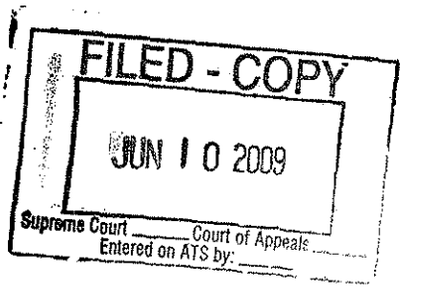
6-10-2009

Ogden v. Griffith Respondent's Brief Dckt. 35964

IN THE SUPREME COURT OF THE STATE OF IDAHO

HENRY OGDEN, an unmarried man; and, MICHELLE HURST, an unmarried woman, Plaintiffs/Respondents, -vs- DENNIS C. GRIFFITH, an unmarried man; and, BONNIE M. PORTER, an unmarried woman, Defendants/Appellants.	**DOCKET NO. 35964**



RESPONDENTS' BRIEF

Appeal from the District Court of the Third Judicial District for Owyhee County
Honorable Thomas J. Ryan, District Judge presiding.

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STATEMENT OF THE CASE

I. Nature of the Case

This appeal arises from the refusal of Dennis C. Griffith ("Griffith") and Bonnie M. Porter ("Porter") (collectively, "Defendants") to abide by the terms of a settlement agreement they entered into with Henry Ogden ("Ogden") and Michelle Hurst ("Hurst") (collectively "Plaintiffs").

Plaintiffs entered into a contract to buy property situated in Owyhee County, Idaho, consisting of forty acres owned by Defendants. Plaintiffs signed the closing documents on November 30, 2006 while Griffith signed closing documents on December 1, 2006 and Porter signed closing documents on December 4, 2006. (R. p. 43). However, Defendants reclaimed the Warranty Deed from the title company before the Plaintiffs' loan funded. (R. p. 43). Plaintiffs subsequently brought a Complaint seeking specific performance or, in the alternative, damages.

On the eve of a jury trial, the parties entered into settlement negotiations. A settlement agreement was reached and a written summary of that agreement was sent by counsel for the Defendants. In reliance upon the settlement agreement, the Plaintiffs instructed the court to vacate the jury trial. (R. p. 165).

Defendants failed to perform under the settlement agreement and Plaintiffs brought a Motion to Enforce the Settlement Agreement. After an evidentiary hearing, the district court ruled that the agreement was enforceable and entered judgment for Plaintiffs. Defendants appeal.

II. Factual and Procedural Background

The Plaintiffs and Defendants entered into a Real Estate Purchase Agreement (hereafter "the agreement") on October 13, 2006. (R. p. 51). The agreement stated that closing was to occur "no later than NOVEMBER 30, 2006" and that time was of the essence. (R. p. 52). However, the closing did not occur on that date. (R. p. 52). Addendum No. 3 to the agreement was drafted that extended the closing deadline to "on or before 12-08-06." On December 1, 2006, Griffith signed the closing documents, including Addendum No. 3. (R. p. 52). On December 4, 2006, Porter signed the closing documents, including Addendum No. 3. (R. p. 52). Plaintiffs did not sign the addendum. (R. p. 52).

Based on the conduct of Defendants, Plaintiffs took steps to secure financing through Bank of America Corporation. (Augmented R., Ex. 1). As of December 7, 2006 all of the conditions for funding the purchase of the subject property had been satisfied and Bank of America was prepared to wire the money to the title company. (Augmented R., Ex. 1). Additionally, Plaintiffs wired funds to the title company to make up the difference between the loan from Bank of America and the purchase price. (Augmented R. Ex. 2).

On December 6, 2006, before the loan funded, Defendants notified the title company that the sale would not take place and retrieved the original warranty deed from Pioneer Title. (R. p. 43). Griffith had become concerned that he was selling the property at too low of a price prior to the November 20 closing due to consultations with three different real estate agents. (R. p. 32).

Thereafter, Plaintiffs filed suit asserting claims of breach of contract, breach of the implied covenant of good faith and fair dealing and seeking an injunction, specific performance, and declaratory judgment. (R. p. 52).

On Plaintiffs' first motion for summary judgment, Plaintiffs alleged that Defendants had waived the November 30 closing date by signing Addendum No. 3 (R. p. 23). The district court denied the motion, stating that factual issues existed with respect to the issue of waiver. (R. p. 23).

