in Meyer's purse, including numerous

cell phones and over $3,000 in cash. The jury found Meyer guilty of trafficking in heroin and she was sentenced to a unified term of thirty years, with ten years determinate. Meyer timely appeals.

ANALYSIS

A. Motion to Suppress

Meyer argues the district court erred when it denied her motion to suppress. Specifically, she asserts Officer Claiborn exceeded the scope of Meyer's consent to search for knives when Officer Claiborn opened a smaller bag inside the purse. The State argues there was no limitation to Meyer's consent and even if there was, the evidence was found within the scope of the limitation because a knife could have easily fit in the smaller bag where the heroin was found. The district court did not err.

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact that are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Warrantless searches are presumed to be unreasonable and therefore violative of the Fourth Amendment. *State v. Weaver*, 127 Idaho 288, 290, 900 P.2d 196, 198 (1995). The State may overcome this presumption by demonstrating that a warrantless search either fell within a well-recognized exception to the warrant requirement or was otherwise reasonable under the circumstances. *Id.* Valid consent is a well-recognized exception to the warrant requirement. *State. v. Stewart*, 145 Idaho 641, 644, 181 P.3d 1249, 1252 (Ct. App. 2008). Consent to search may be in the form of words, gestures, or conduct. *State v. Knapp*, 120 Idaho 343, 348, 815 P.2d 1083, 1088 (Ct. App. 1991). The standard for measuring the scope of consent under the Fourth Amendment is that of objective reasonableness, what would the typical reasonable person have understood by the exchange between the officer and the suspect. *State v. Frizzel*, 132 Idaho 522, 523, 975 P.2d 1187, 1188 (Ct. App. 1999).

The district court determined Officer Claiborn did not exceed the scope of Meyer's consent by searching inside the smaller bag within the purse. The exchange between the officer and Meyer included the following discussion:

> Meyer: Can I get a lighter ... out of my ....
>
> Claiborn: Uh, I don't have a lighter.
>
> Meyer: I have one in my purse right there.

Claiborn: Um ...

Meyer: Please.

Claiborn: Well, if you grab a lighter, again, a lot, a lot of women carry knives in their purse. I can do a quick search, make sure there's ....

Meyer: Ok, so if you search it then I can have a lighter?

Claiborn: Yeah.

Meyer: Ok, I'll get it for you.

While searching the purse, Officer Claiborn asked Meyer if there was anything illegal in the purse to which Meyer responded there was not. Before discovering the heroin, Meyer asked if the officer had the lighter yet and he responded that he had not located it, and continued looking. After looking in a small zebra-print bag, Officer Claiborn found a large amount of heroin that was roughly the size of a golf ball.

The district court determined that, based on an objective reasonableness standard, Meyer gave free and unqualified consent to search her purse. The district court determined that there were no restrictions placed on the scope of the search and that at no time did Meyer "express or indicate any revocation of her consent to search the purse" nor did she "indicate any objection to the manner in which Officer Claiborn was searching the purse." While Officer Claiborn mentioned concern for a knife, Meyer's consent was not limited. The district court did not err in denying Meyer's motion to suppress because Officer Claiborn did not exceed the scope of Meyer's consent by searching inside the smaller bag in her purse.

B. Evidentiary Rulings

Meyer takes issue with two of the district court's evidentiary rulings: (1) the exclusion of evidence related to the methamphetamine found in the back of Officer Claiborn's patrol car, and (2) allowing the State to introduce evidence at trial of the cell phones and cash found in her purse. As to the first matter, the court did not err in prohibiting evidence of the methamphetamine. Meyer argues the presence of methamphetamine in the back of Officer Claiborn's patrol vehicle is relevant to the diligence and credibility of the officer and should not have been excluded. The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of confusing the issues, confusing the jury, or wasting time. Idaho Rule of Evidence 403. A lower court's determination under I.R.E. 403 will not be disturbed on appeal unless it is shown to be an abuse of discretion. *State v. Enno*, 119 Idaho 392, 406, 807 P.2d 610, 624 (1991); *State v. Clark*, 115 Idaho 1056, 1059, 772 P.2d 263, 266 (Ct. App. 1989). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine whether the lower court: (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion; (3) acted consistently with any legal standards applicable to the specific choices before it; and (4) reached its decision by an exercise of reason. *State v. Herrera*, 164 Idaho 261, 270, 429 P.3d 149, 158 (2018). Evidence that is relevant to a material and disputed issue

concerning the crime charged is generally admissible. *State v. Stevens*, 146 Idaho 139, 143, 191 P.3d 217, 221 (2008).

The district court determined the evidence of methamphetamine would be confusing and "an unnecessary waste of time." Both before and during trial, the court determined that the evidence would create a mini-trial as to the question of where the methamphetamine came from. As to Meyer's contention that the presence of the methamphetamine affected Officer Claiborn's credibility, it did not. To the extent the presence of the methamphetamine had some minimal relevance to Officer Claiborn's diligence and attention to proper procedures, its probative value was substantially outweighed by the clear danger of confusing the jury and wasting time. Therefore, the district court did not abuse its discretion when it precluded the evidence under I.R.E. 403.

Meyer additionally takes issue with the district court's evidentiary determination that allowed the State to introduce numerous cell phones and cash found in her purse. Specifically, she argues that this evidence was not relevant to any material fact in the case because conviction for trafficking in heroin only requires the quantity of drugs to total seven grams. Idaho Code § 37-2732B. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. I.R.E. 401; *Stevens*, 146 Idaho at 143, 191 P.3d at 221. Whether a fact is of consequence or material is determined by its relationship to the legal theories presented by the parties. *State v. Johnson*, 148 Idaho 664, 671, 227 P.3d 918, 925 (2010). We review questions of relevance de novo. *State v. Raudebaugh*, 124 Idaho 758, 764, 864 P.2d 596, 602 (1993); *State v. Aguilar*, 154 Idaho 201, 203, 296 P.3d 407, 409 (Ct. App. 2012).

The district court determined the additional evidence found in Meyer's purse was relevant and admissible. On appeal, Meyer argues that evidence of the multiple cell phones and the cash was not relevant to any material fact in the case and should have been excluded. The district court determined that evidence specifically demonstrated knowledge, which is required under the possession portion of the trafficking statute:

> Court: You're arguing that the evidence is not relevant.
>
> Counsel: And I'm asking that because what you are saying is that evidence goes to—
>
> Court: Goes to knowledge.
>
> Counsel: Money and five cell phones goes to knowledge of heroin?
>
> Court: Yes. It is not a very high bar to determine relevancy. And in this particular case the State is correct. It's not 404(b) bad act kind of stuff. It's just plain 401, 402, 403 analysis. And so I believe that the ... cell phone evidence and the money evidence is relevant. And I don't think it's overly prejudicial.

As correctly argued by the State, in order to prove Meyer was trafficking heroin the State had the burden to prove she "possessed" at least seven grams of heroin. In order to show possession, the State was required to further demonstrate that Meyer had knowledge and control of the substance. Meyer argued at trial that she had no knowledge of the heroin in her purse and the State countered that the multiple cell phones and cash in her bag "goes to show you that she knows what's in her purse." Also, as a number of witnesses testified, multiple cell phones are commonly associated with drug sales. Further, the State put on evidence which indicated a drug dog had positively alerted to the money, signaling drug residue on the cash. Based on this evidence, the jury could reasonably infer that Meyer had the requisite knowledge required for possession. The district court did not abuse its discretion in admitting the cell phone and cash evidence.

STATE v. WENKE, 2019 WL 6713403, Court of Appeals of Idaho, December 10, 2019

James H. Wenke appeals from his judgment of conviction after a jury found him guilty of possession of marijuana with the intent to deliver in violation of Idaho Code § 37-2732(a)(1)(B). For the reasons set forth below, we affirm.

Finally, Wenke argues the district court abused its discretion by admitting Officer Mattson's video "without conducting a balancing test and without assessing the video's probative worth." The Idaho Supreme Court held that it is an abuse of discretion to admit or exclude evidence without conducting the I.R.E. 403 balancing test. *State v. Ruiz*, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010). In *Ruiz*, the defendant sought to introduce evidence that a witness testified against him to avoid a mandatory minimum sentence. *Id.*The district court excluded the evidence. *Id.* at 470, 248 P.3d at 721. On appeal, the Court explained that, although the district court acknowledged the evidence was relevant, it abused its discretion because "[t]o exclude evidence under Rule 403, the trial court must address whether the probative value is substantially outweighed by one of the considerations listed in the Rule." *Id.* at 471, 248 P.3d at 722.

In contrast to *Ruiz*, however, the district court in this case complied with I.R.E. 403. When admitting the video, the district court expressly stated that "I find [the video is] relevant, and I don't find that it is in unfairly prejudicial, so I will allow the State to use [it]." Based on this comment, the court indicated it weighed the video's relevance against its prejudicial effects and, thus, engaged in the I.R.E. 403 balancing test to reach its ruling. Accordingly, Wenke has failed to show the district court abused its discretion by admitting Officer Mattson's video.

Wenke asserts the district court abused its discretion by allowing Hickman to testify she saw Wenke divide and weigh marijuana on two previous occasions. Idaho Rule of Evidence 404(b) prohibits introduction of evidence of acts other than the crime for which a defendant is charged if the evidence's probative value is entirely dependent on its tendency to demonstrate the defendant's propensity to engage in such behavior. *State v. Grist*, 147 Idaho 49, 54, 205 P.3d 1185, 1190 (2009). Evidence of another crime, wrong or act, however, may be admissible for another purpose,

such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident. I.R.E. 404(b); *State v. Pepcorn*, 152 Idaho 678, 688-89, 273 P.3d 1271, 1281-82 (2012).

When determining the admissibility of evidence under Rule 404(b), the trial court must first determine whether there is sufficient evidence of the other acts for a reasonable jury to believe the conduct actually occurred. If so, then the court must consider: (1) whether the other acts are relevant to a material and disputed issue concerning the crime charged, other than propensity; and (2) whether the probative value is substantially outweighed by the danger of unfair prejudice. *Grist*, 147 Idaho at 52, 205 P.3d at 1188; *State v. Parmer*, 147 Idaho 210, 214, 207 P.3d 186, 190 (Ct. App. 2009). On appeal, this Court defers to the trial court's determination that there is sufficient evidence of the other acts if it is supported by substantial and competent evidence in the record. *Parmer*, 147 Idaho at 214, 207 P.3d at 190.

In support of the State's intention to admit Hickman's testimony under Rule 404(b), the State proffered Hickman would testify she witnessed Wenke engage in various distribution activities, including weighing, dividing, and delivering marijuana. Wenke argued Hickman's proffered testimony contradicted her sworn testimony at the preliminary hearing, noting Hickman had previously testified she had never seen Wenke deliver marijuana to anyone in Idaho. Ultimately, the district court decided to first hear Hickman's testimony outside the jury's presence before ruling.

Outside the presence of the jury, Hickman testified she had seen Wenke deliver marijuana in Idaho and divide and weigh it on two occasions. On cross-examination, Hickman acknowledged her prior inconsistent testimony about Wenke's delivery of marijuana in Idaho, explaining Hickman answered dishonestly at the preliminary hearing because she was afraid of the gang members to whom Wenke had delivered marijuana. Subsequently, the court ruled:

> I don't find her testimony to be credible *regarding any prior incidents of delivery or distribution*.
>
> .... She did testify completely different in terms of whether she had ever witnessed him giving people any marijuana in Idaho. She said no at the preliminary hearing. And her testimony today doesn't convince me that that is accurate.
>
> So I am going to not allow evidence of the prior incidents in terms of delivery or distribution of marijuana.
>
> I will allow you to talk about she also said that she has seen him with marijuana, she has seen him divide that marijuana before.

(Emphasis added). Thereafter, the court explained its obligation to determine initially under Rule 404(b) analysis whether there was sufficient evidence for a reasonable jury to believe that Wenke's conduct (about which Hickman would testify) actually occurred. At that time, the court stated, "I have to determine whether there's sufficient evidence. And part of that is credibility. And I don't find her to be credible. I don't find her testimony to be credible."

Relying on these latter statements about Hickman's credibility, Wenke contends the district court abused its discretion by allowing Hickman's testimony about weighing and bagging marijuana after determining she was not credible. Read in context, however, these statements about Hickman's credibility relate to the court's original credibility finding, which was limited to Hickman's contradictory testimony about Wenke's delivery of marijuana in Idaho. Accordingly, we reject Wenke's argument. Moreover, we will not substitute our view of the credibility of Hickman's testimony. *See State v. Flowers*, 131 Idaho 205, 207, 953 P.2d 645, 647 (Ct. App. 1998)(ruling appellate court will not substitute its view for that of trier of fact as to credibility).

Wenke also argues dividing, weighing, and delivering marijuana are inextricably intertwined acts because an individual would not divide and weigh marijuana unless he also intended to deliver it. Wenke asserts that, although Hickman did not testify at the preliminary hearing whether she had previously seen Wenke divide and weigh marijuana, if Hickman had testified about this conduct, she would have testified consistently with her testimony at that time, i.e., that she had not seen Wenke divide and weigh marijuana. We are not persuaded by Wenke's argument, which is based on speculation. Moreover, dividing, weighing, and delivering marijuana are clearly distinct acts. Accordingly, we hold that the district court did not abuse its discretion by allowing Hickman to testify that she saw Wenke divide and weigh marijuana.

INTEREST OF DOE I, 165 Idaho 675, Court of Appeals of Idaho, September 27, 2019

Background: State filed a petition to terminate father's parental rights as to his son approximately six months after father was arrested for striking son with a metal bat. The Fourth Judicial District Court, Ada County, Andrew Ellis, Magistrate Judge, terminated father's parental rights. Father appealed.

Opinion
John Doe appeals from the magistrate's judgment terminating Doe's parental rights. Doe argues the magistrate erred when it admitted a report of investigation into evidence over Doe's hearsay objection. Because substantial and competent evidence independent of the report supports the magistrate's findings that Doe neglected his child, we affirm the magistrate's judgment terminating Doe's parental rights.

The statute in question here, I.C. § 16-2009 reads as follows:

> The court's finding with respect to grounds for termination shall be based upon clear and convincing evidence under rules applicable to the trial of civil causes, provided that relevant and material information of any nature, including that contained in reports, studies or examinations, may be admitted and relied upon to the extent of its probative value. When information contained in a report, study or examination is admitted in evidence, the person making such report, study or examination shall be subject to both direct and cross-examination.

CONCLUSION

Idaho Code § 16-2009, to the extent it allows hearsay without a valid hearsay exception, conflicts with the Idaho Rules of Evidence and is of no force or effect. There is substantial and competent evidence to support the magistrate's findings that Doe abused and neglected A.B. independent from the report of investigation. Additionally, the magistrate correctly determined that it is in the best interest of A.B. to terminate Doe's parental rights. Therefore, the judgment terminating Doe's parental rights is affirmed.

STATE v. WEIGLE, 165 Idaho 482, Supreme Court of Idaho, August 27, 2019

Background: Defendant was convicted in the Fourth Judicial District Court, Ada County, Thomas F. Neville, J., at trial and Deborah Bail, J., at sentencing, of robbery. He appealed. The Court of Appeals, 2018 WL 4844785, affirmed. Defendant petitioned for review, which petition was granted.

Opinion

Eric Livingston Weigle (Weigle) was found guilty of robbing a credit union following a two-day jury trial. During the trial, the State's forensic scientist used a PowerPoint presentation to explain how she matched one of Weigle's known fingerprints to one found on the note used in the robbery. At trial, the presentation was admitted as an exhibit for demonstrative purposes without objection. It was then published to the jury. During its deliberations, the jury asked for a copy of the PowerPoint presentation. Weigle's counsel objected; however, the district court overruled the objection and provided the jury with the presentation. The jury found Weigle guilty. The district court imposed a conviction.

Weigle appealed from his judgment of conviction. The Court of Appeals affirmed. This Court granted his petition for review. Weigle argues that giving the presentation to the jury during deliberations was improper and constituted reversible error. For the following reasons, we affirm the trial court's decision to give the jury the PowerPoint presentation and the sentencing court's judgment of conviction.[1]

During deliberations, the jury submitted an inquiry to the court which read: "We are missing a piece of the State's evidence: State's Exhibit No. 13, the CD PowerPoint Presentation that Natasha Wheatley referred to for the fingerprint analysis." Defense counsel objected and argued that Exhibit No. 13 should not be given to the jury during deliberations because it was only admitted for demonstrative purposes. The district court overruled defense counsel's objection. The district court gave the presentation to the jury with an additional handwritten instruction that read, "Exhibit No. 13 will be submitted to you as requested. Remember that it was admitted for a limited purpose and is the subject of Instruction No. 14."[2] Weigle's counsel objected a second time on the same basis. The objection was again overruled.

<u>District courts have discretion to determine how demonstrative exhibits will be used.</u>

Trial judges are endowed with the discretion to determine whether demonstrative exhibits should be provided to the jury during its deliberations. In making that determination, the trial judge should

gauge the potential prejudice that might occur under the circumstances. Rule 105 of the Idaho Rules of Evidence allows evidence to be admitted for a limited purpose with the accompaniment of a limiting instruction.

Trial courts maintain broad discretion in admitting and excluding evidence. *See, e.g., T3 Enterprises, Inc. v. Safeguard Bus. Sys., Inc.*, 164 Idaho 738, 745, 435 P.3d 518, 525 (2019); *State v. Hall*, 163 Idaho 744, 773, 419 P.3d 1042, 1071 (2018), *reh'g denied* (June 28, 2018), *cert. denied*, —— U.S. ——, 139 S. Ct. 1618, 203 L.Ed.2d 897 (2019) (mem). Rule 611 supports this broad discretion. It reads, "The court should exercise reasonable control over the mode and order of ... presenting evidence ...." I.R.E. 611(a). The corresponding federal rule, Rule 611(a) of the Federal Rules of Evidence, has often been cited "as giving courts general discretion over the use of demonstrative exhibits during trial." *State v. Pangborn*, 286 Neb. 363, 373, 836 N.W.2d 790, 799 (2013)(citing to cases from the First, Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits).

In *Pangborn*, the Supreme Court of Nebraska performed a lengthy and apt analysis, including an examination of many other jurisdictions, to articulate the rule that "the submission of demonstrative exhibits to the jury during deliberations should be left to the discretion of the trial court. Accordingly ... a trial judge may exercise his or her broad judicial discretion to allow or disallow the use of demonstrative exhibits during jury deliberations." *Id.* at 802. However, the Nebraska court properly subjected the trial court's discretion to the requirement that the district judge weigh the potential prejudice and provide adequate safeguards to address any prejudice, including a limiting instruction. *Id.* at 802–04.

The court in *Pangborn* reasoned as follows:

> Just because demonstrative exhibits are not substantive evidence does not mean that they should be excluded automatically from jury deliberations. As mentioned earlier, the explicit purpose of a demonstrative exhibit is to aid the jury in its consideration of the evidence and issues in a case. Undoubtedly, in a complex case, demonstrative exhibits would be most helpful when the jury considers the totality of the evidence during deliberations. As the Seventh Circuit has stated, demonstrative exhibits "often are useful tools that enable the jury to visualize and organize the large volume of data produced by trial testimony."
>
> Precisely because demonstrative exhibits can be exceedingly useful, many courts allow demonstrative exhibits to be used in jury deliberations under certain circumstances.

Id. at 798–99 (footnotes omitted). In establishing the requirement for adequate safeguards against prejudice, the Nebraska court recognized the potential for a jury to misuse demonstrative exhibits during deliberations:

> Despite their potential usefulness, demonstrative exhibits also carry the potential to prejudice the party against whom such exhibits are used.

> If used improperly, demonstrative exhibits can distract the jury from considering all of the evidence presented, causing them instead to unfairly emphasize only portions of the evidence. If all parties to a case do not submit demonstrative exhibits, the jury may be tempted to focus more heavily on the evidence to which it has "easy reference." Because they are often prepared specifically for use in litigation, demonstrative exhibits can be tempting vehicles for conveying prejudicial language and assumptions or inadmissible evidence to the jury.
>
> Furthermore, if not instructed on the limited purposes of demonstrative exhibits, the jury may assume that demonstrative exhibits constitute primary proof of the information contained therein, leading the jury to shirk its duty to determine the truth and accuracy of the evidence. The jury may attribute undue weight or credibility to evidence summarized or illustrated in demonstrative exhibits. Or a jury may find the simplicity with which demonstrative exhibits present complex or technical information to be compelling and persuasive. On the other hand, demonstrative exhibits that are not properly explained may ultimately confuse or mislead the jury.
>
> Given the possibility for such forms of prejudice, a trial judge must carefully consider the potential prejudice that may arise from the use of demonstrative exhibits during jury deliberations.

Id. at 802–03 (footnotes omitted). The court then listed potential safeguards, beyond the use of a limiting instruction,

> requiring the proponent of the exhibit to lay foundation for its use outside the presence of the jury, having the individual who prepared the exhibit testify concerning the exhibit, allowing extensive cross-examination of the individual who prepared the exhibit, giving the opponent of the exhibit the opportunity to examine the exhibit prior to its admission and to identify errors, excising prejudicial content prior to submitting the exhibit to the jury, and giving the opposing side the opportunity to present its own exhibit.

Id. at 803–04 (footnotes omitted). Accordingly, we hold that Idaho trial judges have the discretion to allow demonstrative exhibits to be given to the jury during its deliberations, especially if appropriate safeguards are employed to address potential prejudice.

The district court did not abuse its discretion by providing Exhibit 13 to the jury during its deliberations.

When an alleged error is preserved by contemporaneous objection, as it was here, the harmless error test applies and the defendant has the initial burden of showing that the district court committed an error. *Perry*, 150 Idaho at 227, 245 P.3d at 979; *Abdullah*, 158 Idaho at 438, 348 P.3d at 53. Given the analysis above, Weigle must demonstrate that the district court abused its discretion by allowing the demonstrative exhibit to be given to the jury during deliberations. *See Abdullah*, 158 Idaho at 438–39, 348 P.3d at 53–54 (this Court reviews whether

a defendant has demonstrated that the admission of evidence was in error, within the harmless error test, under the abuse of discretion standard).

When determining whether the trial court abused its discretion, this Court considers "[w]hether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

We find the district court did not abuse its discretion. First, Judge Neville recognized the discretionary nature of his decision even while noting that Judge Bail, the judge for whom he was substituting, employed a different procedure. Further, the district court specifically contemplated the curative nature of the limiting instruction he originally provided (Instruction No. 14) and then instructed the jury "Exhibit No. 13 will be submitted to you as requested. Remember that it was admitted for a limited purpose and is the subject of Instruction No. 14." *See Pangborn*, 836 N.W.2d at 803 (noting that several circuits have found "limiting instructions can limit or even eliminate" potential prejudice). Moreover, some of the additional safeguards listed by *Pangborn* were also present here: the individual who prepared the exhibit, Wheatley, testified about the exhibit, and defense counsel had the opportunity to cross-examine her. 836 N.W.2d at 803–04.

Analyzing what transpired at trial, the district judge acted within the boundaries of his discretion. Because the district court did not err in giving Exhibit 13 to the jury during its deliberations, Weigle has not satisfied his initial burden under the harmless error test. Consequently, we need not reach the second prong of that test.

CONCLUSION

For the foregoing reasons, we find the district court did not abuse its discretion when it gave Exhibit 13 to the jury during its deliberations. We therefore affirm the judgment of conviction.

THUMM v. STATE, 165 Idaho 405, Supreme Court of Idaho, August 22, 2019

Background: Defendant, whose convictions for aggravated battery or aiding and abetting aggravated battery and of being a persistent violator of the law, were affirmed on direct appeal, petitioned for post-conviction relief. The Fourth Judicial District Court, Ada County, Samuel A. Hoagland, J., dismissed the petition, and defendant appealed.

NATURE OF THE CASE

In 2009, a jury convicted Vance Thumm of aggravated battery or aiding and abetting aggravated battery and of being a persistent violator of the law. Thumm pursued a direct appeal, but was unsuccessful. In 2013, through counsel, Thumm petitioned for post-conviction relief. The State responded by filing a motion for summary disposition. The district court eventually granted the State's motion and dismissed the post-conviction petition. Thumm now appeals alleging: (1)

ineffective assistance of counsel at trial, sentencing, and on appeal; (2) a *Brady* violation; (3) prosecutorial misconduct; and (4) cumulative error. We affirm the district court's grant of summary disposition.

FACTUAL AND PROCEDURAL BACKGROUND

Vance Thumm, Paris Davis, Frankie Hughes, Jeremy Steinmetz, victim Deven Ohls, and several other people attended an early morning party in a motel room rented by Thumm. At some point during the party Ohls was attacked, allegedly by both Hughes and Thumm. Hughes later admitted to stabbing Ohls in the buttock. After the prolonged attack, Ohls suffered significant bleeding, a concussion, two black eyes, a complex laceration to the lip, a fractured nose, and the stab wound.

The State charged Thumm with aggravated battery under Idaho Code section 18-907 and with being a persistent violator under Idaho Code section 19-2514. Three others, including Thumm's girlfriend, Davis, were also charged in connection to the altercation. Davis was charged with one count of solicitation or destruction, alteration or concealment of evidence under Idaho Code section 18-2603, and one count of accessory to aggravated battery under Idaho Code section 18-907. Following a motion by the State, Thumm's case was joined with that of Hughes and Davis, though Thumm was ultimately tried in a joint trial with only Davis.

Thumm argues that since Bond did not object during either witness's testimony, no inquiry was made into the distinctions between being excited, animated, or "freaking out." He argues that Davis was logical and calculated when she made her statements, so these statements would not have been admitted as excited utterances had an objection been made.

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered to prove the truth of the matter asserted. I.R.E. 801(c). Hearsay is inadmissible except in those circumstances provided by the Idaho Rules of Evidence. I.R.E. 802. An excited utterance is an exception to the hearsay rule and is defined as "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." I.R.E. 803(2). There are two requirements of an excited utterance:

> "(1) an occurrence or event sufficiently startling to render inoperative the normal reflective thought process of an observer; and (2) the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought."

State v. Thorngren, 149 Idaho 729, 732, 240 P.3d 575, 578 (2010) (quoting *State v. Field,* 144 Idaho 559, 568, 165 P.3d 273, 282 (2007)).

It is critical to our inquiry regarding the allegedly offending statements that Davis was speaking very loudly, and was laboring under the effects of witnessing the melee when she made her statements. Hughes and Steinmetz both testified that Davis was animated and crying when she told Thumm he was going to prison and needed to burn his clothes.

It is not disputed that Steinmetz and Hughes' testimony about Davis's statements qualify as hearsay statements. Yet despite Thumm's contention that witnesses were unable to identify Davis as being "excited," the statements she made fall under the excited utterance exception. As noted by the district court, both Steinmetz and Hughes testified that Davis was speaking in a stressed or animated state when in the car. Just before Davis made the statement about prison and burning clothes, she had witnessed a severe beating, an event sufficiently startling to "render inoperative the normal reflective thought process." She made the allegedly offending statements almost immediately following the altercation, with little time to reflect on what had just happened. The testimony Thumm highlights shows only that the witnesses misunderstood the word "excited" as referring only to positive states of emotion.

