

Exhibit 2, Exhibit A, H. There are three primary documents that govern Black Bay Village Condominiums. The Articles of Incorporation, filed on August 11, 2006, created Black Bay Village Owners Association, Inc. (Association). *Id.*, Exhibit 1, Exhibit B. In addition to the Articles of Incorporation, the Association is governed by association bylaws. *Id.*, Exhibit 2, Ex. E. The final document that governs Black Bay Village Condominiums is the Declaration. *Id.*, Exhibit 1, Ex. B. This was submitted by the condominium project developer, Defendant Northwest Group, LLC, who is also the Declarant of the CCRs. *Id.* The CCRs were filed with the Kootenai County Recorder on August 16, 2006. *Id.* In addition to the CCRs, and referenced in paragraph A of the CCRs, plats for the units and common area of Black Bay Village were recorded with Kootenai County on August 17, 2006. *Id.* at ¶ A; Exhibit 1, Ex. A. No more recent plats have been submitted to this Court. On the plats filed for Black Bay Village Condominiums, Unit O is labeled as a “club house.” *Id.*, Exhibit 1, Ex. A, p. 3. Additionally, according to the legend provided on the recorded plat, Unit O is demarcated as a common area. *Id.* The clubhouse also contains a pool. *Id.*, Exhibit 4, ¶ 6; Exhibit 5, ¶ 6; Exhibit 6, ¶ 6.

Defendants, owners of some of the condominium units, began to have concerns with the operation of Black Bay Village Condominiums. Some unit owners communicated their concerns to the Association. *Id.*, Exhibit 2, Exhibit B; Exhibit 3, Exhibit A. Additionally, at least two individuals requested copies of the Association’s financial statements. Attorney Erika Grubbs, representing several condominium owners, requested copies of operation budgets and financial statements for 2007 and 2008 from the Association. *Id.*, Exhibit 3, Exhibit A. Between September 2009 and September 2010, condominium owner Nancy Conley made five written requests for a copy of the Association’s financial statements. *Id.*, Exhibit 2, Exhibit J.

Developer Northwest Group defaulted on a financial obligation, and on April 6, 2012, Idaho Trust Bank foreclosed Black Bay Village Condominiums. *Id.*, Exhibit 1, Exhibit G. On that date, Northwest Group’s interest in the development was transferred to the bank. *Id.* Each unit transferred included an individual condominium and an undivided interest in the common area, referring to the areas that had been identified in the CCRs as they were recorded with Kootenai County on August 17, 2006. *Id.* The CCRs refer to the plats that were filed on the same date and are described above. *Id.*, Exhibit 1, Exhibit A. On August 14, 2012, Northwest Group repurchased Units A and B of the Black Bay Village Condominiums, which included each individual unit and an interest in the common areas that were identified in the CCRs recorded on August 17, 2006. *Id.*, Exhibit 1, Exhibit H.

The Declaration required each owner in the condominium complex to pay monthly assessments to the Association. Chaney withheld her assessments in response to a lack of communication from the Board of Directors of the Association (Board). Chaney Affidavit, p. 2, ¶ 8. Instead Chaney deposited the assessments in an account in Kootenai Case

Number CV-2011-7723 *Conley v. Black Bay Village Association*. *Id.* Presumably, Chaney deposited the assessments in that case because she was a party to that case, keeping in mind the instant case was not filed until October 31, 2011. After Judge Simpson on April 6, 2012, granted summary judgment to Alpha in *Alpha Holdings v. Conley*, Kootenai Case Number CV-2011-9436, (a case in which Chaney was not a party), Alpha, on May 15, 2012, at 4:39 p.m., through an email by its attorney Peter J. Smith, IV to Chaney's (and others) attorney, Steven Wetzel, extended the deadline for payment by Chaney and others to Alpha, until May 17, 2012. *Id.*, Affidavit of Peter J. Smith IV, filed March 28, 2013, Exhibit A. Also in that email, Alpha dictated that if that deadline were not met, an additional \$500 would be added per client of Wetzel's, for attorney fees for preparation of the foreclosure complaint. *Id.* Since that demand was made at the end of that day, the deadline imposed by Alpha's attorney was two business days away. On May 17, 2012, Steven C. Wetzel, as Chaney's attorney (and also as the attorney for Collins, Stanic, Venzona, Joslin and Newman) sent counsel for Alpha, Peter J. Smith, IV, a letter in which Chaney authorized the release of funds deposited with the court in CV 2011 7723, which included a copy of the "Order Granting Disbursal of Funds Deposited With Court", signed by Judge Lansing Haynes, on behalf of Judge Luster, which ordered release of the funds to Lukins & Annis, PS Trust Account on behalf of Alpha Holdings, LLC. *Id.*, and Affidavit of Melanie Baillie, Exhibit 13, Order Granting Disbursal of Funds Deposited With Court, p. 2. However, the check actually dispersing the funds to Lukins & Annis, PS, was available to be picked up only by Lukins & Annis, PS, from the Kootenai County Auditor's office on May 21, 2012. Affidavit of Melanie Baillie, Exhibit 16.

Essentially, this lawsuit was filed because: 1) the funds which were timely ordered released by court on behalf of Chaney (\$8,814.37) and others, were not available to Alpha's attorney on the date which Alpha's attorney had demanded only two days earlier, and 2) because of that, Chaney wouldn't then pay the extra \$500 demanded by Alpha's attorney. The attorney fees and costs involved by both sides in preparation of one hundred pages of briefing and over a thousand pages of affidavits and attachments, must be astonishing and must pale in light of the amounts in controversy.