Plaintiffs subsequently moved for reconsideration of the denial of summary judgment. (R. p. 80). The court concluded "that Griffith either knew what his option were regarding the signing of the extension by virtue of the legal advice he and Porter had obtained, or he should have known." (R. p. 82). The court found "that waiver has been established by his conduct of signing. The same is true of defendant Porter upon her act of signing on December 4, 2006." (R. p. 82). The court did find an issue of fact with regard to whether Defendants signed under duress. (R. p. 83).

The parties subsequently entered into a settlement agreement, which was memorialized by correspondence drafted by counsel for the Defendants. (R. pp. 95-6). When Defendants failed to perform under the settlement agreement, Plaintiffs brought their motion to enforce the agreement. The court held an evidentiary hearing and determined that Defendants had agreed to pay Plaintiffs $40,000 secured by a deed of trust. (R. pp. 133-39). Judgment was entered against Defendants, enforcing the terms of the settlement agreement. (R. p. 142).

Defendants thereafter filed a motion to vacate the judgment pursuant to Rule 59(e) of the Idaho Rules of Civil Procedure. The district court denied the motion because 1) an agreement to settle a lawsuit need not be in writing; 2) an attorney's authority to settle a lawsuit need not be in writing; and 3) Plaintiffs had materially changed their position by vacating the trial in reliance on the settlement. (R. pp. 164-65).

Finally, the district court denied Plaintiffs' request for attorney fees pursuant to Idaho Code sections 12-120(3) and 12-121. (R. pp. 165-66).

ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in ruling that an oral settlement agreement which contemplated the conveyance of an interest in real property was enforceable and not within the purview of the Statute of Frauds Idaho Code section 9-503.

2. Whether the district court erred in ruling that the authority of an attorney to settle a lawsuit does not have to be in writing under the Statute of Frauds even where the settlement contemplated a conveyance of an interest in real property.

3. Whether the district court committed an error of law in applying the doctrine of part of performance which resulted in a remedy, i.e. damages, which was not the equitable remedy of specific performance.

4. Whether the district court's factual finding of part performance was clearly erroneous where plaintiff's "performance", i.e., vacating the trial, was not reasonable, as it was undertaken prior to defendants' execution of the promissory note and deed of trust.

5. Whether, because the parties contemplated the execution of a promissory note and deed of trust as the consummation of their negotiations, the oral settlement agreement was not enforceable.

6. With respect to the real estate purchase and sale agreement, whether defendant sellers waived their right to enforce the original closing deadline by signing an addendum extending the deadline at a point in time when the deadline had already expired.

7. Whether the district court erred in entering partial summary judgment, finding waiver, when there existed genuine issues of material fact precluding summary adjudication.

ADDITIONAL ISSUES PRESENTED ON APPEAL

Plaintiffs raise the following additional issue: Whether the Plaintiffs are entitled to attorney fees and costs on appeal pursuant to I.A.R. 40 and 41 and I.C. § 12-121.

ARGUMENT

I. STANDARD OF REVIEW

The Defendants appeal the district court's Memorandum Decision re Plaintiffs' Motion to Reconsider entered April 17, 2008 and judgment that entered on September 9, 2008. (R. p. 174). In that decision, the district court granted Plaintiffs summary judgment on the issue of waiver. When reviewing a district court's grant of summary judgment, the Supreme Court uses the same standard a district court uses when it rules on a summary judgment motion. *Jordan v. Beeks*, 135 Idaho 586, 589, 21 P.3d 908, 911 (2001). Summary Judgment shall be rendered when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a

matter of law. I.R.C.P. 56(c). The Supreme Court is to liberally construe the record in favor of the party opposing the motion for summary judgment and will draw all reasonable inferences in favor of that party. *Farmers Ins. Co. of Idaho v. Talbot*, 133 Idaho 428, 431, 987 P.2d 1043, 1046 (1999).