The focus of our inquiry is not whether a witness' reaction fits neatly within the lexicon of the word "excited." The focus must be whether the criteria of Rule 803(2) are established: (1) witnessing a startling event, coupled with (2) a spontaneous statement made under the stress of the moment without taking time for reflective thought. Weighed against this standard, we hold that Davis's statements qualify as excited utterances.

KOSMANN v. DINIUS, 165 Idaho 375, Supreme Court of Idaho, May 14, 2019, Petition for Rehearing Denied: August 26, 2019

Footnotes

2. The Court recites the specifics of the mediation throughout this Opinion in accordance with Idaho Rule of Evidence 507(5)(a)(6), which provides that claims of "professional misconduct ... against a mediation party ... occurring during a mediation" are an exception to the general rule of privilege applied to mediation communications.

STATE v. NUSS, 165 Idaho 400, Court of Appeals of Idaho, March 21, 2019, Petition for Rehearing Denied: August 26, 2019

Background: Defendant was convicted in the District Court, First Judicial District, Bonner County, Barbara Buchanan, of lewd conduct with a minor child under the age of sixteen. Defendant appealed.

Opinion
Elijah Z. Nuss appeals from his judgment of conviction for lewd conduct with a minor child under the age of sixteen. Nuss argues that the district court abused its discretion by allowing a "facility dog" and its handler in the courtroom during the victim's testimony. Nuss asserts their presence was prejudicial and deprived him of a fair trial. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2016, the State charged Nuss under Idaho Code § 18-1508 with one felony count of committing a lewd act on a fourteen-year-old child. At the time of trial, the victim was sixteen years old. Before trial, the district court informed the parties that it would allow a "facility dog" to be present during the victim's testimony pursuant to I.C. § 19-3023. Nuss objected, arguing that the facility dog's "mere presence" or "knowledge" of the dog would be prejudicial and that the facility dog would make the victim appear "more vulnerable" and would give her testimony "more credence and emotionality."

The district court overruled the objection. It noted the potential for prejudice, however, and its intent to make the facility dog's presence "as low key as possible." Further, the district court stated its plan to excuse the jury from the courtroom for purposes of moving the facility dog in and out of the courtroom.

Whether a facility dog is allowed in the courtroom when a minor testifies is controlled by I.C. § 19-3023. In 2017, the legislature amended this statute to include a facility dog as support for a child witness. At the time of Nuss's trial, the statute provided in relevant part:

> When a child is summoned as a witness in any hearing in any criminal matter ... parents, a counselor, friend or other person having a supportive relationship with the child, or a facility dog, shall be allowed to remain in the courtroom at the witness stand with the child during the child's testimony unless in written findings made and entered, the court finds that the defendant's constitutional right to a fair trial will be unduly prejudiced.

I.C. § 19-3023(1).

Nuss also criticizes the district court for allowing the facility dog to exit the courtroom in the jury's presence. Nuss complains the district court originally proposed pretrial that the facility dog would exit the courtroom during a recess but then later announced its intention to permit the facility dog to exit in the jury's presence to avoid another recess. On appeal, Nuss states this procedure failed "to mitigate the prejudice" of the facility dog. Nuss, however, never objected to the district court's decision to allow the facility dog's exit in the jury's presence. Regardless, the district court did not err. *See* State v. Adamcik, 152 Idaho 445, 473, 272 P.3d 417, 445 (2012) (concluding error is necessary for application of fundamental error doctrine.) The trial court has discretion to control the presentation of evidence, which should be done so as to avoid wasting time. *See* Idaho Rule of Evidence 611.

Fourth District Bar 2020 Spring Case Review
Civil Procedure and Evidence

James K. Dickinson
Ada County Prosecutor's Office

I. Civil Procedure Cases

Ackerschott v. Mountain View Hospital, Idaho Supreme Court, February 2020

- P sustained injury leading to paraplegia
- Files medical malpractice claim against urgent care clinic
- $6,575,354 jury verdict
- IRCP 50(b) for JNOV is treated as a delayed motion for a directed verdict. Standard is the same
- IRCP 59(e) 14 days to file the motion
- IRCP 2.2(b)(3) prohibits the court from extending the timelines in 50(b) and 59(e)
- Because Ackershott's argument over constitutionality of noneconomic damages cap was filed one day late, it could not be heard by the district court

Brauner v. ACH of Boise, Idaho Supreme Court, February 2020

- Brauner sues ACH (rehab facility) for delay in sending her to hospital for worsening symptoms following knee replacement surgery
- ACH argues it received expert report too late
- IRCP 16(a)(3) provides deadlines only modified by court after stipulation
- IRCP 26(e)(3), court may exclude expert witness for late disclosure, IRCP 37(c)(1) sanctions may be imposed
- Here, though late, P's expert witness disclosure was a supplemental disclosure, and though disclosed near trial, actually reduced the amount of damages sought
- Disclosure was justified and harmless

Mia Kim Vig and Tommy Vig v. Sarah Gerdes, Idaho Court of Appeals, January 2020

- Ms. Gerdes wrote a book entitled "Sue Kim of the Kim Sisters, The Authorized Biography"
- Mia Kim Vig sues Gerdes for defamation resulting from the book's publication
- Allege that contents of book were liable per se

- Damages: lack of invitations to perform in Korea, reputation as human beings and performers, reputation for honesty and integrity
- Vigs send 2 separate requests for admission, Gerdes fails to respond
- Per IRCP 36(a)(4), the requests for admission deemed admitted
- Cross-motions for Summary Judgment
- Case dismissed - Vigs failed to support claims

State of Idaho v. Bettwieser, Idaho Court of Appeals, December 2019

- Bettwieser, driving a postal truck, hits another a car
- Cited for an infraction
- Bettwieser sends discovery – interrogatories – in June
- No response from city attorney
- Bettwieser files a motion to dismiss for failure to reply to discovery request
- Magistrate denies motion for insufficient grounds
- Bettwieser appeals to district court
- Bettwieser appeals to Court of Appeals
- Court of Appeals:
    - Won't consider issues raised first time on appeal
    - But if it did consider the issue, the Idaho Infraction Rules apply, not the IRCP

Kenworth v. Skinner Trucking, Idaho Supreme Court, December 2019

- Kenworth alleges that Skinner was unjustly enriched when Kenworth paid past due lease payments, and balance due on customer's lease to GE Finance
- Trial court determined that Skinner was not enriched, and that Kenworth was an "officious intermeddler"
- Kenworth argues "officious intermeddler" is an affirmative defense, and per IRCP 8(c), should have been pled by Skinner
- Officious intermeddling is *not* an affirmative defense

II. Evidence Cases

Brauner v. ACH of Boise, Idaho Supreme Court, February 2020

- Discussed earlier, regarding IRCP and timing of supplemental disclosure
- The case also discusses I.R.E. 408
- The surgeon settled with Brauner before trial
- ACH wished to cross-examine the surgeon regarding that settlement

- The court refused, citing IRE 408, which prohibits evidence of compromises when offered "to prove or disprove the validity of the amount of a disputed claim or to impeach by a prior inconsistent statement or another purpose."
- The trial court looked to the language of the settlement, and finding no direction as to its admissibility, excluded its admission
- The Supreme Court explains that contents of the settlement do not dictate admissibility
- IRE 408 does not *prohibit* the admission of compromises to show bias, prejudice
- When offered for bias/prejudice, IRE 403 – probative value vs. prejudice is the standard
- Although abuse of discretion, it did not affect ACH's substantial rights

State v. Meyer, Idaho Court of Appeals, December 2019

- After traffic stop, Meyer, a passenger in the car, and driver were asked to get out of the car
- Meyer wanted a lighter from her purse, officer told her if he could first search the purse for weapons, she could look for her lighter
- The purse contained a large bag of heroin which the officer noticed
- Meyer challenges the officer's search and loses
- The purse also contained $3,000 cash and 5 cellphones
- Trial court allows, explaining the cash and phones aren't IRE 404(b) "bad act stuff," but "just plain 401 [relevancy], 402 [relevant evidence admissible], 403 [probative v. prejudice] analysis"
- The Court of Appeals agrees. Because relevant to knowledge and control of heroin, the cash and phones are admissible

In the Interest of John Doe I, Dept. of H and W v. John Doe, Idaho Court of Appeals, 165 Idaho 675, September 2019

- Termination case brought 6 months after father arrested for striking son with a baseball bat
- Idaho Code § 16-2009 provides that in termination cases material and relevant information of any nature may be admitted and relied upon
- Court of Appeals:
    - To the extent I.C. § 16-2009 allows hearsay without a valid hearsay exception, it conflicts with IRE and is of no force or effect

State v. Weigle, Idaho Supreme Court, 165 Idaho 482, August 2019

- Weigle found guilty of robbing a credit union
- During trial forensic scientist used PowerPoint to explain match of known thumbprint to latent print on robbery note
- PowerPoint was admitted during trial for demonstrative purposes
- During deliberation jury asks to see PowerPoint

- Defense objects
- Court overrules, provides PowerPoint with instruction explaining admitted for limited (illustrative or demonstrative) purpose and can't be considered outside that purpose
- S. Court: I.R.E. 105 allows evidence for limited purpose with limiting instruction

Thumm v. State, Idaho Supreme Court, 165 Idaho 405, August 2019

- Several people attend an "early morning" party in a hotel room
- A fight breaks out, a man beaten badly as well as being stabbed in the buttocks
- Thumm's Co-D girlfriend, witnessing the beating, very animated, made loud statements that Thumm was going to prison and needed to burn his clothes.
- Thumm argues on appeal that girlfriend was actually calm and collected and not "freaking out" when she made the comments
- Court notes that per I.R.E. 803(2), an excited utterance requires:
    - witnessing a startling event, and
    - the statements made afterward, with no time for reflective thought
- These statements qualify

WORKERS COMPENSATION CASE LAW SUMMARIES

4TH DISTRICT BAR ASSOCIATION ANNUAL MEETING, MARCH 11, 2020

By Taylor Mossman-Fletcher

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Gomez v. Crookham Company

Opinion Filed February 10, 2020

4-1 Decision; Justice Moeller Authoring, Justice Brody dissenting and Justice Stegner concurring in the result

This is a substitute decision following the Supreme Court's original decision dated December 20, 2019. The focus of the case and the result is on the Exclusive Remedy Rule, which provides that the only remedy for injured workers against employers is within the workers compensation system. Third party cases against employers can only be pursued in rare exceptions under 72-209. The Supreme Court held that the district court erred in failing to consider the issue of whether Crookham "consciously disregarded knowledge" that the equipment Mrs. Gomez was working under posed significant risk to Mrs. Gomez. As result, the Supreme Court remanded to the district court to determine whether this exception to the exclusive remedy rule applies by determining whether there is genuine issue of material fact as to whether Crookham "consciously disregarded knowledge" of serious risk to Mrs. Gomez.

Ayala v. Meyers Farms and the State Insurance Fund

Opinion Filed July 12, 2019

5-0 Decision, Justice Brody Authoring

The Supreme Court set aside the decision of the Industrial Commission. Ayala, the claimant, was injured while driving a company vehicle in 2009, and in 2013 after falling and injuring his right knee. After a hearing before a referee, the Industrial Commission reassigned the case to itself—over Ayala's objection—and found that Ayala's low back condition was not causally related to his 2009 industrial accident, that he was not totally and permanently disabled under the odd-lot worker doctrine, and that he suffered disability of 40% of the whole person inclusive of impairment of his 2009 and 2013 industrial accidents. Ayala appealed these findings, arguing that the Commission denied him due process by failing to have the referee issue recommendations. The Supreme Court agreed, holding the Commission violated Ayala's due process right to a fair hearing. The Court set aside the Industrial Commission's findings of fact and conclusions of law, and remanded the case for a new hearing.

McGivney v. Aerocet and Quest Aircraft

Opinion Filed June 13, 2019

5-0 Decision, Justice Stegner Authoring

The Idaho Supreme Court affirmed the order of the Idaho Industrial Commission (Commission), which awarded George McGivney benefits for injuries he sustained to his left knee during his employment with two employers, Aerocet, Inc. and Quest Aircraft. The Commission apportioned liability equally between Aerocet and Quest. The Supreme Court determined there was no error in consolidating the two worker's compensation claims against the two employers. The Supreme Court further held that the Commission did not err by declining to separately determine McGivney's disability in excess of impairment from his 2011 accident at Aerocet prior to his 2014 accident at Quest. The Supreme Court remanded the case to the Commission to enable it to calculate the amount due Quest's surety from Aerocet's surety for any amounts overpaid by Quest's surety.

Smith v. State of Idaho, Special Indemnity Fund

Opinion Filed June 7, 2019

5-0 Decision, Justice Brody Authoring

The Supreme Court affirmed the decision of the Industrial Commission that found that the Idaho Special Indemnity Fund was not liable to the claimant for worker's compensation benefits. Smith alleged that the Referee determined disability at a future date rather than the date of the hearing, that he improperly interpreted a report, and that he improperly considered an excluded exhibit. The Commission determined that Smith failed to prove he was totally and permanently disabled and the Supreme Court affirmed, holding that the Commission's determinations were supported by substantial and competent evidence

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Moser v. Rosauer's Supermarkets

Opinion Filed May 15, 2019

5-0 Decision, Justice Bevan Authoring

The Idaho Supreme Court affirmed an Idaho Industrial Commission declaratory ruling in which the Commission held that following a claim of an accident, injury, or occupational disease, an employer may require a claimant's attendance at an Idaho Code § 72-433 medical examination.

Oliveros v. Rule Steel Tanks, Inc., Employer, Advantage Workers Compensation Insurance Co., Surety

Opinion Filed March 28, 2019

5-0 Decision, Justice Bevan Authoring

The Claimant's accident resulted in the partial amputation of all four fingers on his dominant hand. The Commission awarded Oliveros compensation for a 32% partial permanent impairment ("PPI") rating but declined to award any additional benefits when the Commission determined his permanent partial disability ("PPD") rating to be 25%. The Idaho Supreme Court affirmed the Commission's decision that found Oliveros was not entitled to a separate award for his PPD and PPI. In so holding, the Court overruled certain statements in *Corgatelli v. Steel West*, Inc., 157 Idaho 287, 335 P.3d 1150 (2014), and *Davis v. Hammock Management*, 161 Idaho 791, 391 P.3d 1261 (2017), that suggest an injured worker is entitled to recover both "impairment" and "disability" benefits under the Act. The Court clarified that Idaho's workers compensation law only provides for an award of income benefits based on disability, not impairment, and any monies received by a claimant for PPI (impairment rating) are part of his final award for PPD (disability). The Court recognized that the Commission erred in its determination that Oliveros could suffer a PPD lower than his PPI because impairment is part of the calculation for disability. Even so, the Court held that the Commission's determination was in reality a finding that Oliveros established no disability in excess of impairment. The Court also held that the Commission's decision to deny Oliveros' request for retraining benefits was supported by substantial and competent evidence.

Aguilar v. State of Idaho, Special Indemnity Fund

Opinion Filed March 14, 2019

5-0 Decision, Justice Stegner Authoring

Here, the Industrial Commission concluded the Idaho Industrial Special Indemnity Fund was not liable to Aguilar for worker's compensation benefits. The Commission based this ruling on its finding that Aguilar had failed to prove his pre-existing impairments combined with his second injury to cause total and permanent disability. The Idaho Supreme Court vacated the Commission's order and remanded the case. The questions on appeal were:

1. Did the Commission apply the correct legal standard when it concluded Aguilar's limitations and restrictions did not materially change following his second injury? and;
2. Did the Commission apply the correct legal standard to analyze the "but for" causation test as set out in Idaho Code section 72-332?

The Court held that the Commission failed to shift the burden of proof to the ISIF after it was undisputed that Aguilar was regularly working at the time of his second injury, and (2) that the Commission failed to analyze both prongs of the disjunctive test set out in Idaho Code section 72-332(1). That test is as follows:

> If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury . . . arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury . . . ***or*** by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease . .

The Court held that because the Commission's decision only dealt with one method of proving the ISIF's liability and because there was medical testimony in the record to support Aguilar's claim under the second (and ignored) method of proof, the Commission erred as a matter of law.

2020 SPRING CASE REVIEW
Real Property Cases

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The following cases are, in my opinion, the highlights of the real property year. I have included land use cases in this summary, as well. Case descriptions are taken from the Idaho Supreme Court opinion summaries.

Monitor Finance v. Wildlife Ridge Estates
Docket No. 45517, January 9, 2019
https://isc.idaho.gov/opinions/45517.pdf

Monitor Finance, L.C., and First Capital Funding, L.C., (collectively referred to as the Beneficiaries) are the holders of a deed of trust, which encumbers the real property claimed to be owned in fee simple by Wildlife Ridge Estates, LLC (Wildlife LLC). Due to a purported default on the underlying debt, the Beneficiaries filed a judicial foreclosure action in district court to foreclose the deed of trust encumbering that property. The district court found Wildlife LLC's defenses and counterclaim were barred by res judicata and ultimately entered judgment in favor of the Beneficiaries. Wildlife LLC appealed the district court's adverse decision dismissing its affirmative defenses and counterclaim. The Idaho Supreme Court affirmed the district court's decision, holding that: (1) Wildlife LLC's affirmative defenses and counterclaim were barred by res judicata; (2) the Beneficiaries' foreclosure action was not barred by the statute of limitations; (3) the Beneficiaries' foreclosure action was not barred by res judicata; and (4) the Beneficiaries are entitled to attorney's fees on appeal.

Floyd v. Bd. Of Ada County Commissioners
Docket No. 45421, January 29, 2019
https://isc.idaho.gov/opinions/45421.pdf

The Supreme Court affirmed the district court's determination that an incarcerated plaintiff had actual notice of his pending tax deed proceedings pursuant to Idaho Code section 63-1005(6). Although the official notices went to the plaintiff's vacant home address, the county treasurer mailed multiple letters to the plaintiff's jail address to explain his delinquent taxes owed and the pending tax deed. Therefore, there was sufficient due process.

McFarland v. Liberty Mutual Insurance Corp.
Docket No. 45781, January 30, 2019
https://isc.idaho.gov/opinions/45781.pdf

This case involves the interpretation of a homeowner's insurance policy. The appellants in this case, Ryan and Kathryn McFarland, own real property that features: a main cabin; a detached garage with an upstairs "bonus room"; and a pump house. After a burst radiator damaged the garage structure, the McFarlands disagreed with their insurer about the amount of coverage their policy provided. The McFarlands contended that the garage was covered as part of the dwelling under Coverage A ("Dwelling Coverage"). The respondent, Liberty Mutual Insurance Group, Inc. ("Liberty"), believed the garage structure fell under Coverage B ("Other Structures Coverage"), which provided a substantially smaller amount of coverage. In July 2017, the McFarlands filed a complaint in Ada County district court alleging, among other claims, breach of contract. The parties filed cross motions for summary judgment. Ruling that the policy

unambiguously provided coverage for the garage under the Other Structures Coverage, the district court granted Liberty's motion for summary judgment and denied the McFarlands'. The McFarlands timely appealed. The Idaho Supreme Court determined that the policy was ambiguous and thus must be construed in favor of the McFarlands. As a result, the Court reversed the award of summary judgment and remanded the case.

Galvin v. City of Middleton
Docket No. 45578, February 8, 2019
https://isc.idaho.gov/opinions/45578.pdf

The Supreme Court affirmed the Canyon County district court's grant of summary judgment to the Galvins on their prescriptive easement claim and its award of attorney's fees to them. The Supreme Court held that the district court correctly concluded that the Galvins did not abandon their easement by participating in the rezoning process, because their use of the road through the easement did not change. The Supreme Court also held that the district court did not abuse its discretion in awarding attorney's fees to the Galvins. The Galvins were awarded attorney's fees and costs on appeal.

Mulberry v. Burns Concrete
Docket No. 45184, February 21, 2019
https://isc.idaho.gov/opinions/45184.pdf

Burns Concrete, Inc., and Canyon Cove Development Company, LLP, appealed the Bonneville County district court's judgment in favor of Nora Mulberry and TN Properties, LLC, regarding the extinguishment of a right of first refusal (ROFR). The district court entered partial summary judgment in favor of Mulberry finding the ROFR was personal to Mulberry and Canyon Cove, and it was subsequently extinguished when Canyon Cove assigned it to Burns Concrete. On reconsideration, the district court held that the ROFR was a servitude, appurtenant to the purchased property, and reaffirmed it was extinguished by Canyon Cove's assignment to Burns Concrete. The Idaho Supreme Court vacated and remanded the district court's decision. The Court held that the ROFR was personal between Mulberry and Canyon Cove and was not extinguished when Canyon Cove purported to assign the ROFR to Burns Concrete.

SilverWing v. Bonner County
Docket No. 45052, February 26, 2019
https://isc.idaho.gov/opinions/45052.pdf

The Idaho Supreme Court reversed a district court's ruling in a promissory estoppel case. The case arose from an agreement between Appellant Bonner County (the "County") and Respondent SilverWing at Sandpoint, LLC ("SilverWing") in which SilverWing sought to develop a residential hangar and taxiway adjacent to the Sandpoint Airport. During development the County led SilverWing to believe that the Federal Aviation Administration ("FAA") had approved plans for the taxiway when it had not, resulting in a substantial change in the construction plans. After trial, a jury returned a verdict in favor of SilverWing under the doctrine of promissory estoppel. The County then filed a motion for judgment notwithstanding the verdict ("JNOV"), which the district court denied. On appeal the Idaho Supreme Court found the dispositive issue to be whether the evidence before the jury showed that SilverWing suffered a substantial economic detriment due to its reliance on the County's promises. In a unanimous decision, the Idaho Supreme Court found that the County had fully performed the promises that SilverWing alleged the County had made and as such, it reversed the district court's denial of the motion for JNOV and remanded the case for a redetermination of costs and fees.

Hardy v. Phelps

Docket No. 45933, May 20, 2019
https://www.isc.idaho.gov/opinions/45933.pdf

The Idaho Supreme Court affirmed a district court order that found Boise County made reasonable efforts to locate Ronald and Donna Phelps ("the Phelpses") to notify them of a tax deed. Boise County sent multiple Pending Issue Letters by certified mail and uncertified mail to more than one address, conducted new internet searches for possible addresses, and searched the county assessor records and treasurer's records to determine whether any new addresses were listed for the Phelpses. The Court held Boise County's efforts satisfied the notice provision of Idaho Code section 63-1005 and due process requirements.

Security Investor Fund v. Crumb
Docket No. 45969, May 23, 2019
https://www.isc.idaho.gov/opinions/45969.pdf

In 2005, the Crumbs and Abbeys formed Abbey & Crumb Developments, LLC, to develop a subdivision near Post Falls, Idaho. Sometime in 2006, the LLC caused a road to be constructed on the Crumbs' property. The road was built over the Crumbs' land abutting the subdivision and, once constructed, was the only drivable road in and out of the subdivision. In September 2006, the Crumbs withdrew from the LLC. Shortly thereafter, the LLC defaulted on a loan from Security Investor Fund, LLC, and Security Financial Fund, LLC (collectively "Security"). Security then accepted deeds in lieu of foreclosure from the LLC and became an owner of certain lots within the subdivision. At some point in 2017, Brian Crumb took the position that certain subdivision lot owners did not have a right to use the entrance road on his adjoining property, as no applicable easements had ever been recorded. Security then initiated the underlying lawsuit in an effort to establish an easement to use the entrance road. The district court granted summary judgment to Brian Crumb and entered judgment in his favor dismissing Security's complaint. The Idaho Supreme Court affirmed, holding that Security failed to sufficiently prove an underlying agreement establishing the easement.

Turcott v. The Estate of Clarence D. Bates
Docket No. 45920, June 7, 2019
https://www.isc.idaho.gov/opinions/45920.pdf

The Idaho Supreme Court affirmed a district court's award of damages for unjust enrichment. Deann Turcott and her husband spent considerable time and money making improvements on her father, Clarence Turcott's land under the belief that she would inherit half of Clarence's estate. Clarence subsequently changed his will and left Deann nothing. Deann filed suit seeking quantum meruit damages for the work she had performed. The district determined that quantum meruit did not apply because there was no implied-in-fact contract between Clarence and Deann; instead, the district court awarded damages under a theory of unjust enrichment. Deann appealed and this Court affirmed, holding there was no evidence of an implied-in-fact contract, particularly given the factual conclusion that Clarence did not request any of the work performed on his land. Deann volunteered to perform the work and as a volunteer she could not compel her father to become indebted to her through an implied-in-fact contract which never existed

Regdab, Inc., v. Graybill
Docket No. 45649, June 13, 2019
https://www.isc.idaho.gov/opinions/45649.pdf

The Supreme Court held that Idaho Rule of Procedure 54(e)(4)(B)'s pleading requirement was not inconsistent with Idaho Code section 45-513, the provision which mandates an award of certain costs and reasonable attorney fees in mechanic's lien foreclosure actions. The plaintiff Regdab was required to plead a specific amount of attorney fees to be awarded in the event of default, which it failed to do. Because of

this pleading deficiency, the Court vacated the default judgment and remanded this case with instruction to enter a default judgment consistent with this opinion.

McGimpsey v. D&L Ventures
Docket Nos. 46023, 46024, 46112, June 13, 2019
https://www.isc.idaho.gov/opinions/46023.pdf

This appeal arose from the breach of a combined lease and buy sell agreement between the tenant McGimpsey and landlord D&L Ventures, Inc., after McGimpsey discovered that D&L was an unregistered Nevada corporation. The Supreme Court affirmed the district court's order granting summary judgment to D&L Ventures, Inc. The Court held that Idaho Code section 30- 21-502 does not impair the validity of contracts; therefore, D&L had the legal ability to convey the property via warranty deed.

Aspen Park v. Bonneville County
Docket No. 45679, July 10, 2019
https://www.isc.idaho.gov/opinions/45679.pdf

The Supreme Court affirmed the decision of the district court in granting summary judgment to Bonneville County that dismissed a petition for review to the district court regarding a denial of a property tax exemption. Aspen Park, Inc., a nonprofit organization, sought a property tax exemption with Bonneville County for its low-income apartments. The County's Board of Equalization denied an exemption because some of the apartments were leased to individuals above 60% of the county's median income level, a requirement set forth in Idaho Code section 63-602GG(3)(c). Aspen Park appealed to the Idaho Board of Tax Appeals, arguing that the statute allowed vacant apartments to be leased to higher-income earners. After the Board of Tax Appeals denied tax exempt status, Aspen Park filed a petition for judicial review with district court. The district court granted Bonneville County summary judgment after deciding that to be eligible for a tax exemption under Idaho Code section 63-602GG, every apartment must be rented to low-income individuals or remain vacant. The Supreme Court held that the plain language of the statute required strict adherence to the property classifications set forth in section 63-202GG(3)(c), except for the manager's unit.

