3-12-2008

Grover v. Wadsworth Appellant's Brief Dckt. 34810

IN THE SUPREME COURT OF THE STATE OF IDAHO

BLAIR GROVER AND JOANN GROVER, Plaintiffs/Respondents, vs. NORMA E. WADSWORTH, individually, and NORMA E. WADSWORTH and/or JANE DOE as Personal Representative of the Estate of A. EARL WADSWORTH, Defendants/Appellants.	)	DOCKET NO. 34810 District Court Case No. CV-06-3134

APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District for

Bonneville County

Honorable Joel E. Tingey, District Judge

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STATEMENT OF THE CASE

A. *Nature of the Case.*

This is a quiet title/contract dispute between the Estate of A. Earl Wadsworth and Norma Wadsworth (Wadsworths), and Blair and JoAnn Grover (Grovers). Grovers claim that, because of miscalculations contained in interim account statements prepared by Earl Wadsworth regarding a Promissory Note and Contract of Sale (collectively referred to as the "Contract"), they had the right to unilaterally stop payment more than four years early and have the title to the property quieted to them. Wadsworths claim Grovers are bound by the terms of the Contract.

B. Procedural History.

Grovers filed an Action to Quiet Title on June 7, 2006, seeking to have the Court quiet title to the subject property in their names. Wadsworths responded on October 16, 2006, by filing their Answer denying the action and counterclaiming to enforce the Contract. Grovers denied the substance of the Counterclaim. On February 8, 2007, Wadsworths moved for summary judgment. Grovers countered with their own Motion for Summary Judgment on February 21, 2007. Oral arguments were heard on March 21, 2007, before the Honorable Richard T. St. Clair. Pursuant to a Memorandum Decision entered on April 5, 2007, Judge St. Clair denied both parties' requests for summary judgment. Although Judge St. Clair found the Contract to be unambiguous, he denied Wadsworths' Motion For Summary Judgment because of the possibility

of an "account stated " – a theory neither party had previously asserted or briefed. (R. Vol. 2, p.193.)

Judge St. Clair retired and the Honorable Joel E. Tingey was appointed to replace Judge St. Clair. Thereafter, Grovers filed a Motion for Reconsideration of Judge St. Clair's Memorandum Decision denying their Motion for Summary Judgment. Wadsworths then moved for reconsideration of their Motion for Summary Judgment. On October 18, 2007, after subsequent briefing and oral argument, Judge Tingey granted Grovers' Motion for Reconsideration, denied Wadsworths' Motion for Reconsideration, and entered summary judgment in favor of Grovers. Wadsworths filed their Second Motion for Reconsideration and Motion for Clarification, which was denied. Subsequent to the Motions for Reconsideration, Grovers sought, and were awarded, attorney fees and costs. Thereafter, Wadsworths filed this appeal.

C. Statement of Facts.

Prior to marrying Norma Wadsworth (Norma) in 1976, Earl Wadsworth (Wadsworth) owned real property located at 660 Northgate Mile, Idaho Falls, Idaho (Northgate property), where he operated a small sailboat business. After his marriage to Norma, the Northgate property remained solely in Wadsworth's name. The Northgate property was sold by contract in 1990, to Dennis and Linda Jensen, and William and Donna Gaston, who intended to use the property to operate an appliance business. The agreed upon purchase price was $115,000.00, of which $80,500.00

was to be amortized over twenty years. The monthly payments of $777.28 were to be made until September 10, 2010, pursuant to a Promissory Note. (R. Vol. 1, pp. 93-5.)

Because of various circumstances, including domestic and health issues, Porter Gaston (Gaston) assumed responsibility for the Northgate property, but was unable to use the Northgate property as initially intended. Gaston decided to sell the Northgate property to avoid the continued monthly payment obligation, which caused a strain on his cash flow.

In 1997, Grovers' son, who had been attending college in Boise, Idaho, desired to open an outdoor recreational equipment store in the Idaho Falls area. Grovers' son located the Northgate property and requested that his parents assist him with financing the purchase of the Northgate property. Blair Grover (Grover) approached Gaston and discussed the possible purchase of the Northgate property. Gaston informed Grover that the Contract, under which he was purchasing the Northgate property, did not allow for any prepayments, so Grovers could not purchase the property outright. (Grover Dep. 33:8-9, 37:5-38:7, Sept. 14, 2007.) Grover inquired of Gaston as to the outstanding balance on the Contract. Gaston stated that, according to the last statement he got from Wadsworth, approximately $56,000.00 was outstanding. Grover, an attorney by profession, filled out a Real Estate Purchase and Sales Agreement form, wherein Grovers agreed to purchase the Northgate property for $104,000.00. One thousand dollars was put down as earnest money. The Agreement stated that the balance was to be paid "*$48,000 cash (approximately) at closing; $56,000 (approx) by assumption of underlying contract balance.*