The Defendants also appeal the Memorandum Decision denying defendants' motion to vacate judgment which decision was entered November 6, 2008. (R. pp. 174-75). With respect to issues of law, such as those involving the interpretation of a statute, the Supreme Court exercises free review. With respect to factual findings made by the district court, the Supreme Court cannot set such findings aside unless the decision is "clearly erroneous." I.R.C.P. 50(b). If the district court's findings are supported by "substantial and competent, though conflicting evidence" the finding must stand. *Muniz v. Schrader*, 115 Idaho 497, 500, 767 P.2d 1272 (Ct. App. 1989.)

II. THE SETTLEMENT AGREEMENT IS ENFORCEABLE BECAUSE IT IS OUTSIDE OF THE STATUTE OF FRAUDS

a. The district court did not err in determining that the agreement was for the settlement of a lawsuit, rather than a land sale contract.

Defendants assert that the court erred in determining that the agreement was for the settlement of a lawsuit and thus outside of the requirements of the statute of frauds (Appellant's Brief, pp. 13-15). The district court unequivocally found that the settlement agreement was "for the settlement of a lawsuit, not a land sale contract." (R. p. 163). Defendants fail to show that the contract was anything but a settlement of a pending lawsuit.

Specifically, Defendants contend that the settlement agreement contemplated the "unwinding of a real estate transaction," thus subjecting the agreement to the statute of frauds. (Appellant's Brief, p. 13). First, the settlement agreement could not contemplate the unwinding of a real estate transaction in this case for the simple reason that a real estate transaction failed to occur. Defendants retrieved the warranty deed from Pioneer Title before the Plaintiffs' loan funded, thus preventing the sale of the property. (R. p. 52). While Plaintiffs' Complaint sought specific performance or damages in the alternative, the settlement agreement undeniably contemplated only money damages. There is no contention by either party that title to the property was to exchange hands. Therefore, the statute of frauds clearly does not apply.

Even if the settlement agreement had contemplated the "unwinding of a real estate transaction," the statute of frauds is only applicable when there is a transfer of an estate in property. Idaho Code § 9-503 states in pertinent part:

> No estate or interest in real property, other than for leases for a term not exceeding one (1) year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

Thus, it is clear, that the unwinding, (i.e. the decision not to undertake) the real estate transaction does not involve the transfer of an "interest in real property." In fact, it involves the decision not to undertake a real estate transaction. Therefore, the unwinding of a real estate transaction does not implicate the statute of frauds.

If the Court finds that the settlement agreement was not a contract for an interest in land, it need not reach the following issues regarding part performance because part performance is merely an exception to the statute of frauds requirement. *Thorn Springs Ranch, Inc. v. Smith*, 137 Idaho 480, 50 P.3d 975 (2002).

b. The court did not commit an error of law in applying the doctrine of part performance.

Defendants assert that the application of part performance was an error of law where claimants under the contract seek a damage remedy, not specific performance. (Appellant's Brief, p. 17). Defendants' assertion, however, misstates the remedy sought by Plaintiffs' Motion to Enforce the Settlement Agreement. In filing their Motion to Enforce Settlement Agreement, Plaintiffs did not seek monetary damages for breaching the settlement agreement. Instead, Plaintiffs sought specific performance of the settlement agreement. (R. p. 64). Argument to the contrary strains the credibility of Defendants.

c. The factual findings of the district court regarding part performance should be upheld as well.

Defendants are correct in concluding that the factual finding of part performance cannot be set aside unless it is "clearly erroneous." (Appellant's Brief, p. 11). The finding of the district court is supported by substantial and competent evidence and should not be overturned.

Here, the district court found that Plaintiffs vacated the trial in reliance upon the settlement agreement. (R. p. 165). There is no evidence in the record to suggest that the trial date was not vacated. Additionally, Defendants assert that there is no evidence that the vacation of the trial was necessary or reasonable. (Appellant's Brief, p. 17). However, the district court

correctly recognized that the issues had been litigated for over a year and the trial had been set for months. (R. p. 165). There is no question that the vacation of the trial date had an adverse impact on only one party—the Plaintiffs. As such, the vacating of the trial date evidences the fact that the parties had reached an agreement. Defendants fail to offer any other plausible reason for the decision to vacate the trial. On this basis, the court found it "appropriate to use its equitable powers to invoke the doctrine of part performance or equitable estoppell to enforce the settlement agreement." (R. p. 165). Because that finding is based on substantial and competent evidence, it should be upheld.