McInturff v. Shippy
Docket No. 45418, August 27, 2019
https://isc.idaho.gov/opinions/45418.pdf

The appeal arose from a disputed water right relating to the St. Joe River in Benewah County, Idaho, between a landowner and tenants who put the water to beneficial use. The license at issue described the water right as "appurtenant to the described place of use." The Idaho Supreme Court held that the tenants owned the water right under the license. Further, the Court held that Shippy and Cedar Creek had failed to timely assert their rights and that the district court did not have jurisdiction to address their claim.

Eagle Creek Irrigation v. A.C & C.E Investments
Docket No. 45675, August 27, 2019
https://www.isc.idaho.gov/opinions/45675.pdf

Eagle Creek Irrigation Company ("Eagle Creek") appealed the Blaine County district court's award of summary judgment in favor of A.C. & C.E. Investments ("AC&CE Investments"). In 2015, AC&CE Investments acquired title to 15 acres of property within Eagle Creek's defined area via trustee's deed. The property's previous owner held 15 shares of Eagle Creek stock. Shortly after acquiring the land, AC&CE Investments began diverting water. In response, Eagle Creek brought an action for declaratory relief asserting that the trustee's deed failed to convey any shares. After the parties filed cross motions for summary judgment, the district court held, as a matter of law, that AC&CE Investments acquired both the

property and the 15 shares because the shares passed as an appurtenance with the property. Shortly after trial began to resolve other issues, the parties agreed to settle the case. The parties agreed that the district court's summary-judgment order would be entered as a final appealable judgment, Eagle Creek would issue the 15 shares to AC&CE Investments, and all other claims would be dismissed with prejudice. The district court approved and incorporated the settlement agreement into its final judgment. Eagle Creek timely appealed. In a unanimous decision, the Idaho Supreme Court held that the district court erred in granting summary judgment to AC&CE Investments because determining whether a stock in a mutual irrigation company is appurtenant to a specific tract of land requires a factual inquiry into the company's governing documents and the individual shares. The Court vacated the portion of the trial court's judgment which concluded that the 15 shares were appurtenant to the property. The Court declined to award attorney's fees on appeal and its decision did not affect the settlement agreement.

Eagle Springs HOA v. Rodina
Docket No. 46323, November 7, 2019
https://www.isc.idaho.gov/opinions/46323.pdf

This appeal stems from a dispute between Jan Rodina and the Eagle Springs Homeowners' Association ("the HOA"). The dispute began when Rodina undertook a construction project installing a fence and retaining wall. Rodina claimed that he had received permission for the project, but the HOA told him that his project exceeded the scope of the permission he had received. In May 2016, the HOA filed a complaint in Ada County district court seeking injunctive relief to remove the fence, wall, and other aspects of Rodina's project. Rodina asserted, among other defenses, that the HOA approved his project and waived the right to enforce certain provisions of the subdivision's Covenants, Conditions, and Restrictions. The district court awarded summary judgment in favor of the HOA and granted injunctive relief. The Idaho Supreme Court affirmed the district court, determining that the HOA did not approve his project as built and that Rodina failed to show that a genuine issue of material fact precluding the award of summary judgment against him.

Caldwell Land & Cattle v. Johnson Thermal
Docket No. 46056, November 15, 2019
https://www.isc.idaho.gov/opinions/46056.pdf

The Idaho Supreme Court vacated a district court's final judgment and order of attorney's fees entered in favor of Caldwell Land and Cattle, LLC ("CLC") and remanded for further proceedings. The appeal stemmed from an unlawful-detainer and breach-of-contract action filed by CLC after purchasing a building where the holdover tenant, Johnson Thermal Systems ("JTS"), asserted a right to remain on the property. The dispute centered on the interpretation of a lease between JTS and the original property owner which granted JTS an option to extend the lease. JTS contended it properly exercised the option; CLC argued that JTS did not. After a bench trial, the district court ruled that JTS failed to exercise the option and thus became a holdover tenant. The court further ruled that when JTS did not vacate the property within the proper timeframe, JTS unlawfully detained the premises and was liable for the ensuing damages. JTS timely appealed.

The Idaho Supreme Court affirmed the district court's ruling that JTS failed to exercise the option to extend. The Court also affirmed the district court's decision to allow CLC's contract claim to be heard alongside its claim for unlawful-detainer damages. The Court further affirmed the district court's decision to award rent and lost profits to CLC for JTS's unlawful detainer, but concluded that the district court erred by awarding CLC damages for losses allegedly sustained by CLC's incoming tenant, Caldwell Peterbilt. Likewise, the Court affirmed the district court's ruling that JTS was liable for breach of contract for failure to timely remove a transformer, repair damages, or timely vacate, and thus affirmed the district court's determination that JTS is liable for damage to the property, the cost of the transformer, and CLC's lost profits stemming from JTS's failure to timely vacate. However, the Court determined that no damages

based on Peterbilt's lost profits should have been awarded under that theory. As a result, the Court remanded for a reentry of damages and instructed the district court to reconsider its order regarding attorney's fees.

First Bank of Lincoln v. Land Title of Nez Perce County
Docket No. 46000, November 18, 2019
https://www.isc.idaho.gov/opinions/46000.pdf

In an appeal arising out of Nez Perce County, First Bank of Lincoln (First Bank) challenges the district court's grant of summary judgment in favor of Land Title of Nez Perce County, Incorporated (Land Title). In 2011, First Bank loaned Donald Tuschoff (Tuschoff) $440,000 to purchase the Hotel Lincoln in Lincoln, Montana. The loan was secured by a deed of trust against the hotel. As additional collateral, Tuschoff assigned First Bank his interest in a note and deed of trust on a bowling alley in Washington. Later, following a sale of the bowling alley, Land Title distributed the proceeds to Tuschoff and other prior purchasers rather than First Bank.

First Bank did not learn of the bowling alley sale until it completed its annual loan review of Tuschoff's hotel loan. Subsequently, Tuschoff defaulted on the hotel loan. First Bank held a non-judicial foreclosure sale of the hotel and placed a full credit bid of the approximately $425,000 owed to it by Tuschoff. First Bank was able to later sell the hotel for only approximately $190,000. First Bank then initiated several lawsuits against various parties in Washington, Montana, and Idaho, seeking to recover the "deficiency" between what it was owed and what it sold the hotel for. Relevant here is First Bank's suit against Land Title in Idaho. The district court, applying Montana law, granted summary judgment in favor of Land Title. The court determined that First Bank's full credit bid extinguished Tuschoff's debt, and once that debt was extinguished, the assignment of Tuschoff's interest in the bowling alley as collateral for that debt was also extinguished. First Bank timely appealed.

In a unanimous decision, the Idaho Supreme Court affirmed the district court. The Court held that Montana law prohibited First Bank from instigating a deficiency action against Tuschoff which meant that there were no damages associated with First Bank's negligence or breach-of-contract claim against Land Title. The Court went on to hold that, even if the Montana law was inapplicable, summary judgment was appropriate because First Bank did not have a colorable negligence claim because it only suffered economic loss. The Court declined to award attorney's fees to either party.

Nemeth v. Shoshone County
Docket No. 46118, November 26, 2019
https://isc.idaho.gov/opinions/46118.pdf

The Supreme Court reversed and remanded the judgment of the district court. The Nemeths own real property and accompanying mining claims in Shoshone County, which are accessed by an old dirt road that crosses National Forest Service lands. After Shoshone County failed to act on the Nemeths' petition to validate a public right-of-way across federal land pursuant to Idaho Code section 40-204A and United States Revised Statute 2477 ("R.S. 2477"), the Nemeths brought a declaratory action seeking validation under Idaho Code section 40- 208(7). The district court dismissed the complaint for lack of subject matter jurisdiction. The Supreme Court reversed and remanded, holding that the Quiet Title Act does not conflict with or supersede the provisions of R.S. 2477 and Idaho laws that allow for county validation of an R.S. 2477 right-of-way on federal land. The Court also held that Idaho Code section 40-208(7) permits a district court to validate an R.S. 2477 right-of-way through a declaratory judgment action.

Losee v. Deutsche Bank Nat'l Trust
Docket No. 45721, November 29, 2019
https://www.isc.idaho.gov/opinions/45721.pdf

Jerry and JoCarol Losee appealed the Bannock County district court's grant of summary judgment in favor of Deutsche Bank National Trust Company (Deutsche Bank). After the Losees defaulted on a home mortgage loan and Deutsche Bank attempted to foreclose, the Losees filed a complaint against Deutsche Bank alleging breach of contract, slander of title, wrongful foreclosure, and a request for declaratory judgment. Responding to Deutsche Bank's motion for summary judgment, the Losees submitted a "Chain of Title Analysis," which they claimed supported an affidavit previously submitted in the case. The district court determined the report was inadmissible hearsay and refused to consider it in ruling on the motion for summary judgment. The district court ultimately granted Deutsche Bank's motion for summary judgment. The Losees appealed, arguing that the district court erred in refusing to consider the "Chain of Title Analysis." The Idaho Supreme Court determined the "Chain of Title Analysis" was hearsay and therefore, the district court did not err in refusing to consider it on summary judgment. Thus, the Idaho Supreme Court affirmed the district court's judgment.

Lamont Bair Enterprises v. City of Idaho Falls
Docket No. 45819, December 6, 2019
https://www.isc.idaho.gov/opinions/45819.pdf

Lamont Bair Enterprises initiated this lawsuit against the City of Idaho Falls (the City) after a broken water main cracked the cement floor and flooded the basement of the company's rental property. Lamont Bair Enterprises alleged the City neglected its water pipes and failed to maintain its water system in a reasonably safe condition. The district court ruled the City was immune from liability under the Idaho Tort Claims Act's (ITCA) discretionary function exception and granted the City summary judgment. Lamont Bair Enterprises appealed, arguing that the ITCA's discretionary function exception does not apply where a city has a duty to maintain its water pipes in a reasonably safe condition. The Supreme Court affirmed the district court's order granting the City summary judgment, holding that the City's plan to replace its aging water pipes qualified as a discretionary function. Costs were awarded to the City as the prevailing party.

Eastside Hwy Dist. V. Delavan
Docket No. 45553, December 11, 2019
https://www.isc.idaho.gov/opinions/45553.pdf

The appeal involved competing claims to real property asserted by adjacent property owners: The East Side Highway District (the District) and Gregory and Ellen Delavan (the Delavans). The parties disputed the location of their common boundary relating to a portion of a road, Boothe Park Road, which includes a boat ramp located on the shore of Lake Coeur d'Alene. The Idaho Supreme Court affirmed the trial court's decision that there was no boundary by agreement. Further, it affirmed the trial court's interpretation of the 1949 deed. However, the Supreme Court vacated the trial court's order granting the Delavans' motion for partial summary judgment on the District's claim to a public highway because hostility is not a requirement under the plain language of Idaho Code section 40-202(3). Accordingly, the case was remanded to the trial court to determine whether the District established a statutory public highway. Additionally, the Supreme Court vacated the trial court's Second Amended Judgment that awarded the Delavans the shoulder area of Boothe Park Road, and remanded that issue to the trial court to determine whether the District has an easement on the shoulder area pursuant to Idaho Code section 40-202(3).

Gordon v. U.S. Bank
Docket No. 45202, December 18, 2019
https://www.isc.idaho.gov/opinions/45202.pdf

The Idaho Supreme Court affirmed the district court's amended judgment dismissing Ellen Gittel Gordon's claims. After Gordon defaulted on her mortgage, the loan servicer initiated nonjudicial foreclosure

proceedings to sell her home at auction. Gordon submitted multiple loan modification applications and appeals in an attempt to keep her home but all were ultimately rejected. As a result, Gordon initiated the underlying action against U.S. Bank, Lisa McMahonMyhran, and Select Portfolio Servicing, Inc. (Lenders) in district court to enjoin the foreclosure sale. Upon the filing of a motion to dismiss that was later converted to a motion for summary judgment, the district court dismissed Gordon's action and allowed the foreclosure sale to take place. First, the Court held that the district court correctly denied Gordon's requested injunction and appropriately granted summary judgment in favor of the Lenders. Next, the Court held that the district court correctly dismissed Gordon's breach of the covenant of good faith and fair dealing claim, as Gordon failed to raise any genuine issue of material fact that the Lenders had violated the covenant.

***Smith ex rel. Smith v. TREASURE VALLEY SEED*, 434 P. 3d 1260** - Idaho: Supreme Court 2019. Filed: January 29, 2019. Rehearing Denied March 7, 2019.

Facts: Case is making a second appellate appearance, after remand on attorney's fees where the District Court re-ordered fees on Rule 11 grounds. Plaintiff, pro se attorney and alleged "irrevocable" Power of Attorney of decedent, was initially suing for breach of contract. Plaintiff did NOT sue as Personal Representative. Initial case was dismissed and fees awarded under I.C. 12-121, because Plaintiff was not real party in interest. Plaintiff failed to timely appeal the substantive "irrevocable" Power of Attorney ruling, leaving only the attorney fees timely for appeal.

Once again on appeal for attorney's fees, Plaintiff attempted to re-argue the merits of the "irrevocable" Power of Attorney. He also challenged the Rule 11 sanctions.

Held: Attorney fees were reasonable, and the court did not have to discuss the power of attorney since issue was waived by failure to timely raise on appeal (the first time). This doctrine is called the Laws of the Case Doctrine. When a fact or law has been decided and not appealed, "such pronouncement becomes the law of the case and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal." The Court also reiterated its prior holding on the validity of an "irrevocable" power of attorney: "A power of attorney terminates once the principal dies. I.C. § 15-12-110(1)(a)."

***MATTER OF ESTATE OF BIRCH*, 434 P. 3d 806** - Idaho: Supreme Court 2019 Opinion filed: February 8, 2019.

Facts: A decedent left a will with intentionally omitted children. The parties, P.R. and Omitted Child #1 and Omitted Child #2, went to mediation and a compromise was reached. The probate judge signed off on the compromise. Personal Representative requested Child #1 pay fees for preparation of the compromise agreement, and it set off a long round of unsuccessful attempts to remove the PR. The court ultimately allowed fees, and issued an order explaining the reason and basis for fees (citing IC 15-3-720). A second memorandum of fees was filed without objection; and no hearing was held. In the final distribution filings, the distribution took out attorneys fees for the second filing, without any court findings on the matter. Both attorney fee awards were appealed. The first was conceded by the parties as error.

Held: The Court stressed the decision was "the result of a situation where a premature memorandum of costs was filed prior to entry of a decision by the magistrate court that would entitle [respondent] to an award of costs. The right to file a memorandum of costs is triggered by a jury verdict or decision of the court. Rule 54(d)(4). Absent a decision, nothing triggers a request for fees or requires an objection. The court also noted the closing order did not have the requirements found in Idaho Rule of Civil Procedure 54(e) or IC 15-8-208. "The Closing Order contains no written findings regarding the merit of Birch's challenges and is silent as to whether the magistrate court considered the Idaho Rule of Civil Procedure 54(e)(3) factors when awarding attorney fees." At 808. Remanded to the trial court to determine the merits of the additional attorney fees.

IN THE MATTER OF GUARDIANSHIP AND CONSERVATORSHIP OF COLE, Idaho: Court of Appeals 2019 (unpublished opinion) (Filed: May 16, 2019)

Dora was an incapacitated adult. She had three children: Darrel, Tony, and Kelly. D and T sought appointment to be Dora's guardian and conservator. Notice of Hearing was sent to K. K objected because of lack of adequate notice to interested persons. The district court characterized the sole issue on appeal as "whether the magistrate erred in not dismissing the petition for lack of jurisdiction due to the failure to serve Dora or Kelly with a summons."

Held: Petitions for guardianship are exempt from I.R.C.P 4 because guardianship proceedings are not adversarial in nature.

BUSINESS CASES

David S. Jensen & Christina W. Hardesty

March 11, 2020

PARSONS BEHLE & LATIMER

Trumble v. Farm Bureau (December 17, 2019)

- "Farm Bureau's obligation under the 2011 Memorandum to pay the service bonus commission did not arise until Trumble satisfied all the stated eligibility conditions. Without an obligation to make such a payment, there can be no anticipatory repudiation because Farm Bureau did not breach any contractual duty—Farm Bureau had none."

PARSONS BEHLE & LATIMER

Guenther v. Ryerson (February 18, 2020)

- "[U]nless otherwise provided in the partnership agreement, partnership assets must be reduced to cash before being distributed to the partners . . . ."
- "[A]ny increase in value in the [partnership] property, including from the date of dissolution until sale, belongs to the partnership."

PARSONS BEHLE & LATIMER

2020
Fourth District Bar
Spring Case Review

Business Cases

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***Trumble v. Farm Bureau Mutual Insurance Company of Idaho*, No. 46133 (Idaho December 17, 2019).**

In December 1995, Brian D. Trumble entered into a Career Agent's Contract ("Agent Contract") with Farm Bureau. Under the contract, Trumble was an independent contractor. The Agent Contract included a non-competition clause that prohibited Trumble from competing with Farm Bureau for 90 days after termination of the contract within a 50 mile radius. About the same time, Farm Bureau provided Trumble with a separate document titled "Career Agent's Service Bonus Commission Memorandum of Understanding." Farm Bureau revised the commission memorandum in 2011. The commission memorandum provided that after completion of each qualifying service year by a qualified agent, a service bonus commission credit would be placed on deposit. The commission memorandum explained the requirements for payment of the bonus as follows:

> The commission credit made on behalf of each agent and interest will not become payable to agent, however, until the agent complies with all other requirements of the plan, terminates, and fulfills the no competition requirements. . . . The no competition restriction referred to above means that the agent shall not own, operate or be employed as an agent, independent contractor or employee of any other insurance company . . . for a period of one year from the date of termination within a radius of fifty (50) miles of the agent's residence at the time of termination. A violation of the no competition restriction will result in forfeiture of the service bonus commission and interest credited. The service bonus commission will be paid one year after the agent terminates their contract with [Farm Bureau], provided the no competition restriction is observed. . . . No service bonus will be paid to any agent committing fraud, dishonesty or other material agent misconduct.

On January 1, 2016, Farm Bureau notified Trumble that he had qualified for service bonus commissions totaling $251, 431.96, if he met "all requirements of the program . . . before and after

termination of [his] contract." On May 4, 2016, Farm Bureau terminated Trumble's Agent Contract for alleged dishonesty. The next day, Trumble's counsel sent a letter to Farm Bureau requesting that if Farm Bureau did not rescind its termination, that Farm Bureau immediately pay Trumble the bonus commission in full. Farm Bureau's counsel responded that based on the dishonesty provision in the commission memorandum, Farm Bureau had no contractual obligation to pay any service bonus commissions to Trumble.

Trumble filed his complaint against Farm Bureau seeking declaratory relief. He then filed a motion for summary judgment seeking a ruling that the non-competition and forfeiture provisions in the commission memorandum were unenforceable. The district court denied summary judgment. Trumble moved for reconsideration, asserting that the forfeiture clause in the commission memorandum was overbroad and that the forfeiture provision should not be enforced because it was unreasonable. The district court upheld the forfeiture provision.

While the litigation was progressing, Trumble had dveloped a list ("Subject List") containing the names and addresses of individuals, some of whom were customers of Farm Bureau. The list came from Trumble's personal contacts, old commission statements, and Trumble's personal knowledge and experience. After the ninety-day non-compete in the Agent Contract had passed, Trumble began working for a competitor and began soliciting new customers from the Subject List. Farm Bureau learned about this when a customer notified Farm Bureau about receipt of a solicitation letter and some customers requested to have their policies with Farm Bureau cancelled.

As a result of Trumble's solicitations, Farm Bureau asserted two counterclaims-- (i) Trumble violated the Idaho Trade Secrets Act ("ITSA"); and (ii) Trumble intentionally interfered with Farm Bureau's prospective economic advantage. Trumble moved for summary judgment on both counterclaims. The district court agreed and granted summary judgment to Trumble.

Farm Bureau also moved for summary judgment on Trumble's complaint, asserting that Trumble's admitted competition with Farm Bureau within one year of his termination acted as a forfeiture of the service bonus under the terms of the commission memorandum. Trumble argued in response that he should be granted summary judgment because Farm Bureau's actions and representations nullified the non-competition requirement of the commission memorandum based on doctrines of quasi estoppel, anticipatory repudiation, and futility. The district court granted summary judgment to Farm Bureau.

The Supreme Court upheld the grant of summary judgment to Farm Bureau. The Court determined that the non-competition and forfeiture provisions were reasonable as a matter of law. Since Trumble was an independent contractor and not an employee, the reasonable analysis applicable to employees does not apply in this case. The forfeiture clause is not a penalty. It was not imposed as a penalty for a breach, but is simply a cost for choosing to compete with Farm Bureau within a year after termination. The forfeiture provision is not unconscionable as it is merely part of a unilateral offer that never came about because the necessary conditions were never satisfied.

The Supreme Court also determined that Trumble's quasi estoppel, anticipatory repudiation, and futility arguments were unsupported by the record and law. The Court explained:

> Farm Bureau's obligation under the 2011 Memorandum to pay the service bonus commission did not arise until Trumble satisfied all the stated eligibility conditions. Without an obligation to make such a payment, there can be no anticipatory repudiation because Farm Bureau did not breach any contractual duty-Farm Bureau had none.

The Supreme Court also upheld the grant of summary judgment in favor of Trumble on Farm Bureau's counterclaims. The Court determined that the Subject List was not a trade secret "because it was almost wholly generated from alternative and independent sources, it contained generally known information and Farm Bureau took few efforts to maintain its secrecy."

On Farm Bureau's second counterclaim asserting interference with Farm Bureau's prospective economic advantage, the Court noted that Farm Bureau's claim is premised on Trumble's alleged violation of the ITSA. Since the Court determined that there was not a violation of the ITSA, there can be no intentional interference claim.

***Joseph Guenther v. Michelle Ryerson*, No. 46258, 2020 WL 772271 (Idaho Feb. 18, 2020).**

Guenther and Ryerson purchased real property together as partners and agreed to develop the property into a vineyard for profit, but there was no written partnership agreement between the parties. There wasn't any agreement as to contributions of labor or expenses to the partnership or which partner was responsible for partnership liability. The parties also built a home on the property financed by a construction mortgage financed by Zions Bank. Both parties invested personal funds into the construction of the house and the vineyard. In 2017, the parties decided that they could no longer be business partners, and Guenther filed a complaint for dissolution of the partnership, unjust enrichment, promissory estoppel, and quiet title to the property. Ryerson counterclaimed for dissolution of the partnership and a determination that she had 50% ownership in the partnership.

The following substantive issues were before the Idaho Supreme Court:

a) Did the district court err in interpreting the Idaho Uniform Partnership Act when it ordered the sale of the real property on the open market in winding up the partnership?

The district court ultimately held under Idaho Code Sec. 30-23-703(c), with the consent of the partnership and its creditor, that each partner had an opportunity to purchase the real property before requiring its sale on the open market. The Court found that Idaho Code Sec. 30-23-703(c) was inapplicable to this case because it applies to disassociation from the partnership when the partnership is not wound up but does not apply when a partnership is being dissolved and wound up. The Court also held that, unless otherwise provided for in a partnership agreement, partnership assets must be reduced to cash before being distributed to the partners, so the district court erred when it allowed both partners an opportunity to purchase the property. The Court also provided "guidance" for the district court in how to structure the sale of the property, and found that the district court erred when it set the price of the property because the property should have been listed for its fair market value and sold at the highest price possible.

b) Did the district court err in determining Guenther was entitled to 100 percent of any increase in equity in the Lost Sage Lane property that occurred after the date of dissolution?

The Supreme Court found that the Idaho Uniform Partnership Act provides that partnership property belongs to the partnership, not to the individual partners. The Court walked through the process of dissolution, winding up, and distribution of the partnership's assets. The Court found that the real property and any increase in the value of the property belongs to the partnership, and that just because Guenther was the sole contributor to the development and upkeep of the property since the date of dissolution does not mean that he is entitled to all increase in equity of the partnership property. Guenther's payment of partnership expenses are to be considered if the partnership has surplus assets that are distributable.

c) Did the district court err in granting summary judgment as to the value of the Lost Sage Lane property as of the date of dissolution.

Because of the Supreme Court's decision that the real property must be sold for its fair market value, the Supreme Court noted that the property's value at the date of the partnership's dissolution was immaterial.

IN THE SUPREME COURT OF THE STATE OF IDAHO
Docket No. 46133

BRIAN D. TRUMBLE,	)	
	)	
Plaintiff-Counterdefendant-Appellant-Cross Respondent,	)	**Boise, May 2019 Term**
	)	
v.	)	**Opinion Filed: December 17, 2019**
	)	
FARM BUREAU MUTUAL INSURANCE COMPANY OF IDAHO, an Idaho corporation; WESTERN COMMUNITY INSURANCE CO., an Idaho corporation; FARM INSURANCE BROKERAGE CO., INC., an Idaho corporation,	)	**Karel A. Lehrman, Clerk**
	)	
Defendants-Counterclaimants-Respondents-Cross Appellants.	)	

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Nancy A. Baskin, District Judge.

The district court's grant of summary judgment for Farm Bureau is affirmed. The district court's grant of summary judgment for Trumble on Farm Bureau's counterclaims is also affirmed.

Points Law, PLLC, Boise, and Eberle, Berlin, Kading, Turnbow & McKlveen, Chtd, Boise, attorneys for Appellant. Michelle R. Points argued.

Racine, Olson, Nye & Budge, Pocatello, attorneys for Respondent. Lane V. Erickson argued.

BEVAN, Justice

I. NATURE OF THE CASE

This case is about whether a career agent for Farm Bureau Mutual Insurance Company can collect service bonus commissions that were credited to him during his career, but which became forfeitable after the agent's termination if the agent competed with Farm Bureau within one year of his termination. The district court held that the agent forfeited his commissions by

competing with Farm Bureau in violation of the one-year non-competition requirement. We agree, affirming the district court's judgment dismissing the agent's claims.

In addition, this case is about Farm Bureau's counterclaims against the agent, alleging the agent misappropriated trade secrets and intentionally interfered with Farm Bureau's prospective economic advantage after his termination. The district court held that the agent was blameless for his actions after termination and dismissed Farm Bureau's counterclaims. We likewise agree with this determination, and affirm the district court's dismissal of Farm Bureau's counterclaims.

II. FACTUAL AND PROCEDURAL BACKGROUND

In December 1995, Brian D. Trumble entered into a Career Agent's Contract ("Agent Contract") with Farm Bureau. Under the Agent Contract, Trumble was an independent contractor who procured insurance from interested buyers on Farm Bureau's behalf. The Agent Contract included a non-competition clause which stated:

> Upon termination of this contract, Agent shall not compete in any way with [Farm Bureau] for a period of ninety days from the date of termination within a radius of fifty miles from Agent's residence at the time of termination. Competition includes but is not limited to the following:
>
> a. Employment as an insurance agent, independent contractor or employee of any other insurance company or agency selling or brokering the same or similar type of insurance as [Farm Bureau];
>
> b. Soliciting casualty, property, disability, life or health insurance;
>
> c. Owning or operating any brokerage or independent insurance agency; or
>
> d. Providing any information to [Farm Bureau's] competitors about [Farm Bureau's] rates, insurance policies, insureds, or policy forms.