Cash amount depends on exact Amount assumed." (R. Vol 2, p.134.) The Agreement was signed on March 13, 1997. According to Grover, he indicated to Gaston that Grover needed to know the exact balance owed, and that Gaston came back a couple of days later with a handwritten document, which Gaston represented came from Wadsworth. The purported outstanding balance on this document was $54,984.23, which was $13,683.50 less than what was actually owed. Grover asked Gaston if he was satisfied with that amount, to which Gaston responded in the affirmative. (Grover Dep. 33:2-34:12.) At no time during this process did Grovers have any direct contact with Wadsworths[1], nor did they perform even rudimentary calculations to determine whether the outstanding balance was consistent with the past or future monthly payment obligations.

At some point, Grover received a copy of the Contract of Sale and Promissory Note and prepared two documents. The first document was the "Assignment and Assumption Agreement" (Assumption) (R. Vol. 1, pp. 96-8), which was signed by Grovers, Gaston, and the Personal Representative of Dennis Jensen. The Assumption contained the following two paragraphs:

> 1. ASSIGNORS ASSIGN AND TRANSFER: Assignors hereby assign and transfer to Grovers all of their right, title and interest in and to the following described real property located in Bonneville County, Idaho:
>
> > Lots 17, 18, 19 and 20 lying East of U.S. Highway 191, in Block 12, Capital Hill Addition to the city of Idaho Falls, County of Bonneville, State of Idaho, according to the recorded plat thereof.

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[1] The first time Grovers had any contact with Wadsworths was in the Spring of 1998. (R. Vol. 1, pp. 34-5.)

Assignors agree to transfer the same to Grovers by Warranty Deed subject only to the underlying obligation due Wadsworth which Grovers are assuming and to easements and rights of way of record.

2. GROVERS ASSUME: Grovers hereby assume and agree to be bound by the Promissory Note and Deed of Trust, copies of which are attached hereto marked Exhibits A and B, and to pay the balance of the Promissory Note, in the amount of approximately $56,000.00, to Wadsworth pursuant to the terms thereof.

(R. Vol. 1, pp. 96-7.)

Grover also prepared the "Consent to Assignment and Assumption, and Release" (Consent). (R. Vol. 1, p. 99-100.) Gaston took the Consent to Wadsworths for their signature. Gaston told Wadsworths that, because of the death of his partner, Gaston needed to sell the building and needed Wadsworths' permission to do so. After Wadsworths agreed, they signed the consent. According to Norma's undisputed testimony, Wadsworths saw only the second page of the Consent, which they signed. (Norma Wadsworth Dep. 32:1- 33:18, Sept. 14, 2007.)

On the following day, May 1, 1997, the transaction between Gaston and Grovers was completed and Grovers took over making the $777.28 monthly payments to Wadsworths. There was never a tender of the $54,984.23 to Wadsworths. In March 1998, Grovers received a two-page handwritten statement from Wadsworth showing the statement of account for 1996 and 1997. (R. Vol. 3, pp. 277-78; *see also* Grover Dep. 22:1-19; Grover Dep. Ex. 3.) The first page of this statement showed the outstanding balance as of May 1, 1997, as $54,984.23, which page is identical to Exhibit A, attached to the Complaint. (R. Vol. 1, p. 12.)

In May 2005, Wadsworth realized there was something wrong with his accounting, noting that the obligation would be paid off substantially sooner than required in the Promissory Note. When Wadsworth advised Grover of the problem and provided a computer generated amortization schedule, Grover went to his own accountant and directed a new amortization schedule using the $54,984.23 figure. (Grover Dep. 62:21- 63:20.) A meeting was held among Wadsworth, Grover, and Gaston, during which Gaston offered to pay back one-half of the overpayment.[2] When no resolution occurred, Grovers continued making the monthly payments until February 2006, and then demanded that Wadsworths execute a warranty deed to Grovers and direct the reconveyance of the Deed of Trust. (R. Vol.1, p. 18.) Subsequently, Wadsworth died and Norma was appointed as personal representative of his estate. Upon Wadsworths' refusal to convey title to the Northgate property to Grovers, they filed the present lawsuit. Neither Gaston nor Jensen have ever been named as a party.