Defendants next argue that the agreement was not complete in its material terms thereby making part performance inapplicable. (Appellant's Brief, p. 12). First, it should be noted that this argument was raised for the first time in the Appellant's Brief. It was not even included in the notice of appeal. (R. p. 170). Idaho law is clear that an issue not raised at the district court will not be considered for the first time on appeal. *Balser v. Kootenai County Board of Commissioners*, 110 Idaho 37, 714 P.2d 6 (1986).

Even so, the argument clearly fails. The district court found that "the settlement is clear and complete as to all the material terms. There is nothing vague or uncertain about the agreement." (R. p. 165). The only terms Defendants attempt to argue that are unknown consist of terms of the deed of trust such as the "right to prepay, right to inspection, protection of beneficiary's rights in the event of litigation, payment of all charges that may become liens, assignment (or not) of condemnation proceeds, and whether successor assigns are bound." (Appellant's Brief, p. 17). First, these are not material terms such as price and subject matter.

Next, and even more importantly, the deed of trust is only security for the agreement. Defendants do not cite to one missing term of the settlement agreement itself. Therefore, the court's determination that the settlement agreement was clear and complete as to all material terms must stand.

d. The existence of a promissory note secured by a deed of trust does not affect the validity of the settlement agreement.

Lastly, Defendants briefly argue that a "written contract was intended by the parties" thus making the oral agreement unenforceable. (Appellant's Brief, p. 19.) Specifically, Defendants state that anticipated execution of the deed of trust and promissory note indicate the parties' intention for a written contract.

This issue was not raised at the trial court level nor was it raised in the notice of appeal. (R. p. 170). Consequently, this issue should not be considered by this Court. *Balser v. Kootenai County Board of Commissioners*, 110 Idaho 37, 714 P.2d 6 (1986). Notwithstanding this fatal defect, there is no evidence to suggest that the contract was to be written at a subsequent time. There is no reference to a written contract in the confirmation letter sent by Defendants' counsel. (R. p. 95). In fact, the letter states that it "will confirm our **oral settlement** agreement reached today." (R. p. 95) (emphasis added). Additionally, no written agreement was ever drafted. Had this been the intent of the parties, surely one would have been drafted contemporaneously with the deed of trust, promissory note, or letter of confirmation.

Analyzed under the factors outlined in *Thompson v. Pike*, it is apparent that the contract was not intended to be written. 122 Idaho 690, 838 P.2d 293 (1992). The factors to be considered by the court are:

> (1) whether the contract is one usually put in writing, (2) whether there are few or many details, (3) whether the amount involved is large or small, (4) whether it requires a formal writing for a full expression of the covenant and promises, and (5) whether the negotiations indicate that a written draft is contemplated as the final conclusion of negotiation.

Id. at 696. First, agreements to settle lawsuits can be written, but there is no requirement to do so. Again, there is no evidence that the parties intended the agreement to be written. This is most convincingly evidenced by the fact that this argument is presented for the first time on appeal. Next, the settlement terms of the agreement are relatively simple. Defendants were to pay a sum of money, evidenced by a promissory note and secured by a deed of trust, in exchange for Plaintiffs dismissing the lawsuit and *lis pendens*. (Augmented R., Ex. 4, and Ex. 6). Third, the amount involved, $40,000, is relatively small. Fourth, as the district court correctly determined, Plaintiffs were seeking the enforcement of a settlement agreement, not a land sale contract. As such, no writing was required. Finally, the negotiations, and most importantly the confirmation letter sent by Defendants' counsel at the time, made no mention of a written version of the agreement. In fact, the written confirmation correspondence speaks to the contrary.

In their Appellants' Brief, Defendants do not even attempt to analyze the intention of the parties using these factors. (Appellant's Brief, p. 22). Instead, they attempt to confuse the intention of the parties to have Defendants complete a promissory note and deed of trust with the intention of the parties to execute a written contract. These are two distinct issues that are clearly

unrelated. It is entirely reasonable to have a verbal agreement that contemplates the execution of a promissory note and deed of trust, as was the case here. Because Defendants have proffered this argument for the first time on appeal and have failed to produce any evidence that the parties intended the contract to be written, the argument that the contract was intended to be written must fail.