At about the same time Trumble entered into the Agent Contract with Farm Bureau, Farm Bureau provided Trumble with a separate document titled "Career Agent's Service Bonus Commission Memorandum of Understanding" with an effective date of January 1, 1994 ("1994 Memorandum"). The 1994 Memorandum explained:

> As of January 1, 1994, each qualifying, full-time agent under contract [with Farm Bureau] will be eligible to receive a service bonus commission after termination if the agent meets the conditions set forth each year and does not compete with [Farm Bureau] for a period of one year after he or she has terminated.

Neither party signed the 1994 Memorandum.

In 2011, Farm Bureau revised the 1994 Memorandum and issued another version of the "Career Agent's Service Bonus Commission Memorandum of Understanding" ("2011

Memorandum").[1] The language quoted above remained substantially unchanged[2] but multiple sections were added to the 2011 Memorandum that were absent from the 1994 Memorandum. Those sections read:

> After completion of each qualifying service year, the service bonus commission credit will be placed on deposit. . . . The commission credit made on behalf of each agent and interest will not become payable to agent, however, until the agent complies with all other requirements of the plan, terminates, and fulfills the no competition requirements. Any commission credit which does not become payable to agent will revert back to [Farm Bureau].
>
> The no competition restriction referred to above means that the agent shall not own, operate or be employed as an agent, independent contractor or employee of any other insurance company . . . for a period of one year from the date of termination within a radius of fifty (50) miles of the agent's residence at the time of termination. A violation of the no competition restriction will result in forfeiture of the service bonus commission and interest credited.
>
> The service bonus commission will be paid one year after the agent terminates their contract with [Farm Bureau], provided the no competition restriction is observed. . . . No service bonus will be paid to any agent committing fraud, dishonesty or other material agent misconduct.

From December 1995 until Trumble's termination in May 2016, Trumble was a qualifying agent who met the requirements to earn the service bonus commission every year. On January 26, 2016, Farm Bureau sent Trumble a letter showing that he had qualified for service bonus commissions totaling $251,431.96, if he met "all requirements of the program . . . before and after termination of [his] contract."

On May 4, 2016, Farm Bureau terminated Trumble's Agent Contract for alleged dishonesty. The next day, Trumble's counsel sent a letter to Farm Bureau requesting that it restore Trumble as an agent and further requesting that if Farm Bureau did not rescind its

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[1]There is a discrepancy between the parties about when the language was first changed. According to Farm Bureau, Trumble was given a similar memorandum in 1996, shortly after he started working at Farm Bureau, with the added language. Trumble also received later memorandums dated in 1998, 2004, 2009 and 2010. While Trumble does not disagree that the 1996, 1998, 2004, 2009, and 2010 memorandums were provided to him and that they contain language more aligned with the 2011 memorandum, Trumble asserts the 2011 Memorandum is controlling because it was the only other Memorandum with an effective date listed. For this appeal, the district court found that the 2011 Memorandum is controlling and neither party contests that holding on appeal. Thus, we will focus on the 2011 Memorandum.

[2] The language in the 2011 Memorandum changed "one year after *he or she* terminated" to "one year after *they* terminated." Additionally, the 2011 Memorandum begins "As of January 1, 2011," instead of "As of January 1, 1994."

termination, that Farm Bureau immediately pay Trumble the bonus commission in full. Farm Bureau's counsel responded on May 9, 2016, explaining that "[Trumble's] [A]gent [C]ontract was ending in part, due to his dishonesty in listing a property in which he held a partial ownership interest, in which he did not reside, as his primary residence, when he knew full well that it was not." Farm Bureau expressed the view that based on the dishonesty provision in the 2011 Memorandum, Farm Bureau had no contractual obligation to pay any service bonus commissions to Trumble. The letter also noted that "even if Mr. Trumble were entitled to his service bonus, the [2011] Memorandum contains a non-competition clause restricting payment until after compliance for a 12-month period."

Two weeks later Trumble filed his complaint, seeking declaratory relief and requesting the district court: (1) find the 90-day covenant not to compete in the Agent Contract unenforceable; and (2) order Farm Bureau to immediately pay Trumble the service bonus commission. Trumble then filed a motion for summary judgment seeking a ruling that (1) the non-competition agreement in the Agent Contract was unenforceable and (2) the non-competition and forfeiture provisions in the 2011 Memorandum were unenforceable.

The district court denied summary judgment, holding that the issue over the non-competition clause in the Agent Contract was moot because more than ninety days had passed. The district court also relied particularly on *Anderson v. Farm Bureau Mut. Ins. Co.*, 112 Idaho 461, 470, 732 P.2d 699, 708 (Ct. App. 1987) (*abrogated on other grounds by Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 778 P.2d 744 (1989), in ruling that the one-year non-competition and forfeiture clauses in the 2011 Memorandum were enforceable as a matter of law. The district court explained:

> [Trumble] . . . asserts that the non-competition restriction in the service bonus commission memorandum is only applicable if the agent terminates his or her contract. . . . In interpreting this provision, [Trumble] focuses only on the phrase "after they have terminated" rather than considering the sentence as a whole. The plain language of the provision indicates the general terms of eligibility "to receive a service bonus commission after termination." In terms of such eligibility, there is no indication that agents who elect to terminate their contracts are treated any differently from agents who have their contracts terminated by [Farm Bureau]. Under [Trumble's] interpretation, an agent whose contract is terminated by [Farm Bureau] would not be eligible to receive any service bonus commission, because the memorandum contains no separate statement defining

> eligibility under that circumstance. For these reasons, the court cannot conclude that the non-competition restriction is inapplicable to [Trumble] simply because he did not elect to terminate his contract with [Farm Bureau].

(Emphasis in original).

About six months later, Trumble moved for reconsideration. Significantly, for purposes of this appeal, Trumble asserted generally that the forfeiture clause in the 2011 Memorandum was overbroad and that the forfeiture provision should not be enforced because it was unreasonable. Trumble sought to distinguish *Anderson*, arguing that it was inapplicable to his case because he had *earned* the service bonus commissions, unlike the agent in *Anderson*. Trumble did not argue that the non-competition clause was ambiguous, or that it should be construed against Farm Bureau.

On reconsideration, the district court held that the 2011 Memorandum is not ambiguous. The court also upheld the forfeiture provision in the 2011 Memorandum, noting that "[a]lthough the law does not favor forfeitures, courts will generally uphold contracts that expressly provide for forfeitures." (quoting *Hull v. Giesler*, 156 Idaho 765, 779 (2014)). The court also noted that forfeitures must strictly follow the contract terms and that "[t]here is no showing . . . that [Farm Bureau] did not follow the terms of the 2011 Memorandum in denying [Trumble's] request for payment of his service bonus prior to the satisfaction of all the terms of the 2011 Memorandum."

During the litigation, Trumble had generated a list ("Subject List") containing the names and addresses of 578 individuals, some of whom were customers of Farm Bureau. Trumble compiled the list from personal contacts in his phone, old commission statements, old calendars and his own personal knowledge and experience. After the ninety-day non-compete in the Agent Contract had elapsed, Trumble began working for one of Farm Bureau's competitors, Post Insurance, and began soliciting new customers from the Subject List. Farm Bureau learned of the solicitation after a customer notified Farm Bureau about receipt of a solicitation letter. Additionally, some customers requested to have their policies with Farm Bureau cancelled as a result of a solicitation letter.

Based on this information, Farm Bureau filed its answer and asserted two counterclaims: (1) Trumble violated the Idaho Trade Secrets Act ("ITSA"); and (2) Trumble intentionally interfered with Farm Bureau's prospective economic advantage. Soon after, Trumble moved for summary judgment on both of Farm Bureau's counterclaims, asserting that Trumble did not

violate the ITSA and that Trumble did not interfere with Farm Bureau's prospective economic advantage. The district court ultimately agreed with Trumble, granting summary judgment to him on the counterclaims, ruling that Trumble did not misappropriate any trade secrets or intentionally interfere with Farm Bureau's prospective economic advantage.

During this same period, Farm Bureau also brought a motion for summary judgment asserting that Trumble's admitted competition with Farm Bureau within one year of his termination acted as a forfeiture of the service bonus commission under the 2011 Memorandum. In response, Trumble argued that summary judgment should be granted to him "on the grounds that Farm Bureau's actions and representations made Trumble's compliance with the terms of the [2011 Memorandum] futile and/or were an anticipatory breach. . . ." Trumble did not argue that the terms of the Memorandum were ambiguous or that it should be construed against Farm Bureau. Indeed, Trumble agreed with what a plain reading of the 2011 Memorandum required of him in his memorandum opposing summary judgment:

> Farm Bureau is correct that the Career Agent's Service Bonus Commission Memorandum of Understanding at issue in this case [the 2011 Memorandum] conditioned payment of the service bonus commission upon Trumble not competing with Defendants for a period of one year. It is also true that Trumble competed with Farm Bureau prior to the expiration of one year. However, Farm Bureau ignores the key undisputed fact explaining why Trumble did not honor the non-compete condition contained in the [2011 Memorandum]: namely, that Farm Bureau made absolutely clear that it would not pay the service bonus commissions even if Trumble complied with the non-compete provision.

Trumble also argued that "Farm Bureau should be estopped from asserting that Trumble was required to comply with the one year term of the non-compete based upon Farm Bureau's past inconsistent statements." He based this argument on doctrines of quasi estoppel, anticipatory repudiation and/or futility, which he contended nullified the non-competition condition in the 2011 Memorandum when Farm Bureau declared it would not pay the service bonus commission based on Trumble's alleged dishonesty.

The district court granted summary judgment for Farm Bureau, holding: (1) the 2011 Memorandum was not ambiguous about what would occur if an agent is terminated; and (2) the non-competition language amounted to a forfeiture provision, which was enforceable and was

not unconscionable. Thus, the court held that Farm Bureau did not breach any contract it had with Trumble and that Trumble had no right to the service bonus commission.

The district court did not award attorneys' fees or costs to either party. Both parties appealed.

III. ISSUES ON APPEAL

1. Whether the district court erroneously granted summary judgment for Farm Bureau, finding Trumble had no right to the service bonus commission because he did not satisfy the eligibility requirements.
2. Whether the district court erroneously granted summary judgment for Trumble, finding no misappropriation of any trade secret or intentional interference with a prospective economic advantage.
3. Whether either party is entitled to attorneys' fees and costs on appeal.

IV. STANDARD OF REVIEW

This Court employs the same standard as the district court when reviewing rulings on summary judgment motions. *La Bella Vita, LLC v. Shuler*, 158 Idaho 799, 804–05, 353 P.3d 420, 425–26 (2015). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A moving party must support its assertion by citing particular materials in the record or by showing the "materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact[s]." *See* I.R.C.P. 56(c)(1)(B). Summary judgment is improper "if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented." *La Bella Vita,* 158 Idaho at 805, 353 P.3d at 426 (quoting *McPheters v. Maile*, 138 Idaho 391, 394, 64 P.3d 317, 320 (2003)). Even so, a "mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment." *Id.* (quoting *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 556, 212 P.3d 982, 986 (2009)).

V. ANALYSIS

A. The district court correctly granted summary judgment for Farm Bureau.

1. The district court's conclusion that the 2011 Memorandum was unambiguous is affirmed.

The first issue that we must resolve is the proper scope and reviewability of Trumble's first issue on appeal--whether the non-competition clause in the commission contract only applies if Trumble terminates the commission contract. Trumble now asserts that the non-competition requirement in the 2011 Memorandum does not apply to him because Farm Bureau terminated his agent's contract, rather than Trumble terminating the contract himself. The problem for Trumble in raising this argument on appeal is that he did not raise the argument in opposing Farm Bureau's motion for summary judgment. As a result, Trumble is bound "to the theory upon which the case was presented to the lower court." *State v. Garcia-Rodriguez*, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017) (citing *Heckman Ranches, Inc. v. State, By & Through Dep't of Pub. Lands*, 99 Idaho 793, 799–800, 589 P.2d 540, 546–47 (1979)); *see also State v. Cohagan*, 162 Idaho 717, 721, 404 P.3d 659, 663 (2017) (explaining this Court will not consider an alternate theory on appeal when that theory was conceded below).

As noted above, in response to Farm Bureau's motion for summary judgment, Trumble argued that summary judgment should be granted to him "on the grounds that Farm Bureau's actions and representations made Trumble's compliance with the terms of the [2011 Memorandum] futile and/or were an anticipatory breach. . . ." Trumble also argued that "Farm Bureau should be estopped from asserting that Trumble was required to comply with the one year term of the non-compete based upon Farm Bureau's past inconsistent statements." He based this argument on doctrines of quasi estoppel, anticipatory repudiation and/or futility, which he contended nullified the non-competition condition in the 2011 Memorandum when Farm Bureau declared it would not pay the service bonus commission based on Trumble's alleged dishonesty.

Trumble did not argue that the terms of the Memorandum meant something different than Farm Bureau argued in its motion for summary judgment. He simply argued on other grounds (which will be discussed below) why the non-competition clause should not be enforced against him. Beyond that, he explicitly agreed that Farm Bureau was *correct* in its assertion of what the language in the 2011 Memorandum required of him. He stated in his memorandum opposing summary judgment:

> *Farm Bureau is correct* that the Career Agent's Service Bonus Commission Memorandum of Understanding at issue in this case [the 2011 Memorandum] *conditioned payment of the service bonus commission upon Trumble not competing with Defendants for a period of one year*. It is also true that Trumble competed with Farm Bureau prior to the expiration of one year.

> However, Farm Bureau ignores the key undisputed fact explaining why Trumble did not honor the non-compete condition contained in the [2011 Memorandum]: namely, that Farm Bureau made absolutely clear that it would not pay the service bonus commissions even if Trumble complied with the non-compete provision.

(Emphasis added).

Thus, Trumble has admitted that the 2011 Memorandum applied to him, no matter how his affiliation with Farm Bureau ended. Trumble is now bound by this concession made in his briefing. *See Cohagan*, 162 Idaho at 721, 404 P.3d at 663; *see State v. Hoskins*, 165 Idaho 217, 224-25, 443 P.3d 231, 238–39 (2019) (reiterating that this Court will not consider an alternate theory when that theory was conceded below). Trumble abandoned his original theory when he opposed Farm Bureau's summary judgment motion below, and he cannot resurrect the theory now, on appeal. Indeed, Trumble acknowledged in his opening brief on appeal that "neither Trumble nor Farm Bureau argued that the [2011 Memorandum] was ambiguous below, and a review of the [2011 Memorandum] *establishes it is not ambiguous*." (Emphasis added).

The only way for Trumble to argue that the 2011 Memorandum means something different from what the district court determined is to claim that the 2011 Memorandum *is* ambiguous. *Kunz v. Nield, Inc.*, 162 Idaho 432, 439, 398 P.3d 165, 172 (2017) ("A contract term is ambiguous when there are two different, reasonable interpretations of the language."). If that were his argument, we would be constrained to review the document's language critically, and apply rules of construction that govern when contractual language is ambiguous. *See, e.g.*, *Fed. Nat'l Mortg. Ass'n v. Hafer*, 158 Idaho 694, 702, 351 P.3d 622, 630 (2015) ("Ambiguities in a contract of adhesion should be construed against the drafter."); *Guzman v. Piercy*, 155 Idaho 928, 936, 318 P.3d 918, 926 (2014) ("The Court construes a stipulation against the drafter."). But since he has never made that argument, and he conceded that Farm Bureau was correct below, his claim on appeal that the 2011 Memorandum means something other than the district court held fails. As Farm Bureau notes, "[w]hen read as a whole, the 2011 [Memorandum] evidences that Farm Bureau is free to terminate an agent who could still qualify to receive a Service Bonus Commission so long as they fulfill the 1-year non-competition eligibility requirement." We thus affirm the district court's initial conclusion on this basis.

2. <u>The district court's holding that Trumble had no right to the service bonus commission was proper</u>.

Trumble raises additional issues regarding the 2011 Memorandum that are properly before us on appeal. He submits that the non-competition and forfeiture provisions in the 2011 Memorandum are unenforceable on three grounds: (1) the non-competition clause is subject to reasonableness standards and, as written, it is not reasonable; (2) the forfeiture clauses are impermissible because they are penalties that bear no reasonable relationship to Farm Bureau's damages; and (3) the forfeiture clauses are unconscionable. Each ground will be discussed in turn.

a. The non-competition and forfeiture provisions are reasonable as a matter of law.

Trumble argues that a "reasonableness standard" should prohibit the reach of the forfeiture clause here because the amount at issue is so substantial that it would be unreasonable to enforce the non-competition clause against him. He supports this argument by asserting that the $251,431.96 service bonus was based on his production and was "earned and vested" over his twenty plus years with the company. Thus, he contends, Idaho should adopt and follow the law that forfeitures tied to restrictive covenants are invalid and/or not enforceable because they are unreasonable.

The facts here do not support Trumble's claim. While the service bonus commission is credited yearly based on the agent completing a qualifying service year, and the amount of the commission is placed on deposit with interest, the 2011 Memorandum clearly states that "[t]he commission credit made on behalf of each agent and interest will not become payable to agent . . . until the agent complies with all other requirements of the plan, terminates, and fulfills the no competition requirements." The 2011 Memorandum further states that if these requirements are not met, "[a]ny commission credit which does not become payable to agent will revert back to" Farm Bureau. Thus, Trumble's credit for service bonus commissions was never "earned" or "vested," and it appropriately reverted to Farm Bureau when Trumble joined another insurance agency within the one-year period.

Trumble's position is juxtaposed against the Court of Appeals' holding in *Anderson* which weighed heavily in the district court's analysis in granting summary judgment against him. Trumble argues that *Anderson* does not fit the facts presented here and that its legal conclusions are erroneous. Trumble posits that the analysis of courts in other states shows that the *Anderson* court's conclusion is now incorrect.

Trumble's reasonableness argument fails for two reasons. First, Trumble was not an employee of Farm Bureau. Most courts that have applied the reasonableness test have done so in the context of an employer-employee relationship not present here. *E.g.*, *Morris v. Schroder Cap. Mgmt. Int'l*, 859 N.E.2d 503, 507 (N.Y. 2006) (applying the reasonableness test to employer-employee relationship); *Gaver v. Schneider's O.K. Tire Co.*, 856 N.W.2d 121, 130 (Neb. 2014) (applying reasonableness standard to employer-employee non-compete); *Lavey v. Edwards*, 505 P.2d 342, 345 (Ore. 1973) (explaining the validity or invalidity of forfeiture clauses in employee pension plans should be determined by the test of reasonableness); *but see Deming v. Nationwide Mut. Ins. Co.*, 905 A.2d 623 (Conn. 2006) (recognizing it was adopting a minority view, the appellate court analyzed the forfeiture of deferred compensation as it would an employment contract non-compete clause). Indeed, this Court applies reasonableness standards to determine whether covenants not to compete in *employment contracts* are valid. *E.g. Freiburger v. J-U-B Eng'rs, Inc.*, 141 Idaho 415, 420, 111 P.3d 100, 105 (2005) ("A covenant not to compete in an employment contract must be reasonable as applied to the employer, the employee, and the public."). Trumble's status as an independent contractor distinguishes the cases holding that forfeiture clauses are subject to a reasonableness analysis. The district court appropriately recognized that Trumble was not an employee of Farm Bureau and that his right to payment was neither earned nor vested. As a result, the reasonableness analysis applicable to employees does not apply in Trumble's case.

Second, the district court appropriately applied *Anderson* in reaching this conclusion. *Anderson* involved an insurance agent who, like Trumble, was an independent contractor, as opposed to an employee. 112 Idaho at 465, 732 P.2d at 703. The Court of Appeals analyzed two separate contracts in making its decision, but one of those contracts was nearly identical to the 2011 Memorandum, so its reasoning and holding covers the facts of this case. *See id*. at 470, 732 P.2d at 708. Like the issue presented here, in *Anderson* the court was asked to determine whether an agreement which "provided for 'service bonus' commissions upon termination if 'the agent . . . does not compete with the Companies for a period of one year after he has terminated'" was an unreasonable restraint of trade. *Id*. In holding that this provision was enforceable, the Court of Appeals stated:

> Anderson argues that such provisions are anti-competition covenants and, as such, are void as restraints of trade. This characterization is overbroad. Agency

> contracts often do contain non-competition covenants. These covenants usually require the agent to refrain from working in the insurance business for certain time periods and within certain geographical limitations. They will be upheld if they are *ancillary to employment* and are reasonable in their application to the covenantor, the covenantee and the general public. However, the provisions set forth in the contracts before us are not restrictive covenants in this sense. They do not prohibit competition; they simply impose contractual forfeitures. Provisions of this type generally are not considered restraints of trade.

Id. (emphasis added) (citations omitted).

This legal conclusion remains correct and forecloses Trumble's argument over the forfeiture clause here. Since the non-competition clause is a forfeiture provision, it is not subject to the same reasonableness analysis that a non-competition covenant applicable to an employee would be. As the district court recognized,

> [c]oncededly, these forfeitures impose a cost for engaging in competition. But the agent, through his competitive activity, mitigates the cost by soliciting customers to buy insurance from the new carriers he represents. The strong weight of judicial authority upholds such agreements even when they are unrestricted in time or territory.

(Quoting *Anderson*, 112 Idaho at 470, 732 P.2d at 708). The strong weight of judicial authority continues to support this conclusion.

b. The forfeiture clause does not amount to a penalty.

Trumble's next argument relies on his first. He maintains that the forfeiture clause acts as a penalty because he had already earned the service bonus commissions. Trumble again contends that words like "will be placed on deposit," and "termination of the Commission Contract will not reduce accrued credits" in the 2011 Memorandum showed that the commissions have already been earned—making the forfeiture an unenforceable penalty "designed to deter a breach or to punish the breaching party rather than compensate the injured party. . . ." As we have already held, the clear mandate of the 2011 Memorandum is that the agent must comply with all the requirements before becoming eligible to receive payment of the service bonus commission. Trumble never became qualified as he violated the non-competition requirement.

Trumble equates the forfeiture provision to a liquidated damages clause, noting that forfeiture provisions should not be enforced when they are "designed to deter a breach or to punish the breaching party rather than compensate the injured party for damages occasioned by the breach." *Hull v. Giesler*, 156 Idaho 765, 779, 331 P.3d 507, 521 (2014). Trumble also cites

Magic Valley Truck Brokers, Inc. v. Meyer, 133 Idaho 110, 117, 982 P.2d 945, 952 (Ct. App. 1999) in support of his argument. *Magic Valley* is readily distinguishable. There, the employment contract between the plaintiff and the defendant provided that in the event of a breach of a non-competition clause by the plaintiff, the defendant would be entitled to liquidated damages in the amount of $5,000 for each calendar month of competition by the plaintiff. 133 Idaho at 113, 982 P.2d at 948. The court held that the clause was unenforceable as exorbitant and unconscionable, amounting to an unenforceable penalty. *See id*. at 117, 982 P.2d at 952.

Unlike *Magic Valley*, but like the district court below, we hold that the non-competition provision in the 2011 Memorandum is not a liquidated damages clause. We note that the Agent's Contract, like the agreement in *Magic Valley*, set forth the agent's promise not to compete for ninety days and contained a liquidated damages clause in the event of a *breach* of that agreement by the agent. In contrast, in the 2011 Memorandum, the non-competition provision is a condition of *eligibility* to receive the service bonus commission, rather than a contractual promise that would be breached by the agent engaging in competition. As noted, the 2011 Memorandum provides that the service bonus commission

> will not become payable to agent . . . until the agent complies with all other requirements of the plan, terminates, and fulfills the no competition requirements.
> . . . .
> A violation of the no competition restriction will result in forfeiture of the service bonus commission and interest credited.
>
> The service bonus commission will be paid one year after the agent terminates their contract with [Farm Bureau], provided the no competition restriction is observed.

Provisions of this type do not prohibit competition and they are not imposed as a penalty for any breach. They simply impose a cost as a consequence for choosing to compete with Farm Bureau within one year of termination – and that cost is a valid "cost for engaging in competition." *Anderson*, 112 Idaho at 470, 732 P.2d at 708.

c. The forfeiture clause is not unconscionable.

Trumble also asserts that the forfeiture provision is unconscionable. For a contract provision to be void as unconscionable, it must be both procedurally and substantively unconscionable. *Lovey v. Regence BlueShield of Idaho*, 139 Idaho 37, 42, 72 P.3d 877, 882 (2003). Procedural unconscionability concerns the bargaining process leading up to the

formation of a contract. *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 321, 246 P.3d 961, 974 (2010). Substantive unconscionability focuses on the terms of the contract. *Id.*

> Procedural unconscionability exists when the contract was not the result of free bargaining between the parties. Indicators of procedural unconscionability generally include a lack of voluntariness and a lack of knowledge. Indicators of lack of voluntariness include the use of high-pressure tactics, coercion, oppression or threats short of duress. A lack of voluntariness can be shown by an imbalance in bargaining power resulting from the non-negotiability of the stronger party's terms and the inability to contract with another party due to time, market pressures, or other factors. Indicators of a lack of knowledge include a lack of understanding regarding the contract terms arising from the use of inconspicuous print, ambiguous wording, or complex legalistic language; the lack of opportunity to study the contract and inquire about its terms; or disparity in sophistication, knowledge, or experience of the parties.
>
> The focus of substantive unconscionability is solely on the terms of the contractual provision at issue. A provision is substantively unconscionable if it is a bargain no reasonable person would make or that no fair and honest person would accept. If a contract term is one-sided or oppressive, it may be substantively unconscionable. In determining whether a term is unconscionable, a court must consider the purpose and effect of the terms at issue, the needs of both parties and the commercial setting in which the agreement was executed, and the reasonableness of the terms at the time of contracting.

Id. (internal quotations and citations omitted). When reviewing an unconscionability determination made by a trial court, the appellate court accepts the factual findings made by the trial court, as long as they are supported by substantial, competent evidence, and freely reviews as a question of law whether under those facts, a contractual provision is unconscionable. *Lovey*, 139 Idaho at 41, 72 P.3d at 881.

The district court here held that "the record is devoid of any facts which the [c]ourt could consider in making an unconscionability determination. [Trumble] simply asserts in his briefing that the bonus service commission memorandum 'was not even a bargained for contract.' " Trumble's argument on appeal mirrors that made before the district court. He claims that the 2011 Memorandum was "not even a bargained for or signed contract[,]" and that "including a forfeiture based upon 'dishonest' conduct is substantively unconscionable because it is oppressive." These allegations are insufficient as a matter of law to establish either procedural or substantive unconscionability. We recognize and agree with the general legal premise refusing to enforce forfeiture penalties that bear no rational basis to the damages incurred by an employer

when an employee competes against it. *E.g.*, *Magic Valley*, 133 Idaho at 117, 982 P.2d at 952. With that said, these principles are of no moment here because: (1) Trumble was not an employee of Farm Bureau; and (2) the forfeiture provision in the non-competition clause was merely part of a unilateral offer that never materialized. Once again, the non-competition provision in the 2011 Memorandum is a condition of eligibility to receive a service bonus commission; it is not a contractual promise on the part of the agent that would be breached by the agent competing with Farm Bureau. Thus, the 2011 Memorandum is not unconscionable.

