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DEC 09 2013

DEPARTMENT OF
WATER RESOURCES

fax & email
received

Dec 05, 2013

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR	)	MOTION TO STRIKE PROTESTS
PERMIT NO. 65-23493 IN THE NAME OF	)	OF WEST MOUNTAIN WATER
ALLEN RANCH LLP AND APPLICATION FOR	)	ASSOCIATION, INC. AND WEST
TRANSFER NO. 78252 IN THE NAME OF	)	MOUNTAIN PROPERTIES, LLC
ALLEN RANCH LLP	)	AND TO DISALLOW THEIR
		PARTICIPATION

COMES NOW the Applicant, Allen Ranch LLP, by and through its counsel of record, Bruce M. Smith, of Moore Smith Buxton & Turcke, Chtd., and moves to strike the Protests of West Mountain Water Association Inc., and West Mountain Properties, LLC and to deny both entities any participation in the proceedings on the pending applications.

The basis for the motion is that I.C. § 3-104 makes it illegal for a person to practice law in Idaho without being licensed by the Idaho Supreme Court. Neither entity filed a protest by an attorney licensed to practice law in Idaho.¹ IDWR rule 210 denotes a

¹ Although West Mountain Water Association, Inc. was represented by an attorney for purpose of its 30(b)(6) deposition, it is not now represented by an attorney, making its participation even more troublesome. The Applicant was only recently informed of the withdrawal of counsel for West Mountain Water Association, Inc. West Mountain Properties, LLC has never been represented by an attorney.

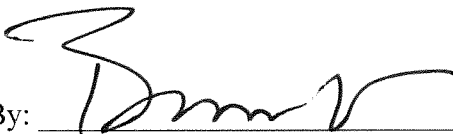
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protest as a pleading. IDAPA 37.01.01.210. As such, the IDWR does not have authority to accept the protests or to allow the participation by either entity. These alleged protestants have no standing to appear before the IDWR. The Applicant has prepared for the hearing given the status of the Protestants. It is a denial of due process to allow either entity to participate at this juncture or to allow their protests to stand given the clarity of the Supreme Court's direction on the issue.

The Idaho Supreme Court's recent decision applying I.C. § 3-104, makes clear that "[T]he law in Idaho is that a business entity, such as a corporation, limited liability company, or partnership, must be represented by a licensed attorney before an administrative body...". *Indian Springs LLC v. Indian Springs Land Investment, LLC*, 147 Idaho 737, 744-745 (2009). (Copy attached.) While a person has a right to represent himself or herself *pro-se*, that right does not extend to the representation of other persons or entities. *Citibank (South Dakota), N.A. v. Carrol*, 148 Idaho 254, 260, 220 P.3d 1073, 1079 (2009) (cited in SRBA subcase 27-11375 wherein the Court held that a member of an association could represent themselves but not the organization). (Copy attached.) For the IDWR to accept the protests or to allow the participation of the protestants would cause the representatives to be subject to contempt of court, a fine of \$500.00, and six months in prison. It is not reasonable for the IDWR to be complicit in causing anyone to be subject to such risks.

Respectfully submitted this 5 day of December, 2013.

MOORE SMITH BUXTON & TURCKE, CHTD.

By: 
Bruce M. Smith
Attorney for Allen Ranch LLP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of December, 2013, I caused to be served a true and correct copy of the foregoing MOTION TO STRIKE to the following:

Original to: (Via Facsimile and hard copy Via U.S. Mail)

Idaho Department of Water Resources
322 E. Front Street
P.O. Box 83720
Boise, ID 83720-0098

Copies to: (Via Email and First Class U.S. Mail)

Email: Shelley.keen@idwr.idaho.gov
Shelley Keen
Regional Manager, Western Region
Idaho Department of Water Resources
2735 Airport Way
Boise, ID 83705-5082

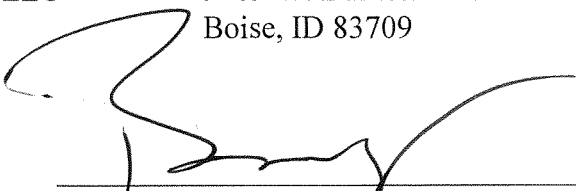
Email: schess123@msn.com
West Mountain Water Association Inc.
c/o Sandra Chess
1200 Lizaso Avenue
Boise, ID 83709

Email: randymcclintick@yahoo.com
Randy and Cris McClintock
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Orvada, NV 89425

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James T. Bunce
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West Mountain Properties LLC
c/o Dwight Jividen
413 Cabarton Road
Cascade, ID 83611

Gary E. Henkel
9109 W. Burnett Drive
Boise, ID 83709


BRUCE M. SMITH

215 P.3d 457 (Idaho 2009), 34623, Indian Springs LLC v. Indian Springs Land Inv., LLC

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215 P.3d 457 (Idaho 2009)

147 Idaho 737

INDIAN SPRINGS LLC, Assignee of D.M. & Shirley Thornhill, husband and wife, and an Assignee of Indian Springs Natatorium, Inc., an Idaho corporation, Plaintiffs-Respondents,

v.

INDIAN SPRINGS LAND INVESTMENT, LLC; Ron Bitton; Professional Escrow Services; The Everett & Ardis Mc Kinney Revocable Trust u/i/d September 25, 1998; AICO Recreational Properties, LLC; Recreational Properties A & B, a partnership; John K. Baker & Julie Baker, husband and wife, Everett W. McKinney & Ardis E. McKinney, husband and wife, Todd W. Andersen and Penny L. Andersen, husband and wife, Terry W. Andersen and Rosanna Andersen Trustees of the Terry W. Andersen and Rosanna Andersen Living Revocable Trust dated February 1, 2001; Glen C. Mahoney and Jane Doe Mahoney, husband and wife, John Does and Jane Does 1-10, Defendants,

and

Terry W. Andersen and Rosanna Andersen, husband and wife, Defendants-Appellants.

No. 34623.

**Supreme Court of Idaho
July 21, 2009**

Rehearing Denied Sept. 3, 2009.

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DEPARTMENT OF
WATER RESOURCES

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[147 Idaho 741] Terry and Rosanna Andersen, Pocatello, pro se appellants argued.

Racine, Olson, Nye & Budge, & Bailey, Pocatello, for respondents. Scott J. Smith argued.

BURDICK, Justice.

This appeal arises from an action filed by Respondent Indian Springs, LLC against various defendants to foreclose a real estate mortgage on the property known as Indian Springs Natatorium, and to collect on the promissory note secured by the mortgage. Appellants Terry and Rosanna Andersen, acting *pro se* on behalf of themselves, individually; Recreational Properties A & B, LLC; Recreational Properties A & B, a partnership; the Terry W. Andersen and Rosanna Andersen Living Revocable Trust; and the Andersen Living Trust, appeal from the district court's award of summary judgment in favor of Indian Springs. The Andersens also appeal from the district court's denial of their post-summary judgment motions. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 2, 1996, D.M. and Shirley Thornhill (the Thornhills) entered into an agreement to sell the real property known as Indian Springs Natatorium to Terry and Rosanna Andersen (the Andersens) and John and Julie Baker (the Bakers), d/b/a Recreational Properties A & B, a partnership, (hereafter A & B Partnership) for a sum of \$750,000. The buyers made a down payment of \$100,000 on the property, and Terry Andersen and John Baker, d/b/a A & B Partnership, signed a promissory note as security for repayment of the remaining \$650,000. This note was later guaranteed by Terry Andersen as Trustee of the Andersen Living Revocable Trust. Although the note was not interest-bearing, it provided that in the event of default the entire unpaid balance would accrue interest at 12% per annum. The note also provided for a late charge of 5% of the amount of each delinquent payment. That same day, the buyers signed a real estate mortgage on the property to secure the note,

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[147 Idaho 742] which was later recorded in Power County. The mortgagors were listed as " Terry W. Andersen, Trustee of Andersen Living Trust, and John K. Baker and Julie A. Baker, husband and wife." At closing, the property was deeded to Terry W. Andersen, as trustee of the Andersen Living Trust, and the Bakers. Indian Springs claims the buyers requested that the property be deeded this way. However, the Andersens argue that A & B was erroneously omitted from the deeds.^[1] The Andersens claim they were never sent a copy of the deeds and, therefore, were not aware of the omission until later.