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C. Procedural Background of Related Cases.

There are two related Kootenai County civil cases which have had decisions made by two other First District Court District Judges, which must be noted.

The first case in which there was a decision made by a District Judge was *Alpha Holdings, LLC v. David Michael Conley and Nancy Ann Conley as Co-Trustees of the David and Nancy Conley Living Trust (Conley)*, Kootenai County Case No. CV 2011 9436. In that case, on April 6, 2012, District Judge Benjamin R. Simpson filed a "Memorandum Decision and Order Granting in part and Denying in Part Plaintiff's Motion to Strike, Granting Plaintiff's Motion for Summary Judgment, Denying

Defendants' Motion to Continue and Denying Defendants' Motion to Consolidate". This case is the most similar to the present case, as in this case, Black Bay Village Homeowners Association recorded a Notice of Lien against the defendants property owners (the Conleys and their trust). April 6, 2012, CV 2011 9436, Memorandum Decision, pp. 1-2. Black Bay Village Homeowner's Association assigned to PITA Group, LLC on July 7, 2011, and PITA Group, LLC assigned to Alpha Holdings on November 22, 2011. *Id.*, p. 2. Judge Simpson found it was undisputed that the Conleys failed to pay the assessments levied by Black Bay Village Homeowner's Association. *Id.* Alpha Holdings sought to foreclose the \$8,897.94 lien against Conleys' property. *Id.* Judge Simpson found Alpha Holdings had the right to sue Conleys for the foreclosure of the lien and/or collection of the assessments. *Id.*, pp. 7-18. This portion of Judge Simpson's decision will be discussed in detail below.

The second case in which there was a decision made by a District Judge was *Nancy Conley and David Conley, Betty Chaney, Bill Joslin, Lynda Nutt, Ray Vezina Jim Collins, and Zoran Stanic, v. Black Bay Village Owner's Association, Inc., Mike Rai, Nick Rail Tammy Morris and Northwest Group, LLC*. Kootenai County Case No. CV 2011 7723. In that case, on January 17, 2013, District Judge John P. Luster filed a "Memorandum Opinion and Order Re: Plaintiffs' Motion for Partial Summary Judgment." In that case, seven condominium owners, including Betty Chaney in the present case, sued their homeowners association, the association's board of directors and the original developer. January 17, 2013, CV 2011 7723, Memorandum Decision, p. 2. The developer, defendant Northwest Group, LLC, was also the declarant of the CCRs. *Id.* Defendant Northwest Group defaulted on its financial obligation to Idaho Trust Bank, and on April 6, 2012, Idaho Trust Bank foreclosed on Black Bay Village Condominiums. *Id.*, p. 3. Idaho Trust Bank then owned all of the developer, Northwest Group, LLC's interest in the project. The group of homeowners sought summary judgment that Unit O (which contained a clubhouse and pool) was a common area with each separate condominium owner owning a 2.5 percent interest in such. *Id.*, p. 4. Defendant developer Northwest Group argued that Paragraph B of the CCRs did not require the developer to designate the common area until the thirtieth unit had sold, and due to the fact that only sixteen condominium units had been sold, Northwest Group argued its obligation to designate a community center or clubhouse had not been triggered. *Id.*, pp. 6-7. Judge Luster disagreed and granted summary judgment in favor of the homeowners, finding that once Idaho Trust Bank foreclosed on April 6, 2012, on the twenty-four unsold and unconstructed units, there were as of that date no more unsold units and thus, the foreclosure triggered the duty to designate the community center and clubhouse. *Id.*, p. 7. Judge Luster also found that the foreclosure by Idaho Trust Bank on April 6, 2012, converted all Class B memberships (those memberships or units owned by the declarant developer Northwest Group, and which held three votes per unit) to Class A memberships (those memberships or units owned by those who actually purchased their condominium units, and which only held one vote per unit).

Id., pp. 8-9. Again, Judge Luster held the foreclosure resulted in a sale to Idaho Trust Bank, and declarant, developer Northwest Group ceased to own anything. *Id.*, p. 9.

Memorandum Decision and Order Denying Defendants' Motion for Summary Judgment, and on Motions to Strike, pp. 1-7.

In that decision, this Court denied defendants' summary judgment and held:

a) there is a dispute of fact as to whether defendants owe money to the Association/Alpha, and a dispute of fact as to "actual attorney fees"; b) even if the Association materially breached the declaration, such breach does not excuse defendants' performance; c) the Board did not violate the Bylaws in conducting its meetings; d) the Idaho Collection Agency Act does not apply, so Alpha has a right to foreclose on Chaney's condominium, and Alpha and PITA have a legal right to foreclose on a lien in the State of Idaho; e) Alpha has a valid assignment from PITA; f) the Declaration allows Alpha the right to sue defendants to foreclose its lien or to collect the Assessments; g) the directors who allegedly assigned the right to collect the Assessments against defendants and the right to foreclose on the liens, had the authority to act for the Association; and h) Alpha has not violated the Fair Debt Collection Practices Act (FDCPA). *Id.*, pp. 21-41.

At no point in defendants' motion for summary judgment was the issue raised by either side as to the legal effect of the *amount* of the various liens that were recorded. That same legal issue was not discussed by either side in the plaintiff's motion for summary judgment which is now before the Court. The Court will discuss that issue. It is dispositive of this lawsuit.