ISSUES PRESENTED ON APPEAL

1. **Did the District Court err, in both fact and law, in granting summary judgment to Grovers based upon an account stated?**
2. **Did the District Court err, both in fact and law, in granting summary judgment to Grovers based upon promissory estoppel?**
3. **Did the District Court err in awarding attorney fees to Grovers?**
4. **Did the District Court err in not granting Wadsworths' Motion for Summary Judgment?**

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[2] The other half had been distributed to the Jensen Estate.

5. Are Wadsworths entitled to attorney fees and costs?

STANDARD OF REVIEW

The appellate Court has free review of the decisions of the District Court. The Idaho Supreme Court has stated:

> When an action will be tried before the court without a jury, resolution of the possible conflict between the inferences is within the responsibilities of the trial court as fact finder. Cameron v. Neal, 130 Idaho 898, 900, 950 P.2d 1237, 1239 (1997). The trial judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but rather the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts, despite the possibility of conflicting inferences. Intermountain Forest Management, 136 Idaho at 235, 31 P.3d at 923; see also Loomis v. City of Hailey, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). When questions of law are presented, this Court exercises free review and is not bound by findings of the district court but is free to draw its own conclusions from the evidence presented. Lettunich v. Key Bank Nat'l Ass'n, 141 Idaho 362, 366, 109 P.3d 1104, 1108 (2005).

Chapin v. Linden, 144 Idaho 393, 397, 162 P.3d 772, 775 (Idaho 2007).

ARGUMENT

The Court granted summary judgment to Grovers based upon the District Court's finding that there was an account stated. In addition, the District Court concluded that promissory estoppel prevented Wadsworths from collecting the remainder of the monthly payments. For the reasons and facts discussed below, neither account stated nor promissory estoppel are applicable.

1. THE DISTRICT COURT ERRED, IN BOTH FACT AND LAW, IN FINDING THAT AN ACCOUNT STATED ENTITLED GROVERS TO AVOID FULFILLING THE TERMS OF THE CONTRACT.

In researching this issue, Wadsworths could find no authority in this state, or in any other state, wherein accounts stated have ever been used in the context of a real estate transaction. Idaho statutory and case law have dealt with accounts stated in the context of goods and services, including labor and wages, in situations involving open accounts. *Sweeney v. Hanmer*, 66 Idaho 462, 162 P.2d 387 (1945); *O'Harrow v. Salmon River Uranium Dev., Inc.*, 84 Idaho 427, 373 P.2d 336 (1962); *Barnes v. Huck*, 97 Idaho 173, 540 P.2d 1352 (1975); *Needs v. Hebener*, 118 Idaho 438, 797 P.2d 146 (Ct. App. 1990). Also, there is no authority wherein account stated has been used to change an unambigious pre-existing contract.

a. Burden of proof.

The party asserting the account stated has the burden to prove the case with "clearness and certainty." For an account stated to constitute a contract, there "should appear to be something more than a mere memorandum; it **should show upon its face** that it was intended to be a final settlement up to date, and this should be expressed with ***clearness and certainty***." *Sweeney*, 162 P.2d at 388 (emphasis added). This standard has been used synonymously with "full, clear and convincing," "full, clear and conclusive," "of so positive a character as to leave no doubt of the fact," and "of such clearness and certainty of purpose as to leave no well-founded doubt upon the subject." *Waller v. Waller,* 15 Ark. App. 336, 693 S.W.2d 61 (Ark. App.1985). Idaho law supports the substantially higher standard of proof. The *Sweeney* decision talks about

an account stated "[p]resuppos[ing] an absolute acknowledgment or admission of a certain sum due. . . ." *Sweeney*, 162 P.2d at 388.

b. Elements of account stated.

To constitute an account stated, Grovers have to prove that both Grovers and Wadsworths had mutually examined the claims of the other parties and, thereafter, entered a mutual agreement between them as to the correctness of the final adjustment of the whole account and the demands of both parties. *Sweeney*, 162 P.2d 387. In addition, as discussed below, a mistake in fact or law is a defense to an account statement. *Davidson Grocery Co. v. Johnston*, 24 Idaho 336, 336, 133 P. 929, 932 (Idaho 1913). *See also McDougall v. Kasiska* 48 Idaho 424, 427 282 P. 943, 946.

In the present case, the evidence is lacking to establish an account stated. There was no mutual examination, no mutual agreement, and no final adjustment. In addition, a clear mistake was made in the calculations, which would be a defense to an otherwise established account stated.

i. There was no mutual examination of the claims of the other party.