On January 23, 1998, the Bakers transferred their interest in the property by warranty deed to AICO Recreational Properties, LLC (AICO).^[2] Terry Andersen is the manager of AICO. On February 24, 1998, Terry Andersen, acting as trustee,^[3] also transferred his interest in the property by quitclaim deed to AICO. Both transfers were recorded in Power County. Despite transferring their interests in the property, the Andersens and the Bakers were still obligated to pay the remaining balance on the property under the terms of the promissory note and real estate mortgage.

Upon learning of these transactions, the Thornhills sent Terry Andersen a notice of default for his attempted transfer of ownership interest in the property to AICO. Pursuant to the terms of the sales agreement, the buyers were required to obtain written permission from the Thornhills prior to selling any portion of the premises.^[4] The Thornhills later discovered that AICO had already mortgaged the property to a third party. The pertinent facts are as follows. On or about September 30, 1997, Todd Andersen, d/b/a AICO, and the Andersen Living Revocable Trust borrowed \$149,720.69 from Everett and Ardis McKinney (the McKinneys), and gave the McKinneys a real estate mortgage on the property to secure the debt. This mortgage was recorded in Power County on January 26, 1998. Shortly thereafter, the same parties borrowed an additional \$40,000 from the McKinneys and recorded a second mortgage on the property in Power County on April 1, 1998. In 2000, the McKinneys began making payments toward the Andersens' note and mortgage with the Thornhills. However, Todd Andersen, d/b/a AICO, and the Andersen Living Revocable Trust later defaulted on their payments to the McKinneys, and on March 6, 2001, a Decree of Foreclosure and Order of Sale was entered against them. Shortly thereafter on March 29, 2001, AICO filed for Chapter 11 bankruptcy, which was converted to a Chapter 7 bankruptcy. The Bankruptcy Court later ordered that AICO abandon its interest in the real property.

The McKinneys made regularly scheduled payments toward the Andersens' note and mortgage until March 2003, but thereafter, payments were sporadic. On February 24, 2005, the Thornhills demanded that all sums due under the note and mortgage were payable in full. However, payment was never received.^[5] The Thornhills subsequently assigned their interests in the note and the mortgage to Respondent Indian Springs, LLC (Indian Springs) on September 27, 2005. The assignment was recorded in Power County. On October 21, 2005, Indian Springs filed a complaint against various defendants to collect on the promissory note and to foreclose on the mortgage. Only the Andersens, individually; A & B Partnership; the Terry W. Andersen and Rosanna Andersen Living Revocable Trust; and the Andersen

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[147 Idaho 743] Living Trust responded to the complaint through counsel. On February 10, 2006, the district court entered default judgment against all defendants who had not answered.

On October 20, 2006, Indian Springs moved for summary judgment. The Andersens' counsel filed a motion in opposition on behalf of A & B Partnership and the Andersen Living Revocable Trust.

On June 28, 2007, the district court granted Indian Springs's motion for summary judgment. In its order, the district court quieted title to the property in Indian Springs and awarded damages against A & B Partnership; Terry Andersen as trustee of the Andersen Living Revocable Trust; and the Andersens and the Bakers, in their individual capacities, for \$270,637.50 plus interest, along with tax payments of \$20,582.46.

On July 26, 2007, the Andersens, acting *pro se*, filed a Motion for Reconsideration, Joining of Indispensible Parties, and New Trial. The Andersens requested that the district court reconsider its award of summary judgment; join at least nine other indispensable parties, including Recreational Properties A & B, LLC (A & B LLC); and permit the Andersens to amend the pleadings to add a counterclaim for damages against D.M. Thornhill and Indian Springs in the amount of \$870,000. After the Andersens filed this motion, their attorney requested leave to withdraw. The district court granted his request on August 9, 2007. Then on September 19, 2007, the district court denied the Andersens' motion for reconsideration.

On September 20, 2007, the Andersens filed a Motion to Dismiss Non-Defaulting Parties. A hearing on the motion was held on November 9, 2007, at which time the district court denied their motion. Then on November 19, 2007, the Andersens filed a Motion for Title Clarification, Rescission of Deeds, and Dismissal of Case. The district court also denied this motion at hearing. The Andersens now appeal from the district court's award of summary judgment in favor of Indian Springs and the court's denial of their post-summary judgment motions.

II. ANALYSIS

On appeal, the Andersens argue the district court erred in granting summary judgment because genuine issues of material fact remain as to title and damages. The Andersens also argue the district court erred by denying their post-summary judgment motions, including their Motion for Reconsideration, Joining of Indispensible Parties, and New Trial; Motion to Dismiss Non-Defaulting Parties; and Motion for Title Clarification, Rescission of Deeds, and Dismissal of Case.

Indian Springs, however, argues this appeal should be dismissed as to all claims made on behalf of the limited liability company, the partnership, and the two trusts because the Andersens are prohibited from representing the business entities and the trusts in a *pro se* capacity. In addition, Indian Springs contends that we should dismiss all claims the Andersens make as to their individual ownership interest in the property because they did not preserve the issue for appeal. Indian Springs also argues the Andersens, in their individual capacities, do not have standing on appeal to contest the district court's denial of their motion for reconsideration because they failed to object to Indian Springs's motion for summary judgment before summary judgment was entered. Finally, Indian Springs argues the district court properly granted summary judgment and properly denied the Andersens' post-summary judgment motions. We will begin by addressing Indian Springs's arguments as to why certain claims should be dismissed, and then we will address the Andersens' remaining claims on appeal.

A. The Andersens may not represent A & B Partnership, A & B LLC, the Terry W. Andersen and Rosanna Andersen Living Revocable Trust, or the Andersen Living Trust in a *pro se* capacity.

1. *The Andersens are prohibited from representing A & B Partnership and A & B LLC in a pro se capacity under Idaho law.*

For the first time on appeal, Indian Springs argues the Andersens are prohibited

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[147 Idaho 744] from representing A & B Partnership or A & B LLC in a *pro se* capacity. Indian Springs asserts that the Andersens' representation of these business entities constitutes the unauthorized practice of law. Generally, we will not consider issues raised for the first time on appeal. However, the Andersens did not represent the partnership or the limited liability company until this appeal; ^[6] accordingly, this is Indian Springs's first opportunity to raise the issue. Therefore, we will consider Indian Springs's argument.

Idaho Code § 3-104 sets forth that no person shall practice law in the State of Idaho without first having been admitted to practice by the Idaho Supreme Court. In order to protect the public against the unauthorized practice of law, the Idaho Legislature has provided laws and provisions under Title 3, Chapter 4 of the Idaho Code governing the granting of the privilege to practice law and its subsequent use, control, and regulation. I.C. § 3-401 *et seq.* The Board of Commissioners of the Idaho State Bar (Board) was formed to carry out the provisions of the Act. I.C. § 3-402. The Board is responsible for investigating and making recommendations upon any matter relating to the practice of law per request of the governor, the Idaho Supreme Court, or the legislature. I.C. § 3-418.

Although Indian Springs argues there is no Idaho case law on point, this Court has previously held that a *pro se* appellant may not represent a business entity. The issue was first raised in *White v. Idaho Forest Indus.*, 98 Idaho 784, 572 P.2d 887 (1977). In that case, White, an unemployment compensation claimant, appealed from an Industrial Commission order denying him benefits. 98 Idaho at 785, 572 P.2d at 888. Throughout the course of the proceedings, Idaho Forest Industries was represented by the Gibbons Company. *Id.* at 788, 572 P.2d at 891. The Gibbons Company prepared and signed pleadings, introduced evidence, and examined witnesses. *Id.* During oral argument, it was brought to the Court's attention that the employee who had performed these legal tasks for the Gibbons Company was not a licensed attorney. *Id.* The Court determined that if this was true, there may be a violation of I.C. § 3-410 and its prohibition against the unlicensed practice of law. *Id.* The Court noted it was irrelevant that the practice was before an administrative body instead of a judicial body because the rules against the unauthorized practice of law apply equally to both. *Id.* Accordingly, the Court directed the Board to conduct a complete investigation

into the matter. *Id.*

The Board released its findings in a letter addressed to the Idaho Industrial Commission dated March 3, 1980. The letter stated: "[T]he Board is of the opinion that except for individuals who might always represent themselves, business entities who appear before the Industrial Commission or a Referee should be represented by attorneys in good standing and admitted to practice before the Supreme Court of the State of Idaho [or by the highest court of the state in which they are admitted to practice law]." Letter from John Simko, Comm'r of the Idaho State Bar, to Will Defenbach, Indus. Comm'n (Mar. 3, 1980). The Court later referenced this letter in *Kyle v. Beco Corp.*, 109 Idaho 267, 271, 707 P.2d 378, 382 (1985), thereby formally adopting the rule that "business entities (other than individuals) must be represented by attorneys" before the Idaho Industrial Commission. The rule applies equally to the practice of law before a judicial body. See *White v. Idaho Forest Indus.*, 98 Idaho 784, 788, 572 P.2d 887, 891 (1977) (citing 2 A.L.R.3d 724 (1965)). In sum, the law in Idaho is that a business entity, such as a corporation, limited liability company, or partnership, must be represented

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[147 Idaho 745] by a licensed attorney before an administrative body or a judicial body.