On May 14, 2013, Alpha filed its "Plaintiff's Motion for Summary Judgment and Notice of Hearing", "Memorandum in Support of Plaintiff's Motion for Summary

Judgment”, “Affidavit of Mike Rai in Support of Plaintiff’s Motion for Summary Judgment” and “Affidavit of Briana Stockdale in Support of Plaintiff’s Motion for Summary Judgment”. In its memorandum, Alpha seeks summary judgment and an order stating: 1) all defendants (collectively defendants) are liable to Alpha in amounts set forth in the memorandum and affidavits; 2) Alpha is entitled to interest on defendants’ obligations at 16%; 3) Alpha holds liens to each defendant’s property; 4) the liens secure payment of the obligations; 5) the liens are enforceable against the properties in the amounts set forth in the memorandum and affidavits and a decree of foreclosure should be ordered; 6) after a sale of the properties and expiration of the redemption period, the purchasers of the property receive deeds to said property; 7) if those proceeds are insufficient, a deficiency judgment be imposed against defendants; and 8) any other further relief as the Court finds proper, equitable and just.

Memorandum in Support of Plaintiff’s Motion for Summary Judgment, pp. 15-17. Alpha argues in the Declaration, defendants agreed to pay Regular Assessments, Extraordinary Assessments and Special Assessments (collectively Assessments) and if such were not paid, the Association may obtain a lien against the affected property. *Id.*, p. 9. Alpha states the Declaration also provides for penalties in such cases, including late charges, fees and interest and these penalties, along with the Assessments, are secured by a lien against a unit, providing a remedy for Alpha in the form of judicial foreclosure. *Id.*, p. 10. Alpha claims the liens here are effective as it has recorded the liens and given notice per the Declaration. *Id.*, p. 11. Alpha also argues the amounts claimed to be due under the liens are accurate, and provides billing statements as proof of attorney fees incurred. *Id.*, p. 13. Alpha states the assignment from the Association and the PITA was valid. *Id.*, p. 14. Alpha concludes with reference to Judge Simpson’s

case, *Alpha Holdings, LLC v. Conley*, where Judge Simpson found such assignments were valid. *Id.* Regarding the issue of assignments, apparently Alpha forgot this Court already decided that issue in its favor in this present case. Memorandum Decision and Order Denying Defendants' Motion for Summary Judgment, and on Motions to Strike, pp. 35-36.

On May 28, 2013, defendants filed their "Defendants/Counterclaimants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment", "Affidavit of Danielle Walters", and "Supplemental Affidavit of Melanie E. Baillie in Opposition to Plaintiff's Motion for Summary Judgment". In that brief, defendants primarily argue these issues have already been decided in the previous motion for summary judgment and this Court determined these issues were "for a jury to decide."

Defendants/Counterclaimants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 2. Defendants also argue, despite being told the \$500 fees were for drafting the foreclosure complaint, the complaint was not drafted until many months after the May 17, 2012, deadline, so as the costs were not incurred until later, those costs should not have been passed on to defendants. *Id.*, pp. 11-12.

Defendants also call into question the multiple billings provided by Alpha, disputing their relevance to the collection of the assessments withheld by defendants. *Id.*, pp. 12-13.

Defendants state they paid the proper amounts and so the liens should be released, not foreclosed upon. *Id.*, p. 17. Defendants also argue the charges claimed by Alpha are unreasonable and were manufactured "purely for leverage to force the Defendants to dismiss the *Conley v. BBV* case." *Id.*, pp. 19-20.

On June 4, 2013, Alpha filed its "Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment". Alpha states the only issue for this Court to decide is

whether Alpha may foreclose on the Liens. Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, p. 2. Alpha argues this Court's previous ruling in its Memo Decision does not automatically result in a material issue of fact as Alpha has provided the proof lacking in the previous motion for summary judgment in the form of a "detailed accounting and Plaintiff's actual billing invoices for legal fees incurred". *Id.*, p. 4. Alpha also argues this case is no longer appropriate for jury trial, **as it claims the only remaining issue is the foreclosure claim**, which is an equitable action. *Id.*, p. 3. (emphasis added). The reasoning for this distinction is if this Court determines a court trial is warranted, Alpha states the district court, as the trier of fact, "is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting evidence." *Id.*, p. 4. Alpha claims the evidence is undisputed that defendants did not pay the full amount to obtain release of the liens prior to the filing of the foreclosure action, and defendants failed to provide Alpha with a payoff before the May 17, 2012 deadline. *Id.*, p. 5. Alpha also argues the attorney fees incurred by Alpha were reasonable and legitimately incurred pursuant to collection efforts. *Id.*, p. 6.

Oral argument on plaintiff's motion for summary judgment was held on July 29, 2013. At the conclusion of that hearing, counsel for defendants complained that counsel for Alpha had not brought up two new legal arguments regarding I.C. § 55-1518 until Alpha's response at oral argument, thus depriving counsel for defendants the opportunity to respond. Specifically, defendants claim at that point Alpha argued for the first time that: 1) I.C. § 55-1518 did not apply because it allowed additional attorney's fees to be added; and 2) the attorney fees added were related to work that was completed and charged for services between May 1, 2012, and May 22, 2012, and not

the \$3,000 drafting project. Defendants/Counterclaimants' Supplemental Memorandum Re: New Issues Argued by Alpha Holdings in Reply Oral Argument, p. 2. At oral argument, at the request of defendants' counsel, this Court allowed both sides to file additional briefs as to how I.C. § 55-1518 applies to this case. On August 7, 2013, defendants filed "Defendants/Counterclaimants' New Issues Argued by Alpha Holdings in Reply Oral Argument," and an "Affidavint of Steven C. Wetzels in Support of Defendants/Counterclaimants' Supplemental Memorandum re: New Issues Argued by Alpha Holdings in Reply Oral Argument." On August 14, 2013, Alpha filed "Plaintiff's Supplemental Memorandum." The filing of that last brief placed Alpha's motion for summary judgment at issue before this Court.