III. THE DEFENDANTS' ATTORNEY HAD THE PROPER AUTHORITY TO ENTER INTO THE SETTLEMENT AGREEMENT

Defendants assert that their attorney who negotiated the settlement agreement, Mr. Ron Shepherd, required written authority to enter into the settlement agreement, because the settlement contemplated a real property transaction. Defendants conclude that because no written authority existed, their attorney lacked proper authority. This argument is based on the fallacious conclusion that the settlement agreement contemplated a real property transaction. As argued above, and as determined by the district court, the transaction was for the settlement of a lawsuit, not a real estate transaction. (R. p. 163).

Additionally, Defendants attempt to confuse the issues by arguing that because "an agent's authority must be in writing in order for him to convey an interest in real property," Mr. Shepherd lacked the requisite authority. (Appellant's Brief, p. 16). Here, as determined by the district court, the settlement agreement did not convey an interest in real property. Thus, the authority to settle the lawsuit need not be in writing.

Whether an attorney has authority to compromise a client's claim is expressly governed by *Caballero v. Wikse*, 140 Idaho 329 (2003). The Court in that case stated that "[t]he

relationship between an attorney and client is one of agency' in which the client is the principal and the attorney is the agent." *Id.*

The district court correctly concluded that Defendants had conferred express authority on March 5, 2008 to Mr. Shepherd to settle the case pursuant to the two alternative offers. (R. p. 137). Additionally, the district court found that Mr. Shepherd's authority was extended to $40,000 to effectuate the settlement. (R. p. 137). This is the case even viewing the evidence in a light most favorable to the Defendants. It was Defendant Griffith's own affidavit that made it apparent that authority had been conferred upon Mr. Shepherd. Griffith stated that when he was informed of the plaintiff's counter offer of $40,000, he replied, "if I could borrow $35,000 that I could borrow $40,000." (R. p. 137). The district court found that the "only reasonable interpretation to be draw from this evidence is that Shepherd had at least implied actual authority to settle this matter for $40,000 which he communicated in his second letter of March 5, 2008, marked as Plaintiffs' Exhibit No. 6 to the June 26, 2008 evidentiary hearing." (R. pp. 137-38).

The fact that the Defendants expressly authorized Mr. Shepherd to enter into the settlement agreement is confirmed by Defendant Griffith's own testimony at the evidentiary hearing before the district court:

> Q. Mr. Griffith, did you at any point contact Mr. Shepherd and tell him he did not have authority to make the deal that he had set forth in Exhibit 6?
> A. He contacted me, and I told him.
> Q. And when did you tell him that he did not have authority?
> A. Oh, about a week after he called me.
> Q. A week after you received the letter?
> A. Yes.
> Q. Tell me about that conversation.

A. Well, that's the conversation we had when I told him I had lost confidence in him even before the meeting, and I wasn't about to sign those documents because I didn't authorize him to make any kind of deal like that. The one that we authorized him to make was to let them buy the place, and the other was his idea.
Q. Well, but no we're starting to come around in circles, and I think we've already covered this. I understand that Mr. Shepherd may have raised that alternative number two as another way to approach the situation, but you ultimately agreed to that despite it was his idea. Right?
A. **I agreed.**
Q. Okay. And you assumed that the plaintiffs would want a lien because the lawyers did. Right?
A. **Yeah.**

(Hearing Transcript, 142-43) (emphasis added).

This is not a case where an attorney made a settlement proposal without the knowledge his client. As the district court noted in its findings of fact:

> In the morning hours of March 5, 2008, attorney Ron Shepherd contacted his clients and requested that they meet with him to review the most recent decision of the Court. At this strategy meeting Mr. Shepherd, his clients and Mr. Hendricks, the paralegal assigned to the case, discussed the prospects of prevailing at trial and the prospects of settlement.
>
> Eventually two possible settlement alternatives were reached. The first alternative was to simply go forward with the sale of the property to the Plaintiffs. The terms of that proposal are set forth in Plaintiffs' Exhibit No. 5 to the June 26, 2008 evidentiary hearing. The second alternative would allow the Defendants to keep the property by paying a sum certain to the Plaintiffs and that said payment would be funded by a loan collateralized by the property. Defendants Griffith felt that such a loan would be easily obtainable within a six month period. The amount agreed upon at the morning meeting of March 5, 2008, was $35,000 to be paid to the plaintiffs.

