IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 18-0439

FEDERAL NATIONAL MORTGAGE ASSOCIATION
Plaintiff/Appellee,

v.

GAIL STAFFORD,
Defendant/Appellant.

Appeal from the Second Judicial District Court, Silver Bow County
Honorable Brad Newman Presiding

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

STATEMENT OF THE ISSUES

I. Under the mootness doctrine, can a party moot a claim that challenges its asserted ownership in real property simply by selling the property at issue to a third party?

II. Whether the district court abused its discretion in denying Stafford's motion for leave to amend and supplement her counterclaims when it did so without making a finding of undue prejudice and without considering the proposed amendment was based upon facts the parties had previously litigated in prior motions for summary judgment?

STATEMENT OF THE CASE

This case involves a dispute as to the ownership of real property on which Defendant/Appellant Gail Stafford has resided for the past nine years. (Dkt. 1, 3). After occupying the property as a tenant of the previous owner, Stafford attended a Trustee's Sale on December 14, 2012 intending to purchase the property. (Dkt. 53, Exh. A). Both Stafford and another witness have submitted sworn affidavits attesting that Stafford placed the high bid at that sale. (Dkt. 15, Exhs. D & E). The trustee, however, prematurely ended the auction and issued a Trustee's Deed to Plaintiff/Appellee Federal National Mortgage Association ("FNMA"). (Dkt. 53).

FNMA initiated this action on June 27, 2013 to evict Stafford. (Dkt. 1). Stafford filed her answer and counterclaims on August 29, 2013 denying FNMA's claimed interest in the property and seeking to quiet title in her favor. (Dkt. 3). Although the counterclaim was initially based on her leasehold interest in the property, the parties subsequently litigated the question of who had placed the high bid at the sale in cross motions for summary judgment filed January 13, 2014 and May 6, 2014. (Dkt. 5, 15). Despite promising the parties it would issue a ruling as quickly as it could, the court never ruled on these motions. (App. B).

FNMA sold the property to a third party on January 22, 2018 and moved to dismiss this action shortly thereafter. (Dkt. 50). Stafford filed her response to the motion to dismiss on March 23, 2018 along with a motion for leave to amend her counterclaims to include the claims previously litigated and additional claims based on the facts previously considered. (Dkt. 51-53). On July 3, 2018, the district court entered an order granting FNMA's motion to dismiss and denying Stafford's motion for leave to amend. (Dkt. 57; App A). Stafford filed a timely notice of appeal on July 27, 2018. (Dkt. 59).

STATEMENT OF FACTS

This action arises out of competing claims to real property located at 86 Elkhorn Lane in Butte, Montana (the "Property"). (Dkt. 52, Exh. 1, ¶ 10)[1]. In 2008, Colin Caffrey obtained a loan from Mann Mortgage, LLC in the amount of $226,100.00 in exchange for a promissory note secured by a deed of trust (the "DOT"). (Dkt. 52, Exh. 1, ¶ 11). The DOT described Mortgage Electronic Registration Systems, Inc. ("MERS") as "beneficiary" and designated Montana Abstract and Title Company as trustee. (Dkt. 52, Exh. 1.A). In 2009, Stafford reached an agreement with Caffrey to lease the back house on the Property and has lived there since. (Dkt. 52, Exh. 1, ¶ 12).

On July 6, 2012, MERS executed an "Assignment of Deed of Trust" purporting to convey all beneficial interest in the DOT to Bank of America, N.A. (Dkt. 52, Exh. 1.C). On August 6, 2012, Bank of America executed a "Substitution of Trustee" purporting to substitute ReconTrust Company, N.A. ("ReconTrust") as trustee. (Dkt. 52, Exh. 1.D). The next day, ReconTrust recorded a "Notice of Trustee's Sale" stating it "will … sell [the Property] at public auction to the highest bidder" on December 14, 2012. (Dkt. 52, Exh. 1.E). Desiring to purchase the

[1] Much of the facts relevant to this appeal are taken from Stafford's proposed First Amended Answer and Counterclaims and the attached exhibits, docket 52, Exhibit 1.A-L. *See Griffin v. Moseley*, 2010 MT 132, ¶ 22, 356 Mont. 393, 234 P.3d 869 (holding that a district court should deny leave to amend only if the pleader "can develop no set of facts under its proposed amendment that would entitle the pleader to the relief sought.").

Property, Stafford called ReconTrust and a representative told her the starting bid would be $190,851.90. (Dkt. 52, Exh. 1, ¶ 18).

Stafford attended the auction on December 14, 2012, bringing a cashier's check for $170,000 plus $49,000 cash, totaling $219,000. (Dkt. 52, Exh. 1, ¶¶ 20-21). Also in attendance were David W. Kneebone and Tony King. (Dkt. 52, Exh. 1, ¶ 20). At 2:00 p.m., the auctioneer, Joseph Nowakowski, approached the group and asked if anyone intended to bid on the Property. (Dkt. 52, Exh. 1, ¶¶ 20-21). Only Stafford and King indicated they would be bidding. (Dkt. 52, Exh. 1, ¶ 21). According to Stafford and Kneebone by affidavit, no FNMA representative was present at the auction. (Dkt. 52, Exh. 1, ¶ 21; Dkt. 15, Exhs. D & E).

Nowakowski excluded King from bidding because he had only a personal check. (Dkt. 52, Exh. 1, ¶ 21). After examining Stafford's means of payment, Nowakowski announced she met the requirements for bidding. (Dkt. 52, Exh. 1, ¶ 21). Nowakowski then made a phone call out of earshot. (Dkt. 52, Exh. 1, ¶ 22). Upon his return, Nowakowski announced the bidding would start at $190,851.90 and increase by one-dollar increments. He then turned to Stafford for her bid. (Dkt. 52, Exh. 1, ¶ 23). Stafford bid "one dollar more," the sum of $190,852.90. (Dkt. 52, Exh. 1, ¶ 23; Dkt. 15, Exh. D, ¶ 14; Dkt. 15, Exh. E at 2).

Nowakowski then abruptly closed the bidding, stating "they" needed at least $238,000. (Dkt. 52, Exh. 1, ¶ 23). Stafford did not learn who had purchased the property until some time later when she examined the Clerk and Recorder's records and discovered a "Trustee's Deed" dated December 19, 2012 issued to FNMA. (Dkt. 52, Exh. 1, ¶ 24; Dkt. 52, Exh. 1.I). Contrary to the series of events testified to by witnesses present at the auction, the Trustee's Deed recites that ReconTrust "did, on December 14, 2012 at 02:00 PM, duly sell at public auction … the premises in said Trust Indenture … to [FNMA] for the sum of $190,851.90." (Dkt. 52, Exh. 1.I). Notably, the sale price recited in the Trustee's Deed is one dollar less than Stafford's bid on the day of the auction. (Dkt. 52, Exh. 1, ¶ 24). It is also less than the reserve price of $238,000 Nowakowski stated as the reason for ending the auction early.