Unfortunately, as this decision will illustrate, even the supplemental briefing on I.C. § 55-1818 filed by each side entirely misses the boat as pertains to that statute.

II. STANDARD OF REVIEW.

A Court may properly grant a motion summary judgment only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court construes all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in a light most favorable to the non-moving party. *Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008). The Court draws all inferences and conclusions in the non-moving party's favor and if reasonable people could reach different conclusions or draw conflicting inferences, then the motion for summary judgment must be denied. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996).

However, if the evidence shows no disputed issues of material fact, then summary judgment should be granted. *Smith v. Meridian Joint School District No. 2*,

128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2002). The non-moving party “must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial.” *Id.*

In ruling on the motion, the Court considers only material contained in the affidavits and depositions which are based on personal knowledge and which would be admissible at trial. *Samuel*, 134 Idaho 84, 88, 996 P.2d 303, 307. Summary judgment is appropriate where a non-moving party fails to make a sufficient showing to establish the existence of an element essential to its case when it bears the burden of proof. *Id.*

III. ANALYSIS.

A. The Issues Identified by the Parties and Arguments of the Parties.

There has been very little legal authority submitted by either side on this matter. Alpha only discussed I.C. § 55-1518, but misinterprets that statute in light of the uncontradicted facts. Memorandum in Support of Plaintiff’s Motion for Summary Judgment, pp. 2-15. The validity of the assignments has already been decided by this Court (Memorandum Decision and Order Denying Defendants’ Motion for Summary Judgment, pp. 36-37), and by Judge Simpson. Affidavit of Melanie Baillie, filed March 13, 2013, Exhibit 8 (Kootenai County Case No. CV 2011 9436, Memorandum Decision and Order Granting in Part and Denying in Part Plaintiff’s Motion to Strike, Granting Plaintiff’s Motion for Summary Judgment, Denying Defendants’ Motion to Continue and Denying Defendants’ Motion to Consolidate, filed April 6, 2012, pp. 7-8. As will be

discussed below, as to Alpha's understanding of the creation of its liens, the amounts of its liens, and validity of its liens, Alpha is completely mistaken.

The issues presented by Alpha in its argument on summary judgment are:

1) what amount is due under the liens; and 2) whether Alpha may foreclose on those liens.

On the issue of amount due on the lien and attorney fees included in the lien, neither party has cited any authority. Were the issue of attorney fees an issue before the Court (attorneys fees are not before the Court as the Court finds Alpha's lien has been satisfied), the issue would come down to the reasonableness of the attorney fees allegedly incurred by Alpha.

As to the issue of the amounts owed by the condominium owners for assessments, Mike Rai in his affidavit gives a timeline as to the amounts which were originally owed on April 19, 2012. Rai Affidavit, p. 6. These amounts allegedly consisted of unpaid Assessments to the Association. *Id.* The alleged total for all six defendants owing was \$28,933.31. *Id.* However, instead of paying off this amount by May 1, 2013, the stated deadline, defendants deposited a total amount of \$23,941.13 with the Kootenai County District Court, under Kootenai Case CV-2011-7723, *Conley v. Black Bay Village Owner's Association*, the case before District Judge John P. Luster. *Id.* Alpha claims this deposit to the district court, rather than to Alpha directly, resulted in additional interest and attorney fees accruing on the lien. However Alpha provided one more extension on the deadline, to May 17, 2012. *Id.*, p. 7. Alpha wrote a letter to defendants' counsel stating if the \$28,933.31 were paid to Alpha in full by May 17, 2012, Alpha would not pass along the additional attorney fees of \$500.00 per defendant. *Id.* Rai claims the additional \$500.00 was: 1) for work related to a

complaint to foreclose on the liens; and 2) for work dealing with other issues related to the delay and deposit of the funds with the Court. *Id.* Rai has attached invoice statements received from Alpha's attorneys showing these incurred fees. However, they total \$2,836.50, or \$472.75 per defendant. *Id.* Thus, for reasons never explained, Alpha has seen fit to tack on an additional \$27.25 per defendant to round the amount owed up to \$500. While this is a relatively small amount of error, it is still an errant amount that is submitted. And, given fact that interest has been accruing on that additional \$27.25 at a rate of 16% since that time, it is not an insignificant error.