(R. p. 3).

The court found that Defendant Griffith "agreed to a settlement amount of $40,000, up $5,000 from the previously offered $35,000." (R. p. 3; Augmented R., Ex. 4). The district court

further found as a matter of fact that "Griffith and Porter would be obtaining a loan to pay the $40,000 and the *lis pendens* was to be released simultaneously with the closing of the loan." (R. p. 4). As to the additional sum, the district court found that Griffith agreed by stating, "that if I could borrow $35,000 that I could borrow $40,000." (R. p. 4). The district court found that Defendants did not dispute the agreement until Defendant Griffith became unemployed, thus jeopardizing his ability to obtain a loan. (R. p. 4).

Because the district court's finding that attorney Ron Shepherd had express authority to settle the Defendants' claims is supported by substantial and competent evidence, the decision of the district court should be affirmed.

IV. THE DEFENDANTS WAIVED THEIR RIGHT TO ENFORCE THE ORIGINAL CLOSING DEADLINE BY SIGNING ADDENDUM NUMBER THREE AND BY EXECUTING ALL OF THE OTHER CLOSING DOCUMENTS AFTER NOVEMBER 30

As a point of clarification, if the Court determines that the settlement agreement is enforceable as argued above, the issue of waiver pursuant to this section becomes moot.

Defendants lastly assert that the district court erred in finding that Defendants waived their right to claim that payment was due on November 30 by signing Addendum No. 3 after that date. (Appellant's Brief, pp. 23-25). Specifically, Defendants state that "[t]he district court did not identify any factual basis to support a conclusion that plaintiffs relied upon the defendants' execution of Addendum No. 3 and that such reliance was reasonable." (*Id.* at p. 23).

As the district court found, waiver is the intentional relinquishment of a right. *Crouch v. Bischoff*, 78 Idaho 364, 368 (1956). It is a voluntary act and implies election by a party to

dispense with something of value or to forego some right or advantage which he might at his option have demanded and insisted upon. *Id.* The existence of waiver ordinarily is a question of fact, and if there is any substantial evidence in the record to support a waiver it is for the trier of fact to determine whether the evidence establishes such a waiver. *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 518 (1982). Waiver is foremost a question of intent; and in order to establish waiver, the intention to waive must clearly appear. *Id.* at 120. Intent to waive a right may, however, be established by conduct. *Id.*

a. The conduct of Defendants unquestionably establish waiver.

The district court found as a matter of law that the conduct of Defendants constituted waiver. (R. p. 82). Because there is only one reasonable interpretation of the conduct of the Defendants, the district court's decision finding waiver should be affirmed.

The district court noted that "Griffith had become concerned that he was selling the property at too low of a price prior to the November 30 closing." (R. p. 82). When Griffith was informed that Plaintiffs wanted to extend the closing, Griffith and Porter consulted three real estate agents and attorney Ed Schiller regarding signing Addendum No. 3, a document that would extend the closing date. Also, "Griffith consulted with another real estate agent and with his attorney Ron Shepherd. (R. p. 82). On December 1, 2006, "Griffith signed Addendum # 3." (R. p. 82). Similarly, Porter signed Addendum No. 3 on December 4, 2006. (R. p. 82).

Based on these facts, the district court found that Defendants had waived their right to claim that plaintiff had breached the contract by failing to make funds available on November 30, 2006. (R. p. 82). Most importantly, Defendants sought legal counsel before signing the

documents on December 1st and December 4th. The district court correctly concluded that Defendants "either knew what [their] option were regarding the signing of the extension by virtue of the legal advice he and Porter had obtained, or [they] should have known." (R. p. 82).

As stated above, waiver is primarily a question of intent. Here, it is crystal clear that each Defendant intended to waive their claim that the transaction had to be closed by November 30 by entering into the real estate transaction after November 30, 2006. Not only did each defendant sign Addendum No. 3 specifically extending the closing date, they signed every other document that is required to be signed at closing, including the document that actually transfers title—the warranty deed. Further, they sought the advice of counsel before going forward with closing. (R. p. 82). It would be absurd to go through the process of closing a real estate transaction after November 30 if the Defendants did not intend to waive a claim based on performance by November 30. As such, the fact that Defendants signed all of the closing documents, including Addendum No. 3 and the warranty deed after November 30, establishes that Defendants waived any right to claim the transaction had to be completed by November 30.

b. The Plaintiffs acted in reasonable reliance of the Defendants' waiver of the November 30, 2006 closing date.