To mutually examine the claims of the other party requires each party to exercise due consideration of the claims of the other party. The District Court held that:

> When Gaston informed the Grovers that they would purchase the Property subject to the Note, the Grovers agreed, but had Gaston verify the amount with Wadsworth. *Wadsworth in turn provided Gaston and the Grovers* with Wadsworth's 1996/1997 amortization table. Since it was Wadsworth who provided the amortizations

> and balance owed, Wadsworth must be deemed to have conducted an *examination as to the actual amount owed.* While *Grovers did not conduct a separate examination* as to past payments, they did inquire as to the seller, Wadsworth, who was the individual keeping track of payments, balance owed, etc. The Court finds that the Grovers' inquiry to the seller who was keeping a running record of payments and balance owed was an adequate examination.

(R. Vol. 3, p. 250) (emphasis added).

The District Court erred in its findings of supposed supportive facts and in application of the law. Although the District Court, in a court trial, could draw inferences, the same inferences must come from "uncontroverted evidentiary facts", not facts created by the Court. Further, the Court must draw the "most probable" inferences. There is no evidence, nor is there insufficient evidence, to support the District Court's findings and conclusions, particularly the emphasized portions above.

Although Grover testified that Gaston brought him the statement of account in mid-March 2007[3], the facts do not support that testimony. If the handwritten statement was created in March 1997, Wadsworth would have had to project the outstanding balance for six weeks later. In addition, the documents drafted by Grover the following month[4], continue to list the "approximate $56,000.00" figure. Even as late as April 30, 1997, the "approximate" language was still being used. The most probable inference of fact is that Grovers did not receive the

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[3] The Real Estate Agreement between Gaston and Grover was dated March 13, 1997. Grover testified that Gaston brought back the handwritten statement "a couple of days later."

[4] Assumption and Consent agreements.

handwritten statement until March 1998. There is no evidence to show that Wadsworths prepared and furnished a statement knowing of its intended use. (Grover Dep. 34:16- 35:7; Gaston Dep. 38:24- 39:10, June 5, 2007.) Gaston could not recall any exchange of documents between himself and Wadsworths. (Gaston Dep. 78:9-13.)

Grovers either ignored or did not examine Wadsworths' claims. Wadsworths' claim was that the monthly payments were to continue pursuant to the Contract. Grover admitted that he knew of the continued contractual liability of monthly payments into 2010, but did not examine whether or not the second-hand representation of the outstanding balance was consistent with the monthly obligation. (Grover Dep. 38:1-9.) Grovers were on at least inquiry notice as to whether or not the terms of the Promissory Note were consistent with the purported outstanding balance, particularly in light of Grover being informed that prepayments were prohibited and there could not be an outright purchase. The only logical inference that could be drawn from such fact is that monthly payments would at least continue as per the Contract.

There cannot be a logical conclusion that Wadsworth examined Grovers' "claims" by looking at his own records. Until immediately prior to the sales transaction being completed, Wadsworths neither knew of Grovers' identity, nor were they privy to any negotiations, conversations, or contracts between Gaston and Grover. The only correct inference to be drawn from the facts is that Wadsworth believed the new purchasers, Grovers, would pay according to the Promissory Note. Further, Grovers did not have any "claims" until at least 2005, when Wadsworth notified them of the error(s). Until then, Grovers assumed that the payment

obligation would continue into 2010. For the reasons stated below, any claim originating in 2005 could not be construed as an account stated because there would be no agreement as to a final adjustment.

The mutual examination requirement is not intended to be passive in nature. In one case, the Idaho Supreme Court held that an account stated is not necessarily created, even if the parties had met and mutually signed a document. *Gunn v. Perserverance Min. v. Mill Co.*, 23 Idaho 418, 130 P. 458 (1913); *O'Harrow,* 373 P.2d 336.

ii. There was no "final adjustment" to constitute an account stated.

The second major prong of account stated is for the party asserting the account stated to establish the "final adjustment." *O'Harrow*, 373 P.2d at 338; *Argonaut Ins. Co. v. Tri-West Const. Co.*, 107 Idaho 643, 646, 691 P.2d 1258, 1261 (Ct. App.1984). To constitute an account stated, the transaction must be understood by the parties as a final adjustment of the respective demands between them and the amount due, resulting in "[a] mutual agreement between them as to the correctness of the allowance and disallowance of the perspective claims and of the balance, as it is struck upon the final adjustment of the whole account and demands of both sides." *Sweeny*, 162 P.2d at 389. *See also*, *O'Harrow* 373 P.2d at 338.