The \$23,941.13 was eventually paid to Alpha, along with additional funds from each defendant (as noted in Rai's affidavit) on May 22, 2012, five days after Alpha's stated deadline. *Id.*, p. 8. As a result of the delay, Alpha then tacked on (and Alpha mistakenly believes it can do this) to the recorded lien amounts: the \$500.00 per defendant for attorney fees, as well as "collection costs". *Id.* Alpha has submitted no proof on the collection amounts. *Id.* The total amounts are set forth on page seven of Rai's affidavit. Alpha has also calculated interest on those amounts from May 17, 2012, to May 14, 2013, at a rate of 16%. *Id.*, p. 9. Alpha then alleges it incurred more costs (without submitting proof or details of such) of \$893.11 for defendant Chaney and \$75.00 for all the other defendants (again without explanation for the discrepancy). *Id.* Alpha also claims it incurred more attorney fees between May 17, 2012, and October 31, 2012, of \$6,185.00, or \$1,030.83 per defendant, proof of which is submitted in the form of invoice statements attached to Rai's affidavit. *Id.*, pp. 9-10. Alpha then added this \$1,030.83 charge to each defendant's additional cost bill (\$893.11 for Chaney and \$75.00 for all other defendants) and then calculated interest on those amounts at 16% from October 31, 2012, to May 14, 2013. *Id.*, p. 10. Alpha finally added all amounts

together and gave a grand total allegedly due from each defendant, ranging from \$1,911.72 to \$5,376.72. *Id.*

Defendants argue first and foremost summary judgment should be denied because this Court, in its previous summary judgment order, stated the issue of attorney fees “was for a jury to decide.” Defendants/Counterclaimants’ Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, p. 2. It is true this Court stated attorney fees was an issue for the jury, but only for that particular summary judgment motion, as Alpha had failed to provide any supporting evidence of attorney fees incurred, other than Peter Smith’s conclusory statements about such fees. In this current motion for summary judgment, Alpha has included Rai’s affidavit setting forth Alpha’s calculation of the amounts due on the liens and supporting evidence in the form of invoice statements from Alpha’s attorneys (for the attorney fees as least). Thus, at this time the Court has more information before it in this summary judgment motion than it did in the previous motion for summary judgment. While defendants’ argument that the conclusion should be the same on the above grounds alone is not well-taken, attorney fees are no longer an issue for a different reason.

Defendants also argue the attorney fees allegedly incurred by Alpha were not fees “incurred for the preparation of the foreclosure complaint” as represented by Alpha in its May letter giving Defendants the May 17, 2012, deadline, but were other fees unrelated to the preparation of the foreclosure complaint. *Id.*, p. 11. Defendants argue this representation was a blatant false statement as the complaint was not drafted until September and October of 2012. *Id.* Defendants argue charges for a foreclosure complaint not drafted until September and October of 2012 should not have been incurred in May 2012. *Id.* Defendants also argue many of the alleged incurred fees are not “actual attorney fees” as required under Idaho law, but are really “bloated fees

related to the attempt to force the defendants to dismiss the case before Judge Luster, CV-2011-7723.” *Id.*, p. 14. Defendants claim an examination of the billing invoices shows billings related to conversations between Alpha’s counsel and insurance defense counsel for the Association and the directors regarding the *Conley* case. *Id.*

Defendants claim these billings are related to *Conley* and not this case because “the insurance defense counsel does not work on the day-to-day activities of the Association since the Association maintains a management company and has a separate non-litigation counsel.” *Id.* Defendants claim these conversations cannot have anything to do with this case because Alpha alone has the right to collect the past due assessment or foreclose on the liens as the assignee and, therefore, there is “no reason to converse with anyone about the debt it owned”. *Id.* This is an overbroad assertion. It seems unreasonable to think Alpha, by virtue of its status as assignee alone, has absolutely no reason to ever converse with anyone else about the debt, and especially the assigning entity.

However, Alpha does not have unlimited authority to have its attorneys converse with any party in any case and later seek fees against defendants in this case for that time. At oral argument, Alpha made a valid point that this case and the *Conley* case are undeniably intertwined, despite all efforts to keep them separate, and overlapping conversations are inevitable. It is possible the conversations between Alpha and the insurance defense counsel were related to both cases in terms of settlement for both. Other than the assertions of both parties, the Court simply does not have the facts before it. It is not this Court’s duty to speculate as to conversations between parties and so this Court cannot decide the validity of these billings on the facts before it. If fees were an issue, on this basis alone, summary judgment would be denied.

Defendants point specifically to a billing from May 2, 2012, where the bill states Alpha's counsel conversed with the insurance defense counsel regarding defendants' deposit with the Court in the *Conley* case, and states there was "no reasons for any discussion with litigation counsel in regard to the deposit because . . . the deposit was not be [sic] recognized". *Id.*, p. 14-16. Such an argument is unreasonable, as it would seem logical to confer with counsel on another case where money relevant to this case has been deposited.

Defendants also point to a number of other billings related to conversations between Alpha's counsel and others. As stated above, many of these conversations can be attributed to the fact that, despite best efforts to the contrary, these two cases are intertwined and, thus, some conversational overlap is to be expected.

Defendants' final argument is the liens were paid in full prior to any additional attorney fees being incurred; thus, foreclosure of the liens is wrongful under I.C. § 55-1518. Defendants/Counterclaimants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 17. Defendants argue I.C. § 55-1518 "further provides that '[u]pon payment of said assessment and charges in connection with which such notice has been so recorded, or other satisfaction thereof, the management body **shall** cause to be recorded a further notice stating the satisfaction and the release of the lien thereof.'" *Id.* (emphasis added by defendants in briefing). Thus, defendants discuss the *remedy* when a lien is satisfied, but ignore that portion of the statute which *defines* what constitutes a lien. Unfortunately, defendants' discussion of the remedy when a lien is satisfied was the closest either party came to discussing the dispositive issue.