3. Trumble's quasi-estoppel, futility and anticipatory repudiation arguments are unsupported by the record and applicable case law.

Trumble also argues that statements made by Farm Bureau at and around the time of Trumble's termination relieved Trumble from complying with the non-competition clause based on the doctrines of quasi-estoppel, futility, and/or anticipatory repudiation. First, Trumble alleges the doctrine of quasi-estoppel bars Farm Bureau from relying on the non-competition clause in the 2011 Memorandum because Farm Bureau took inconsistent positions about why Trumble had no right to the service bonus commission. Second, Trumble argues that the doctrine of futility released Trumble from complying with the non-competition clause. Lastly, Trumble argues that Farm Bureau anticipatorily repudiated its "contract" when Farm Bureau informed Trumble he would not receive the service bonus commission regardless of his compliance with the non-competition clause.

a. Quasi-estoppel does not apply.

First, Trumble asserts the doctrine of quasi-estoppel bars Farm Bureau from relying on the non-competition clause in the 2011 Memorandum. According to Trumble, Farm Bureau was inconsistent by representing at the time of termination that Trumble would never receive a service bonus commission even if Trumble complied with the non-competition clause.

"The doctrine of quasi-estoppel 'prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken.' " *Keybank Nat'l Ass'n v. PAL I, LLC*, 155 Idaho 287, 294, 311 P.3d 299, 306 (2013). The doctrine applies when:

> (1) [T]he offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to

> maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.

Id. (quoting *Atwood v. Smith*, 143 Idaho 110, 114, 138 P.3d 310, 314 (2006)). "Quasi-estoppel is essentially a last-gasp theory under which a defendant who can point to no specific detrimental reliance due to plaintiff's conduct may still assert that plaintiffs are estopped from asserting allegedly contrary positions where it would be unconscionable for them to do so." *Id*. (quoting *Schoonover v. Bonner Cnty.*, 113 Idaho 916, 919, 750 P.2d 95, 98 (1988)).

Here, Farm Bureau has consistently maintained one general position—Trumble is not entitled to the service bonus commission because he did not satisfy all of the eligibility requirements under the 2011 Memorandum. Farm Bureau first informed Trumble he would not be entitled to the service bonus commission because he was terminated for dishonest conduct. At that time, Farm Bureau also informed Trumble that "even if [Trumble] were entitled to his service bonus, the Memorandum contains a non-competition clause restricting payment until after compliance for a 12-month period." During litigation, Farm Bureau discovered Trumble was competing and violating the non-competition clause in the 2011 Memorandum. Based on this information, Farm Bureau filed for summary judgment arguing Trumble had no right to the service bonus commission in spite of the dishonesty allegations because it was undisputed that Trumble was competing in direct violation of the one-year non-competition clause. Thus, while Farm Bureau's initial statements and reasons for terminating Trumble were based on allegations of dishonesty, those claims were not the sole basis for its asserted defenses, as its counsel pointed-out in the May 9, 2016, letter, within days of Trumble's termination as set forth above. Trumble cannot show that Farm Bureau took an inconsistent position and then changed that position in an unfair way. Trumble thus fails to satisfy the first factor necessary to establish a successful quasi-estoppel claim.

b. The contract doctrine of anticipatory repudiation does not apply.

Based on the same statements made by Farm Bureau at the May 4, 2016, meeting and in the May 9, 2016, letter, Trumble argues that Farm Bureau anticipatorily repudiated its obligations under the 2011 Memorandum when it told Trumble that he would not receive the service bonus commission. "An anticipatory breach of a contract has been defined as 'a repudiation [by the promisor] of his contractual duty *before the time fixed in the contract for his performance has arrived*.' " *Swafford v. Huntsman Springs, Inc.*, 163 Idaho 209, 213, 409 P.3d

789, 793 (2017) (emphasis in original) (quoting *Foley v. Munio*, 105 Idaho 309, 311, 669 P.2d 198, 200 (1983)). A repudiation is "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach[.]" RESTATEMENT (SECOND) OF CONTRACTS § 250 (1981). A repudiating party's language "must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform." *Id*. cmt. b. Further, a statement of repudiation must threaten a breach of sufficient gravity that, "if the breach actually occurred, it would of itself give the obligee a claim for damages for total breach. . . ." *Id*. cmt. d.

Again, the doctrine of anticipatory breach requires the breach of a contractual duty. Farm Bureau's obligation under the 2011 Memorandum to pay the service bonus commission did not arise until Trumble satisfied all the stated eligibility conditions. Without an obligation to make such a payment, there can be no anticipatory repudiation because Farm Bureau did not breach any contractual duty—Farm Bureau had none.

Beyond that, the May 9, 2016, letter contemplated the possibility that Farm Bureau misjudged Trumble's behavior and specifically informed Trumble that the non-competition provision applied even if the dishonesty provision did not apply, when it stated, "even if Mr. Trumble were entitled to his service bonus, the [2011] Memorandum contains a non-competition clause restricting payment until after compliance for a 12-month period." Thus, as the district court noted, Farm Bureau did not express that Trumble would *never* be paid under any circumstances, but that Trumble could maintain eligibility for the service bonus commission if he successfully challenged Farm Bureau's allegations about his dishonesty. Farm Bureau issued this clarification two weeks before Trumble filed his initial complaint on May 23, 2016, and months before Trumble began working for Post Insurance in August 2016. As the district court summarized:

> So while [Trumble] has established that he believed [Farm Bureau] would not pay the service bonus because they thought he acted dishonestly, there are no facts in the record to support a claim that [Trumble] reasonably believed there had been an anticipatory repudiation of *all* eligibility requirements of the [2011 Memorandum by Farm Bureau] prior to his filing of the Complaint or to competing in August of 2016.

Thus, Trumble's attempt to show that Farm Bureau repudiated an obligation to pay him before he qualified for the same is unsupported by this record.

c. The doctrine of futility does not apply.

Trumble asserts he did not need to comply with the non-competition clause because doing so would be futile. He argues that once Farm Bureau declared that it would not pay the service bonus commission to Trumble due to his alleged dishonesty, it would have been futile for him to comply with the one-year covenant not to compete. This argument fails for the same reasons stated regarding his anticipatory repudiation argument.

The law is well settled that one will not be required to undertake a useless act. *Ford v. Lord*, 99 Idaho 580 (1978). Even so, as has been established, Farm Bureau made clear to Trumble well before he filed his complaint that "even if Mr. Trumble were entitled to his service bonus, the [2011] Memorandum contains a non-competition clause restricting payment until after compliance for a 12-month period." Given the conclusion that Trumble had to comply with the 12-month non-competition clause before he was eligible for any bonus commission payments, his argument that it would have been useless to adhere to the non-competition clause because Farm Bureau had already made up its mind is erroneous. He ultimately filed suit and had every right to disprove Farm Bureau's claims that he was terminated for dishonesty. Had he successfully done so, while waiting for the one-year period to run, he would have been eligible to receive the service bonus commission. Thus, it would not have been futile for him to make that choice and avoid competing with Farm Bureau for one year as required.

B. The district court properly granted summary judgment for Trumble on the misappropriation and intentional interference of a prospective economic advantage claims.

Farm Bureau alleges the district court erroneously granted summary judgment for Trumble on its misappropriation and intentional interference of a prospective economic advantage claims. Farm Bureau continues to argue on appeal that the Subject List is a trade secret and that Trumble's mere usage constitutes a misappropriation under the ITSA. Farm Bureau also argues that by violating the ITSA, Trumble wrongfully interfered with Farm Bureau's prospective economic advantage. We affirm the district court's grant of summary judgment for Trumble.

1. <u>The district court did not err in granting summary judgment for Trumble on the misappropriation claim because the Subject List is not a trade secret.</u>

In its initial counterclaim, Farm Bureau alleged the Subject List constituted a trade secret because the list contained "confidential and proprietary internal records, lists and data compiled, owned and used by Farm Bureau in its operations, which Farm Bureau ha[d] continue[d] to protect as confidential." Farm Bureau further alleged that "Trumble's retention, possession and/or use of the above confidential information constitute[d] a misappropriation" in violation of the ITSA. In reply, Trumble argued he created the Subject List after he was terminated, the list was created based on his own personal knowledge and experience, the Subject List derived no independent economic value, and Farm Bureau did not reasonably maintain its secrecy. Further, even if the Subject List were a trade secret, Trumble argued he did not acquire it by improper means and therefore did not misappropriate the Subject List.

The district court found nothing in the record to refute Trumble's assertions that he created the Subject List after termination based on his phone contacts, commission statements, and calendars and that none of these sources "contained the kind of proprietary information that could only have been obtained from [Farm Bureau]." The district court also found "no evidence that the actual information at issue in this case was subject to any reasonable efforts to maintain its secrecy" past the ninety-day non-competition clause in the Agent Contract. The district court ultimately ruled the Subject List was not a trade secret. The district court reiterated that even if the Subject List were a trade secret, Trumble did not acquire it through improper means. The district court thus ruled there was no genuine dispute based on the evidence provided and granted summary judgment in Trumble's favor.

On cross-appeal, Farm Bureau argues the district court erroneously granted summary judgment in Trumble's favor because Trumble admitted in his affidavit that "a few names on the Subject List (approximately 20 or so) came from [his] old commission statements and calendars." Farm Bureau interprets this statement as Trumble admitting use of a customer list, which, according to Farm Bureau, by itself constitutes a trade secret. Farm Bureau also alleges mere usage of the customer list constitutes misappropriation. Farm Bureau's argument, with no additional evidence, does not create a genuine dispute.

"To prevail in a claim brought under the ITSA, '[a] plaintiff must show that a trade secret actually existed.' " *La Bella Vita*, LLC v. Shuler, 159 Idaho 799, 807, 353 P.3d 420, 428

(quoting *Basic Am., Inc. v. Shatila*, 133 Idaho 726, 734, 992 P.2d 175, 183 (1999)). Without this showing, there can be no misappropriation. *Id*. The ITSA defines a trade secret as:

> [I]nformation, including a formula, pattern, compilation, program, computer program, device, method, technique, or process, that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. . . .

I.C. § 48-801(5). This Court has also taken direction from the Restatement of Torts section 757, which lists six additional factors that can be used to determine whether information is, or is not a trade secret. *Shatila*, 133 Idaho at 735, 992 P.2d at 184. These factors include

> (1) the extent to which the information is known outside [the plaintiff's] business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. (quoting RESTATEMENT OF TORTS § 757, cmt. b (1939)). These factors are not required, but "address the issue of whether the information in question is generally known or readily ascertainable." *Id*.

When a plaintiff successfully establishes the existence of a trade secret, the plaintiff must also show that the defendant misappropriated the trade secret. *See* I.C. § 48-801. Misappropriation is defined as:

> (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
> (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
> A. Used improper means to acquire knowledge of the trade secret; or
> B. At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
> i. Derived from or through a person who had utilized improper means to acquire it;
> ii. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

iii. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

C. Before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it has been acquired by accident or mistake.

I.C. § 48-801(2). Improper means include "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy. . . ." I.C. § 48-801(1).

Farm Bureau notes that this Court has held customer lists are trade secrets. *See Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 898, 243 P.3d 1069, 1086 (2010) (explaining "customer lists . . . are trade secrets."); *see also Northwest Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002) (explaining that it was undisputed the customer list was a trade secret). Even so, not every customer list constitutes a trade secret. *See La Bella Vita*, 158 Idaho at 810, 353 P.3d at 431.

In *La Bella Vita*, a salon sued its former employees who had opened their own salon, alleging the former employees misappropriated trade secrets. *Id*. at 803, 353 P.3d at 424. According to the salon, the former employees "wrongfully took and used its confidential client lists, calendars, scheduling lists, client contact information, and other information regarding products, services, and client preferences in the creation and promotion" for the new salon. *Id*. at 802, 353 P.3d at 423. In response, the former employees argued the lists were compiled from their own personal efforts including information from "cell phone and email contacts, church membership directories, social media connections, suggestions and referrals from family and friends, public phone books, online directories, internet searches, word of mouth, and use of referral cards." *Id*. at 808, 353 P.3d at 429. The district court granted summary judgment against the salon, finding no evidence produced to refute the fact the former employees generated the client list through "*alternative and independent methods and sources*." *Id*. at 803, 353 P.3d at 424 (emphasis added). On appeal, the salon argued summary judgment was improper because there was a genuine dispute about the lists' confidentiality, no matter how the lists were compiled. *Id*. at 808, 353 P.3d at 429. In support of these contentions, the salon provided evidence including, but not limited to, the confidentiality of its clients. *Id*. at 810, 353 P.3d at 431. The salon's confidentiality and privacy practices were established through the testimony of its owner:

> [La Bella Vita's] data system included the names, phone numbers, physical addresses, email addresses, special dates (birthday, anniversaries), services and product profiles used by the client . . . and referral information. This information was generated for the specific purpose of keeping the clients as customers and maintaining good client relations. I was careful to ensure that all of this information was included as part of our confidentiality contract with our employees. The importance of keeping this information confidential was discussed in the confidentiality contract as well as the employee handbook.

Id. These customer lists were stored at the salon "in a way that the information did not become public." *Id*. The former employees argued the lists were not confidential because it was the practice of the salon to print portions of the list as a daily schedule and post these schedules around the salon, allowing anyone receiving services to view them. *Id*. at 811, 353 P.3d at 432. This Court held summary judgment was improper because "a genuine factual dispute as to the confidential nature of [the salon's] client list and client-related information" was presented. *Id*. at 812, 353 P.3d at 433. Although this Court did not identify the parameters for what constitutes confidentiality, we noted that "[a] person's contact information can be ascertained in a variety of ways, including through the involuntary sharing or selling of information. It is nearly impossible to completely control these other avenues . . . even though [the salon's] clients considered the same to be non-public and confidential." *Id*. at 814, 353 P.3d at 435.

Here, the Subject List does not constitute a trade secret because it was almost wholly generated from alternative and independent sources, it contained generally known information and Farm Bureau took few efforts to maintain its secrecy. First, the Subject List was generated from alternative and independent sources. In *La Bella Vita*, the district court found the customer list may not have been a trade secret because the list could be generated from alternative and independent sources such as "cell phone and email contacts, church membership directories, social media connections, suggestions and referrals from family and friends, public phone books, online directories, internet searches, word of mouth, and use of referral cards." 159 Idaho at 808, 353 P.3d at 429. Although this Court ultimately held the district court erred in granting summary judgment against the salon owner, this Court's holding was based on confidentiality concerns regarding the customer list itself, not how it was generated. *See id*. at 810, 353 P.3d at 431. Thus, customer lists generated from independent sources such as those identified do not automatically constitute trade secrets. *See id*. Here, the Subject List was mostly generated from Trumble's personal knowledge accumulated while working as an insurance agent as well as through the

contacts in his phone. Although around twenty names on the Subject List were compiled from old commission statements and calendars accessed when Trumble was working for Farm Bureau, most of the names included on the list were from Trumble's own alternative and independent sources.

Second, the Subject List generally contains only contact information of individuals—their names and addresses. As briefly noted in *La Bella Vita*, contact information can be determined in many ways, even if involuntarily, making it essentially public information. *Id*. at 814, 353 P.3d at 435. Such public information cannot, on its own, constitute a trade secret.

Third, Farm Bureau did not take reasonable efforts to maintain the secrecy of the information included on the Subject List. The Subject List includes names and addresses only. This information was compiled mostly from Trumble's phone contacts. Mr. Swore, a Farm Bureau employee who maintained the operating systems and network infrastructure, provided testimony about Farm Bureau's protocol after an agent is terminated and explained how an agent's contacts are removed from Farm Bureau's server and any saved contacts, including addresses, are sent directly to the terminated individual. In his deposition, Mr. Swore testified that Trumble's contacts were sent directly to him. After learning Trumble's contacts had not been sent to Trumble, Mr. Swore altered his testimony accordingly. However, Mr. Swore did not alter his testimony about Farm Bureau's protocol. It is hard to maintain an argument that contacts generated during employment are intended to remain a secret when Farm Bureau's practice is to provide terminated individuals with a copy of their contacts from the server.

Farm Bureau particularly challenges the portion of the Subject List that Trumble admits was generated from past commission statements sent by Farm Bureau. Although this Court did hold summary judgment was improper when conflicting testimony was provided about the general business practices regarding the confidentiality of the customer list and customer information, 158 Idaho at 812, 353 P.3d at 433, here no such dispute is supported by the record. Farm Bureau sent unredacted commission statements to Trumble throughout his tenure which included the names of customers and customer policy numbers. It is also undisputed that the commission statements lacked any language relaying the statements as confidential. There also was no business policy or practice in place informing agents that the information in the commission statements was confidential. And even if there were some aspect of confidentially

implied by Farm Bureau about the commission statements, the statements did not have addresses of the customers. Thus, on these facts we conclude that the Subject List could not have divulged confidential information when the information Trumble used to mail solicitation letters was not included in the commission statements. Based on these reasons, we agree with the district court that the Subject List is not a trade secret.

Even if the list were a trade secret, Farm Bureau is also required to prove Trumble misappropriated its trade secrets in order to establish a successful ITSA claim. Merely using information obtained during his association with Farm Bureau in a new capacity does not rise to the level of misappropriation. *Northwest Bec-Corp v. Home Living Service*, 136 Idaho 835, 839, 41 P.3d 263,267 (2002) (explaining that the legislature did not intend the ITSA to be read so broadly that merely hiring a competitor's employee constitutes acquiring a trade secret because employees will naturally take with them the skills, training and knowledge acquired from previous employment). Nor is there any evidence in the record that the Subject List was acquired through improper means. Farm Bureau made no allegation of theft, bribery or misrepresentation. Its argument is founded on Trumble breaching a duty to maintain secrecy. As discussed directly above, Farm Bureau did not take reasonable efforts to maintain secrecy. Even so, the district court found that the Agent Contract provided a specific list of forbidden activities that a terminated agent could not participate in for a period of ninety days. Thus, the district court found that this provision signified that after the ninety days had passed, Trumble was free to engage in any of the listed activities without breaching the Agent Contract. Trumble adhered to the ninety-day term in the Agent Contract and thus there was no evidence of breach to maintain secrecy. Farm Bureau had the duty "to present evidence that demonstrated there was a genuine issue of material fact in order to survive summary judgment." *Id.* at 841, 41 P.3d at 269. It failed to do so. Summary judgment in Trumble's favor was proper on the misappropriation claim.

2. The district court properly granted summary judgment for Trumble on the intentional interference with a prospective economic advantage claim.

To maintain a successful claim for intentional interference with a prospective economic advantage, a plaintiff must show:

> (1) [T]he existence of a valid economic expectancy, (2) knowledge of the expectancy on the part of the interferer, (3) intentional interference inducing termination of the expectancy, (4) the interference was wrongful by some measure

> beyond the fact of the interference itself, and (5) resulting damage to the plaintiff whose expectancy has been disrupted.

Wesco, 149 Idaho at 893, 243 P.3d at 1081 (quoting *Cantwell v. City of Boise*, 146 Idaho 127, 138, 191 P.3d 205, 216 (2008)). Interference is wrongful where "(1) the interferer had an improper motive to harm the plaintiff; or (2) the means used by the interferer to cause injury to the prospective advantage were wrongful by reason of statute, regulation, recognized common law rule, or an established standard of a trade or profession." *Syringa Networks, LLC v. Idaho Dep't. of Admin.*, 155 Idaho 55, 64–5, 305 P.3d 499, 508–09 (2013). "The mere pursuit of one's own business purposes is not sufficient to support an inference of an improper motive to harm the plaintiff." *Id.*at 65, 305 P.3d at 509.

Farm Bureau's argument that Trumble interfered with its economic expectancy is based on Trumble's alleged violation of the ITSA. As noted above, there is no genuine dispute based on the record that Trumble violated the ITSA. Without an ITSA violation, there can be no intentional interference claim based on Farm Bureau's arguments. Beyond that, Trumble's actions were taken to pursue his own business purposes. Pursuing one's own business interest cannot support an inference of an improper motive to harm Farm Bureau. *See id.*

In summary, Farm Bureau provided no additional evidence to create a genuine dispute that the Subject List was a trade secret, that Trumble misappropriated the Subject List or that Trumble wrongfully interfered with Farm Bureau's prospective economic advantage. Summary judgment for Trumble on Farm Bureau's counterclaims was proper. We affirm the district court.

C. Neither party is entitled to attorney fees or costs on appeal.

Both parties request attorney fees and costs on appeal under Idaho Code section 12-120(3). Section 12-120(3) states "[i]n any civil action to recover . . . in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs." Commercial transaction is "defined to mean all transactions expect transactions for personal or household purposes." *Id.* In determining which party prevailed where there are claims and counterclaims between opposing parties, this Court determines who prevailed in the action from an overall view, not through a claim-by-claim analysis. *Oakes v. Boise Heart Clinic Physicians, PLLC*, 152 Idaho 540, 545, 272 P.3d 512, 517 (2012).

Here, we affirm the district court's grant of summary judgment for Farm Bureau holding Trumble had no right to the service bonus commission. We also affirm the district court's grant of summary judgment for Trumble on the misappropriation and intentional interference with a prospective economic advantage claims. Based on our rulings, neither party prevailed. As a result, neither party is entitled to attorney fees or costs on appeal.

VI. CONCLUSION

The district court's grant of summary judgment for Farm Bureau is affirmed. The district court's grant of summary judgment for Trumble on Farm Bureau's counterclaims of misappropriation of trade secrets and intentional interference with a prospective economic advantage is also affirmed. Neither party is entitled to attorney fees or costs on appeal.

Chief Justice BURDICK, Justices BRODY, STEGNER and MOELLER, CONCUR.

IN THE SUPREME COURT OF THE STATE OF IDAHO
Docket No. 46258

JOSEPH GUENTHER, an individual,	)	
	)	
Plaintiff-Counterdefendant-Respondent-Cross Appellant,	)	**Boise, November 2019 Term**
	)	
	)	**Opinion filed: February 18, 2020**
v.	)	
	)	**Karel A. Lehrman, Clerk**
MICHELLE RYERSON, an individual,	)	
	)	
Defendant-Counterclaimant-Appellant-Cross Respondent.	)	
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Lynn G. Norton, District Judge.

The judgment of the district court is affirmed in part, vacated in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Sasser & Jacobson, PLLC, Boise, for Appellant/Cross Respondent. James. F. Jacobson argued.

Givens Pursley, LLP, Boise, for Respondent/Cross Appellant. Amber N. Dina argued.

BURDICK, Chief Justice.

Michelle Ryerson appeals multiple decisions of the district court entered during the dissolution and winding up of West Foothills TIC, a partnership in which she was a partner. Specifically, Ryerson argues the district court misapplied the Idaho Uniform Partnership Act by entering an order requiring liquidation of the partnership's real property by sale at a fixed price, and by allowing her former partner the opportunity to purchase the property from the partnership. Ryerson also argues the district court erred in granting summary judgment on the issue of the real property's value as of the date of dissolution because, as the real property's owner, she is presumed competent to testify about its value. Finally, Ryerson argues the district

court erred in dismissing her counterclaim seeking a determination that she is entitled to 50 percent of the partnership's profits upon dissolution.

Joseph Guenther, the other partner in West Foothills TIC, also cross-appeals several decisions from the same proceedings. First, Guenther argues the district court misapplied a provision of the Idaho Uniform Partnership Act by determining that it could not allow Guenther to purchase the partnership's real property without the consent of the partnership's creditors. Guenther also argues the district court erred in declining to award him attorney's fees in the action below because he was the prevailing party and the gravamen of his claims was a commercial transaction.

I. FACTUAL AND PROCEDURAL BACKGROUND

Prior to June 2009, Joseph Guenther and Michelle Ryerson were in a relationship as an unmarried couple. Initially, they were not business partners; however, in June 2009, the couple purchased real property at 8571 N. Lost Sage Lane, Boise, Idaho 83714 and formed a partnership, West Foothills TIC (notwithstanding the use of TIC in the name of the entity, the parties do not assert that they intended to hold the property as tenants in common). There was no written partnership agreement. There also was no clear agreement between the parties allocating contributions of labor or partnership expenses to either partner. Nor was there an agreement clearly delineating which partner was responsible for which partnership liability. However, both parties agreed that the purpose of the partnership was to purchase the property and develop it into a vineyard for profit. Both parties also agreed the property would be used to provide housing for Guenther, Ryerson, and Ryerson's two children. The parties commingled their personal funds with partnership funds, paying for the partnership's liabilities using funds from individual checking accounts, personal credit cards, a joint checking account, and a credit card they held together.

To build their home on the property, Guenther and Ryerson obtained a $528,600 construction loan from Zions Bank, which eventually was converted into a 30-year mortgage. Construction began in August 2015 and the house was completed in January 2016. Ryerson and her two children moved into the house in January 2016, followed by Guenther in May 2016. Both parties invested a considerable amount of personal funds and labor into development of the vineyard and construction of the house.

On March 26, 2017, Guenther and Ryerson ended their relationship and decided they could not continue to operate the business as partners. Guenther initiated the present action in June 2017 when he filed a complaint and then an amended complaint alleging four causes of action: (1) dissolution of the partnership; (2) unjust enrichment; (3) promissory estoppel; and (4) a request for declaratory judgment quieting title to the property. About a week later, Ryerson filed an answer and counterclaim against Guenther for judicial dissolution of the partnership and a determination that she had a 50 percent ownership stake in the partnership. Both parties agreed that the end of their personal and business relationship on March 26, 2017, was a dissociative act requiring dissolution and winding up of the partnership.

At the beginning of the winding up process, Ryerson asked the court to liquidate the partnership's assets by sale, including the property on Lost Sage Lane. Guenther, on the other hand, asked the court to allow him to buy out Ryerson's interest in the property, so that he could continue to live there and work the vineyard. On January 5, 2018, the district court entered an order granting Ryerson's motion to liquidate the partnership's assets. In its decision, the district court explained that, under the Idaho Uniform Partnership Act, it did not have the power to release Ryerson from her mortgage liability without Zions Bank's consent.

Guenther subsequently filed a motion to reconsider the court's order granting Ryerson's motion to liquidate (Guenther's first motion for reconsideration). After a hearing, the district court granted Guenther's first motion for reconsideration and ruled that it would not require the property on Lost Sage Lane to be liquidated by sale on the open market. Instead, the court entered an order permitting Guenther to buy out Ryerson's interest in the property because Guenther had presented new evidence that Zions Bank was willing to refinance the property in Guenther's name alone and would release Ryerson of all liabilities on the original mortgage.

Around the same time that he filed his first motion for reconsideration, Guenther also filed a motion for summary judgment on the issues of the value of the Lost Sage Lane property and each party's total contributions to the partnership. The district court granted that motion in part and denied it in part. The district court granted summary judgment on the issue of property value as of the date of dissolution, but denied summary judgment as to the amount of each party's contributions.