On March 14, 2013, FNMA served Stafford with a 30-day "Notice to Quit" in which FNMA claimed to be "the purchaser of [the Property] at the Trustee's Sale held on December 14, 2012." (Dkt. 52, Exh. 1.J). Stafford refused to vacate and FNMA filed this action on June 27, 2013. (Dkt. 1). Stafford answered the complaint, asserting a counterclaim for quiet title. (Dkt. 3 at 4-6). Although the quiet title counterclaim originally rested upon Stafford's leasehold interest in the Property, it also alleged that FNMA's claim to title was "without any right" and that FNMA "has no right, title, estate, lien, or interest in the real property." (Dkt. 3 at 5).

FNMA moved for summary judgment shortly thereafter, on January 13, 2014. In responding to the motion, Stafford relied in part on this Court's then-recent decision in *Pilgeram v. Greenpoint Mortgage Funding, Inc.*, 2013 MT 354, 373 Mont. 1, 313 P.3d 839. *Pilgeram* held that MERS does not qualify as a "beneficiary" under Montana's Small Tract Financing Act ("STFA") and cannot assign the trust indenture in that capacity. *Pilgeram*, ¶ 17. Stafford argued that "FNMA's deed is void" because the sale did not strictly comply with the STFA. (Dkt. 9 at 7). Because no discovery had yet been conducted, the court stayed consideration of FNMA's motion "until further order." (Dkt. 10).

The scheduling order required discovery be completed by May 26, 2014 and dispositive motions filed before June 13, 2014. (Dkt. 12). Notably, the order conspicuously omitted any deadline for amending pleadings, stating "n/a" under "Joinder and Amendments." (Dkt. 12 at 2). Stafford served FNMA with discovery requests on February 12, 2014 and March 11, 2014. (Dkt 14). The requests asked FNMA to identify all witnesses and, more specifically, to

> identify the bidder and list the facts and circumstances which support FNMA's claim in their motion for Summary Judgment that FNMA was the highest bidder at the Trustee's Sale held on December 14, 2012.

(Dkt. 14). FNMA did not respond to these requests within the 30-day period required by Rule 33(b)(2) of the Montana Rules of Civil Procedure.

In the absence of responses to her discovery requests, in order to ensure compliance with the scheduling order, Stafford filed her motion for summary judgment on May 6, 2014. (Dkt. 15). Citing *Pilgeram*, Stafford argued that "[t]he Trust Indenture does not comply with the STFA because MERS is not a valid beneficiary." (Dkt. 15 at 5). Stafford also submitted affidavits of Gail Stafford and David Kneebone, both of which asserted it was Stafford, and not FNMA, who had placed the high bid at the trustee's sale. (Dkt. 15, Exhs. D & E). ReconTrust's "[l]ack of strict compliance with the STFA," Stafford argued, "void[ed] [the] trustee's foreclosure ... and any interest in title claimed thereafter." (Dkt. 15 at 5-7).

FNMA did not object to the court's consideration of these arguments. (Dkt. 16). Rather, in its response brief, FNMA acknowledged that "Stafford argues that the sale was not properly cried because FNMA did not have a representative present at the sale ...[,] that she was the highest bidder," and that her argument "impl[ies] that she should be the owner." (Dkt. 16 at 2-3). FNMA addressed that argument on its merits:

> the only evidence Stafford offered to corroborate her allegations is an affidavit by David Kneebone. ... who claims he was at the sale and that Stafford was the highest bidder, yet admitted that there was an unknown person[2] at the sale, whose name he did not catch. *Id.* The

[2] While not relevant to this appeal, this statement in FNMA's brief rests upon a fundamentally incorrect interpretation of Kneebone's affidavit. Although Kneebone indeed states he did not catch the name of this "unknown person," the affidavit makes clear that "he" (i.e. the "unknown person") was the person who conducted the auction, i.e. Nowakowski. (Dkt 15, Exh. E at 1). Thus,

> lack of evidence provided to support Stafford's claim, and David Kneebone's statement that there was an unknown person at the sale, both are enough to show a genuine issue of material fact does, in fact, exist.

(Dkt 16 at 14). Meanwhile, FNMA continued to ignore Stafford's discovery requests, necessitating Stafford's filing of a motion to compel, which the district court granted. (Dkts. 14 & 17).

The Court set a hearing on the parties' motions for summary judgment for September 8, 2014. (Dkt. 28). Although FNMA still had not responded to Stafford's discovery requests, in disregard of a court order requiring it to do so, the business day before the hearing FNMA filed an affidavit of Joseph Nowakowski. (Dkt. 33). In that affidavit, filed only after FNMA had ignored Stafford's discovery requests for six months and long after the 21-day deadline for filing responsive affidavits to a motion for summary judgment[3], Nowakowski, for the first time, claimed that FNMA was the high bidder at the Trustee's Sale held on December 14, 2012. (Dkt. 33). Stafford promptly moved for dismissal of FNMA's complaint and entry of default on her counterclaim as a sanction for FNMA's discovery violation. (App. B at 11-12; Dkt. 35).

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that individual could not, as FNMA implies, have been the phantom FNMA representative who placed a bid at the sale. *See* § 71-1-315(3), MCA (trustee may not bid at the sale).

[3] *See* Rule 56(c)(1)(B), M.R.Civ.P.

At the hearing on September 8, 2014, the district court heard arguments on the parties' cross-motions for summary judgment. (App. B). At the end of the hearing, the Court told the parties, "I will get you rulings on these motions as quickly as I can." (App. B at 20:15-17). Notwithstanding this promise, eight months passed without an order on the pending motions. FNMA filed a notice of issue on May 26, 2015, reminding the court that the motions remained outstanding. (Dkt. 26). Two other motions were filed, including a motion for a scheduling conference. (Dkt. 42, 47). Still, the district court issued no order on any of the outstanding motions. (*See* Dkt. *passim*). Three years passed without any significant action in the case. (*See* Dkt. *passim*). Stafford retained new counsel. (Dkt. 49).

On or about December 5, 2017, FNMA listed the Property for sale on Auction.com without notifying the court, its counsel, or Stafford. (Dkt. 52, Exh. A, ¶ 27). Even though the listing noted the pendency of the district court action, disclaimed warranties of title and stated the Property was occupied with buyer being responsible for obtaining possession, Wade Randall Ayala bid on and agreed to purchase the Property. (Dkt. 52, Exh. A, ¶¶ 27-28). Prior to closing, counsel for Stafford personally contacted Ayala and his attorney, informing them Stafford disputed FNMA's claim of title to the Property and that Stafford was the actual high bidder. (Dkt. 52, Exh. A, ¶¶ 27-28). Despite this knowledge, Ayala closed on the

Property on January 22, 2018, purchasing it for $173,657.40. (Dkt. 52, Exh. A, ¶ 29).