B. The Dispositive Issue.

Defendants are correct in stating the relief that is required (that Alpha must file a notice stating satisfaction and release of the lien), but defendants fail to articulate the

portion of that statute that mandates the legal conclusion *why* the defendants are entitled to that relief. Idaho Code § 55-1518 states:

An assessment upon any condominium made . . . shall be a debt of the owner thereof at the time the assessment is made. The amount of any such assessment, **together with those other charges thereon**, such as interest, costs (including attorney's fees), and penalties, which may be provided for in the declaration, **shall be and become a lien upon the condominium assessed when the management body causes to be recorded with the county recorder of the county in which such condominium is located a notice of assessment, which shall state the amount of the assessment and any other charges thereon as may be authorized by the declaration**, a description of the condominium against which the same has been assessed, and the name of the record owner thereof. Upon such payment of said assessment and charges in connection with which such notice has been so recorded, or other satisfaction thereof, the management body shall cause to be recorded a further notice stating the satisfaction and the release of the lien thereof.

I.C. § 55-1518 (bold and underlining added). Even a cursory look at that statute shows an assessment becomes a **debt** the moment the assessment is made, but an assessment becomes a **lien** on a condominium only when the management body causes to be *recorded* a notice of assessment which states the amount of the assessment and any other charges. The assessment may include attorney fees, collection costs and interest, to be included in that lien, but the lien is limited to what is in the assessment that is filed with the recorder. In other words, just because a management body records an assessment for a certain amount does not mean that the management body can magically create a lien *for more than* that certain amount to also include additional or other costs, attorney fees and interest. That is exactly what Alpha is trying to do here, and Alpha claims it has the legal ability to do so by misreading the statute.

The Court finds I.C. § 55-1518 is not ambiguous. It is clear that the only way an association (a "management body") can create a "lien" under that statute is when it "records" the "notice of assessment." In preparing that "notice of assessment", the

“management body” is free to include “other charges thereon, such as interest, costs (including attorney’s fees), and penalties”, but it is not free to include those amounts after it files the lien.

Not only is I.C. § 55-1518 unambiguous, the Court looks to a similar statute which has a stark difference created by *additional language* in that statute. Idaho Code § 45-810 governs “homeowner’s association liens.” A plain reading of that statute shows a homeowner’s association can make assessments against a lot for costs of maintenance of common areas, and will have a lien if they file a “claim” “in the county in which the lot or some part thereof is located.” I.C. § 45-810(1), (2)(b). The claim is recorded with the county recorder. I.C. § 45-810(2)(c). The stark difference between this homeowner’s association statute and the condominium association statute is the homeowner’s association statute has the following language:

(b) When a claim has been filed and recorded pursuant to this section and the owner of the lot subject to the claim thereafter fails to pay any assessment chargeable to such lot, then so long as the original or any subsequent unpaid assessment remains unpaid, such claim shall automatically accumulate the subsequent unpaid assessments without the necessity of further filings.

I.C. § 45-810(2)(b). Thus, if Alpha was a homeowner’s association, Alpha could actually do what it wants this Court to allow it to do...because the applicable statute would allow it. But Alpha is not a homeowner’s association, it is a condominium association, and defendants are not homeowners, they are condominium owners...and there is no applicable statutory provision that allows condominium associations to do what homeowner’s associations are statutorily allowed to do. The reason this Court looks to this Homeowner’s association statute for comparison is the doctrine of *expression unius est exclusion alterius*. That doctrine is “a canon of construction holding that to express or include one thing implies the exclusion of the other, or of the

alternative. Black's Law Dictionary 602 (Bryan A. Garner ed., 7th ed., West 1999). Idaho has recognized that "where a constitution or statute specifies certain things, the designation of such things excludes all other." *Poison Creek Pub., Inc. v. Central Idaho Pub., Inc.*, 134 Idaho 426, 429, 3 P.3d 1254, 1257 (Ct.App. 2000). When a statute specifies which areas are to be encompassed in its enforcement, it is generally accepted that those areas not mentioned are not to be included. *Hewson v. Asker's Thrift Shop*, 120 Idaho 164, 167, 814 P.2d 424, 427 (1991). The homeowner's association statute (I.C. § 45-810(2)(b)) allows an association, once it has filed a lien, to pile on subsequent assessments (not attorney fees) to that existing lien, the condominium association statute (I.C. § 55-1518), does not. The Court can only assume the Idaho Legislature intended the outcome of its actions.

Alpha obliquely states: "Plaintiff is entitled to a judgment against Defendants because no genuine issue of fact exists in this case." Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 15. Alpha next claims:

Defendants have a duty to pay all assessments, late charges, attorneys' fees, and interest due under the terms of the CC&Rs, and they have failed to do so. Black Bay Village HOA filed a valid Notice of Homeowner's Association Liens against the condominium units owned by the Defendants and thereby created a lien, and the right to enforce said liens was validly assigned to Plaintiff. For all of these reasons, Plaintiff respectfully requests that this Court grant its Motion for Summary Judgment and order that: 1. the defendants are liable to Plaintiff [for amounts totaling \$17,924.18 plus interest from May 14, 2013 to the present at 16%, against Chaney, Joslin, Vezina, Alberta Ltd., Newman and Stanic]; 2. [interest at 16%]; 3. That Plaintiff holds the Chaney Lien, Joslin Lien, Vezina Lien, Alberta Lien, Newman Line, and Stanic Lien; 4. That the Liens secure payment of the Amounts Due Under the Liens, plus accrued interest from May 14, 2012 which accrues at the rate of 16% per annum or as set by Idaho Code § 28-22-104 to date of Decree of Foreclosure, plus reasonable attorney's fees and costs. 5. That the Liens are enforceable liens against the the [sic] real property of the Defendants as follows [for amounts totaling \$17,924.18], and for a Decree of Foreclosure that said real properties be sold by the Sheriff of Kootenai County...