On the issue of property value, Guenther provided an expert appraisal valuing the property at $600,000. Ryerson provided her own testimony that the property was worth

"significantly more" than the amount stated in the appraisal obtained by Guenther, and that the "baseline asking price for the property should be no lower than $800,000." Acknowledging that Idaho law provides for a presumption that the owner of property is competent to testify as to its value, the district court determined that Ryerson had not stated an opinion as to the property's fair market or full cash value. Finding that Ryerson had not offered any admissible evidence as to the value of the property, the district court granted summary judgment determining the property to be worth $600,000 at the time of dissolution. Based on the $600,000 valuation, the district court also determined that the partnership had $144,789.92 of equity in the property as of the date of dissolution.

After those rulings, Ryerson filed a motion for reconsideration (Ryerson's first motion for reconsideration) seeking reconsideration of the February 16 decisions on Guenther's motions. At a March 29, 2018, hearing on Ryerson's first motion for reconsideration, the district court ruled from the bench in extensive detail, denying the motion in part and granting it in part. The district court denied the portion of Ryerson's motion that requested reconsideration of the order granting summary judgment as to the value of the Lost Sage Lane property. At the same time, the district court granted the portion of Ryerson's motion that requested reconsideration of the order allowing Guenther to buy out Ryerson's interest in the property. The district court reasoned that it could not enter an order allowing Guenther to buy out Ryerson's interest in the property under Idaho Code section 30-23-703(c) without the consent of the partnership. Because Ryerson did not consent to Guenther buying out her interest in the property, the district court determined that liquidation of the property by sale on the open market was the only option available, and entered an order to that effect.

A two-day court trial took place on April 2 and 3, 2018. Numerous exhibits were admitted, both parties and a number of witnesses testified, and counsel for both sides submitted written closing arguments to the court. The district court entered its Findings of Fact, Conclusions of Law under Idaho Rule of Civil Procedure 52 on May 14, 2018. The district court found by a preponderance of the evidence that the total amount of Ryerson's contributions to the partnership was $101,514.66. As for Guenther, the district court found by a preponderance of the evidence that the total amount of his contributions to the partnership was $330,163.22. The combined total contributions of Ryerson and Guenther were $431,677.88. Therefore, the district court determined that Guenther had made 76 percent of the total contributions to the partnership

and Ryerson had made 24 percent of the total contributions. It also determined that any increase in equity in the Lost Sage Lane property was 100 percent attributable to Guenther.

The district court's findings and conclusions also ordered Guenther and Ryerson to make additional capital contributions to the partnership in cash to pay off the partnership's mortgage with Zions Bank. However, the partnership already had sufficient assets to satisfy its obligation to Zions Bank, so Guenther filed a motion to clarify, arguing that the district court's order was not consistent with the Idaho Uniform Partnership Act's winding up provisions. The district court treated the remainder of Guenther's motion, which argued again that he should be allowed to purchase the property, as another motion for reconsideration (Guenther's second motion for reconsideration).

On July 2, 2018, the district court entered a Clarification of Conclusions of Law, Memorandum Decision Reconsidering Liquidation, in which it clarified its original Findings of Fact, Conclusions of Law, and granted Guenther's second motion to reconsider the March 29 ruling that the Lost Sage Lane property had to be liquidated by sale on the open market. In that decision, the district court reasoned that requiring the sale of the property on the open market would cause economic waste of the partnership's assets and unreasonably prolong the winding up process. Because Guenther wanted to purchase the property and appeared to have obtained financing through Zions Bank, the district court entered another order giving him the opportunity to do so. Specifically, the order provided that Guenther would be allowed to purchase the Lost Sage Lane property by July 31, 2018, if he refinanced through Zions Bank. If Guenther were unable or unwilling to purchase the property from the partnership, Ryerson would then have the opportunity to purchase the property "by August 31, 2018 for cash or by refinance . . . ." The district court also explained what a refinance and purchase of the property by either party must accomplish:

> [a]ny financing of the property must completely satisfy the partnership's entire debt to Zions Bank and result in termination of the deed of trust in Joseph Guenther and Michelle Ryerson's names. Any financing or cash contributions must also completely extinguish the pro rata share of equity . . . of the opposing party.

If neither party purchased the property by August 31, 2018, then the order required it to be sold on the open market. In that case, the price would be set at an amount equal to "the real property value in the appraisal Guenther obtained in his efforts to refinance the property by July 31, 2018 plus six percent of that value."

The district court also entered an Amended Findings of Fact, Conclusions of Law and a Judgment dismissing Guenther's claims for unjust enrichment and promissory estoppel and Ryerson's counterclaim with prejudice. Guenther does not appeal the dismissal of his claims for unjust enrichment or promissory estoppel.

After Zions Bank refused to go forward with financing Guenther's purchase of the property, Guenther sought alternative financing through Guild Mortgage. On July 30, 2018, Guenther filed a motion requesting that the district court amend its order for sale of the property to provide him an additional two weeks to close his loan refinance with Guild Mortgage. The district court held a hearing on the motion on August 8, 2018. At the hearing, Guenther explained that Guild Mortgage had underwritten the loan and it was prepared to close on the sale of the property as soon as the next day if the district court were to grant Guenther's motion. Denying Guenther's motion, the district court ruled from the bench, stating:

> The issue at this point is simply an issue of credibility. This is Mr. Guenther's fourth attempt to present a financing scheme which he proposes would extinguish the liabilities of Ms. Ryerson and the partnership's debt to the creditor.
>
> The reason I fashioned the order the way that I had fashioned it was because of what was actually filed and actually on the record because of Zions Bank, in the second iteration, had represented that they did not have an objection to – that one was actually an assumption of the loan. And I had determined that an assumption of the loan did not extinguish Ms. Ryerson's liabilities; it had to be a new finance.
>
> So really moving from Zions Bank to Guild Mortgage is not just an issue of a typographical error in the Court's order for sale. Moving from Zions Bank, who had previously indicated in this litigation that it did not object to the refinance as a creditor of the partnership, to remove Zions Bank and substitute Guild Mortgage circumvents this Court's orders and its prior orders on the reconsideration.
>
> Because what I had actually reconsidered was the record before the Court, what was actually filed. And this is not a matter of simply changing Zions Bank to Guild Mortgage and changing a date in the Court's order. This is actually introducing another lending scheme without any indication in the record about whether Zions Bank, which is the creditor of the partnership, has evaluated or would oppose this scheme. And it would actually alter the record of the litigation even after trial.

> And so because of that, I am not going to change my previous order. Because of that, Mr. Guenther's time to actually purchase the property under the Court's order has now expired.

On August 14, 2018, Guenther filed another motion for reconsideration (Guenther's third motion for reconsideration), requesting the district court reconsider its decision denying his motion for an amended order for sale of the property. The district court denied the motion from the bench on September 5, 2018, explaining:

> The Court has discussed the case law of Arnold versus Burgess and Kelly versus Silverwood Estates at length in its previous decisions, and also the statutory basis for dissolution of a partnership and the requirement for consent of the partner and/or the third-party creditors in its earlier decisions.
>
> And the plaintiff again asked the Court to reconsider and allow additional time for the plaintiff to secure financing from a different lender, close on the real estate to avoid economic waste of the real property. And the issue of economic waste has previously also been discussed in the Court's decisions.
>
> So really for the reasons stated in the earlier decisions, as well as from the bench on August the 8th of 2018, the Court is going to deny reconsideration at this time and will not further amend the order for sale.

Because Ryerson did not then purchase the property, it was set to be listed and sold on the open market with the price set at an amount equal to the value in the appraisal obtained by Guenther in his efforts to refinance the property ($725,000), plus six percent. If it became necessary to list and sell the property, the order specified the procedures for doing so. First, Guenther would choose five possible realtors. Then, Ryerson would select one of those realtors to serve as the listing agent for the property. The listing agent at his or her discretion could reduce the price at which the property was listed so long as notice of each price reduction was provided to the district court. Finally, the district court retained jurisdiction over the sale. Before the property could be sold, both parties filed appeals, and this Court stayed the sale.

On appeal, Ryerson argues that the district court erred in the following ways: (1) granting summary judgment on the value of the property at the time of dissolution; (2) ordering the buyout of her interest in the partnership's real property as opposed to liquidation by sale; (3) fixing the price of the property at $725,000 plus six percent once sale of the property was ordered; (4) failing to determine that she is entitled to 50 percent of the partnership profits or

remaining surplus if funds remain after all of the partnership's liabilities and partner contributions are satisfied; (5) determining that the partners' respective interests in the partnership were based on their capital contributions to the partnership; and (6) dismissing her counterclaim.

Guenther argues in his cross-appeal that the district court erred in: (1) finding that, in winding up the partnership, Idaho Code section 30-23-703(c) prevented it from entering an order allowing Guenther to purchase the property from the partnership without the third-party creditor's consent; (2) ordering the sale of the property on the open market despite finding that doing so would cause significant economic waste of the partnership's assets; and (3) declining to award him attorney's fees below as the prevailing party.

II. ISSUES ON APPEAL

A. Did the district court err in ordering the sale of the Lost Sage Lane property on the open market in winding up the partnership under the Idaho Uniform Partnership Act?

B. Did the district court err in determining Guenther was entitled to 100 percent of any increase in equity in the Lost Sage Lane property that occurred after the date of dissolution?

C. Did the district court err in granting summary judgment as to the value of the Lost Sage Lane property as of the date of dissolution?

D. Did the district court properly decline to award attorney's fees to Guenther under Idaho Code section 12-120(3) despite having found that he was the prevailing party?

III. STANDARD OF REVIEW

We review summary-judgment rulings under the same standard used by the court below. *Hayes v. City of Plummer*, 159 Idaho 168, 170, 357 P.3d 1276, 1278 (2015) (citing *Gracie, LLC v. Idaho State Tax Comm'n*, 149 Idaho 570, 572, 237 P.3d 1196, 1198 (2010)).

> Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party.

Id. (citations and quotation marks omitted).

This Court exercises free review over issues of statutory interpretation because they are questions of law. *State v. Owens*, 158 Idaho 1, 3, 343 P.3d 30, 32 (2015) (citing *State v. Dunlap*, 155 Idaho 345, 361, 313 P.3d 1, 17 (2013)).

IV. ANALYSIS

A. In winding up the partnership, the district court erred in allowing each partner an opportunity to purchase the Lost Sage Lane property before requiring its sale on the open market.

Though the district court went back-and-forth several times on the issue of whether it had the authority to allow Guenther to buy the Lost Sage Lane property instead of listing it for sale, it ultimately determined that it could do so with the consent of the partnership and its third-party creditors under Idaho Code section 30-23-703(c). On appeal, Ryerson argues the district court erred in applying section 30-23-703(c) during the winding up of the partnership because that section applies only when a partner dissociates from a partnership, and here, both partners sought dissolution. She further argues that, under Idaho Code section 30-23-806, sale of the property and distribution of the partnership's assets is the only means of winding up a partnership's affairs, at least where one partner seeks to force a sale.

Guenther also argues that the district court erred in applying section 30-23-703(c). Specifically, he argues the district court mistakenly believed its order allowing Guenther to purchase the Lost Sage Lane property from the partnership had to require the consent of Zions Bank (the third-party creditor). Guenther further argues that, under Idaho Code section 30-23-806 and Idaho case law, the district court was not required to order a forced sale of the partnership property and could have wound up the partnership by alternative means.

For the reasons below, we conclude that during judicial dissolution and winding up of a partnership's business under the Idaho Uniform Partnership Act, a partnership's assets must be sold for their fair market value unless the partners agree to an alternate method for distribution of partnership assets.

1. Idaho Code section 30-23-703(c) is inapplicable to the dissolution and winding up of a partnership under the Idaho Uniform Partnership Act.

Prior to 2001, the Idaho Uniform Partnership Act was modeled after the Uniform Partnership Act of 1914 (UPA). *Costa v. Borges*, 145 Idaho 353, 356, 179 P.3d 316, 319 (2008). However, in 1998, Idaho amended the Idaho Uniform Partnership Act to remodel it after the Revised Uniform Partnership Act (RUPA). 1998 Idaho Sess. Laws 226. The amendments became effective after January 1, 2001. *See* 1998 Idaho Sess. Laws 259. Therefore, despite its name, the Idaho Uniform Partnership Act ("the Act") is modeled after RUPA, not UPA. The Act

defines a partnership as "an association of two (2) or more persons to carry on as co-owners a business for profit . . . ." I.C. § 30-23-102(a)(8).

Under the Act, "[a] partnership is an entity distinct from its partners." I.C. § 30-23-201(a). Before Idaho adopted RUPA, a partner's withdrawal from a partnership automatically caused dissolution and winding up of the partnership. *St. Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP*, 148 Idaho 479, 485, 224 P.3d 1068, 1074 (2009) (citations omitted). Now, "[a] partner who chooses to withdraw from the partnership is dissociated [under Idaho Code section 30-23-601(1)], but 'the dissociation of the partner does not require the dissolution of the partnership and the winding up of its affairs.'" *Id.* (quoting *Costa*, 145 Idaho at 357, 179 P.3d at 320). That is, dissociation of a partner *can* cause dissolution and winding up of the partnership, but no longer automatically causes dissolution in all circumstances.

The Act provides two distinct statutory pathways to follow upon a partner's dissociation. *See* I.C. § 30-23-603(a) ("If a person's dissociation results in a dissolution and winding up of the partnership's business, part 8 of this chapter applies; otherwise, part 7 of this chapter applies."). If a partner's dissociation does not result in the dissolution and winding up of the partnership, the dissociation provisions in Part 7 of the Act govern the rights of the dissociating partner, the partnership, and its remaining partners. But when a partner's dissociation does result in the dissolution and winding up of the partnership, Part 8 of the Act applies.

In the present case, both parties agreed that the end of their personal and business relationship on March 26, 2017, was a dissociative act requiring dissolution and winding up of their partnership. Both parties sought judicial dissolution, and further agreed that the Idaho Uniform Partnership Act governed the dissolution and winding up of their partnership.

Throughout the proceedings below, the district court relied on Idaho Code section 30-23-703(c) as providing it the authority to allow a partner to purchase partnership property during the winding up process. Ruling from the bench at the September 5, 2018, hearing, the district court explained that part of the reason it was denying Guenther's motion for reconsideration was because of "the requirement for consent of the partner and/or the third-party creditors" that it had discussed in its earlier decisions. At the August 8, 2018, hearing on Guenther's motion to amend the court's order for sale of the property, the court refused to amend its order reasoning that "[the proposed amended order was] actually introducing another lending scheme without any indication in the record about whether Zions Bank, which is the creditor of

the partnership, has evaluated or would oppose th[e] scheme." In its Clarifications of Conclusions of Law, Memorandum Decision Reconsidering Liquidation, the district court explained in detail each decision it had made regarding sale of the Lost Sage Lane property up to that point. At each stage, connecting all the way back to the district court's original decision regarding liquidation on October 26, 2017, the district court referred to Idaho Code section 30-23-703(c) as governing the potential sale to Guenther. Therefore, it is clear from the record that the district court was under the impression that Part 7 of the Act gave it the authority to allow Guenther to purchase the property, so long as Zions Bank consented to the arrangement.

However, Idaho Code section 30-23-703(c) does not apply to this case. As explained above, section 30-23-703(c) is a part of the dissociation pathway in the Idaho Uniform Partnership Act that applies when a partner dissociates from the partnership, but the partnership is not wound up and continues without the dissociating partner. Section 30-23-703(c) does not apply when a partnership is being dissolved and wound up pursuant to Idaho Code sections 30-23-801 et seq. In short, dissociation statutes do not apply to dissolution cases. *See* I.C. § 30-23-603(a). Because both parties in this case sought dissolution and winding up of the partnership, the district court erred when it determined that it could enter an order allowing Guenther to buy the Lost Sage Lane property from the partnership under section 30-23-703(c).

2. Judicial dissolution and winding up of a partnership under The Idaho Uniform Partnership Act requires liquidation of partnership assets by sale on the open market.

Having determined that Idaho Code section 30-23-703(c) does not apply, the question remains as to whether a court may allow a partner to purchase partnership property during the judicial dissolution and winding up of a partnership under Part 8 of the Idaho Uniform Partnership Act.

Idaho Code sections 30-23-801 et seq. govern the dissolution and winding up of a partnership in Idaho. *See* I.C. § 30-23-603(a). "Where partners mutually agree to a dissolution, any partner has the right to wind up partnership affairs in accordance with the [partnership] agreement." *Arnold v. Burgess*, 113 Idaho 786, 790, 747 P.2d 1315, 1319 (Ct. App. 1987) (citing I.C. § 53-337 (repealed 2001); *Burnham v. Bray*, 104 Idaho 550, 557, 661 P.2d 335, 342 (Ct. App. 1983)). *See also* I.C. § 30-23-802. Upon the application of any partner who has not wrongfully dissociated, "the district court may order judicial supervision of the winding up of a dissolved partnership" for good cause shown. I.C. § 30-23-802(e).

"Winding up is the process of settling partnership affairs after dissolution, and generally involves an accounting and liquidation of the partnership's assets." *Mays v. Davis*, 132 Idaho 73, 75, 967 P.2d 275, 277 (1998) (citing *Kelly v. Silverwood Estates*, 127 Idaho 624, 628, 903 P.2d 1321, 1325 (1995); *Arnold*, 113 Idaho at 790, 747 P.2d at 1319). The object of an accounting is to determine the value of each partner's interest in the partnership as of the date of dissolution and establish whether the partnership has any profits or losses. *Id.* (citing *Kelly*, 127 Idaho at 629, 903 P.2d at 1326). Ordinarily, the district court will order liquidation of partnership assets by sale and apply the proceeds according to the priorities set out in Idaho Code section 30-23-806. *Id.* (citing *Kelly*, 127 Idaho at 628, 903 P.2d at 1325) (referring to the priorities established in Idaho Code section 53-340 (repealed 2001), the precursor to Idaho Code section 30-23-806)).

Ryerson contends that, in the winding up process, all the partnership's assets must be reduced to cash before being distributed pursuant to section 30-23-806. She further claims that liquidation by sale on the open market is the only way to determine the property's true value. Guenther, on the other hand, argues that alternative means of winding up a partnership's business are not prohibited by the Idaho Uniform Partnership Act, and would be more equitable under the circumstances in this case.

"The objective of statutory interpretation is to give effect to legislative intent." *State v. Olivas*, 158 Idaho 375, 379, 347 P.3d 1189, 1193 (2015) (quoting *State v. Doe*, 156 Idaho 243, 246, 322 P.3d 976, 979 (2014)). Interpretation of a statute "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written." *Id.* (quoting *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011)).

Idaho Code section 30-23-802(b)(1) mandates that in winding up a partnership's affairs, the partnership "[s]hall discharge the partnership's debts, obligations, and other liabilities, settle and close the partnership's business, and marshal and distribute the assets of the partnership[.]" The Act provides the framework for distributing a partnership's assets during the winding up of a partnership:

> (a) In winding up its business, a partnership shall apply its assets, including the contributions required by this section, to discharge

> the partnership's obligations to creditors, including partners that are creditors.
>
> (b) After a partnership complies with subsection (a) of this section, any surplus must be distributed in the following order . . .
>
> > (1) To each person owning a transferable interest that reflects contributions made and not previously returned, an amount equal to the value of the unreturned contributions; and
> >
> > (2) Among partners in proportion to their respective rights to share in distributions immediately before the dissolution of the partnership, except to the extent necessary to comply with any transfer effective under section 30-23-503, Idaho Code.

I.C. § 30-23-806. Section 30-23-806(f) further requires that "*all* distributions made [to the partners] must be *paid in money*." I.C. § 30-23-806(f) (emphasis added).

The plain language of section 30-23-806(f) is unambiguous. If a distribution is made to a partner during the winding up of a partnership's business, the distribution must be paid in money. Such a requirement cannot reasonably be interpreted as allowing distributions to partners in any form other than money. To allow distributions in any other form would contradict the plain language of the statute. The partnership's assets must be reduced to cash before being distributed to the partners.

Our interpretation is in accord with the interpretation of the Supreme Court of Montana on the same issue. In *McCormick v. Brevig*, the Montana Supreme Court interpreted Montana's version of RUPA. 96 P.3d 697 (Mont. 2004). Montana's statute contains similar "in cash" language to the Idaho statute, which the *McCormick* Court interpreted as requiring the partnership's assets be reduced to cash by forced sale before they are distributed to creditors and partners. *Id.* at 702. In *McCormick*, two siblings operated their family ranch together as partners for a number of years. *Id.* at 701–02. After deciding the partnership had to be dissolved and its business wound up, the district court ordered that one of the partners would be allowed 60 days to buy out his sibling's interest in the partnership once the value of her interest had been determined via appraisal. *Id.* at 702. The Montana Supreme Court reversed, determining that the plain language of RUPA makes clear that upon dissolution all partnership assets must be reduced to cash before distribution. *Id.* at 705. The Court reasoned that because the language of the

statute required partners to receive their distributions "in cash," the only way to make such distributions was to reduce the partnership's assets to cash before distributing them. *Id.*

Despite the plain terms of the Act, Guenther invites us to read the statute liberally, construing it in a way that allows courts the discretion to wind up a partnership by means other than the compelled liquidation of partnership assets. He cites to the Court of Appeals' decision in *Arnold v. Burgess* in support of his interpretation. 113 Idaho 786, 747 P.2d 1315 (Ct. App. 1987). However, when the Court of Appeals decided *Arnold v. Burgess*, the UPA still governed partnership law in Idaho. RUPA, which governs the partnerships in this case, was enacted over a decade later. The change in statutory schemes that occurred between *Arnold* and the present case vitiates much of the persuasive value of the Court of Appeal's decision. We decline to use the holding in *Arnold* to circumvent the plain language of section 30-23-806(f).

While a rule requiring the forced sale of a partnership's assets upon its dissolution and winding up may seem harsh at first glance, its rigidity is lessened by the fact that the rules for winding up a partnership within section 30-23-806 are default provisions. *See* I.C. § 30-23-105 (With the exception of the specific provisions listed in sections 30-23-105(c) and (d), the partnership agreement governs "relations among the partners as partners and between the partners and the partnership" as well as "the business of the partnership and the conduct of that business . . . ."). A partnership agreement cannot change the requirements of section 30-23-802 that a dissolved partnership must be wound up, its liabilities discharged, and its assets marshalled and distributed. I.C. § 30-23-105(c)(13). But the partnership agreement can alter the default provisions for distribution of partnership assets to partners under section 30-23-806(b) and (c). *See* I.C. § 30-23-105(c)–(d) (where section 30-23-806 is not on the list of unmodifiable provisions). Therefore, partners who agree that liquidation of the partnership's surplus assets upon dissolution is undesirable may pursue an alternate path.

Having determined that, unless otherwise provided in the partnership agreement, partnership assets must be reduced to cash before being distributed to the partners under section 30-23-806, application of the Idaho Uniform Partnership Act to the facts of this case becomes fairly straightforward. Guenther and Ryerson had no written partnership agreement and neither party alleged that their oral agreement provided for distributions of partnership assets in any form other than cash. Therefore, the default provisions of the Idaho Uniform Partnership Act control and the partnership's assets must be reduced to cash before being distributed to the

partners. Thus, the district court erred in entering an order allowing Guenther and Ryerson each an opportunity to purchase the property at a given price before it was listed for sale. However, except for fixing the price, the remaining portion of the district court's order requiring the property be listed and sold on the open market is in accord with section 30-23-806.

Because we hold that the partnership property must be reduced to cash before distribution under section 30-23-806, we will also provide guidance for the district court in structuring the sale of the partnership property. Generally, the sale of partnership property is "held in such a manner and on such terms and conditions as the court deems proper." 59A Am.Jur.2d *Partnership* § 709. However, the district court's decision to fix the price at which the property may be listed is flawed. In winding up the partnership's business, the district court should seek to sell the partnership's assets at their fair market value. An asset's "fair market value" is "the amount that a willing buyer, who desires to buy but is under no obligation to buy, would pay a willing seller, who desires to sell but is under no obligation to sell." 59A Am.Jur.2d *Partnership* § 625. Thus, to obtain its fair market value, property should be sold at the highest price the market will bear.

In this case, the district court provided no legal support for its decision to fix the sale price at the amount that it did. Nor did it offer any other explanation. The appraisal on which the district court based the fixed price was obtained by Guenther in an effort to refinance the property, not to sell it. Based on the lack of authority present in the decision to fix the sale price in this case, we can only conclude that it was arbitrarily reached. Accordingly, we instruct the district court on remand to enter a new order allowing the Lost Sage Lane property to be sold at its fair market value.

B. The district court erred in assigning 100 percent of any post-dissolution increase in equity of the Lost Sage Lane property to Guenther.

Ryerson contends the district court erred because the Lost Sage Lane property remained partnership property during the winding up of the partnership and any surplus from its sale must be distributed according to Idaho Code section 30-23-806. Guenther argues the district court correctly assigned any increase in equity in the Lost Sage Lane Property after the date of dissolution because Ryerson has since abandoned the property and has not contributed towards expenses or upkeep of the property.

As noted, "[a] partnership is an entity distinct from its partners." I.C. § 30-23-201. Therefore, partnership property "belongs to the partnership as an entity, rather than to the

individual partners." *See* I.C. § 30-23-203 official cmt. A partnership does not terminate upon dissolution, but continues until its affairs have been completely wound up. I.C. § 30-23-802(a). Explained another way, before a partnership legally ends, three steps must be completed, (1) dissolution, (2) winding-up of the partnership's business or liquidation, and (3) termination of the partnership. *Ramseyer v. Ramseyer*, 98 Idaho 47, 51, 558 P.2d 76, 80 (1976) (citations omitted); *see also* I.C. § 30-23-802.

As explained above, Idaho Code section 30-23-806 governs the distribution of assets during the winding up of a partnership. Section 30-23-806 provides that the partnership's assets should first be used to pay its obligations to any creditors. I.C. § 30-23-806(a). Then, once the partnership's creditors are satisfied, remaining partnership assets are used to repay any unreimbursed contributions made by partners. I.C. § 30-23-806(b)(1). If the partnership does not have sufficient assets to repay all of the partners' unreimbursed contributions under subsection (b)(1), the available assets should be distributed proportionally to the partners based on the amount of their respective contributions. I.C. § 30-23-806(e). Finally, if partnership assets remain, the surplus is distributed to the partners in proportion to their rights to share in partnership profits. I.C. § 30-23-806(b)(2). Absent a partnership agreement to the contrary, every partner "is entitled to an equal share of the partnership profits." I.C. § 30-23-401(a). Therefore, the default rule is that partners share profits per capita, not in proportion to capital contributions. *See* I.C. § 30-23-401(a) official cmt.