Both parties prepared motions addressing this turn of events. (Dkt. 56, Exh. A, ¶¶ 4-9). On March 13, 2018, FNMA moved to dismiss, stating only that because it did not own the Property, it was no longer appropriate to proceed with Stafford's quiet title claim. (Dkt. 50). FNMA's combined motion and brief consisted of six sentences and contained no legal analysis or evidentiary support for its factual assertions. (Dkt. 50). On March 23, 2018, Stafford filed a response brief opposing FNMA's motion to dismiss. (Dkt. 51, 53). In her response brief, Stafford pointed out FNMA could not create mootness simply by voluntarily ceasing the conduct challenged in her counterclaim. (Dkt. 53 at 2). Stafford also argued the sale did not moot the case *ab initio* because her proposed amended counterclaims included causes of action that did not depend upon FNMA claiming title to the Property. (Dkt. 53 at 3-6).

In a separate motion to amend filed that same day, Stafford noted her proposed amendment only made explicit claims already litigated or added new legal theories to facts already considered by both parties. (Dkt. 51; Dkt. 52 at 9-11). Specifically, Stafford sought a declaratory judgment that FNMA never acquired title because FNMA did not purchase the property in a sale "at public auction to the

highest bidder," as required by the STFA. § 71-1-315(3), MCA. (Dkt. 52 at 9-11). Stafford also sought a declaratory judgment that FNMA never acquired valid title because the chain began with an invalid assignment from MERS. (Dkt. 52 at 9-11). Stafford further sought to add claims for actual fraud, negligent misrepresentation, constructive fraud, and violations of the Montana Consumer Protection Act ("CPA") based on these same facts. (Dkt. 52 at 11). Finally, Stafford's proposed amended counterclaims included claims against Ayala for unjust enrichment, constructive trust, and quiet title. (Dkt. 52, Exh. A at ¶¶ 54-64). Specifically, Stafford asserted by obtaining title to the Property with knowledge of Stafford's claims, Ayala "received a benefit under such circumstances as to make it inequitable for him to retain that benefit." (Dkt. 52, Exh. A at ¶¶ 57-58). Because none of these claims "depend[ed] upon FNMA claiming an interest in the property," Stafford argued there was no basis to dismiss the complaint. (Dkt. 53 at 5).

The District Court ruled on both motions in an order filed July 3, 2018. (App. A). While the court recognized mootness occurs only when "the issue presented at the outset of the action has ceased to exist," the court narrowly interpreted the "issue" to mean only the legal claim "raised in the original pleadings." (App. A at 3). Based on the fact FNMA "no longer assert[ed] any claim of title to the subject property," the court found the sale mooted Stafford's "quiet title

action." (App. A at 2). The court did not address Stafford's proposed amended counterclaims and ignored Stafford's argument that those claims did not depend upon FNMA's claimed interest in the property. (App. A). It did so based solely on the fact that Stafford filed her motion "after [FNMA] filed its motion to dismiss." (App. A at 3). While the Court faulted Stafford for not amending her counterclaims sooner, it did not consider its own failure to rule on outstanding motions or FNMA's refusal to engage in discovery. (App. A at 3).

The court further held FNMA's voluntary cessation did not create an exception to mootness because the "alleged wrongful conduct could not reasonably be expected to recur." (App. A at 3). In so holding, the court stated the "alleged wrongful conduct" consisted of FNMA's "initiation of a wrongful detainer action." (App. A at 3). The court again ignored Stafford's proposed amended counterclaims based solely on timing. (App. A at 3).

STANDARD OF REVIEW

While neither FNMA nor the district court specified the procedural basis for dismissing Stafford's counterclaims, a dismissal on the ground of mootness affects the court's jurisdiction and is therefore reviewed *de novo* regardless of the procedural posture in which it arises. *Stanley v. Lemire*, 2006 MT 304, ¶ 52, 334 Mont. 489, 148 P.3d 643. Moreover, because the motion occurred long after the time for a

responsive pleading, considered facts outside the complaint, and sought dismissal with prejudice, it in effect sought summary judgment pursuant to Rule 56 of the Montana Rules of Civil Procedure. *See In re Williams Petition*, 145 Mont. 45, 56, 399 P.2d 732, 738 (1965) (holding that the Supreme Court construes lower court decisions based on their substance rather than their form). This Court reviews a district court's grant of summary judgment *de novo*, applying the same Rule 56 criteria as the district court. *Lohmeier v. DNRC*, 2008 MT 308, ¶ 12, 346 Mont. 23, 192 P.3d 1137.

This Court reviews a district court's decision denying leave to amend for abuse of discretion. *Griffin v. Moseley*, 2010 MT 132, ¶ 22, 356 Mont. 393, 234 P.3d 869. "A court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811. "[I]t is an abuse of discretion to deny leave to amend where it cannot be said that the pleader can develop no set of facts under its proposed amendment that would entitle the pleader to the relief sought." *Griffin*, ¶ 22.

SUMMARY OF THE ARGUMENT

The court's dismissal of Stafford's counterclaims reflects a fundamental misapplication of the mootness doctrine. Mootness occurs only when the trial court

lacks power to grant "some form" of effective relief. Further, a case can be mooted by a "voluntary cessation" of the challenged conduct only when the defending party satisfies a "heavy burden" to establish that the conduct cannot be reasonably expected to recur. In evaluating whether "some form" of effective relief exists, this court's cases make clear the district court must consider not merely the legal theories set forth in the original complaint, but also other potential forms of relief. Similarly, in construing the "challenged conduct" the district court must look beyond the elements of the cause of action asserted and to the "constellation of facts" that forms the basis for the dispute between the parties.

Stafford's proposed amended counterclaims included legal theories and arguments that did not depend upon FNMA's interest in the Property. The "issue" for purposes of mootness was not, as the district court construed it, limited to the elements of an action for quiet title, but consisted of the factual question of who placed the high bid at the sale. The sale of the Property did not moot this issue because Stafford's proposed amended counterclaims would have provided "effective relief" that did not depend upon FNMA's interest in the property. Similarly, the conduct Stafford had challenged throughout this case was not merely FNMA's interest in the Property, but its acquisition of the Property in the first instance. FNMA's sale of the Property did not terminate that controversy and therefore could

not, by itself, establish that the challenged conduct could not reasonably be expected to recur.

The court further abused its discretion in denying Stafford's motion for leave to amend. As this court has made clear on numerous occasions, leave to amend should be denied only upon a finding of prejudice to the opposing party. Because FNMA had not engaged in discovery or in scheduling mediation, which resulted in the Court setting aside the trial date, FNMA could not establish it would suffer prejudice as a result of the amendment. Moreover, because the failure to have these issues litigated earlier resulted from FNMA's own intransigence to discovery, any prejudice to FNMA could in no sense have been regarded as "undue."