Therefore, we hold the Andersens are prohibited from representing A & B Partnership and A & B LLC in a *pro se* capacity. Accordingly, we dismiss all claims the Andersens make on behalf of the partnership and the limited liability company, as these business entities have not made an appropriate appearance or argument before the Court.

2. The Andersens are prohibited from representing the Terry W. Andersen and Rosanna Andersen Living Revocable Trust or the Andersen Living Trust in a pro se capacity.

Indian Springs also argues for the first time on appeal that the Andersens are prohibited from representing the Terry W. Andersen and Rosanna Andersen Living Revocable Trust or the Andersen Living Trust in a *pro se* capacity.^[7] This issue is a matter of first impression for the Court. Under Idaho law, a trust is not a separate legal entity; rather, a trust is no being at all. *State v. Cosgrove*, 36 Idaho 278, 284, 210 P. 393, 395 (1922). The trust property is owned by the trustee. "A trustee is a man who is the owner of the property and deals with it as principal, as owner and as master, subject only to an equitable obligation to account to some person to whom he stands in the relation of trustee, who are his *cestuis que trustent*." *Id.* Thus, the only difference between an individual and a trustee owning property is that the trustee is also subject to an equitable obligation to account to the beneficiary. Since we allow individuals to represent their property interests in a *pro se* capacity, it would appear we ought to allow trustees to represent their ownership interests in property *pro se* as well. However, this conclusion is incorrect. It is fairly well-established that a trustee's duties in connection with his or her office do not include the right to present an argument *pro se* in the courts. 76 Am.Jur.2d *Trusts* § 606 (2005); see also *C.E.*

Pope Equity Trust v. U.S., 818 F.2d 696, 697-98 (9th Cir.1987); *Florida Bar v. Hughes*, 824 So.2d 154, 155-59 (Fla.2002); *Back Acres Pure Trust et al. v. Fahnlander et al.*, 233 Neb. 28, 443 N.W.2d 604, 605 (1989). Although a non-attorney may appear *pro se* on his own behalf, that privilege is personal to him. See *C.E. Pope Equity Trust*, 818 F.2d at 697. By representing the trust *pro se*, the trustee would be representing the interests of others, i.e. the beneficiaries, and would therefore be engaged in the unauthorized practice of law. 76 Am.Jur.2d *Trusts* § 606 (2005). In the instant case, the record is devoid of evidence showing the Andersens are the beneficial owners of the claims asserted by the trusts.^[8] In fact, there is no evidence in the record verifying the existence of the trusts. Assuming the Andersens are even the trustees, they are engaging in the unauthorized practice of law in violation of I.C. § 3-410. Accordingly, we dismiss all claims the Andersens make on behalf of the Terry W. Andersen and Rosanna Andersen Living Revocable Trust and the Andersen Living Trust.

B. The Andersens do not claim an individual ownership interest in the property.

Next, Indian Springs argues the Andersens may not claim an individual interest in the property on appeal since the Andersens failed to challenge the district court's determination below that they have no ownership interest in the property. However, the Andersens do not argue they have an individual ownership interest in the property; rather,

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[147 Idaho 746] they argue A & B Partnership holds title to the property and that the partnership was erroneously omitted from the deeds. Therefore, Indian Springs's argument on this point is irrelevant.

C. The Andersens' failure to challenge Indian Springs's motion for summary judgment in their individual capacities does not preclude them from appealing the district court's award of summary judgment.

Finally, Indian Springs argues the Andersens, in their individual capacities, do not have standing to contest the district court's award of summary judgment because the Andersens failed to challenge Indian Springs's motion for summary judgment. After Indian Springs moved for summary judgment, the Andersens filed an objection to summary judgment on behalf of themselves as trustees of the Terry W. Andersen and Rosanna Andersen Living Revocable Trust and on behalf of A & B Partnership. However, after the district court awarded summary judgment, only the Andersens, in their individual capacities, filed a motion for reconsideration.

For purposes of summary judgment, the moving party bears the initial burden of proving the absence of material fact issues. *Sherer v. Pocatello School Dist. No. 25*, 143 Idaho 486, 489, 148 P.3d 1232, 1235 (2006). Only then does the burden shift to the non-moving party to come forward with sufficient evidence to create a genuine issue of material fact. *Id.* at 489-90, 148 P.3d at 1235-

36. When reviewing an order for summary judgment, we apply this same standard of review. *P.O. Ventures, Inc. v. Loucks Family Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007). Accordingly, a non-moving party is not precluded from appealing an order of summary judgment just because the non-moving party failed to object to the motion below. The moving party may have failed to meet its initial burden, thereby rendering summary judgment inappropriate. Therefore, we hold the Andersens are not precluded from appealing the district court's award of summary judgment.

D. The Andersens' remaining claims on appeal

1. The district court's award of summary judgment

a. Standard of Review

When reviewing an order for summary judgment, this Court applies the same standard of review that was used by the trial court in ruling on the motion for summary judgment. See *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 307, 160 P.3d 743, 746 (2007). " Summary judgment is proper when ' 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.' " *Id.* (quoting I.R.C.P. 56(c)). " If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review." *Id.*

As set forth above, the burden is on the moving party to prove there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. *Cafferty v. State, Dep't of Transp., Div. of Motor Vehicle Servs.*, 144 Idaho 324, 327, 160 P.3d 763, 766 (2007). This Court liberally construes all disputed facts in favor of the non-moving party, and all reasonable inferences drawn from the record will be drawn in favor of the non-moving party. *Cristo*, 144 Idaho at 307, 160 P.3d at 746. If reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented, then summary judgment is improper. *McPheters v. Maile*, 138 Idaho 391, 394, 64 P.3d 317, 320 (2003).

b. The district court did not err in quieting title to the property to Indian Springs on summary judgment.

First, the Andersens argue the district court erred in granting summary judgment because genuine issues of material fact remain as to which party holds title to the property. The Andersens are concerned about this issue for the purpose of redemption

court to quiet title to the property. The Andersens objected, arguing A & B Partnership was erroneously omitted from the original deeds and was the true title holder to the property. The district court found that when the Andersens and the Bakers admitted they did not claim an interest in the property, so did A & B Partnership. The court viewed A & B Partnership's attempt to claim an interest in the property " as an unsupportable means to simply postpone the inevitable determination that neither the Andersens, Bakers, A & B nor AICO have an interest in the property." Accordingly, the district court quieted title to the property to Indian Springs.

We will not consider the Andersens' argument regarding title. The Andersens only claim A & B has an ownership interest in the property. As set forth above, the Andersens are prohibited from representing the interests of the business entities, including the partnership, in a *pro se* capacity. See *Kyle v. Beco Corp.*, 109 Idaho 267, 271, 707 P.2d 378, 382 (1985); *White v. Idaho Forest Indus.*, 98 Idaho 784, 788, 572 P.2d 887, 891 (1977). Therefore, we affirm that portion of the district court's award of summary judgment quieting title to Indian Springs.