In this case, the Lost Sage Lane property is partnership property, and any increase in value in the property, including from the date of dissolution until sale, belongs to the partnership. The partnership did not terminate upon dissolution, but continued for the sole purpose of winding up its business. Although Guenther has been the sole contributor to the development and upkeep of the property since the date of dissolution, that does not mean he is entitled to all increases in equity of the partnership property or that Ryerson has been divested of any interest in the partnership post-dissolution. That is not to say that Guenther should receive nothing for his post-dissolution contributions to the partnership. Rather, his payment of partnership expenses, mortgage payments, development costs, and any other unreimbursed contributions made by him are to be taken into consideration if the partnership has surplus assets, distributable pursuant to Idaho Code section 30-23-806(b). Likewise, any benefit received by Guenther after the date of dissolution, such as the fair rental value of the property for the months he has continued to live

there or any profits from the vineyard that have been distributed to him since dissolution, should be used to offset the amount of his total contributions to the partnership. Therefore, the district court erred in determining that Guenther was entitled to 100 percent of any gain in equity in the Lost Sage Lane property that accrued after the date of dissolution.

Furthermore, the district court determined that the partnership's surplus assets would be distributed on a pro rata basis, 76 percent to Guenther and 24 percent to Ryerson. This determination was based on the finding that the partnership's total surplus assets would not exceed the total amount of uncompensated capital contributions made by the partners. However, in conducting its analysis, the district court did not have the benefit of our holding that the Lost Sage Lane property must be sold for its fair market value on the open market. Because the property has not been sold, any profits from its coming sale have not yet been realized by the partnership. Therefore, the exact value of the partnership's assets after being converted to cash is still unknown. However, based on the district court's findings of fact and the arguments of the parties on appeal regarding the value of the property, we can speculate that there will be a surplus of partnership assets after Zions Bank, the partnership's only creditor, has been repaid. If there are surplus partnership assets after Zions Bank has been repaid, they must be distributed pursuant to Idaho Code section 30-23-806(b). Though the district court determined that Guenther had contributed 76 percent, and Ryerson 24 percent of the total partnership contributions, those percentages do not take into account either partner's contributions made after the date of dissolution. Therefore, only after all the partnership's assets have been reduced to cash and the costs of the sale have been paid from the proceeds of the sale can a final determination of each partner's capital contributions be made. Once each partner's right to distribution for uncompensated capital contributions has been satisfied, the remaining partnership assets must be distributed based on each partners right to share in the partnership's profits. Because there was no partnership agreement to the contrary, the default rule controls, Guenther and Ryerson have a right to share equally in the partnership's profits.

In conclusion, on remand the partnership's business should be wound up as follows. After the Lost Sage Lane property is sold and the costs of the sale paid from the proceeds, the partnership's obligation to Zions Bank must be discharged pursuant to Idaho Code section 30-23-806(a). Then the total unreimbursed capital contributions of each partner must be adjusted to include contributions made after the date of dissolution and up to the sale. To determine the

total amount of each partners' post-dissolution contributions, a hearing or new trial, if necessary, should be held. Then the partnership's assets must be distributed pursuant to Idaho Code section 30-23-806(b)(1). If there are insufficient partnership assets to fully reimburse each partner for their uncompensated contributions, each partner must receive a pro rata share of the total available assets based on the total amount of their respective contributions. If there are sufficient assets to compensate each partner for their respective contributions, then the remaining assets should be distributed as profits, 50 percent to each partner, pursuant to Idaho Code section 30-23-806(b)(2).

C. We need not determine whether district court erred in granting summary judgment as to the value of the Lost Sage Lane property.

In light of our holding that the Lost Sage property must be sold during the winding up process, the property's value as of the date of dissolution is immaterial. Regardless of whether the property was worth $600,000 (as found by the district court on summary judgment) or more than $800,000 (as alleged by Ryerson) as of the date of dissolution, its fair market value as of the date it is actually sold will likely be different. The other purpose served by the district court's decision on summary judgment was that it provided a value to be used in calculating how much of the proceeds from the sale of the Lost Sage Lane property constituted post-dissolution equity, which the district court attributed solely to Guenther. Our holding that the district court erred in finding that Guenther was entitled to 100 percent of any increase in equity of the Lost Sage Lane property makes the summary judgment determination immaterial to that issue as well. Therefore, we need not address further whether the district court erred in granting summary judgment as to the value of the Lost Sage Lane property at the time of dissolution.

D. The district court properly declined to award attorney's fees to Guenther under Idaho Code section 12-120(3).

Guenther argued below and now argues on appeal that he was entitled to attorney's fees as the prevailing party below pursuant to Idaho Code section 12-120(3). The district court determined that Guenther was the prevailing party, but denied his request for attorney's fees on the basis that a commercial transaction was not the gravamen of Guenther's claims because the claims were brought to enforce a statutory scheme. Guenther argues the district court erred because it did not discuss the gravamen of his claims on a claim-by-claim basis. He admits that the gravamen of his claim for judicial dissolution was for the enforcement of a statutory scheme,

the Idaho Uniform Partnership Act. However, Guenther argues a commercial transaction was the gravamen of his claim for declaratory judgment and Ryerson's counterclaim.

Idaho Code section 12-120(3) provides:

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

I.C. § 12-120(3). "The term 'commercial transaction' is defined to mean all transactions except transactions for personal or household purposes." *Id.* "Under this statute, when a commercial transaction comprises the gravamen of a lawsuit, the prevailing party shall be awarded attorney fees." *Kugler v. Nelson*, 160 Idaho 408, 416, 374 P.3d 571, 579 (2016) (citing *Idaho Transp. Dep't v. Ascorp, Inc.*, 159 Idaho 138, 141, 357 P.3d 863, 866 (2015)). Whether a commercial transaction comprises the gravamen of a lawsuit is an inquiry that is made on a claim-by-claim basis. *Sims v. Jacobson*, 157 Idaho 980, 984–85, 342 P.3d 907, 912–13 (2015) (citing *Willie v. Bd. of. Trs.*, 138 Idaho 131, 136, 59 P.3d 302, 307 (2002)). A prevailing party may still recover under section 12-120(3) when the opposing party alleges a commercial transaction, but a commercial transaction never actually existed. *See Garner v. Povey*, 151 Idaho 462, 469–70, 259 P.3d 608, 615–16 (2011). When the gravamen of a claim is to enforce a statutory scheme, attorney's fees are not appropriate under Idaho Code section 12-120(3). *Kelly v. Silverwood Estates*, 127 Idaho 624, 631, 904 P.2d 1321, 1328 (1995).

Here, Guenther's declaratory action to quiet title and Ryerson's counterclaim alleging she had a 50 percent ownership stake in the partnership were brought in furtherance of judicial dissolution and winding up of the partnership's business. The declaratory action sought to quiet title to the property in the name of the partnership so the property could be sold during the winding up of the partnership. Ryerson's counterclaim was for the sole purpose of determining each partner's ownership interest in the partnership. The focus of both claims was to determine the rights of the partners with respect to the judicial dissolution and winding up of the partnership under the Idaho Uniform Partnership Act. Therefore, the gravamen of both claims was the enforcement of a statutory scheme for dissolution and winding up of partnerships. Therefore, the district court did not err in declining to award attorney's fees under section 12-120(3).

E. We decline to award attorney's fees on appeal.

Guenther requests an award of attorney's fees on appeal pursuant to Idaho Appellate Rule 41 and Idaho Code section 12-120(3). For the same reasons discussed above, that Guenther's claim for declaratory judgment and Ryerson's counterclaim to establish her ownership interest in the partnership were brought to enforce the statutory scheme, we decline to award attorney's fees on appeal.

V. CONCLUSION

For the reasons above, we vacate the district court's order requiring the sale of the Lost Sage Lane property on the open market for a fixed price. We hold that the Idaho Uniform Partnership Act requires the sale of partnership property upon dissolution unless otherwise agreed by the parties. We also hold that the district court erred in fixing the price at which the property was to be listed for sale. We reverse the district court's order attributing 100 percent of post-dissolution increases in equity in the partnership's Lost Sage Lane property to Guenther. We affirm the district court's order denying attorney's fees. Finally, we remand for further proceedings consistent with this opinion. No attorney's fees on appeal. Costs are awarded to Ryerson as the prevailing party.

Justices BRODY, BEVAN, STEGNER, and MOELLER **CONCUR.**

4th DISTRICT ANNUAL

FAMILY LAW CASE UPDATE

March 4, 2019 through March 3, 2020

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I. CUSTODY

***Kelly v. Kelly*, 165 Idaho 716, 451 P.3d 429 (2019).**

The Idaho Supreme Court vacated a magistrate court's award of primary physical custody and sole legal custody of a minor child to Brandon Kelly after determining that the magistrate court impermissibly allowed Brandon to hire his own expert to conduct a parenting time evaluation.

The Court held that under Idaho Rule of Family Law Procedure 719, parenting time evaluators can only be selected by stipulation of the parties or by appointment of the court. In either case, the chosen expert must be neutral, and not beholden to either side.

The Court held the magistrate court violated the scope and purpose of Rule 719 by allowing Brandon to hire his own expert to act as a parenting time evaluator. The Court concluded that this error clouded the entirety of the judicial process and required that the judgment regarding child custody and visitation be vacated and remanded for a new trial.

The Court did affirm several of the magistrate court's evidentiary rulings for guidance upon remand.

II. BREACH OF FIDUCIARY DUTY CLAIM

***Parkinson v. Bevis*, 165 Idaho 599, 448 P.3d 1027 (2019).**

Ms. Parkinson appealed a district court's dismissal of her claim for breach of fiduciary duty against her attorney, James Bevis. Parkinson filed a complaint alleging Bevis breached his fiduciary duty when he disclosed a confidential email to the opposing attorney after a settlement had been reached in Parkinson's divorce action.

Bevis filed a motion to dismiss under Idaho Rule of Civil Procedure 12(b)(6), arguing that Parkinson's complaint failed to state a claim for relief. The district court dismissed Parkinson's claim after finding it was a legal malpractice claim which Parkinson could not prevail on because she suffered no damages as a result of the disclosure. Parkinson filed a motion to amend her complaint to clarify that the remedy she sought was the equitable relief of fee disgorgement, which the district court denied.

The Idaho Supreme Court reversed and remanded, recognizing that a lawyer can violate his fiduciary duty, causing no damage, in which case an equitable remedy like Parkinson sought may be recoverable. The Court held that Parkinson could sue her attorney for breach of a fiduciary duty arising out of the attorney-client relationship, just as any other principal may sue an agent who owes a fiduciary duty.

The Court explained that its holding was narrow, and offered relief to a client only in those cases in which the client seeks fee disgorgement as a solitary remedy. For these reasons the Court held that the district court also abused its discretion when it denied Parkinson's motion to amend.

III. PROPERTY AND SPOUSAL SUPPORT ISSUES

***Papin v. Papin*, 116 Idaho 9, 454 P.3d 1092 (2019).**

The appeal involved a complex divorce between Husband and Wife. Husband appealed from the Bonneville County district court's decision, which affirmed in part the judgment of the magistrate court dividing the marital estate. On appeal, Husband argued that the district court erred in affirming several of the magistrate court's rulings, including: (1) its holding that the marriage settlement agreement was invalid; (2) its holding that the community was entitled to reimbursement for the funds expended towards the mortgage and property taxes on Husband's separate property home; (3) its characterization of certain property as either separate or community; (4) its valuation of certain property; (5) its award of spousal maintenance to Wife; and (6) its award of attorney fees to Wife. The Supreme Court held that the district court erred in affirming the magistrate court's award of attorney fees to Wife because the magistrate court was not provided with sufficient information to determine a reasonable award and the magistrate court considered one of the statutory factors under an incorrect standard. Accordingly, the Supreme Court remanded the issue back to the district court with instructions to reverse and remand to the magistrate court.

The Supreme Court affirmed the remaining issues. The Supreme Court affirmed the district court's ruling that the marriage settlement agreement was invalid because it lacked consideration, but that the district court erred in affirming the magistrate court's finding that the document was procedurally invalid on alternate grounds that it did not contain grantee's mailing address. The Supreme Court also affirmed the remaining issues as to reimbursement, characterization, valuation, and spousal support. Notably, on the reimbursement issue the Supreme Court affirmed the district court in affirming the magistrate's holding that the community was entitled to reimbursement for the funds expended on the mortgage and property taxes paid on Husband's separate home.

IV. TERMINATION OF PARENTAL RIGHTS

***In re Doe I,* 164 Idaho 849, 436 P.3d 670 (2019).**

The Supreme Court affirmed the judgment of the Washington County Magistrate Court in terminating the parental rights of Jane Doe to her minor child. The Court held that substantial and competent evidence supported the magistrate's findings that Mother neglected the child and that termination was in the child's best interests.

***In re Doe I,* 165 Idaho 33, 437 P.3d 33 (2019).**

The Idaho Supreme Court affirmed the magistrate's court decision terminating Jane Doe's (Mother) and John Doe's (Father) parental rights over their minor children. The Court held: (1) Mother's due process rights were not violated due to issues with the microphones during day three and four of the hearing; (2) affirming the magistrate's denial of Father request for a jury trial; (3) substantial and competent evidence supported magistrate court's finding that Father failed to comply with the case plan; (4) the magistrate court did not abuse its discretion in allowing admission of a police video over Father's objection; (5) substantial and competent evidence supported magistrate's decision not to reinstate reasonable efforts and allow visitation; (6) substantial and competent evidence supported the finding that termination was in the best interests of the two minor children.

***In re Doe I,* 164 Idaho 883, 436 P.3d 1232 (2019).**

The Supreme Court affirmed the judgment of the Lincoln County Magistrate Court in terminating the parental rights of Jane Doe to her minor child. Mother appealed the magistrate court's decision and argued that (1) the Idaho Department of Health and Welfare did not make adequate efforts to reunify the family and that the court erred by finding that the Department's efforts were reasonable; and (2) that termination was not in the best interests of the children.

The Idaho Supreme Court held that an inquiry into the Department's efforts at reunification and aiding a parent with a case plan is not statutorily relevant on appeal of the termination of parental rights. Court also held that Mother failed to show that the trial court's finding was not supported by substantial and competent evidence.

***In re Doe,* 164 Idaho 875, 436 P.3d 1224 (2019).**

The Supreme Court affirmed the judgment of the Lincoln County Magistrate Court in terminating the parental rights of John Doe (Father) to his minor children. Father appealed the trial court's finding and argued that the trial court's finding of neglect was not supported by substantial, competent evidence and that the court had erred by not considering how his periods of incarceration affected his ability to comply with the Department's case plan. A finding of neglect under Idaho Code § 16-2002(3)(b) requires the magistrate court to find that the parent is responsible (indirectly or directly) for non-compliance of a case plan.

The Idaho Supreme Court held that the trial court's finding of neglect was supported by substantial, competent evidence and that Father had failed to demonstrate that compliance with his case plan was impossible.

***In re Doe,* 165 Idaho 46, 437 P.3d 922 (2019).**

Jane Doe (Mother) appealed a Cassia County's magistrate court's termination of her parental rights to her minor child. The magistrate terminated Mother's rights based on neglect and entered an order based on that finding on December 18, 2017. However, in a subsequent decree issued on December 15, 2017 the magistrate court stated Mother's parental rights were being

terminated based on abandonment. On appeal both Mother and Department raised procedural issues relating to the inconsistencies in the Order and Decree.

The Idaho Supreme Court remanded the case back for an entry of new judgment stating that the Order would constitute the findings of fact and conclusions of law. Mother again appealed and argued that the magistrate court erred when it terminated her parental rights. The Idaho Supreme Court affirmed the magistrate's termination of Mother's parental rights. The Court held that there was substantial, competent evidence supporting the magistrate court's finding of neglect.

***In re Doe II*, 165 Idaho 199, 443 P.3d 213 (2019).**

The Bonner County magistrate court entered an order finding that Father had abandoned the minor child and that termination of his parental rights was in her best interests. Father appealed. The Idaho Supreme Court affirmed the Bonner County magistrate court's termination of Father's parental rights based on a finding of statutory abandonment under Idaho Code § 16-2005(5). The Court held that there was substantial and competent evidence to support the magistrate court's determination.

***In the Interest of Doe I*, 165 Idaho 675, 450 P.3d 323 (Ct. App. 2019).**

Father appealed from magistrate's court decision terminating his parental rights and argued magistrate erred when it admitted the report of investigation into evidence over his hearsay objection. Court of Appeals affirmed magistrate court's judgment terminating dad's parental rights holding there was substantial and competent evidence to support the magistrate's findings that father abused and neglected his child independent from the report of investigation. As to the report the Court of Appeals agreed with Father that to the extent Idaho Code § 16-2009 allows hearsay without a valid hearsay exception it conflicts with the Idaho Rules of Evidence and is of no force or effect.

***In the Matter of Doe II*, 166 Idaho 47, 454 P.3d 1130 (2019).**

The Idaho Supreme Court affirmed the magistrate court's order terminating a mother's parental rights as to her child. The Court explained that there was substantial and competent evidence supporting the magistrate court's factual findings that Mother's conduct met the definitions of abandonment and neglect set forth in sections 16-2002(5) and 16-1602(31) of the Idaho Code, and that termination of Mother's parental rights was in the child's best interests.

***In re Doe*, 166 Idaho 57, 454 P.3d 1140 (2019).**

John Doe ("Father") appealed the magistrate court's order terminating his parental rights to his minor children, Jane Doe I ("B.L.S.") and Jane Doe II ("A.C.S."), entered on June 11, 2019. The Idaho Department of Health and Welfare filed a petition to terminate Father's parental rights on December 11, 2018. After a four-day trial, the magistrate court found by clear and convincing evidence that termination of Father's parental rights was proper on the grounds of neglect and that

termination of Father's parental rights was in the best interests of the children. Father appealed, arguing that neither of the magistrate court's findings were supported by substantial, competent evidence. The Idaho Supreme Court determined that substantial, competent evidence supported both findings. Accordingly, the Idaho Supreme Court affirmed the magistrate court's final order terminating Father's parental rights to B.L.S. and A.C.S.

***In re Doe I*, 166 Idaho 68, 454 P.3d 1151 (2019).**

Jane Doe ("Mother") appealed the magistrate court's order terminating her parental rights to her minor children, Jane Doe I ("B.L.S."), Jane Doe II ("X.V.S."), and Jane Doe III ("A.C.S."), entered on June 11, 2019. The Idaho Department of Health and Welfare filed a petition to terminate Mother's parental rights on December 11, 2018. After a four-day trial, the magistrate court found by clear and convincing evidence that termination of Mother's parental rights was proper on the grounds of neglect and that termination was in the bests interests of the children. Mother appealed, arguing that neither of the magistrate court's findings was supported by substantial, competent evidence. The Idaho Supreme Court determined that substantial, competent evidence supported both findings. Accordingly, the Idaho Supreme Court affirmed the magistrate court's final order terminating Mother's parental rights to B.L.S., X.V.S., and A.C.S.

***In the Matter of Doe I*, 166 Idaho 79, 454 P.3d 1162 (2019).**

Jane Doe ("Mother") appealed a magistrate court's decision to terminate her parental rights to her son (A.V.). Father's termination was the subject of a separate appeal. The Idaho Supreme Court affirmed the magistrate court's decree terminating her parental rights. It held that the magistrate court did not err in determining that Mother neglected A.V. and did not err in determining that termination was in A.V.'s best interests.

***In the Matter of Doe I*, 166 Idaho 86, 454 P.3d 1169 (2019).**

John Doe ("Father") appealed a magistrate court's decision to terminate his parental rights to his son (A.V.). Mother's termination was the subject of a separate appeal. The Idaho Supreme Court affirmed the magistrate court's decree terminating his parental rights. It held that the magistrate court did not err in determining that termination was in A.V.'s best interests; did not consider the number of Mother and Father's children as a factor in its analysis; and did not err in concluding that Father was, along with Mother, responsible for A.V.'s neglect.

***In the Interest of Doe* I, __ P.3d __, 2020 WL 502397 (Idaho).**

Jane Doe (Mother) appealed a magistrate court's decree terminating her parental rights to her son. The Idaho Supreme Court affirmed the magistrate court's decree, holding that the magistrate court did not err in determining that Mother neglected child and that termination was in the child's best interests.

***In the Matter of Doe I,* __ P.3d __, 2020 WL 547396 (Idaho).**

The Idaho Supreme Court affirmed the magistrate court's finding that termination of Mother's parental rights was in the best interests of her children, K.M. and R.M. As a result, the Court affirmed the magistrate court's decree terminating Mother's parental rights. The Court awarded costs on appeal to IDHW.

***In the Matter of Jane Doe I,* __ P.3d __, 2020 WL 632850 (Idaho Ct. App.).**

In this case arising out of Canyon County, the Court of Appeals affirmed the magistrate court's judgment terminating Jane Doe's parental rights. The magistrate court terminated Doe's parental rights after finding clear and convincing evidence that Doe neglected her child and that termination is in the child's best interests.

Doe raised two issues on appeal. First, Doe challenged whether the reviewability of the Idaho Department of Health and Welfare's reasonable efforts toward reunification satisfied due process. Second, Doe asserted that it was impossible for her to complete her case plan because, during the course of the child protection proceedings, the magistrate approved moving the child out of state when her foster family (her maternal aunt and uncle) relocated to New York. The Court of Appeals held that reasonable efforts are an ongoing consideration throughout the child protection proceedings and that a finding of reasonable efforts is subject to appellate review from that proceeding. The Court of Appeals rejected Doe's argument that due process requires more and reiterated that reunification efforts are not subject to appellate review in the termination case because those efforts are not relevant to the termination decision under I.C. § 16-2005. The Court of Appeals also held there was substantial and competent evidence to support the magistrate court's finding of neglect and that termination is in the child's best interests and that, contrary to Doe's argument, the child's removal from Idaho did not make it impossible for Doe to comply with her case plan.

2019 Headline News: Criminal Law Update[1]

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Article 1, Section 17 of the Idaho Constitution

State v. Clarke, 165 Idaho 393 (June 12, 2019): In *Clarke*, the Court held that Article 1, Section 17 of the Idaho Constitution prohibited warrantless arrests for misdemeanors committed outside law enforcement's presence (also known as "completed misdemeanors"). In interpreting the Idaho Constitution, the Court examined the common law during the time leading up the adoption of the Idaho Constitution. The Court determined that, "based upon the state of the common law in 1889, the framers of the Idaho Constitution would have understood that Article 1, section 17 prohibited warrantless arrests for completed misdemeanors." The Court was "fully mindful of the significance of this conclusion." Prior to *Clarke*, an Idaho statute authorized warrantless arrests for certain completed misdemeanors, including domestic violence. Despite the "extremely powerful policy considerations" to allow such arrests, the Court concluded that these considerations "must yield to the requirements of the Idaho Constitution." To comply with the Idaho Constitution, law enforcement must obtain a warrant to arrest for a completed misdemeanor, even if probable cause exists for the arrest.

Fundamental Error

State v. Miller, 165 Idaho 115 (March 15, 2019): *Miller* clarified prongs two and three of fundamental error under *State v. Perry*, the seminal fundamental error case from 2010. As to prong two, which requires the defendant to show "the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision," the Court explained:

> We reemphasize that in order to satisfy this prong of *Perry* a defendant bears the burden of showing clear error in the record. This means the record must contain evidence of the error and the record must also contain evidence as to whether or not trial counsel made a tactical decision in failing to object. If the record does not contain evidence regarding whether counsel's decision was strategic, the claim is factual in nature and thus more appropriately addressed via a petition for post-conviction relief. . . . Thus, we clarify that whether trial counsel made a tactical decision in failing to object is a claim that must be supported by evidence in the record. Appellate counsel's opinion that the decision could not have been tactical does not satisfy the second prong of *Perry*.

Regarding prong three, the Court referred to *Perry*'s statement that the error "must have affected the outcome of the trial proceedings" as its holding, and the statement that "the defendant bears

[1] This update includes some, but not all, cases decided by the United States Supreme Court and Idaho Supreme Court from November 2018 to November 2019. This update does not include Idaho Court of Appeals' cases.

the burden of showing there is a 'reasonable possibility' that the error affected the outcome of the trial" as dicta. The Court opined that "the 'reasonable possibility' language has resulted in confusion among litigants as to what standard applies, with some parties arguing the standard should be the same 'reasonable probability' standard applicable in ineffective assistance of counsel cases." The Court therefore said:

> We take this opportunity to clarify that the third prong of *Perry* requires that the defendant demonstrate that the clear error in the record—i.e., the error identified in the first and second prongs—actually affected the outcome of the trial proceedings. Whether the error affected the trial proceedings must be clear from the appellate record. In so requiring, we note that the words "reasonable possibility" are no longer appropriate or descriptive of the third prong of *Perry*.

Juvenile Court

In re Doe, 165 Idaho 72 (April 2, 2019): There are a few takeaways from *Doe* on juvenile court jurisdiction, sentence modification, and credit for time served. After the juvenile court revoked Doe's probation, she moved to reduce her sentence pursuant to Idaho Criminal Rule 47 (the general motions rule). The juvenile court denied her motion. The Idaho Supreme Court agreed. The Court held that, according to the Idaho Juvenile Rules, Doe had forty-two days to appeal the juvenile court's revocation order before it lost jurisdiction. Her Rule 47 motion was not filed within that time, and her Rule 47 motion did not extend the juvenile court's jurisdiction. Further, the Court held that a motion for leniency pursuant to Idaho Criminal Rule 35 is inapplicable in juvenile court proceedings, so Doe could not avail herself to that motion for a sentence reduction. Next, the Court held that I.C. § 20-505 and I.C. § 20-507 also did not extend the juvenile's jurisdiction to rule on a motion past the forty-two day appeal cutoff. The Court also rejected Doe's equal protection challenge based on the disparate treatment between juveniles and adults in their respective criminal proceedings. Perhaps in response to this result, which effectively prevented juveniles from seeking sentence modification, the Court referred the matter to the Juvenile Justice Advisory Committee. Lastly, on the matter of credit for time served, the Court held that the adult statutes for credit for time served, I.C. § 18-309 and I.C. § 19-2603, and the Court's interpretation of those statutes, did not apply to juvenile proceedings.

Eighth Amendment and Juvenile Offenders

State v. Shanahan, 165 Idaho 343 (July 11, 2019): This case concerns the Eighth Amendment's application to juvenile defendants. In 2012, the U.S. Supreme Court held in *Miller v. Alabama*, 567 U.S. 460, that sentencing courts must consider a juvenile's youth and attendant characteristics before imposing a fixed life sentence. (The U.S. Supreme Court later held *Miller* applied retroactively.) In *Shanahan*, a juvenile defendant alleged that his sentence of life imprisonment, with thirty-five years fixed, was illegal under *Miller*. The Court agreed that *Miller*'s rationale extended to "lengthy fixed sentences that are the functional equivalent of a determinate life sentence." But, applied here, the Court held that the juvenile's sentence was not the functional equivalent of life and, as such, did not implicate *Miller* or render his sentence unconstitutional.

Credit for Time Served

State v. Osborn, No. 46389 (Sept. 11, 2019): The Court held that a defendant is entitled to credit for time served on each consecutive sentence upon the district court's revocation of the defendant's probation and execution of his sentences. The defendant in *Osborn* pled guilty to two offenses and received two consecutive sentences. The judge suspended those sentences and placed the defendant on probation. Later, the defendant was served with a bench warrant for violating his probation. The defendant was in custody for 106 days before the judge revoked his probation and executed his consecutive sentences. The Court agreed that the defendant was entitled to credit for 106 days on each consecutive sentence. The Court reasoned that the relevant statute, I.C. § 19-2603, mandated credit on each "suspended sentence."