Id., pp. 15-16. The claim made by Alpha in item four above illustrates Alpha's fundamental misreading of I.C. § 55-1518. Alpha's attorneys write: "After crediting each defendant for the funds tendered on May 17, 2012, [\$23,941.13, Rai Affidavit, pp. 6-7, ¶ 14] additional collection costs, attorneys' fees, and interest remain due on the Liens. Rai Aff. ¶ 23, at 10-11." Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 14. (underlining added, bracketed portion added). Alpha's attorneys also write:

It is also undisputed that although Defendants made partial payment on May 17, 2012, they did not pay the full amount of the outstanding balances. The funds that were tendered to Plaintiff on May 22, 2012 were not paid by the stated deadline and as a result did not pay off the entire balance on the respective liens. The funds that were untimely tendered were nevertheless properly credited against the Defendants' respective liens, but a balance remains, and that balance is secured by the Liens Plaintiff seeks to foreclose on this action.

Id., p. 13. None of this is legally correct. These passages shows Alpha's gravely mistaken belief that it can add additional attorney fees, costs and interest, to a lien *after* it has been recorded.

Alpha's legally mistaken belief as to how I.C. § 55-1518 works was evident two years ago, when in November 2011, Alpha recorded each of the liens at issue. In each of those separate Notice of Homeowner's Association Lien" documents, there is a category for each monthly assessment the particular condominium owner failed to make, a category for "late fees", a category for "finance charge", and a category for "recording fees". For each of these categories, in every lien, there is an amount stated. In each of these separate documents, toward the end of those above categories, there is also a category entitled "Attorney's Fees: To Be Determined". In every recorded lien document, that category is left blank. There is no amount stated. Plaintiff's Submission of Certified Documents in Support of its Motion for Summary Judgment, Exhibit 8

(defendant Newman), Exhibit 9 (defendant Zoran), Exhibit 10 (defendant Chaney), Exhibit 11 (defendant Vezina), Exhibit 12 (defendant Joslin), Exhibit 13 (defendant Alberta Ltd.). By creating a “To Be Determined” category, either Alpha had no idea it had no legal ability to add on to an existing lien, or Alpha obtained some very bad legal advice in 2011 when it created those assessment notices. In either event, at present, Alpha’s attorneys are making a specious claim that Alpha can keep adding attorney fees and interest to the amounts recorded, and foreclose on it all. That claim finds no support in the clear language of I.C. § 55-1518. Idaho Code § 55-1518 allows the management body to put in costs, attorney fees and interest into a lien, but only if the management body first actually includes those costs, attorney fees and interest *in the assessment* (the “Notice of Homeowner’s Association Lien”) that the management body later records. Stated differently, I.C. § 55-1518 makes it clear you can only obtain a lien in the amount shown on the assessment that you then record. In order for those costs, attorney fees and interest to become the amount of the lien, they have to already be included in the assessment which you then record. The recording of the assessment makes it a lien. The statute is devoid of any language permitting foreclosure for amounts exceeding the stated amount **on the face of the lien**.

It is true the payoff amount set forth by Alpha via its May 15, 2012, letter was \$28,944.42 (more recently, in the Rai Affidavit, this amount is \$28,933.31). It is also true the amount timely deposited by defendants with the Court in the other case and eventually (but beyond the time limit Alpha demanded) tendered by the clerk of the court to Alpha was \$23,941.13, about \$5,000 short of what Alpha demanded. But it is also true that the lien amounts recorded by Alpha total only \$8,070.74. That is the determinative fact.

The above quoted passages all show that the relief sought by Alpha in this

lawsuit is not in any way to obtain a monetary judgment against defendants, the relief sought by Alpha is clearly to *foreclose its liens* against each of the defendants. That fact that this is the relief Alpha seeks from this Court is made crystal clear by the prayer for relief Alpha makes in its Complaint:

PRAYER

THEREFORE, Plaintiff prays for judgment in its favor as follows:

A. The Court declare Plaintiff to have a valid and subsisting lien on the Chaney Property, the Joslin Property, the Vezina Property, the Alberta Property, the Newman Property, and the Stanic Property.

B. That the Court enter a decree of foreclosure that the Chaney Property, the Joslin Property, the Vezina Property, the Alberta Property, the Newman Property, and the Stanic Property and the interests of the parties therein be sold in accordance with Idaho law, the proceeds of the sale be returned to the court, and Plaintiff be paid the Amounts Due under the Claim of Lien plus interests, and all other amounts due;

Complaint, p. 9. If there were any doubt that the only relief sought by Alpha is foreclosure, Alpha removed those doubts when in its last brief, it claimed: “Additionally, although this case is currently scheduled for a jury trial, that setting is in error now that Plaintiff’s foreclosure claim is the only remaining issue.” Plaintiff’s Reply Memorandum in Support of Motion for Summary Judgment, p. 3. Thus, since Alpha does not seek a money judgment and only seeks to foreclose on its liens, and because this Court finds Alpha cannot foreclose on the amounts it claims under those liens (due to its failure to understand the amount of those liens allowed under I.C. § 55-1518), because Alpha has already received more than it is entitled to under those liens, they jury trial must be vacated.