We note, however, that the district court erred in determining A & B Partnership could not claim an ownership interest in the real property because the Andersens and the Bakers did not claim individual ownership interests in the property. The Andersens and the Bakers were deemed to have admitted that they had no individual ownership interests in the property through their failure to respond to Indian Springs's discovery requests. The partnership, however, specifically denied Indian Springs's request for admission that it did not claim an ownership interest in the real property. Although the Andersens and the Bakers were partners of A & B Partnership, their individual ownership interests in the property are separate and distinct from the partnership's interest. Nevertheless, we find that the district court's error is harmless since the Andersens may not represent the partnership *pro se*.

The Andersens attempt to save their argument that the partnership is the true title holder to the property in asserting the district court erred by refusing to join A & B LLC as an indispensable party. A & B LLC is listed on the footnote of the warranty deed.^[9] The Andersens argue that because A & B LLC is the only remaining partner of Recreational Properties A & B, the limited liability company should be joined to pursue the partnership's claim to title to the property.

We review the district court's determination that A & B LLC was not an indispensable party under an abuse of discretion standard. *Utter v. Gibbins*, 137 Idaho 361, 366, 48 P.3d 1250, 1255 (2002). In considering a claim of an abuse of discretion, we apply a three-factor test that focuses upon: " (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Id.*

We hold that the district court did not abuse its discretion in finding that A & B LLC was not an indispensable party. The crux of the Andersens' argument is that A & B LLC is the remaining

partner of A & B Partnership. However, the operating agreement for A & B Partnership does not list the limited liability company as a partner-only the Andersens and the Bakers. Therefore, we also affirm the district court's denial of their motion to join an indispensable party.

c. The district court did not err in granting summary judgment to Indian Springs on the issue of damages.

Next, the Andersens argue the district court erred in granting summary judgment because genuine issues of material fact remain

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[147 Idaho 748] as to the principal amount owing under the promissory note. The Andersens assert Indian Springs is judicially estopped from arguing the principal amount owing is more than \$188,000 based on a written statement made by D.M. Thornhill during the bankruptcy proceedings that the principal amount owing as of April 12, 2002 was only \$254,000. The bankruptcy objection was signed and prepared by Lyle Eliassen, the Thornhills' attorney. The Andersens assert that if the principal amount owing under the note as of April 2002 was \$254,000 and Indian Springs's records reflect that \$66,000 was paid toward the note between April 2002 and June 2003, then the remaining balance on the note as of June 2003 was only \$188,000. Yet, in 2006, at the time of summary judgment, Indian Springs claimed \$270,637.50 was the principal amount owing under the note. As such, the Andersens assert there is a genuine issue of material fact as to the amount owing under the note.

Indian Springs, however, argues we should not consider the Andersens' claim of judicial estoppel because there is no copy of the bankruptcy objection in the record on appeal. In the Andersens' Second Response to Motion for Summary Judgment, the Andersens asserted that a copy of the bankruptcy objection was attached to Terry Andersen's affidavit, which was filed in conjunction with the Andersens' initial Response and Objection to Indian Springs's Motion for Summary Judgment. Although the bankruptcy objection is not attached to Terry Andersen's affidavit in the record on appeal, we were able to locate a copy of the document in the record. The bankruptcy objection was included in the "exhibits" submitted by the Andersens in support of their motion for reconsideration. The district court did not admit these documents into evidence but nevertheless allowed them to be included in the record for review on appeal. It appears that the bankruptcy objection was attached to Terry Andersen's affidavit below, but that the Andersens inadvertently forgot to attach the objection when they augmented the record to include Terry Andersen's affidavit. As such, we will treat the bankruptcy objection as having been considered by the district court in ruling on summary judgment.

Indian Springs further argues the Andersens have failed to satisfy the requirements necessary for the application of judicial estoppel. "The doctrine of judicial estoppel prohibits 'a party from assuming a position in one proceeding and then taking an inconsistent position in a subsequent

proceeding.' " *Riley v. W.R. Holdings, LLC*, 143 Idaho 116, 121-22, 138 P.3d 316, 321-22 (2006) (quoting *A & J Constr. Co. v. Wood*, 141 Idaho 682, 688, 116 P.3d 12, 18 (2005)). " Idaho courts may apply the doctrine even if the prior proceeding was a bankruptcy action." *Riley*, 143 Idaho at 122, 138 P.3d at 322. Generally when a litigant, through sworn statements, " obtains a judgment, advantage or consideration from one party, he will not thereafter, by repudiating such allegations and by means of inconsistent and contrary allegations or testimony, be permitted to obtain a recovery or a right against another party, arising out of the same transaction or subject matter." *Loomis v. Church*, 76 Idaho 87, 93-94, 277 P.2d 561, 565 (1954). " Because judicial estoppel is an equitable doctrine existing to protect the dignity of the judicial process it is ' invoked by a court at its discretion.' " *Riley*, 143 Idaho at 122, 138 P.3d at 322 (quoting *Sword v. Sweet*, 140 Idaho 242, 252, 92 P.3d 492, 502 (2004)).

Before addressing the issue of judicial estoppel, it is helpful to understand how Indian Springs arrived at \$270,637.50 as being the principal amount owing. In its original complaint filed October 21, 2005, Indian Springs claimed the principal amount owing under the note was \$248,000.^[10] Indian Springs also claimed \$248,000 as the principal amount owing in its motion for summary judgment. However, in its first reply to the motion for summary judgment, Indian Springs increased its request for damages, claiming \$278,637.50 was the principal amount owing under the note. In support of its claim, Indian Springs attached Lyle Eliassen's

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[147 Idaho 749] affidavit, in which Eliassen verified that he had made a full review of all receipts, copies of checks received, and records to date and that \$278,637.50 was the principal amount owing under the note. Indian Springs later reduced this amount to \$270,637.50 based on evidence that \$8,000 was paid toward the principal balance after the action was commenced. The district court found that no genuine issue of material fact remained as to the amount owing under the note and accordingly entered damages against the Andersens for the principal amount of \$270,637.50. The district court did not address the Andersens' argument for judicial estoppel.

Although the district court erred by failing to address the Andersens' argument for judicial estoppel, the error was nevertheless harmless. As set forth above, the party asserting judicial estoppel must show that the sworn statement at issue was used to obtain a judgment, advantage, or consideration from another party. *Loomis*, 76 Idaho at 93-94, 277 P.2d at 565. Here, the Andersens failed to introduce any evidence that the Thornhills, as the assignors of Indian Springs's interest, ever obtained a " judgment, advantage, or consideration" from D.M. Thornhill's statement during the bankruptcy proceeding. See *id.* Therefore, we affirm the district court's award of summary judgment as to damages.

2. *The district court did not abuse its discretion in denying the Andersens' motion for reconsideration.*

Next, the Andersens argue the district court erred in denying their motion for reconsideration of the court's award of summary judgment. The Andersens argue the district court overlooked evidence that the Andersens made a tender offer for \$225,000 that was rejected by Indian Springs. Accordingly, the Andersens argue the district court should have decreased its award of damages to Indian Springs by \$225,000 under I.C. § 28-3-603(2). The Andersens claim their tender offer is contained in their Notice of Offer to Purchase Note and Mortgage, which was filed on December 6, 2006 in conjunction with the filing of their first objection to Indian Springs's motion for summary judgment. Attached to the notice is a document entitled " Offer to Purchase Note & Mortgage," under which Ecometrix Division Meditech, Inc. agreed to purchase the Andersens' interest in the note for an undisclosed amount up to \$225,000, subject to certain conditions.

" The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court." *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). We consider: " (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Lettunich v. Lettunich*, 145 Idaho 746, 749, 185 P.3d 258, 261 (2008).

Pursuant to I.C. § 28-3-603(2), " [i]f tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, there is discharge, to the extent of the amount of the tender, of the obligation of an indorser...." " Tender" is defined by this Court as follows:

[T]he unconditional offer of a debtor to the creditor of the amount of his debt. This means the real amount of the debt as fixed by the law, and the purpose of the law of tender is to enable the debtor to relieve himself of interest and costs and to relieve his property of encumbrance by offering his creditor all that he has any right to claim. This does not mean that the debtor must offer an amount beyond reasonable dispute, but it means the amount due,-actually due.

Dohrman v. Tomlinson, 88 Idaho 313, 318, 399 P.2d 255, 258 (1965) (quoting *Kelley v. Clark*, 23 Idaho 1, 12, 129 P. 921, 924 (1912)). The offer to pay must be accompanied by a present manifest ability to pay. *Pollard Oil Co. v. Christensen*, 103 Idaho 110, 116, 645 P.2d 344, 350 (1982). " [A]s a general matter a tender must be unconditioned."