State v. Keeton, No. 46693 (Oct. 7, 2019): The Court held that a defendant is entitled to credit for time served for an offense when the complaint alleging the offense is dismissed and later refiled by the State. The defendant in *Keeton* was in custody for thirty-two days following his arrest for an offense before his release on his own recognizance. After his release, the State dismissed the complaint due to a procedural error and filed a new complaint alleging the same offense. The Court agreed that the defendant was entitled to credit for his initial thirty-two days in custody because the relevant statute, I.C. § 18-309, guarantees credit for "the offense." The Court reasoned that the separate case numbers associated with the two complaints did not result in different offenses in order to deny the defendant credit for time served.

Evidence

State v. Cunningham, 164 Idaho 759 (Feb. 21, 2019): There are two takeaways from *Cunningham*. First, the hearsay rules apply to restitution proceedings under I.C. § 37-2732(k), but not under I.C. § 19-5304. Second, documents prepared in anticipation of a restitution request, such as the timesheet and affidavit the State offered in this case, are not admissible as business records under Idaho Rule of Evidence 803(6). After *Cunningham*, the Court adopted Idaho Criminal Rule 37, which outlines the requirements for a prosecutor's affidavit submitted in support of a request for restitution under I.C. § 37-2732(k).

State v. Weigle, 165 Idaho 482 (Aug. 27, 2019): The Court held that trial courts have discretion to give demonstrative exhibits to the jury during deliberations. The Court recommended that trial courts employ "appropriate safeguards," such as a limiting instruction, before doing so. The Court also recognized that trial courts could keep a demonstrative exhibit from the jury due to unfair prejudice or similar concerns. In reaching this decision, the Court determined that I.C. § 19-2203, which governed the papers given to the jury during deliberations, was a "nullity" because it encroached on the Court's inherent authority to determine court process.

State v. Sanchez, 165 Idaho 563 (June 13, 2019): The State charged in defendant in *Sanchez* with threatening a public servant, in violation of I.C. § 18-1353(1)(b), for sending a threatening letter to a prosecutor. Among other issues, Sanchez argued that the prosecutor's reaction to the letter was not relevant because his reaction was not an element of the offense. The Court disagreed. In a matter of first impression, the Court held that the threat must be viewed in context, including the reaction of the listener, to determine whether it was in fact a threat. Therefore, the prosecutor's

reaction was relevant evidence. The Court also held that I.C. § 18-1353(1)(b) was not facially overbroad because it did not prohibit a substantial amount constitutionally protected speech and conduct.

Judicial Notice

Rome v. State, 164 Idaho 407 (Nov. 29, 2018): *Rome* underscores the specificity required for a court to properly take judicial notice under Idaho Rule of Evidence 201. Although *Rome* dealt with an older version of Rule 201, it appears that the Court's discussion of the Rule's requirements is equally applicable to the current version. To properly request notice under Rule 201, the best practice is to: (1) list the individual document you want the court to notice; (2) list the facts within that document that you want to notice; (3) explain those are "adjudicative facts" that can be properly noticed and are not subject to reasonable dispute; and (4) include citations to the pages on which those adjudicative facts appear.

Substantive Crimes

State v. Amstad, 164 Idaho 403 (Nov. 29, 2018): The Court defined the meaning of a "place" for the frequenting statute, I.C. § 37-2732(d). This statute prohibits any person from being "present at or on premises of any place" where he knows illegal substances are being held. The Court first determined the statute was ambiguous because Black's Law Dictionary noted "place" was "a very indefinite term" and could mean any "locality, situation, or site," as well as "an occupied situation or building." "Premises," on the other hand, meant "a house or building, along with its grounds." Because "place" was indefinite and ambiguous, the Court looked to the other tenets of statutory construction to interpret its meaning. Ultimately, the Court held that a "place" includes a vehicle in a parking lot. In reaching this interpretation, the Court expressed concern that individuals could escape liability "simply by entering a parked vehicle." The Court explained, "Because a vehicle can be at or on premises of a place, a person within a vehicle is also capable of being at or on premises of a place." Therefore, Amstad's presence in a car (with marijuana inside) parked in a college campus parking lot did not "protect him from liability."

State v. Wilson, 165 Idaho 64 (March 28, 2019): The Idaho Supreme Court in *Wilson* clarified the elements the State must prove to secure a conviction for aiding and abetting methamphetamine trafficking. Because the crime of trafficking requires the principle to knowingly be in actual or constructive possession of twenty-eight or more grams of methamphetamine, the defendant argued that the State had to prove the aider and abettor had knowledge of the weight of methamphetamine. The Court disagreed, holding that knowledge of the weight is not an element of trafficking for the principal or the aider and abettor. Instead, the knowledge element only requires the State to prove either the actual weight of the methamphetamine or the weight as represented by the alleged trafficker. If the State proves weight by representation, then it need only prove only a single representation by either the principal or the aider and abettor.

State v. Lantis, 165 Idaho 427 (Aug. 23, 2019): The *Lantis* Court examined the scope of "disturbing the peace," prohibited by I.C. 18-6409. The Court first held that this phrase was ambiguous. After examining the statute's "historical beginnings," the Court concluded that the statute was not intended to criminalize "disturbing one's personal peace, through transmitting offensive material

to a third party." In other words, the conduct must disturb the exterior peace and quiet of the victim or those in close proximity to the offensive conduct. In light of this interpretation, the Court held the defendant's conduct of sending salacious emails to an ex-girlfriend's employers to get her fired, while reprehensible, was not "disturbing the peace."

State v. Cook, 165 Idaho 305 (July 10, 2019): The *Cook* Court held the statute on the display of temporary permits was unconstitutionally vague as applied to the defendant. The temporary permit statute requires a permit to be "readily legible," but offers no other requirements on visibility or readability (unlike the license plate statute). The Court also noted that the Transportation Board had not promulgated any rules on permit display, and the prior case law on permit display was unclear. Without any concrete guidelines, the Court recognized, "Even today, it is not possible to know how to comply with this statute." Therefore, the Court reasoned that the statute was vague as applied to the defendant's conduct of a properly displayed and valid permit that was obscured by condensation on the rear windshield.

Attorney-Client Privilege

State v. Robins, 164 Idaho 425 (Nov. 30, 2018): *Robins* addressed the question of what remedy is appropriate when the prosecution violates the attorney-client privilege. The Court appears to have endorsed a burden-shifting rule from the Ninth Circuit: If the prosecution had access to defense strategies, as opposed to a particular piece of evidence, then the defendant has to show the prosecution "acted affirmatively to intrude into the attorney-client relationship to obtain the privileged information." If he makes that showing, the burden shifts to the State to show that there has been no prejudice to the defendant. The State can meet that burden by proving, by a preponderance of the evidence, that its evidence and trial strategy "derived from an origin independent of" the privileged information.

Shackles during Trial

State v. Medina, 165 Idaho 501 (Aug. 27, 2019): Among other issues, the Court determined that appellate review of the use of shackles and jail garb at trial have the same requirement of "compulsion." With respect to jail garb, a defendant must object to wearing jail garb at trial. If no objection is made, it is presumed that the jail garb was not compelled. In *Medina*, the Court applied the same presumption to shackles. If the defendant fails to object to the use of shackles at trial, any requirement of compulsion is "negated." Lacking a compulsion component, a defendant is unable show a violation of a constitutional right and, therefore, cannot satisfy fundamental error on appeal to challenge the use of shackles at trial.

U.S. Supreme Court: Ineffective Assistance of Counsel

Garza v. Idaho, 139 S. Ct. 738 (Feb. 27, 2019): The *Garza* Court answered the question left open by its decision in *Roe v. Flores-Ortega*: Prejudice under *Strickland v. Washington* is presumed when a client, despite having signed an appeal waiver, instructs his attorney to appeal, and his attorney fails to do so. Central to the Court's reasoning were its conclusions that "no appeal waiver serves as an absolute bar to all appellate claims," and that filing of a notice of appeal is a "purely ministerial task." Therefore, an attorney who disregards the client's instruction to appeal performs

deficiently, and prejudice is presumed because the attorney's actions deprived the client of a proceeding to which he had a right. To prevail on an ineffective assistance of counsel claim after *Garza*, a post-conviction petitioner need only show that he instructed his attorney to appeal and his attorney failed to do so.

U.S. Supreme Court

Civil Forfeiture

Timbs v. Indiana, 139 S. Ct. 682 (Feb. 20, 2019): The U.S. Supreme Court in *Timbs* held that the Fourteenth Amendment's Due Process Clause incorporates the Eighth Amendment's Excessive Fines Clause, rendering it applicable to the states. Because of the Court's earlier holding in *Austin v. United States* that even civil forfeitures, which are "at least partly punitive," fall within the purview of the Eighth Amendment, defendants can now challenge such state civil forfeitures as excessive under the Eighth Amendment.

Blood Draw Consent

Mitchell v. Wisconsin, 139 S. Ct. 2525 (June 27, 2019): The U.S. Supreme Court held that the police may "almost always" order a warrantless blood draw to measure an unconscious driver's blood alcohol content. The police do not need a warrant for a blood draw if (1) the driver is unconscious or in a "stupor" and must be taken to the hospital, (2) the police do not have the time or ability to administer a breath test, and (3) the police have probable cause.

Batson Challenges

Flowers v. Mississippi, 139 S. Ct. 2228 (June 21, 2019): The U.S. Supreme Court reiterated the importance of *Batson v. Kentucky*, 476 U.S. 79 (1986), "to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system." *Batson* held that the State cannot discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial. *Flowers* provided an in-depth discussion of the constitutional rights at issue, the case law before and after *Batson*, the purpose of *Batson*, and the appropriate analysis for *Batson* challenges.

Dual Sovereignty

Gamble v. United States, 139 S. Ct. 1960 (June 17, 2019): The U.S. Supreme Court declined to overrule its longstanding precedent and, consequently, reaffirmed that the Double Jeopardy Clause of the Fifth Amendment does not prohibit dual prosecutions for the same conduct under state and federal law. This "dual-sovereignty doctrine" allows both the state and federal "sovereigns" to prosecute a defendant for the same conduct without violating double jeopardy protections. The U.S. Supreme Court provided a thorough review of the double jeopardy clause's text, case law, treatises, and historical documents to reach its decision.

Stoel Rives LLP

Notable 2019 Bankruptcy Cases

Presented by J.B. Evans
4th Dist. Bar Spring Case Review
March 11, 2020

Stoel Rives LLP

Taggart v. Lorenzen, 139 S. Ct. 1795

- Civil Contempt Sanctions Case
- Subjective/good-faith belief of no violation enough? Not anymore!
- Objective Standard: No sanctions if there is "fair ground of doubt" as to the wrongfulness of the defendant's conduct.
- Objectively unreasonable belief insufficient
- **Takeaway**: as always, abundance of caution is a good idea when bankruptcy is involved

In re Hurley, 601 B.R. 529 (9th Cir. BAP 2019)

- Student Loan Debt: as hot as a bankruptcy issue gets – 11 U.S.C. § 523(a)(8)
- Debtor was a law student
- Goes to work for IRS and solicits bribe
- Inevitably…gets caught, loses his license, and goes to jail
- Seeks undue hardship discharge of his student loans under the *Brunner test*
- Discharge denied – hardship self-imposed

Stoel Rives LLP

Hillen v. Wilmington Savings
2019 WL 2214039 (Bankr. D. Idaho)

- Debtors buy real property: promissory note, DOT
- Fall behind on payments – DIL of foreclosure
- A month later: file for chapter 7 bankruptcy
- Bank records DIL after bankruptcy filing
- Trustee seeks to avoid bank's DOT: strong-arm
- Idaho Code § 55-606 – unrecorded instrument valid b/t parties and those with actual knowledge
- Doctrine of Merger
- Bank left with no DOT & DIL defeated by Trustee

In re Sarria, 606 B.R. 854

- Prevailing Party Analysis: judgment of $2,490
- Plaintiff's counsel sought award of $175,000 of $233,076 its attorneys' fees incurred
- Idaho Code § 12-120(3)
- Idaho R. Civ. P. 54(e)(3)
- Reasonableness factors analysis – proportionality not dispositive

Stoel Rives LLP

Garvin v. Cook Investments, 922 F.3d 1031

- Chapter 11 Plan
- Debtors were real estate holding companies
- One real estate holding company leased land to a marijuana grower
- Rents paid by marijuana grower used to fund plan
- U.S. Trustee says: That's illegal! *see* 11 U.S.C. §1129(a)(3)
- Ninth Circuit says: not so fast – the plan can't be proposed by illegal means but substantive provisions can indirectly violate non-bankruptcy law

NOTABLE BANKRUPTCY CASES – 2019

Fourth District Bar Case Review – March 11, 2020

CASE #1: *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019)

The Supreme Court held that a bankruptcy court may hold a creditor in civil contempt for violating a discharge order if there is "no fair ground of doubt" as to whether the order barred the creditor's conduct, adopting mostly an objectively reasonable standard.

Here, Taggart held an interest in an Oregon company. The company and its two other owners sued Taggart claiming he had breached the company's operating agreement. Before the state court trial, Taggart filed a chapter 7 petition and received a discharge. After discharge was entered, the state court entered judgment against Taggart and awarded attorney's fees to the plaintiffs. Taggart then returned to bankruptcy court seeking civil contempt sanctions against the plaintiffs based on a violation of the discharge order under §§ 524(a)(2) and 105, claiming the plaintiffs' attempts to collect the attorney's fees awarded by the state court were improper. The bankruptcy court held plaintiffs in contempt and awarded sanctions, but the Ninth Circuit Bankruptcy Appellate Panel vacated the sanction award and the Ninth Circuit affirmed, applying a subjective standard, and concluded that a "creditor's good-faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable."

The Supreme Court rejected this purely subjective standard, instead finding that civil contempt sanctions should be evaluated using a mostly objective standard. The Court reasoned that "when a statutory term is 'obviously transplanted from another legal source, it brings the old soil with it.'" Using the civil contempt standard found outside of bankruptcy law, the Court found that civil contempt sanctions should not be awarded where there is fair ground of doubt as to the wrongfulness of the defendant's conduct. The Court noted that this "fair ground of doubt" standard is generally objective and a subjective belief that one is complying with an order will not insulate the individual if that belief is objectively unreasonable.

CASE #2: *Hurley v. United States (In re Hurley)*, 601 B.R. 529 (9th Cir. BAP 2019)

The panel upheld the bankruptcy court's finding that a debtor seeking to discharge his student loans under § 523(a)(8) failed to sustain his burden of showing he made a good faith effort to repay his loans under the *Brunner* test. Prior to bankruptcy, the debtor had accumulated over $250,000 in student loan debt in pursuit of his law degree and an L.L.M. After graduation, he went to work for the IRS. During his tenure there, he solicited a bribe of $20,000 from the owner of a business he had just audited. Unsurprisingly, he was caught, indicted, convicted, and lost his law license. While incarcerated, he filed an adversary proceeding seeking the discharge of his student loans because repayment of the loans would cause him undue hardship. Prior to his criminal conduct, the debtor had made good faith efforts by making payments on his loans, seeking appropriate forbearances and deferments, and entering into an Income Based Repayment Plan. Even so, the panel found that such good faith efforts were outweighed by the nature of his criminal conduct. Accordingly, the panel upheld the bankruptcy court's decision granting summary judgment to the student loan company, finding that the debtor's hardship was self-imposed.

CASE #3: *Hillen v. Wilmington Savings Fund Society, FSB (In re Dennis)*, 2019 WL 2214039 (Bankr. D. Idaho May 21, 2019)

The debtors purchased real property and executed a promissory note and deed of trust. After falling behind on the payments, they executed a deed in lieu of foreclosure, which expressly indicated that it completely satisfied the deed of trust and the promissory note. They filed their chapter 7 petition a month later, and the bank recorded the deed in lieu post-petition. The trustee commenced an adversary proceeding seeking avoidance of the deed of trust. After a brief discussion of judicial notice, the Court considered avoidance using the trustee's strong-arm powers under § 544(a). Applying Idaho Code § 55-606, the Court held that an unrecorded instrument is valid between the parties and those who have notice of it, and that if a subsequent purchaser/encumbrancer has actual knowledge of the prior interest, recordation is immaterial as to that party. Because the bank had notice, the trustee's strong-arm powers will prevail over the bank's interest. The Court then considered the effect of the doctrine of merger, holding that while the note merged into the deed of trust and would otherwise operate to trump the trustee's interest, the deed in lieu also conveyed an interest in property, and it expressly stated the intention to extinguish the security created by the deed of trust. As such, the conveyance of ownership in the deed of trust was merged into the deed in lieu, and the bank became owner of the property, and its security for the note – the deed of trust – was eliminated. Thus, on petition day, the bank held only an unrecorded deed in lieu, which under Idaho law may be defeated by a bankruptcy trustee.

CASE #4: *JA, LLC d/b/a Leku Ona v. Sarria (In re Sarria)*, 606 B.R. 854 (Bankr. D. Idaho 2019) (on appeal to the USDC of Idaho)

In this case, the Court found that a creditor-plaintiff was a "prevailing party" on its claim against the debtor-defendant under § 523(a)(2)(A) where $2,490 in damages had been awarded in the adversary proceeding. *See* 2019 WL 2612728. As the prevailing party, the creditor-plaintiff was thus potentially entitled to attorneys' fees under state law and sought an award of $175,000 of the $233,076.50 in attorneys' fees it billed during the adversary proceeding. The Court applied Idaho Code § 12-120(3) and determined that the creditor-plaintiff was entitled to attorney's fees as the prevailing party in litigation related to a commercial transaction. Next, the Court made findings on the twelve factors bearing on the reasonableness of attorneys' fees under Idaho R. Civ. P. 54(e)(3) in determining the proper amount of a fee award. After reducing the fees for various reasons under the factors, the Court ultimately awarded a judgment of $125,123 to the creditor-plaintiff for attorneys' fees. Separately, the creditor-plaintiff's costs of $7,981.31 were awarded under Local Bankruptcy Rule 7054.1.

CASE #5: *Garvin v. Cook Invs. NW, SPNWY, LLC*, 922 F.3d 1031 (9th Cir. 2019)

Considering an issue of first impression in the Ninth Circuit, the panel held that § 1129(a)(3) directs bankruptcy courts to police the means by which a reorganization plan is proposed, but not its substantive provisions. Here, the consolidated debtors were five real estate holding companies. One of the five debtors leased land to a marijuana growing operation which, while legal under state law, violated federal drug laws. Rents paid by the marijuana grower to the debtor were used to support the plan of reorganization. The U.S. Trustee objected to confirmation under § 1129(a)(3), which forbids confirmation of a plan proposed "by any means forbidden by

law." The Circuit rejected the U.S. Trustee's argument, holding that the plain language of § 1129(a)(3) directs courts to look at whether the plan was proposed by a means forbidden by law, but does not direct courts to comb the plan in search of substantive provisions which violate non-bankruptcy law. The Circuit pointed out that the phrase "not by any means forbidden by law" modifies the phrase "[t]he plan has been proposed." Reading "has been proposed" out of the statute would render it nonsensical, violating a fundamental canon of statutory interpretation.

2020
SPRING CASE REVIEW

1. *Ciccarello v. Davies, MCHD LLP, et al.*, Idaho Supreme Court, No. 46340 (12/23/19)

Legal Malpractice Case

General Facts

Attorney structured companies and a group of investors to safeguard Plaintiff's LLC (F.E.M.) from potential seizure by the feds as a result of Plaintiff's pending criminal charges. Members of two LLC's orally agreed with Plaintiff that he would receive $2M majority ownership in one LLC (Baus) in exchange for sale of F.E.M.'s assets to another LLC (Lotus). Plaintiff was paid monthly as CEO of Lotus. When Plaintiff requested his ownership interest in Baus, it was not done. He was incarcerated, the monthly payments stopped, and Plaintiff was ousted from Lotus by its members.

Plaintiff's complaint was for legal malpractice alleging the attorney did not protect his interests from ouster.

Issues:

1. Defendant filed a MSJ alleging Plaintiff failed to provide expert testimony to show attorney's conduct "fell below the standard of care or that his performance was the proximate cause of any damages."

   Plaintiff's response to the MSJ relied on Plaintiff's expert witness disclosure and he did not file an affidavit.

   District court heard the MSJ and took it under advisement on 12/18/17. On 1/24/18, Plaintiff filed "rebuttal expert disclosure" and Declaration of his expert.

   On 1/25/18, the district court granted SJ because there was no expert affidavit opinion on the standard of care or proximate case.

2. Plaintiff moved for reconsideration of SJ under IRCP 11.2 and filed an additional Affidavit of his expert.

   District court denied that motion because expert testimony was not timely provided at the MSJ stage.

3. On 5/7/18, Plaintiff moved for relief from the Order granting SJ under IRCP 60(b)(1) and (6), arguing mistake.

   District court denied that motion because it was not a mistake of fact.

Idaho Supreme Court *affirmed*:

1. Grant of the MSJ because Plaintiff failed to provide expert affidavits on standard of care and proximate cause.

2. Denial of Motion to Reconsider because district court did not abuse its discretion to not consider untimely affidavits which were more than 50 days late.

3. Denial of Rule 60(b) Motion because it was a mistake of law, not a mistake of fact.

The Court also awarded Defendants' attorneys' fees because the case arose out of several commercial transactions.

2. *Parkinson v. Bevis,* Idaho Supreme Court, No. 46269 (9/10/19)

Plaintiff appealed dismissal of her claim for breach of fiduciary duty against her attorney.

Allegation

Her attorney disclosed a confidential email to opposing counsel after settlement of a divorce case. Plaintiff admitted she suffered no damage from the disclosure. (There was no permissive disclosure of the email available under IRPC 1.6(a) or (b)).

District Court Proceedings

Defendant filed a motion to dismiss, which the district court granted on two grounds.

1. Insufficient facts to show the information was confidential or privileged; and

2. Amendment of the Complaint was futile because a breach of fiduciary duty claim is indistinguishable from a negligence/tort/legal malpractice claim based on *Bishop v. Owens.*

Idaho Supreme Court Opinion, reversed

1. Since it was a Motion to Dismiss, the court accepted that the communication was confidential.

2. Distinguished 2012's *Bishop v. Owens.*

Bishop held since Plaintiff's breach of contract claim asserted the same factual basis as legal malpractice claim, when an attorney breaches a duty arising from attorney-client relationship, it is a legal malpractice claim (tort). Otherwise, there would be a per se breach of contract claim in every legal malpractice action.

The Court held:

When a claim for breach of fiduciary duty seeks **only equitable remedies**, it is an equitable claim, independent of malpractice, even when the breach of fiduciary duty was potentially negligent.

Some Topics of the Court's Discussion

When determining whether to exercise its equitable remedy discretion, courts should apply policy considerations and the Restatement, including:

1. "Policy considerations favor this extension, particularly notions of deterrence," and

2. Did the lawyer's conduct impair the value of services received?

The Court adopted The Restatement (Third) of the Law Governing Lawyers, Section 37, and stated:

> A lawyer's **violation of duty** to a client warrants fee forfeiture only if the lawyer's violation was **clear**. A violation is **clear** if a **reasonable lawyer**, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful.
>
> The Restatement criteria are used to determine whether the trial court may order forfeiture of all or a portion of the attorneys' fees as the equitable remedy.

The factors to determine whether an attorney has to return fees include:

1. The extent of misconduct;

2. Whether the breach involved a knowing violation or conscious disloyalty to a client;

3. Whether forfeiture is proportionate to the seriousness of the offense; and

4. The adequacy of other remedies.

The Court also noted:

"It is a **breach of loyalty**, not actual damages, which violates the fiduciary relationship." ...

However, "if a breach of fiduciary duty claim includes a claim for damages, that claim is appropriately subsumed by the legal malpractice claim."

3. *Kosmann v. Dinius*, 165 Idaho 375, 446 P.3d 433 (2019)

First Sentence of the Court's Conclusion:

> "The record in this case is so tarnished with questionable conduct that it has presented this Court with a vexing ethical and legal dilemma."

Factual Background:

Kosmann was a former client of Dinius. In that case, Kosmann was awarded a judgment. His opponent appealed and Kosmann did not fully pay Dinius. Dinius withdrew and filed an attorneys' fee lien against the judgment. Kosmann replaced Dinius with Messerly for the appeal. Judgment was *affirmed* and then Kosmann filed a malpractice and breach of contract claim vs. Dinius.

That case was mediated by a district judge. Dinius agreed to a $40,000 payment to Kosmann, but before the agreement was final, Messerly met with Dinius' counsel and requested Dinius release all of his potential claims against Messerly. Dinius asserted that was unethical and the mediation was delayed so counsel could call the Idaho State Bar.

Eventually, Messerly dropped his release request and instructed Kosmann to go alone to tell the mediator he would accept $40,000 without Messerly's release.

However, when Kosmann went alone to talk to the mediator, he asked if he could talk to Dinius. Messerly claimed he was unaware of this, but the mediator told Dinius of the request. Dinius initially refused to do so, but claimed that after repeated urging from the mediator, he acquiesced.

During that meeting, Kosmann and Dinius agreed to settle for a payment of $32,000 and agreeing that Dinius would not sue Messerly.

However, when Dinius' counsel and Messerly were then unable to agree to the settlement agreement language, she ordered a transcript of the oral settlement agreement and filed a Motion to enforce it. Kosmann filed a Cross-Motion for $40,000. The parties also filed Cross-Motions for sanctions. Kosmann argued that Dinius violated IRPC 4.2, and that the court had inherent authority to impose sanctions for ethical violations. Dinius' request for sanctions argued Kosmann's motions were frivolous.

The district court enforced the $32,000 settlement and granted Dinius' counsel sanctions equal to one hour of time spent on the Motion to Strike an untimely supplemental brief.

Kosmann filed a Motion to Reconsider, but that was denied because he failed to timely file his Memorandum and Messerly's Declaration in support.

It will come as no surprise all this was appealed.

Idaho Supreme Court Opinion:

1. The law of contracts is not entirely abandoned when ethical concerns are raised.

2. Although we have discomfort with the manner in which the settlement agreement was consummated, the district court was correct, the oral settlement agreement was enforceable.

3. We decline to decide whether Dinius violated IRPC 4.2 because the trial court properly left that determination to the Idaho State Bar, noting that Messerly, while "quick to point out Dinius's behavior … he completely ignores his own substantial contributions to this case's descent into an ethical quagmire." (Citing IRPC 1.2(a) and 1.7(a)(2)).

4. The district court did not err in declining to impose sanctions against Dinius for the alleged IRPC 4.2 violation. Bar gets it all.

5. Court noted the Preamble to IRPC; the rules are not designed to be the basis of civil liability; they are not procedural weapons; they are "not a cudgel with which opposing attorneys can bash each other to gain a tactical advantage in litigation."