The District Court found that Wadsworth intended the 1996/1997 statement to be a "current, definitive statement of the account." (R. Vol. 3, p. 249.) A "current" statement is not the same as a "final adjustment." Obviously, a "final adjustment" has the aspects of finality or completeness. "In creating an account stated, the minds of all parties thereto must meet and

understand that a final adjustment of each upon the other is being made." *Big Sky Livestock, Inc. v. Herzog,* 171 Mont. 409, 558 P.2d 1107 (Mont.1976). A "statement of account" is defined as "[a] report issued periodically (usu. monthly) by a creditor to a customer, providing certain information on the customer's account, including the amount billed, credits given, and the balance due." BLACK'S LAW DICTIONARY 1139, (7th abr. ed. 2000). In *Arnold v. Burgess*, 113 Idaho 786, 790, 747 P.2d 1315, 1319 (Ct. App. 1987), the Court of Appeals distinguished between a statement of account and an account stated:

> A statement of account is a mere rendition of an account. See BLACK'S LAW DICTIONARY 1263 (5th ed. 1979). Some form of assent or agreement is required to convert it to an account stated. *Kugler v. Northwest Aviation, Inc.*, 108 Idaho 884, 887, 702 P.2d 922, 925 (Ct.App.1985). That is, the former is an oral or written statement, a form of evidence; the latter is a contract, a concept of law.

O'Harrow, 373 P.2d at 338.

The handwritten documents can only be statements of account, not accounts stated. The District Court cited *Needs* as analogous to the present case. The District Court indicated that because Wadsworth was silent or didn't object, this created a "rebuttable presumption that he agreed to the correctness of the $54,984.23 figure." (R. Vol. 3, p. 251.) The District Court, in applying a rebuttable presumption, improperly shifted the burden of proof to Wadsworth and modified the standard of proof.

Needs is not analogous. In *Needs,* a contractor (Needs) was attempting to collect for services and materials from a homeowner (Hebener). After the construction was completed,

Needs sent Hebener a statement for his services and materials. Several other statements from Needs to Hebener followed and the parties had several discussions regarding payments. Hebener never disputed the statements and even made a partial payment. Based upon these circumstances, the *Needs* court found that an account stated existed. The present case is starkly different. The District Court held that Wadsworths' silently acquiesced by failing to object to their own statement(s). In doing so, the District Court was putting Wadsworths on both sides of the discussion, which is inconsistent with the concepts imbedded in an account stated.

The District Court's attempt to use an account stated in a real estate scenario does not fit. Account stated is a concept based upon open account type of dealing in services and goods, not real estate transactions, including modification of real estate contracts.

There is no evidence wherein one could reasonably conclude that the handwritten documents were anything more than intermediate statements of account, provided annually and intended to assist the recipient in identifying interest paid as related to income tax returns. (Grover Dep. 22:1-26:4.) There was nothing on the face of any of the statements with any hint of finality, as required by law.

iii. The District Court failed to properly consider the miscalculations in light of an account stated.

A mistake in fact or law is a defense to the application of an account stated. In *Colorado F. & I. Co. v. Chappell*, 12 Colo. App. 385, 55 P. 606, the Colorado Court of Appeals states:

> If, to a bill for an account, the defendant plead, or in his answer rely upon a settled account, the plaintiff may surcharge by alleging and proving omissions in the account, or may falsify by showing errors in some of the items stated in it. The rule is the same in principle at law. A settled account is only prima facie evidence of its correctness. It may be impeached by proof of unfairness or mistake, in law or in fact.

As q*uoted in Davidson Grocery Co. v. Johnston*, 133 P. 929 at 932. *McDougall v. Kasiska* 427 282 P. 943 at 946.

There is clear and undisputed proof that a mistake was made. The District Court, although discussing the mistake in terms of whether it was a unilateral or mutual mistake, never discussed the fact that a mistake was made in light of an account stated and erred by not discussing such fact. The mistake does not need to be a mutual mistake to act as a defense to an account stated.

Wadsworths submit that the issue of a mistake dovetails into the requirement of having the parties mutually examine the claims of the other party, and come to a final resolution based upon an informed discussion, before an account stated can exist. In 1997, both Grovers and Wadsworth believed the stated outstanding balance was consistent with the amortized payment schedule.