The district court should have considered the affirmative bases for amendment set forth in Rule 15. Specifically, the parties had already litigated by implied consent many of the claims Stafford sought to include in her amended counterclaims. Leave to amend should have likewise been granted under the liberal standards of Rule 15, M.R.Civ.P., because the proposed amendment merely sought to add new legal theories based on facts the parties had previously considered. Lastly, Stafford should have been allowed to "supplement" her counterclaims under Rule 15(d) with claims based upon the sale to Ayala. By failing to consider any of these affirmative bases for leave to amend, the court abused its discretion.

The decision below should be reversed and remanded for further proceedings under Stafford's amended counterclaims.

ARGUMENT

I. THE DISTRICT COURT ERRED GRANTING FNMA'S MOTION TO DISMISS BECAUSE THE SALE OF THE PROPERTY DID NOT END THE CONTROVERSY AND IT CONSTITUTES A VOLUNTARY CESSATION TO WHICH MOOTNESS DOES NOT APPLY

FNMA's motion to dismiss relied entirely on the fact it had sold the Property to a third party. (Dkt. 50 at 3). Although FNMA's two-paragraph brief did not identify the source of law that justified dismissal, the district court concluded the sale of the property rendered the controversy non-justiciable on grounds of mootness. (App. A at 3). This holding is erroneous for two reasons. First, the court failed to address the "fundamental question" of whether, notwithstanding the sale, the court retained the ability to "grant some form of effective relief." *Briese v. Public Employees' Retirement Board*, 2012 MT 192, ¶ 14, 366 Mont. 148, 285 P.3d 550. And second, it did not require FNMA to meet its "heavy burden" of showing the challenged conduct could not be reasonably expected to recur. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶¶ 34, 38, 333 Mont. 331, 142 P.3d 864.

A. The Sale of the Property Did not Affect the Power of the Court to Grant Effective Relief Because Stafford Retained Claims Against FNMA That Existed Independently of its Interest in the Property

In granting FNMA's motion to dismiss, the court disregarded the effect of Stafford's proposed amended counterclaims because, in its view, the "timing" of the proposed amendments undermined her opposition to the motion. (App A at 3). Mootness, however, is not a pleading requirement, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), but instead a component of the "constitutional minimum" required to invoke the power of the court to decide "justiciable controversies," *Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶ 32, 360 Mont. 207, 255 P.3d 80; *Greater Missoula Area Federation of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d 881. As this Court has repeatedly stated, mootness is "the doctrine of standing set in a time frame." *Havre Daily News*, ¶ 31; *Child Start*, ¶ 23. Mootness may occur when, as a result of some "intervening event or change in circumstances," the "issue presented at the outset ... cease[s] to exist or is no longer live." *Child Start*, ¶ 23.

The district court must always address this inquiry by asking the fundamental question whether, notwithstanding the event or change in circumstances, it remains "possible to grant some form of effective relief." *Briese*, ¶ 16; *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶ 37, 364 Mont. 390, 276 P.3d 867; *see also Knox v. Service Employees International Union*, 567 U.S. 298, 132 S.Ct. 2277, 2287 183 L.Ed.2d 281 (2012) ("A case becomes moot only when it is *impossible* for the court to grant *any*

effectual relief whatever to the prevailing party.") (emphasis added). Because the change in circumstances often makes relevant legal theories the parties could not have anticipated at the outset, this Court has defined the "issue presented" for purposes of mootness by reference to the factual dispute between the parties rather than the specific legal theories pled. *Stuivenga*, ¶ 49. An issue is not moot so long as there remains a legal theory, pleaded or unpleaded, that may resolve that factual dispute. *Stuivenga*, ¶ 49; *In re Marriage of Gorton*, 2008 MT 123, 342 Mont. 537, 182 P.3d 746.

In *Stuivenga*, for example, the resolution of the question as to which of two occupants was driving a vehicle at the time of an accident would determine which party should recover certain insurance proceeds. *Stuivenga*, ¶¶ 2, 7. After a jury ruled in favor of Stuivenga, he used the proceeds to pay medical expenses and then moved to dismiss the appeal as moot. *Id.* at ¶ 13-14, 18. This Court denied that motion, holding "the fact that the monies have passed into the hands of third parties does not render this Court unable to grant effective relief to Evans." *Id.* at ¶ 47. In so holding, the court emphasized the "issue presented" was not merely the legal question of who was entitled to the specific insurance proceeds, but the basic factual question of "who was driving." *Id.* at ¶ 49. That issue, the Court held, did not cease to exist upon transfer of the funds to a third party because "relief may also take the

form of restitution as necessary to avoid unjust enrichment—rather than a literal return of the parties to their starting positions." *Id.* at ¶¶ 48-49; *accord Knox*, 132 S.Ct. at 2287 (holding that merely providing the refund the plaintiffs had requested in their complaint did not moot the case "because there is still a live controversy as to the adequacy of the [defendant's] refund notice.").

The Court applied the same reasoning in the context of a sale of real property in *Marriage of Gorton*. During the pendency of an appeal from a marital dissolution order, the husband sold a parcel of real property in dispute. *Marriage of Gorton*, ¶ 13. This Court declined to hold the transfer mooted the case. *Id* at ¶ 14. The "issue," for purposes of mootness, was not the specific treatment of one particular asset, but instead the appropriate distribution of marital assets. Because the district court retained the ability on remand to "fashion a remedy which could involve payment from the sale proceeds or other adjustments," that issue had not ceased to exist as a result of the transfer. *Id.* at ¶ 18.

The district court should have conducted a similar analysis in this case. As these cases make clear, the "issue" here is not, as the district court described it, strictly limited to the elements of the legal theory of quiet title. Stafford's counterclaims were always based on her factual contention that FNMA never acquired a valid interest in the Property in the first instance. (Dkt. 3 at 5). Indeed,

shortly after filing her counterclaims, Stafford filed affidavits stating it was she, and not FNMA, who had placed the high bid at the sale. FNMA has thus long recognized that "Stafford argues that the sale was not properly cried because FNMA did not have a representative present at the sale and that she was the highest bidder." Much like the question of "who was driving" in *Stuivenga*, the "issue" in this case is the factual question of who placed the high bid at the Trustee's Sale.

Having properly defined the "issue" for purposes of mootness, it becomes clear the issue does not "cease to exist" simply because the Property has come into the hands of a third party. "[T]he fact that property has changed hands and third-party interests are involved does not necessarily, in and of itself, render an [action] moot." *Stuivenga*, ¶ 44. Rather, the Court asks whether, notwithstanding the change in circumstances, "some form" of effective relief can nevertheless be granted. As *Stuivenga* and *Gorton* make clear, relief may include legal theories the parties had not previously contemplated.

Stafford's motion to amend specifically articulated those legal theories, including:

(1) declaratory judgment based on violations of the STFA;

(2) actual and constructive fraud, negligent misrepresentation, and CPA violations; and

(3) quiet title based on unjust enrichment and constructive trust.