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[147 Idaho 750] *Brinton v. Haight*, 125 Idaho 324, 329, 870 P.2d 677, 682 (Ct.App.1994).

Here, the Andersens' so-called tender offer does not constitute a tender of payment under Idaho law. The Andersens never offered to pay Indian Springs the real amount of the debt. See *Dohrman*, 88 Idaho at 318, 399 P.2d at 258. Rather, the Andersens granted Equinox the exclusive right to purchase the note up to a maximum amount of \$225,000. Furthermore, the offer was not unconditional. See *Brinton*, 125 Idaho at 329, 870 P.2d at 682. Equinox only agreed to pay up to

\$225,000 for the note if certain conditions were met, including, but not limited to: (1) a court determination as to the final amount due and owing, (2) a release of security on the portion of the property known as "house property," (3) a stipulation between the parties or a court ruling that the note and mortgage are a valid lien on the property and the house property, and (4) a stipulation between the parties or a court ruling that the release provisions in the sales agreement are valid. Thus, we affirm the district court's denial of the Andersens' motion for reconsideration.

3. *The district court did not abuse its discretion in denying the Andersens' motion to amend the pleadings to add a counterclaim for damages.*

The Andersens also argue the district court erred in denying their post-summary judgment motion to amend the pleadings to add a counterclaim for damages against the Thornhills and Indian Springs in the amount of \$870,000. ^[11] In support of their motion, the Andersens argued that D.M. Thornhill failed to disclose certain problems relating to the property before the parties entered into the sales agreement, causing the Andersens to incur \$690,000 in expenses. The Andersens also argued that D.M. Thornhill fraudulently converted \$180,000 in personal property. The district court denied the Andersens' motion, finding it to be without merit, irrelevant, and untimely.

Idaho Rule of Civil Procedure 15(a) provides that leave to amend a pleading shall be freely given when justice so requires. "A trial court's decision to deny a motion to amend a pleading is reviewed by this Court under an abuse of discretion standard." *Silver Creek Computers, Inc. v. Petra, Inc.*, 136 Idaho 879, 881, 42 P.3d 672, 674 (2002). To determine whether the trial court abused its discretion, we look at: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Id.*

Although the Andersens challenge the district court's denial of their motion on the basis that it was meritless and irrelevant, the Andersens have not challenged the court's alternative basis for denying the motion as being untimely. In *Andersen v. Professional Escrow Services, Inc.*, 141 Idaho 743, 118 P.3d 75 (2005), a prior appeal involving the Andersens, we held: "When a decision is 'based upon alternative grounds, the fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the other grounds.'" 141 Idaho at 746, 118 P.3d at 78 (quoting *MacLeod v. Reed*, 126 Idaho 669, 671, 889 P.2d 103, 105 (Ct.App.1995)). Here, we find that the district court's decision to deny the Andersens' motion to add a counterclaim may be sustained on the ground of untimeliness. The only reason the Andersens provide for waiting to add a counterclaim is that they thought title was the more important issue until after the court's entry of summary judgment. The motion was not based on newly discovered evidence, but rather on facts known to the Andersens even before the action was commenced. Furthermore, the district court determined that the Andersens' motion to amend their complaint was "simply an additional attempt by [the Andersens] to circumvent

[147 Idaho 751] the summary judgment decision previously entered by the [district court]." This Court has held that if a trial court finds bad faith or a dilatory motive on the part of the movant, leave to amend the pleadings should not be granted. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 272, 561 P.2d 1299, 1305 (1977). Therefore, we affirm the district court's denial of the Andersens' motion to amend the pleadings to add a counterclaim for damages.

4. *The Andersens failed to provide an adequate record to substantiate their claim that the district court erred in denying their motion to dismiss the non-defaulting parties.*

The Andersens argue the district court erred in denying their post-summary judgment motion to dismiss the non-defaulting parties. A hearing on the motion was held on November 9, 2007, at which time the district court denied the motion. However, the Andersens have failed to include a copy of the hearing transcript or the district court's written ruling in the record on appeal. This Court has held that "[t]he appellant has the obligation to provide a sufficient record to substantiate his or her claims on appeal." *W. Cmty. Ins. Co. v. Kickers, Inc.*, 137 Idaho 305, 306, 48 P.3d 634, 635 (2002). In the absence of a record that is adequate to review the Andersens' claims, we will not presume error below. See *id.* Accordingly, we affirm the district court's denial of the Andersens' motion to dismiss the non-defaulting parties.

5. *The Andersens also failed to provide an adequate record to substantiate their claim that the district court erred in denying their motion for title clarification, rescission of the deeds, and dismissal of the case.*

Finally, the Andersens argue that the district court erred in denying their post-summary judgment motion for title clarification, rescission of the deeds, and dismissal of the case. A hearing on the motion was held on January 23, 2008, at which time the district court denied the Andersens' motion. Again, the Andersens have failed to include a copy of the hearing transcript for this Court's review. As set forth above, "[t]he appellant has the obligation to provide a sufficient record to substantiate his or her claims on appeal." *Id.* Therefore, we affirm the district court's denial of the motion.

E. Indian Springs is entitled to costs and attorney fees on appeal.

Indian Springs requests attorney fees on appeal pursuant to the express terms of the sales agreement,^[12] promissory note, and real estate mortgage. Idaho Rule of Civil Procedure 54(e)(1) states that attorney fees may be awarded when provided by contract. Here, the promissory note states: " In case suit is instituted for the collection of this note, or any portion hereof, or in case this note, or any portion hereof be collected by an attorney, I, we, or either of us, promise to pay a reasonable sum as an attorney's fee in such suit or action or for such collection." The real estate mortgage also states that in the case of foreclosure, the mortgagees are entitled to " such sum as

the court may adjudge reasonable as an attorney's fee to be allowed the plaintiff...." Although Indian Springs was not a party to these contracts, the Thornhills assigned their interest in the promissory note and real estate mortgage to Indian Springs. Through this assignment, Indian Springs is entitled to attorney fees on appeal under the note and mortgage.

III. CONCLUSION

For the reasons set forth above, we affirm the district court's award of summary judgment in favor of Indian Springs. We also affirm the district court's denial of the Andersens' post-summary judgment motions. We award Indian Springs attorney fees on appeal pursuant to the promissory note and

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[147 Idaho 752] real estate mortgage. Costs to Indian Springs.

Chief Justice EISMANN and Justices J. JONES, HORTON and KIDWELL, Pro Tem, concur.

Notes:

[1] The property was deeded by warranty deed and by corporate warranty deed.

[2] In 1996, AICO was formed in Colorado as a limited liability company. Later that year, Terry Andersen registered AICO in Idaho as a foreign limited liability company. Terry Andersen is the manager of AICO Idaho. The Andersens claim that AICO Colorado later joined its interests with other investors to form Recreational Properties A & B, LLC and was subsequently dissolved.

[3] Terry Andersen signed the quitclaim deed as "trustee," but did not specify which trust he represented.

[4] This restriction on sale was not included in the mortgage. We are not called upon to determine whether the provisions of the sales agreement continued to be in effect upon exchange of the deed and mortgage and express no opinion on the matter.

[5] The demand letter was addressed to Terry Andersen, as manager of AICO.

[6] The Andersens did not act *pro se* until after summary judgment was entered. Before that time, A & B Partnership was represented by counsel, and A & B LLC was never a party to the action. Furthermore, the Andersens' post-summary judgment motions were not filed on behalf of the partnership or the limited liability company. The motion for reconsideration was filed on behalf of "Terry and Rosanna Andersen, Pro Se" ; the motion to dismiss non-defaulting parties was filed on

behalf of " Terry and Rosanna Andersen, defendants in the above captioned action" ; and the motion for title clarification, rescission of the deeds, and dismissal of the case was filed on behalf of " Rosanna Andersen, pro se."

[7] Again, this is Indian Springs's first opportunity to raise the issue as the Andersens did not represent the trusts in a *pro se* capacity until appeal. Therefore, we will consider Indian Springs's argument.