The miscalculation needs to be resolved in favor of what the parties' intended. The parties' intent is stated definitively in the 1990 documents. These documents required the continued monthly payments through 2010. While Idaho appellant courts have not dealt with the issue of mistakes in amortization calculations, other states have. In *Mathis v. Wendling*, 962 P.2d

160 (Wyo.1998), the Wyoming Supreme Court dealt with facts similar to the present case. In *Mathis,* errors were made in the amortized payments so that if all the payments were made as calculated, there would still be a $20,000.00 deficiency. The Wyoming Supreme Court applied the four corners standard of reviewing the document on its face to determine the parties' intent. *See also, Trip-Tenn, Inc v. Schultz*, 656 N.W.2d 747, 751 (S.D. 2003). In the present case, as explained in greater detail below, the clear intent of the parties was that Grovers would continue to make the payments according to the Contract. The Assumption, prepared by Grover, stated that he would assume the promissory terms "pursuant to the terms thereof." (R. Vol. 1, p. 97.) The Consent prepared by Grover stated that they "will assume the balance owed on the note and continue making the payments thereon according to its terms." (R. Vol. 1, p. 99.)

The District Court stated that "the final payment date is not a material term of the Note, and is at best secondary to the terms of the agreement identifying the balance owed and the interest rate." (R. Vol. 3, p. 252.) Payment is material to the Contract. The District Court's approach substantially negated the original Contract and instead focused on the creation of a new contract, in spite of Wadsworths' lack of involvement. All of the terms, including principal balance, had already been determined and were patently being assumed and assigned.

2. THE DISTRICT COURT ERRED, BOTH IN FACT AND LAW, IN GRANTING SUMMARY *JUDGMENT* TO GROVERS BASED UPON PROMISSORY ESTOPPEL.

The District Court erred in both fact and law in ruling that, based upon promissory estoppel, Grovers were entitled to have ownership in the Northgate property quieted in their name. The

District Court, citing *Gillespie v. Mountain Park Estates, LLC*, 138 Idaho 27, 29 56 P.3d 1277, 1279 (2002), stated that:

> The elements of promissory estoppel are as follows: "(1) the detriment suffered in reliance was substantial in an economic sense; (2) substantial loss to the promisee acting in reliance was or should have been foreseeable by the promisor; and (3) the promisee must have acted reasonably in justifiable reliance on the promise as made.' *Mitchell v. Bingham Memorial Hosp.*, 130 Idaho 420, 942 P.2d 544 (1997) (quoting *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank*, 119 Idaho 171, 178 n. 2, 804 P.2d 900, 907 n. 2 (1991)) (quoting *Mohr v. Shultz*, 86 Idaho 531, 540, 388 P.2d 1002, 1008 (1964).

The District Court then discussed the three elements identified above without what has been separately identified as the fourth element by some case law – the promise itself.

> To prevail on a promissory estoppel claim, a party must prove the existence of all *four elements* of promissory estoppel: (1) reliance upon a specific promise; (2) substantial economic loss to the promisee as a result of such reliance; (3) the loss to the promisee was or should have been foreseeable by the promisor; and (4) the promisee's reliance on the promise must have been reasonable. Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A., 119 Idaho 171, 182, 804 P.2d 900, 911 (1991). To avoid summary judgment on his promissory estoppel claim, a party must provide proof of each element of his claim. Podolan v. Idaho Legal Aid Services, Inc. 123 Idaho 937, 854 P.2d 280 (Ct.App.1993). (Emphasis added).

Zollinger v. Carrol, 137 Idaho 397, 399, 49 P.3d 402, 404 (Idaho 2002).

a. Wadsworth did not make a specific promise to Grovers.

Judge Tingey never identified any promise made by Wadsworth. A promise is substantially different than a representation of fact. A "promise" is "[t]he manifestation of intention to act or refrain from acting in a specified way, conveyed in such a way that another is justified in understanding that a commitment has been made; a person's assurance that the person will or will not do something." BLACK'S LAW DICTIONARY 984, (7th abr. ed. 2000) In making

the distinction between a promise and a representation of fact, the inquiry is whether a reasonable person in the position of the listener would conclude that the speaker had made a promise or only expressed an opinion, prediction, or expectation, which is a factual issue. *Watson v. Idaho Falls Consol. Hosp., Inc.*, 111 Idaho 44, 47, 720 P.2d 632, 635 (1986); *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 368, 679 P.2d 640, 645 (1984).