The district court also noted that the Plaintiffs obtained the necessary funding on December 7, 2006 in reliance on the Defendants' waiver. (R. p. 81). Daniel Godoy, a junior account executive employed with Bank of America Corporation, was involved in the real estate purchase at issue. In his affidavit, Mr. Godoy stated:

> 3. As of December 7, 2006 all of the conditions for funding the purchase of the Subject Property had been satisfied and Bank of America was prepared to wire the money to Pioneer Title.
>
> 4. As of December 7, 2006 the only impediment to funding the transaction was Griffith's pulling the warranty deed from Pioneer Title on December 6, 2006.

(Augmented R., Ex. 1). This is verified by the affidavit of Carrie Redovian, an escrow officer employed with Pioneer Title who worked on the subject transaction. She stated in her affidavit:

> 5. On or about December 4, 2006, subsequent to signing the closing documents, Griffith retrieved the original warranty deed from Pioneer Title, making it impossible for closing to proceed.
>
> 6. Pioneer Title received Ogden's money to fund the purchase of the Subject Property on December 7, 2006 and such money was ready to be released to Griffith and Porter on December on December 8, 2006 in compliance with Addendum #3.
>
> 7. As of December 7, 2006 the only impediment to funding the transaction was Griffith's pulling the warranty deed on December 6, 2006. Bank of America's funding was contingent upon escrow/title's ability to fund and record upon receipt of Bank of America's loan proceeds.
>
> 8. Had Griffith left the warranty deed with Pioneer Title the closing could have proceeded as scheduled.

(Augmented R., Ex. 2). This evidence conclusively establishes that Plaintiffs relied upon the actions of the Defendants.

Further, the Plaintiffs' reliance was unquestionably reasonable. Not only did Plaintiffs rely on the Defendants signing Addendum No. 3, but they also relied on the fact that the Defendants signed and executed all of the other closing documents, including the warranty deed. Most important of which was the warranty deed—the document that actually transfers title. Once the closing documents were signed by both Defendants, it was entirely reasonable for

Plaintiffs to take the necessary steps to ensure that funding was available. In fact, it was the unexpected and unreasonable action of the Defendants in retrieving the warranty deed from the title company that brought a halt to the transaction. Because that event was unforeseeable, Plaintiffs acted in reasonable reliance on the Defendants signing the closing documents.

c. The district court's finding of waiver on summary judgment was proper.

Finally, Defendants argue that the issue of waiver is not the proper subject of a summary judgment motion. In support of this position, Defendants cite to two cases, neither of which deal with the issue of waiver. *A & B Irrigation Dist. V. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 754, 118 P.3d 86 (2005); *Shoup v. Union Sec. Life Ins. Co.*, 142 Idaho 152, 155, 124 P.3d 1028 (2005). Instead, both of these cases deal with the issue of equitable estoppel. While it is true both issues have an element of reliance, they are two distinct legal theories. Consequently, Defendants fail to cite to any authority that stands for the proposition that a district court cannot decide the issue of waiver on summary judgment.

Moreover, this is appropriate for summary adjudication. The existence of waiver ordinarily is a question of fact, and if there is any substantial evidence in the record to support a waiver it is for the trier of fact to determine whether the evidence establishes such a waiver. *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 518 (1982). However, as the district court concluded, in this case there is but one reasonable conclusion that can be drawn from these facts. (R. p. 82). By consulting an attorney prior to signing the closing documents and Addendum No. 3, Defendants undeniably waived the right to claim Plaintiffs breached the contract by failing to

make funds available on November 30. Therefore, the district court's determination that waiver had been established should be upheld.

V. PLAINTIFFS ARE ENTITLED TO THEIR REASONABLE ATTORNEY FEES AND COSTS INCURRED PURSUANT TO THIS APPEAL

If the Court affirms the decisions of the district court, Plaintiffs are entitled to their reasonable attorney fees and costs incurred in responding to this appeal pursuant to Idaho Code §§ 12-121 and 12-123.