[8] It should be noted that in their Memorandum in support of Motion to Dismiss Non-Defaulting Parties, the Andersens asserted they have " no knowledge" of an Andersen Living Trust. However, Terry Andersen signed the real estate mortgage as trustee of the Andersen Living Trust. In addition, in their Motion for Reconsideration, Joining of Indispensible Parties, and New Trial, the Andersens asserted that the Terry W. Andersen and Rosanna Andersen Living Revocable Trust" was strictly limited to the direct offspring of the Andersens as succeeding trustees and beneficiaries," and that when Andersen signed documents for said trust he signed " usually as trustee indicating he was a fiduciary acting on behalf of others."

[9] The warranty deed is footnoted as follows: " Warranty Deed-Thornhill to Recreational Properties A & B L.L.C." This is the only place A & B LLC is listed on the warranty deed.

[10] Indian Springs also claimed \$248,000 was the principal amount owing under the note in its amended complaint.

[11] On appeal, the Andersens argue that because their proposed counterclaim for damages (\$870,000) exceeded Indian Springs's claim for damages (\$326,850.53), the court was precluded from entering summary judgment. The Andersens do not cite to case law in support of this proposition.

[12] As previously indicated, we are not called upon to determine whether the provisions of the sales agreement continued in effect upon exchange of the deed and mortgage and express no opinion on the matter. Because Indian Springs is entitled to attorney fees under the promissory note and the real estate mortgage, there is no need for us to address whether Indian Springs is entitled to attorney fees under the sales agreement as well.

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220 P.3d 1073 (Idaho 2009)

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CITIBANK (SOUTH DAKOTA), N.A., Plaintiff-Respondent,

v.

Miriam G. CARROLL, Defendant-Appellant.

No. 35053.

Supreme Court of Idaho, Boise

November 25, 2009

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[148 Idaho 255] Miriam G. Carroll, Kamiah, appellant pro se.

Stroock & Stroock & Lavan LLP, Los Angeles, California, and Hawley Troxell Ennis & Hawley LLP, Boise, for respondent. Sheila R. Schwager argued.

J. JONES, Justice.

This is an appeal from the district court's grant of summary judgment against Miriam Carroll in Citibank (South Dakota), N.A.'s collection action. We affirm.

I.

Factual and Procedural Summary

Carroll requested and received a credit card from Citibank in 1999, and she regularly used the card until December 2004. Carroll had a zero balance on her account as of September 9, 2003. However, between December 22, 2003, and February 12, 2004, Carroll transferred balances in the amount of \$24,800 from other accounts to her Citibank account. Carroll continued to make the minimum payment on her account during this time and immediately after the balance transfers. However, on November 29, 2004, Carroll made her last minimum payment on the account, making no payments after that date, despite the fact that her account had a balance due of \$20,884.30.

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On January 3, 2005, Citibank received a letter from Carroll that questioned the accuracy of her account balance but did not allege

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[148 Idaho 256] any specific charge that was in dispute.^[1] Citibank responded by letter on January 7, 2005, reminding Carroll that it had engaged in a lawful extension of credit under federal and state law, Carroll was obligated to pay her account balance according to the terms of the credit card agreement, there was a balance due and owing, and the account was closed as the result of her default. Carroll never responded to Citibank's letter and made no further payments on her account.

As a result of Carroll's nonpayment, Citibank filed suit against her seeking recovery of the account balance, plus interest and attorney fees. Carroll answered pro se, asserting the existence of billing errors in the account and denying that she was in default. Carroll also asserted a number of affirmative defenses, including violations of the Truth in Lending Act (TILA) and the Fair Credit Reporting Act (FCRA), and negligence per se. Citibank filed a motion for summary judgment, seeking a monetary judgment against Carroll on the account.

In opposition to Citibank's motion for summary judgment, Carroll abandoned her billing error and the TILA/FCRA arguments, instead focusing on the fact that Citibank was not licensed under the Idaho Collection Agency Act (ICAA) and that it lacked standing, i.e., that it had engaged in asset securitization, assigning the receivables from Carroll's account to a trust in order to sell account-backed securities, and no longer owned the account. Citibank argued that, despite the fact that it had assigned the receivables from Carroll's account to a trust, it was still the owner of the account and contractually entitled to collect the account balance. Citibank also argued that, because it was a national bank, it was governed by federal law and, thus, not required to register under the ICAA. After voluminous briefing and multiple hearings and depositions, the district court agreed, finding that Citibank was entitled to judgment as a matter of law.

Carroll immediately filed a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(B). Carroll again argued that Citibank was not a real party in interest as required by I.R.C.P. 17(a), Citibank misrepresented the amount of the debt, and evidence was improperly admitted and considered in support of the summary judgment motion. Carroll also filed a document, simply styled "Objections," in which she argued that the court should not have granted Citibank's summary judgment motion because it had not yet ruled on Carroll's motion to dismiss for lack of standing. Carroll also argued the I.R.C.P. 17(a) real-party-in-interest issue in her Objections document. Citibank, in turn, filed memoranda in opposition to Carroll's motions, and also moved for entry of judgment on the summary judgment motion, along with an award of attorney fees and costs.

Ultimately, after several attempts at continuance, extension of discovery, and other dilatory tactics

by Carroll, the district court denied Carroll's motion to reconsider and entered judgment for Citibank, along with an award of attorney fees and costs. The court also issued a protective order against further discovery because of Carroll's continuing requests for discovery and service of subpoenas throughout the pendency of the motion for reconsideration. Carroll filed a timely appeal to this Court.

II.

Issues on Appeal

The following issues are presented on appeal: (1) whether the issue of ICAA governance can properly be reviewed by this Court; (2) whether the district court erred in determining that Citibank was a real party in

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[148 Idaho 257] interest with standing to pursue the collection claim against Carroll; (3) whether Citibank is entitled to attorney fees and costs on appeal; and (4) whether Carroll's husband, David F. Capps, engaged in the unauthorized practice of law.

A.

Standard of Review

This Court exercises free review over constitutional issues, such as issues of standing and federal preemption. See *Fisk v. Royal Caribbean Cruises, Ltd.*, 141 Idaho 290, 292, 108 P.3d 990, 992 (2005). When reviewing the grant of a motion for summary judgment, this Court applies the same standard used by the district court in ruling on the motion. *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 556, 212 P.3d 982, 986 (2009). " Summary judgment is properly granted when ' 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 judgment as a matter of law.' " *Id.* (quoting Idaho R. Civ. P. 56(c)). The burden of demonstrating the absence of a genuine issue of material fact is on the moving party. *Id.* This Court must construe the record in favor of the nonmoving party, drawing all reasonable inferences in that party's favor. *Id.* If a court finds that reasonable minds could differ on conclusions drawn from the evidence presented, the motion must be denied. *Id.* However, the nonmoving party must respond to the motion with facts that specifically show there is an issue for trial; the showing of a mere scintilla of evidence will be insufficient to meet that burden. *Id.* The denial of a motion for reconsideration is reviewed for abuse of discretion. *Id.* at 560, 212 P.3d at 990.

B.

Throughout the proceedings in the district court and in her notice of appeal, Carroll argued that Citibank should not be able to collect her debt because it has failed to register with the State of Idaho, as required by the ICAA (Idaho Code sections 26-2221 to 2251). However, Carroll makes no mention of the ICAA argument in her opening brief. This Court will not consider an issue not "supported by argument and authority in the opening brief." *Jorgensen v. Coppedge*, 145 Idaho 524, 528, 181 P.3d 450, 454 (2008); see also Idaho App. R. 35(a)(6) ("The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to authorities, statutes and parts of the transcript and the record relied upon.") Here, because Carroll has failed to make any argument or cite any authority in her opening brief to support her argument on the application of the ICAA, this Court need not consider the applicability of the ICAA to Citibank and the credit obligation in question.

C.

Carroll argues that Citibank's action should be dismissed because it is not a real party in interest. Carroll has two bases for this contention. First, Carroll argues that Citibank's assignment of the receivables from her account to a trust, as a part of an asset-securitization transaction, deprives Citibank of the right to sue because an assignor is not a real party in interest. Second, Carroll argues that because Citibank is not entitled to retain the receivables if recovered, it has suffered no injury and therefore lacks standing to sue. As a result, Carroll argues that the district court should not have granted summary judgment to Citibank because its real-party-in-interest status and standing to bring suit present questions of material fact that should have been presented to a jury. Citibank, in turn, argues that it only made a partial assignment of its interest in Carroll's account and, because of its extensive role in controlling and servicing the account, it has a sufficient stake in the account to allow for a finding of real-party-in-interest status and standing as a matter of law. It also footnoted in its brief that despite the partial assignment, it was the sole owner of the account at the time this action was commenced because any interest of the trust had theretofore reverted back.