The remedies for these claims do not depend upon FNMA's interest in the Property. Specifically, the remedy for a party's failure to strictly comply with the STFA is to void the attempted sale. *Terry L. Bell Generations Trust v. Flathead Bank of Bigfork*, 2013 MT 152, ¶ 15, 370 Mont. 342 302 P.3d 390. A showing of fraud gives rise to damages in tort. § 27-1-202, MCA. The CPA authorizes an award of treble damages. § 30-14-133(1), MCA. The remedy for unjust enrichment is the imposition of a constructive trust. *Northern Cheyenne Tribe v. Roman Catholic Church*, 2013 MT 24, ¶ 39, 368 Mont. 330, 296 P.3d 450 (2013). Like the payment of restitution in *Stuivenga* or a "payment from the sale proceeds or other adjustments" in *Gorton*, the existence of these alternative remedies preserved the ability of the court to grant effective relief notwithstanding the sale of the Property.

The district court erred by disregarding these alternative legal theories and instead basing its decision to dismiss the counterclaims based solely upon the elements of quiet title.

B. FNMA Failed to Meet its "Heavy Burden" Under the Voluntary Cessation Exception to Show that the Challenged Conduct Could Not Reasonably Be Expected to Recur

The district court's analysis also reflects a fundamental misapplication of the "voluntary cessation" exception to the mootness doctrine. Courts have long recognized the legitimate concern that, when threatened with legal action, a

defendant might voluntarily cease the conduct challenged in that action in order to avoid an unfavorable decision. *City of Erie v. Pap's AM*, 529 U.S. 277, 288, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000); *Heisler v. Hines Motor Co.*, 282 Mont. 270, 937 P.2d 45, 48 (1997). To prevent such a "manipulat[tion of] the litigation process," this Court has held a defendant's voluntary conduct can moot a case "only when it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Havre Daily News*, ¶¶ 34, 38.

The Court has emphasized the importance of properly defining the "allegedly wrongful behavior" in applying this exception. *Havre Daily News*, ¶ 38 n.9. At a sufficiently high level of abstraction, the "wrong" will always be expected to recur. *See Havre Daily News*, ¶ 38 n.9 (noting that some other causes of action under the legal theory alleged "will predictably recur"). By the same token, if defined too narrowly, the wrong will almost never be reasonably expected to recur. *See Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S.Ct. 2652, 2663, 168 L.Ed.2d 329 (2007) ("[h]istory repeats itself, but not … every 'legally relevant characteristic … down to the last detail."). To avoid these problems, courts define the "wrong" not according to the elements of the claims pled, but by the "constellation of facts … which breathe life into and shape" those claims. *Havre Daily News*, ¶ 38 n.

9; *Montanans Against Assisted Suicide v. Board of Medical Examiners*, 2015 MT 112, ¶ 15, 379 Mont. 11, 347 P.3d 1244.

The district court ran astray of that principle in this case when it defined the "wrong" solely by reference to the legal claims set forth in the pleadings. According to the court, FNMA's allegedly wrongful behavior consisted of its "initiation of a unlawful detainer action." (App. A at 3). While it is true FNMA no longer had the ability to initiate an unlawful detainer action against Stafford, the unlawful detainer action represented only a consequence of the wrongful conduct from which Stafford sought relief. Throughout this case, Stafford has claimed FNMA "has no right, title, estate, lien, or interest" in the real property. (Dkt. 3 at 5). FNMA's unlawful detainer action was merely a symptom of that wrong, not the wrong itself.

The district court's focus on the "unlawful detainer action" ignored the "constellation of facts which breathe life into and shape" Stafford's claims. *Havre Daily News*, ¶ 38 n. 9. As should have been apparent from briefs and procedural history of this case, Stafford's dispute as to FNMA's claim of title rested upon her contention that it was she, and not FNMA, who had placed the high bid at the sale. It was thus FNMA's acquisition of the Property, in violation of the STFA's requirement of a sale to the "highest bidder," § 71-1-315(3), MCA, that constituted the "allegedly wrongful behavior" in this case. Under this Court's precedents,

FNMA bore a "heavy burden" to show such conduct could not reasonably be expected to recur. *Havre Daily News*, ¶ 34.

FNMA did not meet that burden. First, although the sale disclaimed a present interest in the Property, it did not end the controversy as to how FNMA acquired the Property in the first instance. A voluntary cessation does not moot the controversy when the defendant "continues to defend the legality" of its past conduct. *Knox*, 132 S.Ct. at 2287. In this case, FNMA received $173,657.40 based on its claim of title to the Property. Stafford would have been entitled to these funds if, as she alleges, it was her that placed the high bid at the trustee's sale. In this regard, the allegedly wrongful behavior never ceased at all. FNMA cannot show that alleged wrong could not reasonably be expected to recur if its voluntary cessation never actually ended the alleged wrong in the first place.

Second, to the extent FNMA's sale of the Property ended the alleged wrong, its effectiveness in doing so depended upon the validity of its transfer to Ayala. The problem with FNMA's reliance on its sale of the Property, however, is that Stafford's challenge to FNMA's ownership of the Property necessarily also challenged its very authority to sell the Property.[4] Perhaps no principle of property law is more fundamental than the maxim "*nemo dat quod non habet*"—no one can sell that which

[4] It is important to note that FNMA sold the Property without notifying Stafford, the District Court or its own counsel prior to auctioning the Property on Auction.com.

he does not own. *Mitchell v. Hawley*, 83 U.S. 544, 550, 21 L.Ed. 322 (1872). To allow a party to end a dispute alleging it was not the lawful owner of property by selling the very property over which it is alleged to lack ownership would be paradoxical to say the least. It would allow the defendant to retain the value of the disputed interest while avoiding any inquiry into the legitimacy of that interest, effectively promoting the very "manipulation of the litigation process" the voluntary cessation exception was designed to avoid. This cannot be the law.

Similarly, a purchaser's interest in real property is void if he gave value with notice of the impropriety. *Erler v. Creative Finance & Investments*, 2009 MT 36, ¶ 21, 349 Mont. 207, 203 P. 3d 744. Stafford sought to amend her counterclaims in part to allege that Ayala had notice of Stafford's claims at the time he purchased the Property. If established, this finding would render the quitclaim deed to Ayala void and title would revert back to the grantor, FNMA. In that event, FNMA would resume its ownership of the Property—i.e. the same "allegedly wrongful behavior" the district court narrowly described. In order to meet its "heavy burden" to show this conduct could not recur, FNMA therefore at least had to show Ayala lacked notice of the alleged impropriety when he acquired the Property. FNMA provided no evidence or argument on this point. It therefore did not carry that burden.