Because in this lawsuit Alpha is only asking this Court to determine that Alpha be allowed to foreclose against defendants on its liens (as opposed to simply asking this Court to make a determination of amounts owed by defendants in their assessments), and because Alpha’s liens are limited to what Alpha recorded, and because the collective lien amounts Alpha recorded total \$8,070.74, and because Alpha now has

\$23,941.13 in its possession from defendants, which Alpha has already “applied” to a much larger debt that Alpha has mistakenly, and illegally, labeled a lien, there is no dispute of fact that Alpha has \$15,870.39 excess over the actual lien amount. There can be no other legal conclusion based on these undisputed facts other than that defendants have paid off the liens, plus an additional \$15,870.39. The defendants are entitled, pursuant to I.C. § 55-1518, to a recorded “satisfaction and release of the lien”, and they have been entitled to that recorded “satisfaction and release of the lien” since May 17, 2012, when Judge Haynes ordered the \$23,941.13 released to Lukins & Annis (Alpha’s attorneys) on behalf of Alpha Holdings (Affidavit of Melanie Baillie, Exhibit 13), and certainly no later than May 21, 2012, when the check from the Clerk of the Court to Lukins & Annis was issued. *Id.*, Exhibit 16. Since that date, each of the defendant’s title has been slandered by Alpha’s lien.

The following table shows the extent of Alpha’s overreaching by Rai claiming in his affidavit that defendants collectively owe \$28,933.31; the table illustrates what was actually recorded as a lien by Alpha on each condominium owner’s property, and what Alpha now illegally seeks to foreclose upon, and the difference:

Owner	Alpha’s Amounts (Rai Affidavit)	Lien Amounts (Attachments to Alpha’s Complaint, and Plaintiff’s Submission of Certified Documents Support of its Motion for Summary Judgment, Exhibits 8-13)	Difference
Chaney	\$8,920.14	\$3,878.21	\$5,041.93
Joslin	\$5,069.32	\$661.03	\$4,408.29
Vezina	\$5,069.32	\$661.03	\$4,408.29
Alberta	\$5,102.31	\$661.03	\$4,441.28
Newman	\$2,462.75	\$1,191.47	\$1,271.28
Stanic	\$2,309.47	\$1,017.97	\$1,291.50
Totals	\$28,933.31	\$8,070.74	\$20,862.58

Via Rai's affidavit and Alpha's briefing, Alpha seeks to show this Court how the original payoff amounts have increased due to interest, additional costs and attorney fees.

There is no possible reading of I.C. § 55-1518 that produces the result demanded by Alpha to defendants eighteen months ago, or as argued by Alpha's counsel at present.

All Alpha had to do to obtain the result it now seeks was to re-record the liens to reflect these higher amounts. However, up to the present time, Alpha has failed to do this.

Idaho Code § 55-1518 makes it clear that the Association (and now Alpha via assignment) has no legal right to foreclose on the stated lien amounts because *defendants have already paid those amounts, and more!*

Consequently, Alpha has failed to prove to this Court it is entitled to summary judgment on the issue of whether or not defendants have paid off their liens in an amount totaling \$28,933.31. As such, summary judgment must be denied.

The evidence before the Court shows the actual lien amounts, totaling \$8,070.74 have been paid, and defendants are immediately entitled to a recorded "satisfaction and release of the lien" by Alpha. That is the legal result mandated by I.C. § 55-1518. Summary judgment must be granted in favor of the defendants against Alpha to the extent that Alpha must immediately record a "satisfaction and release of the lien" for each of the individual defendants. Additionally, Alpha must make immediate return to the defendants of the amount tendered by the defendants into the Clerk of Court (\$23,941.13) which are in excess of the \$8,070.74 lien.

The Idaho Supreme Court has held summary judgment can be granted to a non-moving party. *Harwood v. Talbert*, 136 Idaho 672, 677, 39 P.3d 612, 617 (2001). In *Harwood*, the Idaho Supreme Court held:

The district court may grant summary judgment to a non-moving party even if the party has not filed its own motion with the court. A motion for summary judgment allows the court to rule on the issues placed before it as a matter of law, the moving party runs the risk the court will find against it . . .

Id. A district court may also not decide an issue not raised in the moving party's motion for summary judgment. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530, 887 P.2d 1034, 1037 (1994). In instances where summary judgment is granted to the non-moving party, the appellate courts liberally construe the record in favor of the party against whom summary judgment was entered. *Harwood*, 136 Idaho 672, 677-78, 39 P.3d 612, 617-18.

IV. CONCLUSION AND ORDER.

For the reasons set forth above;

IT IS HEREBY ORDERED plaintiff Alpha Holdings LLC's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that all attorney fees sought by Alpha Holdings LLC against defendants, as a result of Alpha's lien foreclosure in this lawsuit, are DENIED.

IT IS FURTHER ORDERED summary judgment is GRANTED in favor of defendants against plaintiff Alpha Holdings LLC, in that Alpha Holdings, LLC must:

- 1) immediately record a "satisfaction and release of the lien" for each of the individual defendants; and
- 2) immediately return to the defendants from the \$23,941.13 tendered by defendants into the Clerk of Court (which were then dispersed to Alpha Holdings, LLC), the amount which is in excess of the \$8,070.74 total amount of the legal liens, said amount being \$15,870.39.

IT IS FURTHER ORDERED defendants are the prevailing parties in this case and, as such, defendants are entitled to costs and fees against plaintiff to be determined.

IT IS FURTHER ORDERED the jury trial scheduled for November 4, 2013, is
VACATED.

Entered this 30th day of August, 2013.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2013, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
Peter J. Smith

Fax #
664-4125

| **Lawyer**
Steven C. Wetzel

Fax #
664-1684

Jeanne Clausen, Deputy Clerk