1.

"Every action shall be prosecuted in the name of the real party in interest." Idaho R. Civ. P. 17(a). A real party in interest is "one who has a real, actual, material, or substantial interest in the subject

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[148 Idaho 258] matter of the action." *Caughey v. George Jensen & Sons*, 74 Idaho 132, 134-35, 258 P.2d 357, 359 (1953). The main purpose of the real-party-in-interest rule is to ensure that the defendant will not be subjected to multiple obligations, and that the party bringing the action has the ability to protect the defendant from subsequent suits concerning the same obligation. *Id.* at 135, 258 P.2d at 359. "A party may have capacity to sue without being a real party in interest." 59

AM.JUR.2D *Parties* § 43 (2009). However, where real-party-in-interest status has been made mandatory by statute or rule, as it has in Idaho, real-party-in-interest status must be demonstrated before a suit can proceed. See Idaho R. Civ. P. 17(a) (" Every action *shall* be prosecuted in the name of a real party in interest.") (emphasis added). Generally, the holder of legal title to the subject matter of a cause of action is a real party in interest. *Caughey*, 74 Idaho at 135, 258 P.2d at 359. Legal title is defined as " title that evidences apparent ownership but does not necessarily signify full and complete title or a beneficial interest." BLACK'S LAW DICTIONARY 1523 (8th ed. 2004).

It is unnecessary to address Carroll's arguments about Citibank's status as a real party in interest, as the plain language of Citibank's agreement with the trust to which it made the partial assignment shows that Citibank held full title to Carroll's account at the time it brought suit against her. The agreement between Carroll and Citibank gives the following terms for default: You default under this Agreement if you fail to pay the minimum payment listed on each billing statement when due, fail to make payment to any other creditor when due ... exceed your credit line without permission,.... If you default, we may close your account and demand immediate payment of the full balance.

Carroll made the last payment on her account on November 29, 2004. The amended complaint in this matter was not filed until July 10, 2006, over one-and-one-half years after Carroll made her last payment, meaning that she had been in default for almost eighteen months when Citibank filed suit. Furthermore, Citibank sent Carroll a letter in January 2005, responding to her billing error letter and notifying her that her account had been closed for failure to make payment, which is an event of default under the agreement between Citibank and Carroll. Billing statements sent to Carroll after December 2004 also made clear that Carroll's account was in default.

Under Citibank's agreement with the trust, any account that is delinquent for 185 days " shall be deemed a Defaulted Receivable" unless the obligor/debtor has declared bankruptcy or become insolvent at some earlier time. " Delinquent," in the context of a credit obligation, simply means " past due or unperformed." BLACK'S LAW DICTIONARY 460 (8th ed. 2004). " Deemed" means " [t]o treat something as if (1) it were really something else, or (2) it had qualities that it does not have," essentially, to establish an operative legal fiction. *Id.* at 446. Accordingly, the language of the defaulted-receivable provision of the trust agreement shows that it is triggered automatically once an account had been in default for 185 days, rendering the receivable from the account a defaulted receivable, despite the fact that other underlying conditions for defaulted-receivable status have not been met.

The " deemed" language of the trust agreement is important because of the way in which the agreement defines " defaulted receivables." The trust agreement defines " defaulted receivables" as accounts that " are charged off as uncollectible" in Citibank's files. While this may seem to require an affirmative action on the part of Citibank to characterize the account as a defaulted receivable, the deeming language in the agreement converts the receivable to a defaulted receivable after 185 days of default without affirmative action by Citibank. The trust agreement

also provides that on the date that a receivable becomes a defaulted receivable, it will *automatically* be transferred back to the seller (Citibank) without any further action on the part of the trust or Citibank.^[2]

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[148 Idaho 259] In this case, Carroll's account was 185 days in default at some point in mid-2005, and the amended complaint was not filed until 2006, meaning that all interest in Carroll's account reverted to Citibank under the terms of the trust agreement before Citibank filed suit. Because all interest held by the trust in Carroll's account was transferred to Citibank before it sued Carroll, it held legal title to all aspects of the account, including the right to payment. As the holder of legal title, Citibank is a real party in interest, entitled to bring suit under I.R.C.P. 17(a) and the *Caughey* standard. As noted in *Caughey*, the purpose of the real-party-in-interest rule is to ensure that the defendant is not subjected to multiple obligations because both an assignee and assignor are seeking recovery. Because title to Carroll's account was vested entirely in Citibank at the time it brought suit and the trust had no legal interest in Carroll's account, there is no danger that Carroll will be subject to multiple obligations. Thus, because the plain language of the trust agreement demonstrates that Citibank was the real party in interest, and that no other party had any interest in Carroll's account at the time it brought suit, Citibank's real-party-in-interest status does not create a question of fact that would preclude the district court's grant of summary judgment.^[3]

2.

Because Citibank was the sole owner of Carroll's account at the time it brought suit, it is entitled to recovery of the funds on that account and, therefore, has standing to sue. Questions of standing must be decided by this Court before reaching the merits of the case. *Taylor v. Maile*, 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009). Standing inquiries focus on the party seeking relief. *Id.* In order to demonstrate standing, a party must be able to "allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Id.*

Citibank has suffered an injury in this case because it has not been paid under its agreement with Carroll. Carroll's argument that Citibank lacked standing is largely focused on her contention that, even if Citibank recovered in this suit, it would be contractually obligated to pay any recovery it received to the trust. Carroll argued that because Citibank was not entitled to retain any recovery it might be awarded on the account, it had failed to demonstrate any proof of damage. As discussed above, Citibank was vested with all with all interest in Carroll's account by the terms of the trust agreement when her account became more than 185 days delinquent; accordingly, Citibank is entitled to retain any recovery that is awarded in this action. Additionally, the record is replete with evidence demonstrating Citibank's entitlement to recovery on the account in the amount of the judgment entered by the district court. Thus, were Citibank to collect the amount shown to be due in this case, it would be entitled to that amount.

Therefore, Citibank has demonstrated that it has standing to sue because it suffered an injury that will be redressed by the relief awarded by the district court's grant of summary judgment. Accordingly, the district court's grant of summary judgment is affirmed.

D.

Citibank argues that it is entitled to an award of attorney fees and costs pursuant to Idaho Code sections 12-120(3), 12-121, and 12-123, as well as Idaho Appellate Rule 41 and the contractual provisions in the agreement between Carroll and Citibank.

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[148 Idaho 260] Carroll does not address the issue of attorney fees. Citibank is entitled to its attorney fees and costs on appeal according to the agreement between the parties. The agreement between Citibank and Carroll provides " [i]f we refer collection of your account to a lawyer who is not our salaried employee, you will have to pay our attorney's fees and court costs or any other fees, to the extent permitted by law." Idaho Rule of Civil Procedure 54(e)(1) allows for attorney fees to be awarded when provided for by the contract between the parties. Idaho R. Civ. P. 54(e)(1); *Indian Springs, L.L.C. v. Indian Springs Land Inv., L.L.C.*, 147 Idaho 737, 751, 215 P.3d 457, 471 (2009). In order to be entitled to fees under the agreement, Citibank is required to show that it retained an attorney that was not its salaried employee to collect on Carroll's account. This showing is apparent in the record from the affidavits in support of the fee award entered in the district court, as well as the averments in the amended complaint. Accordingly, Citibank is entitled to an award of attorney fees and costs under the agreement between the parties. Its other bases for attorney fees need not be addressed.

E.