Idaho Code § 12-121 states that "[i]n any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties . . ." In enacting this section, the Idaho Legislature intended prevailing litigants to be made whole for attorney's fees and costs when justice so requires. Section 1 of S.L. 1987, ch. 263.

In this case, justice requires that the Plaintiffs be made whole in defending against this appeal. This case stems from the refusal of Defendants to honor an agreement that they freely and willing entered into. The only party that benefited from the vacation of the jury trial are the Defendants. The decision to not abide by the terms of the settlement agreement clearly was based on the fact that Defendant Griffith had lost his job, thus reducing the likelihood that a loan could be obtained. However, Defendants had already gained the benefit of having the trial vacated. Because the Defendants had improper motives in contesting the settlement agreement and in bringing this appeal, justice requires that Plaintiffs be awarded their reasonable attorney fees and costs.

For the same reasons stated above, this appeal was brought frivolously under Idaho Code § 12-123. As argued above, Defendants admit that their attorney had authority to enter into the

settlement agreement. At the hearing on the motion to enforce the settlement agreement, Mr. Griffith testified that:

> A. I told her I had agreed to $40,000, and she [Ms. Porter] said she didn't want to pay it. She thought we ought to just go ahead and go to court and make them buy the place. That's what she wanted to do.

(Hearing Transcript, p. 140). Further, the Defendants agreed to execute a deed of trust.

> Q. Okay. So your testimony would be that Ron never explained any of those things to you?
> A. He explained Deed of Trust or Promissory Note. He discussed that, and we discussed six months to get the loan. And I don't remember any discussion of lis pendens or Deed of Trust – well, a couple of other ones. I thought it was just going to be, you, if they took the money they'd just get a promissory note and maybe a lien or something.
> Q. Right. And that's exactly what the Deed of Trust is, isn't it, is a lien?
> A. I didn't know. I don't know. Is it? It seems to me it would be a little more than a lien.

(Hearing Transcript, p. 137). Griffith later clarified his position:

> Q. So where did you get the idea that the plaintiffs may want a lien?
> A. I just assumed they would. Nobody told me that.
> Q. Well –
> A. You know, the lawyer wanted a lien to secure his thing, so I just assumed they would want a lien.
> Q. Sure. And were you okay with that assumption?
> A. I guess.

(Hearing Transcript, p. 139).

The Defendants also admit that their attorney had authority to enter into the settlement agreement.

> Q. Mr. Griffith, did you at any point contact Mr. Shepherd and tell him he did not have authority to make the deal that he had set forth in Exhibit 6?
> A. He contacted me, and I told him.
> Q. And when did you tell him that he did not have authority?
> A. Oh, about a week after he called me.

Q. A week after you received the letter?
A. Yes.
Q. Tell me about that conversation.
A. Well, that's the conversation we had when I told him I had lost confidence in him even before the meeting, and I wasn't about to sign those documents because I didn't authorize him to make any kind of deal like that. The one that we authorized him to make was to let them buy the place, and the other was his idea.
Q. Well, but no we're starting to come around in circles, and I think we've already covered this. I understand that Mr. Shepherd may have raised that alternative number two as another way to approach the situation, but you ultimately agreed to that despite it was his idea. Right?
A. **I agreed.**
Q. Okay. And you assumed that the plaintiffs would want a lien because the lawyers did. Right?
A. **Yeah.**
Q. Right. And you wanted six months to be able to make that payment because you didn't have $35- or $40,000 sitting in the bank?
A. Well, six months in order to get the loan because I knew that a re-fi you can't get overnight. You have to have appraisals and all kinds of stuff.

(Hearing Transcript, p. 142-42) (emphasis added).

It is clear that the Defendants admit to agreeing to the settlement and that their attorney had the authority to enter into the agreement. Further, the Defendants' own testimony shows that he understood security would be required to secure the Plaintiffs' interest. In other words, the Defendant's own testimony shows that this appeal was brought in an unreasonable and frivolous manner. Therefore, Plaintiffs are entitled to reasonable attorney fees and costs pursuant to Idaho Code § 12-123.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court affirm the decisions of the district court and grant Plaintiffs their reasonable attorney fees and costs on appeal.

DATED this 10th day of June, 2009.

DINIUS LAW

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2009, I caused to be served two true and correct copies of Cross-Appellant's Brief by the method indicated below to the following:

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