As discussed briefly above, Wadsworth's handwritten documents could only be construed as a representation of fact, more particularly a "statement of account" or "account statement." This is different than a promise, which is the cognitive act of agreeing to do something or specifically agreeing to refrain from doing something. Even if Grover had been given the handwritten statement as alleged, Wadsworth promised nothing and only stated his belief on the current state of the obligation. There were no facts upon which a conclusion could be reached, wherein Wadsworths agreed to accept less than what was required by the Contract.

Finally, *arguendo,* even if the statement of account was a promise, the promise would only have been made to Gaston. There is no evidence to show that Gaston was entitled to make promises to Grover, which would be binding upon Wadsworths. A basic tenant of agency law is that such agency has to be created by the acts of the principal. *Clark v. Gneiting*, 95 Idaho 10, 501 P.2d 278 (1972). As an attorney, Grover would have substantially heightened understanding of this basic principle of law.

b. Wadsworths could not foresee Grover's reliance.

There is no evidence showing Wadsworths even knew of Grovers' identity, let alone what contract negotiations were taking place between Gaston and Grover. Neither the Assumption nor the Consent, the only two documents that arguably were provided to Wadsworths, exhibit any terms other than the assumption of the terms of the Promissory Note. In fact, these documents unequivocably establish a promise to assume the debt by Grovers. This was the only promise made.

c. Grover did not reasonably rely upon any promise.

Again, assuming *arguendo*, that the statement of account was given to Grover and could be construed as a promise, Grovers still did not rely upon the statement for the matter of future payments to Wadsworths. Applying the "reasonable person in the position of the listener" standard, the following facts would dictate that Grovers did not rely upon the statement of account to determine how long the monthly payments had to be made:

1. Grover was a seasoned and experienced attorney who had handled hundreds of real estate transactions. Grover knew what amortization schedules were and had prepared, as well as directed the preparation of, amortization tables many times. (Grover Dep.12:3-15:25.)
2. The statements of account Grovers received were handwritten calculations. These would be suspect in light of Grovers knowledge of amortization tables, both in terms of how they appear and how they are calculated. Comparing the Statements

of Account at any given time to actual amortization tables would show immediate discrepancies.

3. Grovers had possession of, and knew the contents of, the Contract of Sale and Promissory Note. Grover prepared the Assignment and Consent agreements based upon such knowledge. (Grover Dep. 43:8-14.)
4. Grovers had no personal contact with Wadsworths. The first contact with Wadsworth was almost a year after Grovers purchased Gaston's interest in the Northgate property. (Grover Dep. 34:16-35:7.)
5. Grover knew he would need to make the monthly payments in the exact amount, as required by the Promissory Note, and did so until February 2006. Grover did not know of the discrepancy until it was brought to his attention by Wadsworth in 2005. (Grover Dep 39:7-19.)
6. Grovers knew that no prepayments had been made. Grover had all data available to him to recalculate the amortization schedule, but chose not to do so. (Grover Dep. 37:5- 38:7.) Grovers assumed the continuity of payments through September 2010.
7. Grovers did not believe there was an inconsistency between the statement of account and the scheduled payoff date, pursuant to the Promissory Note. (Grover Dep.39:10- 41:10.)

d. Promissory estoppel is a substitute for consideration, not a modification or replacement of an existing contract.

Idaho has clearly followed the traditional view that promissory estoppel is "'a substitute for consideration, not a substitute for agreement between the parties." *Lettunich*, 114 Idaho at 367, 109 P.3d at 1109.'" *Chapin* 62 P.3d at 776. When a contract already exists, there is no need for additional consideration and promissory estoppel is irrelevant. While promissory estoppel may provide consideration for a contract, there must be sufficiently definite agreement to have enforceable contract." *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l. Bank, N.A.*, 119 Idaho 171, 178, 804 P.2d 900, 907 (1991). The 1990 Contract of Sale, Promissory Note, and Deed of Trust, constitute the enforceable contract. The down payment and the monthly payments constitute the consideration for the purchaser of the Northgate property. The evidence is uncontradicted that Grover assumed the Contract of Sale and Promissory Note "according to its terms and conditions." The terms and conditions of the Contract required Grovers to make the monthly payments until paid in full according to the no prepayment clause, which was specifically inserted into the Contract. Grover was evasive in his attempt to avoid acknowledgment of the obvious – his assumption of the Contract pursuant to its terms. Grover's testified as follows:

> Q. Did you understand that there was an obligation for you to pay $777.28 per month?
> A. Yes.
> Q. Did you understand that obligation was to continue through 2010?
> A. I don't have an independent recollection of that, but I got to believe that I did. That's what it says.
> THE WITNESS: Well, the note said through some month in 2010. I did not know whether there had been prepayment or forgiveness of any amounts. I wasn't even sure that all of the prior payments had been made.