Finally, as one of the largest holders of mortgages in the United States, it is reasonable to expect that FNMA will in the future accept trustee's deeds predicated upon assignments from MERS and/or violations of the STFA. As an exception to the mootness doctrine, the voluntary cessation exception allows courts to rule on non-extant controversies for the purpose of "provid[ing] guidance concerning the legality of expected future conduct." *Havre Daily News*, ¶ 38. For this reason, the defendant's "heavy burden" applies not just to the situation being litigated, but also to "substantially similar situation[s]" that will arise in the future. *Havre Daily News*, ¶ 39. FNMA's sale of the Property at issue in this case does nothing to establish that it will not accept future assignments predicated upon sales from MERS or violations of the STFA. Thus, even under the district court's narrow construction of the "wrong," FNMA has not satisfied its "heavy burden" to show such conduct cannot reasonably be expected to recur.

The district court's unreasonably narrow interpretation of the wrong resulted in an order that failed to require FNMA to satisfy its "heavy burden" to establish that the challenged conduct could not be expected to recur. It should be reversed.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING LEAVE TO AMEND BECAUSE IT FAILED TO IDENTIFY ANY UNDUE PREJUDICE TO FNMA AND FAILED TO CONSIDER THE AFFIRMATIVE BASES FOR AMENDMENT SET FORTH IN RULE 15

The district court did not directly address Stafford's motion for leave to amend. Instead, it treated that motion as merely an argument in opposition to the motion to dismiss, which it summarily rejected without considering Stafford's arguments or the standards of Rule 15, M.R.Civ.P. (App. A at 3). While the decision to grant or deny leave to amend generally rests within the discretion of the district court, *Deschamps v. Treasure State Trailer Court, Ltd*, 2010 MT 74, ¶ 18, 356 Mont. 1, 230 P.3d 800, deference to the district court's discretionary decisions "presupposes that the district court did, in fact, exercise its discretion," *State v. Weaver*, 276 Mont. 505, 509, 917 P.2d 437, 440 (1996). The "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion." *Priest v. Taylor*, 227 Mont. 370, 740 P.2d 648, 653 (1987) (quoting *Foman v. Davis*, 371 U.S. 178, 181-182, 83 S.Ct. 227, 229-230, 9 L.Ed.2d 222, 226 (1962)).

Under Rule 15, a party must obtain the district court's leave to amend a pleading when more than 21 days have elapsed since service of a responsive pleading. Rule 15(a)(2), M.R.Civ.P. Rule 15 makes clear, however, that "[t]he Court should freely give leave when justice so requires." Rule 15(a)(2), M.R.Civ.P. "[T]his mandate is to be heeded." *Foman*, 371 U.S. at 182. Rule 15, this Court has held, sets forth a policy of "broad liberality" in granting amendments, *State ex rel. Barnard-*

Curtiss Co. v. District Court, 113 Mont. 107, 111, 122 P.2d 419, 420 (1942), such that "it is the rule to allow amendments and the exception to deny them," *Lien v. Murphy Corp.*, 201 Mont. 488, 493, 656 P.2d 804, 806 (1982). Generally, "leave to amend should be freely given absent prejudice to the opposing party." *Griffin v. Moseley*, ¶¶ 22, 29.

A. Delay Did Not Justify Denial of Leave to Amend Because it Was Not Accompanied by Undue Prejudice to FNMA

To the extent the district court considered Stafford's motion to amend, it denied that motion based solely on the "timing" of the proposed amendments. While the court has discretion to deny leave to amend "for an apparent reason" including "undue delay," *Farmers Coop Ass'n v. Amsden, LLC*, 2007 MT 286, ¶ 12, 339 Mont. 445, 171 P.3d 690, "[d]elay alone" has long been regarded "an insufficient reason to deny the [claimant's] motion to amend." *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006). To justify denial of leave to amend, the delay must be "undue," meaning it must be accompanied by prejudice. *Amsden* ¶ 12; *Peuse v. Malkuch*, 275 Mont. 221, 227, 911 P.2d 1153, 1156 (1996). The Court has found such prejudice only when "the opposing party already had expended 'substantial effort and expense' in the course of the dispute that 'would be wasted' if the moving party were allowed to proceed on a new legal theory." *Amsden*, ¶ 14; *Bitterroot Int'l*

Sys., Ltd. v. Western Star Trucks, 2007 MT 48, ¶¶ 50-54, 336 Mont. 145, 153 P.3d 627.

In *Western Star*, for example, the plaintiff sued for breach of a written contract. *Western Star*, ¶ 16. The defendant answered but did not assert a statute of frauds defense. *Id.* at ¶¶ 16, 47. The plaintiff earnestly engaged in discovery over multiple years, including traveling to Canada to depose key witnesses and successfully defending a motion for summary judgment on the existence of a valid contract. *Id.* at ¶¶ 19-20, 52. After all of these efforts, and three months before trial, the defendant moved for leave to amend its answer to assert a statute of frauds defense. *Id.* at ¶ 47. The trial court denied the motion and this Court affirmed. *Id.* at ¶ 54.

Although five years had passed between the filing of the complaint and the defendant's motion to amend, the Court did not rest its decision solely upon the "timing" of the proposed amendment. *Id.* at ¶ 52. Rather, the decision turned on the fact that the amendment "would have prejudiced [the plaintiff's] case because discovery had already closed." *Id.* Specifically, "the delay would have deprived [the plaintiff] of the opportunity to seek discovery of admissions, documents, and witness testimony to establish the defenses to statute of frauds, including sufficiency of writings, part performance, and estoppel." *Id.* Because the plaintiff "already had

deposed key witnesses in Canada at great expense," re-opening discovery and repeating the process was not a viable option. *Id.* at ¶ 53.

None of these factors are present in this case. Unlike the plaintiff in *Western Star*, apart from requesting a writing from Stafford evidencing her lease with Caffrey, FNMA has not served any other discovery requests and has steadfastly ignored Stafford's requests until Stafford's Motion to Compel was granted by the district court. (Docs. 14 & 17). Even then, FNMA's response included objections and non-responsive answers to Stafford's requests and were served more than sixty (60) days after the Court's twenty (20) day deadline for response. As such, FNMA has not incurred any effort or expense—much less "substantial" effort and expense—that would be wasted if Stafford was allowed to amend her counterclaims.

By the same token, the limited testimony FNMA has produced only proves that the legal theories Stafford proposes to include in her amended counterclaims are in no sense "new" to FNMA. Shortly after this litigation began, Stafford served specific discovery requests asking FNMA to state the facts and circumstances supporting its claim to have been the highest bidder. Although FNMA never adequately responded to these requests by identifying an FNMA bidder present at the sale, it did file an affidavit of Joseph Nowakowski for the sole purpose of disputing Stafford's claim to be the high bidder, on the business day evening prior

the hearing on the Motions for Summary Judgment. (Dkt. 33.) As Stafford's proposed amendments all rely upon this crucial fact, FNMA cannot claim ignorance as to the legal theories she proposes to add. Thus, unlike the defendant in *Western Star*, who sought to assert a legal theory that it had previously waived in its answer, Stafford seeks to amend her counterclaim to include a legal theory the parties have extensively litigated since the first few months of this litigation. FNMA can show no prejudice in having to defend such a claim.