Although not raised by the parties as an issue on appeal, this Court cannot ignore the fact that Carroll's husband, David F. Capps, engaged in the unauthorized practice of law in this matter, over Citibank's repeated objections and with the approval of the district court judge. The practice of law has been defined as " doing or performing services in a court of justice, in any matter ... in a larger sense, it includes legal advice and counsel, *and the preparation* of instruments and contracts through which legal rights are secured..." *In re Matthews*, 58 Idaho 772, 776, 79 P.2d 535, 537 (1938). The practice of law must be something beyond merely filling in blanks on preprepared forms. *Id.* A person who engages in the practice of law without a license may be held in contempt of court, fined up to \$500, and sentenced to up to six months in prison. I.C. §§ 3-104, 3-420. We reiterate our recent holding in *Indian Springs* that while a person has a right to represent himself or herself pro se, the right does not extend to the representation of other persons or entities. 147 Idaho at 751, 215 P.3d at 464-65; *see also Weston v. Gritman Mem. Hosp.*, 99 Idaho 717, 720, 587 P.2d 1252, 1255 (1978).

In this case, the record clearly shows that Capps, who is not licensed to practice law, represented Carroll. Carroll admitted in her response to requests for admissions that Capps had drafted the pleadings and papers that were filed on her behalf in this case. Capps himself made similar admissions on the record during a court proceeding, indicating that he was drafting a brief that would be filed with the district court. Capps argued in motion hearings before the district court, over Citibank's objection, with the approval of the district judge.

The integrity of our court system depends on adherence of judicial officers to the laws, as written by the Legislature and interpreted by this Court. In district court, the district judge is the gatekeeper. The district judge is responsible for seeing that the parties comply with the law, even though the judge may disagree with the provisions adopted by the Legislature or may find them burdensome to apply. It is surprising that a district judge would allow an individual appearing before him to violate legislative dictates prohibiting the unauthorized practice of law, despite repeated objections of counsel representing the opposing party. The Court must strongly emphasize that this type of conduct is not to be permitted. After all, we are a State and Nation of laws, not individuals who can disregard duly enacted laws as they see fit.

III.

We affirm the district court's order granting summary judgment in favor of Citibank and award Citibank its costs and attorney fees on appeal.

Chief Justice EISMANN, and Justices BURDICK, W. JONES and HORTON concur.

Notes:

[1] The letter Carroll sent to Citibank was based on forms obtained from a now defunct corporation, Dynamic Solutions, Inc. The letter claimed that the credit card company made a billing error because it failed to credit the account holder for a signed note, essentially a promissory note, that was entered into at the time of the application for, and issuance of, the credit card. The theory lacks any basis in law because, even were a promissory note given in satisfaction of the credit card debt, of which there is no evidence in this case, Citibank would still be entitled to seek collection of the amount owing under the promissory note. If the application for credit were a promissory note, as Carroll argues, then it would be collectible under the terms of the credit agreement entered into in this case, meaning that Citibank would be entitled to send a statement that reflects the amount owing on the note.

[2] The relevant clause reads:

[O]n the date when any Receivable in an Account becomes a Defaulted Receivable the Trust shall

automatically and without further action or consideration be deemed to transfer, assign, set over and otherwise convey to the applicable Seller, without recourse, representation or warranty, all right, title and interest of the Trust in and to the Defaulted Receivables arising in such Account, all monies due and to become due with respect thereto and all proceeds thereof....

[3] Carroll also argued that Citibank had not yet regained title to her account at the time of suit because it was required to generate paperwork when the account was transferred back from the trust to Citibank. This argument evidences a misunderstanding of the terms of the trust agreement. Provisions that require the generation of paperwork concern "ineligible receivables" rather than the "defaulted receivables" that are at issue in this case. Further, even were there a requirement that some paperwork be generated, the requirement would be irrelevant in light of the deeming language contained in section 2.09 of the trust agreement, providing that the interest transfers automatically on default without any action by either party.

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DEC 09 2013

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JAN - 4 2013	
By _____	Clerk
_____	Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	) Subcase No. 27-11375
	)
Case No. 39576	) ORDER GRANTING MOTION TO STRIKE
	)
	)
	)
	)
_____	)

I.

BACKGROUND

1. On December 13, 2012, the Basin 27 Water Users' Advisory Board filed a document entitled *Response Brief in Opposition to the Parties' Blackfoot River Equitable Adjustment Settlement Agreement Pursuant to the 1990 Fort Hall Indian Water Rights Settlement Agreement Revised October 17, 2012* ("Response Brief") in the above-captioned matter.

2. On December 24, 2012, the Basin 27 Water Users' Advisory Board filed a document entitled *Clarification of Basin 27 Water Users' Settlement Agreement "Concerns"* ("Clarification Brief") in the above-captioned matter.

3. On January 3, 2012, the State of Idaho filed a *Motion to Strike* pursuant to Idaho Rule of Civil Procedure 12(f) requesting that this Court strike the *Response Brief* and *Clarification Brief* from the record.

II.

ORAL ARGUMENT

The State of Idaho did not request oral argument on its *Motion to Strike* and this Court in its discretion, and pursuant to Idaho Rule of Civil Procedure 7(b)(3)(D), finds that no oral argument is necessary.

III. ANALYSIS

A. The Basin 27 Users' Advisory Board has not properly appeared in the above-captioned proceeding.

On November 10, 2010, the Court entered an *Initial Scheduling Order Setting Forth Procedures on State's Motion for Accounting and United States' and Tribes' Joint Motion to Enforce* in the above-captioned matter. That *Order* directed that parties wishing to participate in the *Motion to Enforce* file a *Notice of Intent to Participate* with the Court on or before January 4, 2011. The Basin 27 Water Users' Advisory Board did not file a *Notice of Intent to Participate* and the time for doing so has long expired. While certain individuals who appear to be members of the Basin 27 Water Users' Advisory Board did timely file *Notices of Intent to Participate* (i.e., Marvin R. Yancey and Mark B. Pratt), the Court finds that those individuals filed their *Notices* on their own personal behalf, and not on behalf of the Basin 27 Water Users' Advisory Board.

Should the Basin 27 Water Users' Advisory Board wish to participate in the above-captioned matter at this stage in the proceedings, it would be required to file a motion to that effect with the Court. And, Idaho law requires that any such motion on behalf of the Board be filed by an attorney licensed to practice law in the State of Idaho. The Idaho Supreme Court has directed that while a person has the right to represent himself or herself *pro se*, that right does not extend to the representation of other persons or entities. *Citibank (South Dakota), N.A. v. Carroll*, 148 Idaho 254, 260, 220 P.3d 1073, 1079 (2009). Therefore, while Marvin R. Yancey and Mark B. Pratt may represent themselves *pro se* in this proceeding, they may not represent the Basin 27 Users' Advisory Board unless they are licensed to practice law.

Since the Basin 27 Users' Advisory Board did not timely file a *Notice of Intent to Participate* in this matter, and has not otherwise properly moved the Court for leave to participate in this matter, the Court in its discretion will grant the State of Idaho's *Motion to Strike* the documents filed by the Basin 27 Users' Advisory Board.

B. Briefing filed in opposition to a proposed settlement agreement is premature at this point.

The State argues that briefing filed in opposition to an anticipated settlement agreement is premature at this point in the proceeding since no proposed settlement agreement has been

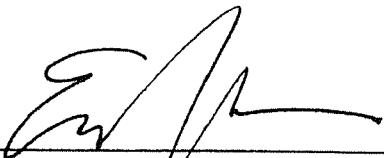
submitted to the Court for its review. This Court agrees. On December 19, 2012, the Court entered an *Order Setting Procedure on Proposed Settlement Re: Equitable Adjustment* in this proceeding. It contains a deadline for submitting a proposed settlement by way of a joint motion of January 31, 2013, and directs that any party to the *Motion to Enforce* opposing the joint motion may file a response brief on or before February 14, 2013. Should Marvin R. Yancey, Mark B. Pratt, or any other party that has filed a *Notice of Intent to Participate* wish to file briefing in opposition to a proposed settlement submitted to this Court, they may do so pursuant to the schedule set forth in this Court's December 19, 2012 *Order*.

**IV.
ORDER**

THEREFORE, BASED ON THE FORGOING THE FOLLOWING ARE HEREBY ORDERED:

1. The State of Idaho's *Motion to Strike* is **hereby granted**.
2. The *Response Brief* and *Clarification Brief* filed by the Basin 27 Users' Advisory Board in the above-captioned matter on December 13, 2012, and December 24, 2012, respectively, **are hereby stricken from the record**.

DATED: January 4, 2013.



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION TO STRIKE was mailed on January 04, 2013, with sufficient first-class postage to the following:

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ORDER GRANTING MOTION TO STRIKE

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