In addition to the utter lack of prejudice that would occur if Stafford were allowed to amend, the district court failed to consider the cause of the delay in this case. As the procedural history set forth above demonstrates, Stafford made every effort to move this case forward toward a resolution, serving discovery requests and filing motions within the deadlines set forth in the scheduling order. It was FNMA's failure to respond to discovery and the district court's failure to rule on the pending motions that caused this case to languish. Because none of the delay in this case is attributable to Stafford, it cannot in any sense be regarded as "undue."

In short, the district court abused its discretion when it denied leave to amend without making a specific finding of undue prejudice to FNMA.

B. Rule 15 Specifically Authorizes Leave to Amend in this Case Based on Implied Consent, the Liberal Standards for Amendment of Pleadings, and the Supplemental Pleadings Provision of Rule 15(d)

To make matters worse, the district court failed to consider the affirmative bases to permit amendment set forth in Stafford's motion. As argued extensively below, leave to amend is particularly appropriate in this case because: (1) the parties have already litigated by implied consent the claims Stafford seeks to include in her amended counterclaims; (2) the claims merely add new legal theories to facts already considered by both parties; and (3) Rule 15(d) specifically allows amendment to supplement the pleadings to address events that occurred after the filing of the initial pleadings. In its summary denial of Stafford's motion, the district court failed to consider any of these valid bases for amendment and therefore abused its discretion. *Priest*, 740 P.2d at 653.

i. The District Court Should Have Granted Leave to Amend Under Rule 15(b) Because Stafford's Proposed Amendment Only Expressly Asserted Claims The Parties Had Already Tried by Implied Consent

Rule 15 specifically authorizes a party "at any time" to move to amend the pleadings "to conform them to the evidence" and to raise "an unpleaded issue" that has been "tried by the parties' express or implied consent." Rule 15(b)(2), M.R.Civ.P. For issues tried by implied consent, this Court has applied Rule 15(b) "liberally in favor of allowing amendment of pleadings." *Brothers v. Surplus Tractor Parts Corp.*, 161 Mont. 412, 418, 506 P.2d 1362 (1973). Specifically, the rule allows

amendment to include claims of which the opposing party had notice and argued in prior briefing. *Bates v. Neva*, 2013 MT 246, ¶ 15, 371 Mont. 466, 308 P.3d 114.

In *Bates*, a prospective tenant filed a complaint against her landlord for sexual harassment, relying on a particular subsection of the Montana Human Rights Act that prohibited discrimination in "public accommodations." *Bates*, ¶ 1. Her complaint omitted any reference to a separate subsection that prohibited discrimination in "real estate transactions." *Bates*, ¶ 4. Because the apartment did not qualify as a "public accommodation," the grounds set forth in her complaint provided no basis for the relief she requested. *Bates*, ¶ 8. However, the parties had presented evidence and argument as to the status of the parties' relationship—particularly, whether the complainant was a "tenant." *Bates*, ¶¶ 1, 4-6. Finding that she did qualify as a tenant, the commission imposed liability under the real estate transaction provision, even though it had not been specifically pleaded. *Bates*, ¶ 8.

This Court affirmed on the basis that the parties had tried the issue by implied consent. *Bates*, ¶¶ 19-20. While recognizing that Neva's complaint "could have been clearer," the Court held "it was sufficient to put Bates on notice of the nature of the claim Neva was bringing: that she rented commercial property from Bates who committed unlawful sexual harassment." *Bates*, ¶ 19. By submitting testimony and briefing on the issue of whether Neva constituted a "tenant", the

Court found that Bates and Neva had sufficiently litigated that issue to permit the parties to try the issue by implied consent pursuant to Rule 15(b). *Id.*

Just as the parties in *Bates* consented to trying the real estate transaction provision by briefing the factual predicate for it, Stafford and FNMA consented to litigate the validity of the Trustee's Sale by arguing that issue in the course of these proceedings. After alleging in her original counterclaim that FNMA had no valid interest in the Property, Stafford first raised this issue only a few months later in a response to FNMA's motion for summary judgment filed February 7, 2014. In that brief, Stafford argued that the Trustee's Sale did not comply with the STFA because it depended upon an assignment from MERS. After submitting discovery requests to FNMA asking it to identify the factual basis for its contention that it had placed the high bid, Stafford filed her own motion for summary judgment on May 6, 2014 in which she argued that the sale was invalid because it did not strictly comply with the STFA. In two affidavits supporting that motion, Stafford expressly argued that FNMA's deed was invalid because it was in fact her, and not FNMA, who had placed the high bid at the sale.

Much like the landlord in *Bates*, FNMA responded by litigating this issue on its merits. In its response brief, FNMA acknowledged "Stafford argues that the sale was not properly cried because FNMA did not have a representative present at the

sale ...[,] that she was the highest bidder." (Dkt. 16 at 2-3). FNMA specifically recognized that her argument "impl[ies] that she should be the owner." (Dkt. 16 at 2-3). Instead of objecting to this argument on grounds of lack of notice, FNMA argued that Stafford's affidavits simply did not establish the absence of a genuine issue of material fact on this issue and filed the Nowakowski affidavit asserting contrary facts a few months later. If the relatively scant testimony in *Bates* sufficed to constitute implied consent in that case, surely these extensive arguments and evidentiary submissions qualify as implied consent here.

In substance, Stafford's argument sought a ruling pursuant to the Uniform Declaratory Judgments Act, § 27-8-101, MCA, *et seq.*, that the Trustee's Sale did not comply with the STFA both because it relied on an invalid assignment from MERS and because it constituted a sale to a party who was not the highest bidder. This is precisely the claim Stafford seeks to include in her amended counterclaims. Just as the complainant in *Bates* was allowed to amend her pleadings to conform to the evidence presented in that case, the district court below should have allowed Stafford to amend her pleadings to conform them to the evidence submitted in this case.

Because the parties had already litigated these claims by implied consent, the district court abused its discretion in refusing to consider them.

ii. The District Court Should Have Granted Leave to Amend Under the Liberal Standards of Rule 15(a) Because Any New Claims Stafford Sought to Assert Were Based on Facts Already Considered by FNMA

Even where the precise legal claims have not been expressly litigated by implied consent, the basic mandate of Rule 15(a) to grant leave whenever "justice requires" still applies. Rule 15(a)(2), M.R.Civ.P. The purpose of this rule is to "provide litigants the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1204 (10th Cir. 2006). To avoid preclusion of potentially meritorious claims, this Court has held that "justice requires" amendment whenever new claims stem from the same transaction, occurrence, or event as the initial pleading. *Lien*, 656 P.2d at 807. As such, leave to amend should be granted when the proposed amendment "merely adds an additional theory of recovery" to facts "already considered by the opposing party." *Laber*, 438 F.3d at 427; *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510 (4th Cir. 1986).

In *Lien*, for example, the original complaint sought recovery for damages that occurred when oil leaked from the defendant's pipes onto the plaintiff's land. *Lien*, 656 P.2d at 804. The original complaint contained claims for breach of contract and negligence. *Id.* After the passage of nine years, and damage continuing to Plaintiff's land, the plaintiff moved to amend its complaint to include claims for negligence in

the form of *res ipsa loquitur* as well as nuisance, trespass, and strict liability. *Id.* at 805. The district court denied the plaintiff's motion, and instead granted the defendant's motion to dismiss. *Id.* at 805-06. This Court reversed, holding that the district court's order was an abuse of discretion:

> The new damages and theories of liability set forth in Blue Ox's amended complaint stem from the same occurrence as the first complaint. Though the evidence shows additional leaks since the first filing, the occurrence is oil pollution of the underground water supply. New causes of action arising out of the same transaction, occurrence or event may be set forth in an amended pleading.
> ...
> For these reasons, justice requires Blue Ox be allowed to amend their original complaint to reflect the new and recurring damages to the land, as well as the additional theories of liability.

Lien, 656 P.2d at 806-07; *see also Foman*, 371 U.S. at 182 (allowing amendment to assert recovery in quantum meruit after court dismissed contract claim on grounds of statute of frauds).

Like the amendments in *Lien*, Stafford's proposed amended counterclaims merely sought to add additional theories of recovery to facts FNMA had already considered in the prior motions for summary judgment. The facts recited in the First Amended Answer and Counterclaims mirror those set forth in the Stafford and Kneebone affidavits that were the subject of extensive briefing and argument since the outset of this case. Stafford merely sought to add new theories of recovery to those facts. Specifically, Stafford's proposed amendment asserted that FNMA's and

the Trustee's conduct gave rise to claims for actual and constructive fraud, negligent misrepresentation, violations of the CPA, and unjust enrichment. As *Lien* demonstrates, FNMA would not have been prejudiced by these amendments because it has long had knowledge of the facts underlying these claims.

Accordingly, Stafford should have been granted leave to amend because the proposed amendment merely sought to add additional legal theories to facts FNMA had already considered.

iii. The District Court Should Have Granted Stafford Leave to Amend Under Rule 15(d) Because the Amendment Was Also Necessary to Supplement Her Counterclaims with Facts that Occurred After the Original Pleadings

Finally, the district court abused its discretion by ignoring Stafford's request to supplement her counterclaims to include facts based on the sale of the Property to Ayala. Rule 15(d) provides:

> On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense.

Rule 15(d), M.R.Civ.P. The purpose of this rule is to "minimize technical obstacles to a determination of the controversy on its merits" and "promote as complete an adjudication of the dispute between the parties as possible." *Keith v. Volpe*, 858 F.2d

467, 473-74, 476 (9th Cir. 1988)[5]. Because the rule "plainly permits supplemental amendments to cover events happening after suit … it follows, of course, that persons participating in these new events may be added if necessary." *Griffin v. County Sch. Bd. of Prince Edward Cnty*, 377 U.S. 218, 227, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964). To permit a supplemental pleading, the claims "need not all arise out of the same transaction" but must only share the same "concern." *Keith*, 858 F.2d at 474.

In this case, the sale of the Property to Ayala clearly shared the same "concern" as the counterclaims set forth in the original counterclaims. The focus of the initial counterclaims rested upon the validity of FNMA's interest in the Property and sought to quiet that interest in Stafford herself. One unavoidable consequence of these allegations is that, if true, they would deprive FNMA of any authority to transfer the Property to a third party. The sale of that Property to Ayala necessarily implicated this concern and therefore was a proper basis for a supplemental complaint.

Although Stafford argued this basis in her Motion to Amend, the district court ignored that argument altogether in its order. *Compare* Dkt. 52 at 8 (requesting

[5] This Court has encountered "few opportunities to consider the meaning of … Rule [15(d)]." *Buck v. Buck*, 2014 MT 344, ¶ 17, 377 Mont. 393, 340 P.3d 546. However, "since M.R. Civ. P. 15(d) was based upon and is phrased identically with Fed.R.Civ.P. 15(d)," this Court has found decisions of the Federal Courts interpreting Rule 15(d) to be persuasive. *Buck*, ¶¶ 17-18.

"leave to amend and supplement her Answer and Counterclaim to … set out transactions that have occurred after the date of the original answer and counterclaims" and quoting the text of Rule 15(d), M.R.Civ.P.) *with* App. A at 3-4 (failing to consider Rule 15(d) or the sale of the Property to Ayala). Indeed, Stafford's proposed amendment included an equitable claim for unjust enrichment against Ayala based on his retention of the Property under circumstances that make retention of it unjust. Based on this new transaction, Stafford sought relief in the form of a constructive trust and quiet title against Ayala.

Instead of addressing these claims, the district court rested its decision upon the erroneous premise that Stafford "knew of the potential additional parties and claims several years ago." (App. A at 3). The import of this premise is dubious because, as set forth above, any attempt to assert these claims sooner was thwarted by both the district court's failure to rule on *any* pending motions and FNMA's refusal to engage in discovery. Nevertheless, the premise is patently false as a factual matter because Stafford's claims against Ayala could not have arisen until he closed on the Property on January 22, 2018. Stafford filed her Motion to Amend a mere two months later, on March 23, 2018. A more accurate statement would have been that she knew of the potential claims and parties "weeks ago."

As this court has made clear, refusal to grant the leave "without any justifying reason appearing for the denial" is an abuse of discretion." *Priest*, 740 P.2d at 653 (quoting *Foman*, 371 U.S. at 181-182). Stafford should have been allowed to amend her counterclaims to include claims relating to transactions that occurred after the filing of her original counterclaims. By failing to consider Rule 15(d), the district court abused its discretion.

CONCLUSION

For these reasons, Stafford respectfully requests that the district court's July 3, 2018 "Order Granting Plaintiff's Motion to Dismiss and Order Denying Defendant's Motion to Amend the Pleadings" be reversed and that the case be remanded for further proceedings on Stafford's Amended Counterclaims.

Respectfully submitted,

GRANITE PEAK LAW, PLLC

/s/ Adam H. Owens
Adam H. Owens

DATED: December 5, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rule of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Goudy Old Style text typeface of 14 points; is double-spaced, with left, right, top, and bottom margins of one inch; and that the word count calculated by Microsoft Word is 9,904 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, Appendices, and Certificate of Service.

/s/ Adam H. Owens
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APPENDIX

CERTIFICATE OF SERVICE

I, Adam H. Owens, certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on December 5, 2018:

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