Q. Did you have any belief or understanding that it was going to get paid off earlier at that time in 1997?
A. I don't think I gave it a thought one way or the other. I don't remember thinking of it one way or the other. This is what I was told. The buyer and seller said, this is what you owe if you're going to take on the balance, and I knew it was $777.28 a month at 10 percent. I don't remember thinking about when I was going to get it paid off what you were signing up is to make the payments through 2010?
A. It was in the note. What I believed I was signing up for was $54,984.23 payable at 10 percent at $777.28 however long that took. Dave, if it had turned out that it didn't pay out till 2012, I don't think I would be in court saying, well, it says 2010, because I could read what the payment was and the unpaid balance, and I expected to pay that.

(Grover Dep. 36:22-42:7.)

From the circumstances of this case, the only logical conclusion that can be drawn is Grover believed the monthly payment obligations would continue as required by the Contract. The Supreme Court has outlined some fundamental principles and rules of construction, which are applicable in this case, including:

> Our primary objective when interpreting a contract is to discover the mutual intent of the parties at the time the contract is made. Opportunity, L.L.C. v. Ossewarde, 136 Idaho 602, 607, 38 P.3d 1258, 1263 (2002). "If possible, the intent of the parties should be ascertained from the language of the agreement as the best indication of their intent." Id. We construe the contract against the person who prepared the contract. Win of Michigan, Inc., 137 Idaho at 751, 53 P.3d at 334.

Straub v. Smith, No. 07-33348, 2007 WL 4166247 at *2 (Idaho Nov. 27, 2007).

In this case, (1) the mutual intent of the parties was determined in 1990, between Wadsworth and Gaston; (2) Grover drafted the Assumption and Consent documents which state, without equivocation, that Grovers were assuming the obligation to pay the Promissory Note and to "continue making the payments thereon according to its terms." (R. Vol. 1, p. 99); (3) the

In this case, (1) the mutual intent of the parties was determined in 1990, between Wadsworth and Gaston; (2) Grover drafted the Assumption and Consent documents which state, without equivocation, that Grovers were assuming the obligation to pay the Promissory Note and to "continue making the payments thereon according to its terms." (R. Vol. 1, p. 99); (3) the statement of account is not a contract and no intent or meeting of the minds could be drawn from the statement; and (4) the written documents prevail over representations from a third party (Gaston).

The only reason Grover wanted the outstanding balance was to determine the amount of money he was going to pay Gaston for his equity in the Northgate property, not to determine the duration of the payments. Grover's March 23, 2005, letter to Wadsworth, attached to the Action (R. Vol.1, p. 16), stated that "it was critical for me [Grover] to know the unpaid amount due *so I would know how much money to pay the sellers.*" (R. Vol.1, pp.16-17.) (Emphasis added.) This intent is also expressed in the Real Estate Purchase and Sales Agreement form, wherein Grovers wrote that the balance was to be paid "*$48,000 cash (approximately) at closing; $56,000 (approx) by assumption of underlying contract balance. Cash amount depends on exact Amount assumed.*" (R. Vol. 2, p.134.)

e. Even if promissory estoppel was applicable, the District Court erred in reforming the Contract of Sale and Promissory Note.

The District Court, even if it had not made the numerous errors as stated above, erred further by granting Grovers the Northgate property outright. As indicated above, promissory estoppel is used as a substitute for consideration, not to establish the terms of the contract. *Black Canyon*, 804 P.2d at 900. Judge St. Clair, in his earlier ruling, indicated that one basis not to

grant summary judgment was to determine whether or not Gaston could be made responsible for the overpayment. Gaston, in his deposition, indicated he was willing, even in 2005 and thereafter, to pay back one-half of the overpayment. (Gaston Dep. 26:10-27:5; 49:6-9.) Nevertheless, the District Court's decision would deprive Wadsworths of $42,750.40 in payments, which is not equitable.

3. THE DISTRICT COURT ERRED IN AWARDING ATTORNEY FEES TO GROVERS.

a. The District Court erred in concluding that this transaction was a commercial transaction.

"The test is whether the commercial transaction comprises the gravamen of the lawsuit. Attorney's fees are not appropriate under I.C. §12-120(3) unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover." *Brower v. E.I. DuPont De Nemours and Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (Idaho 1990). The District Court does not state why it believed the transaction was commercial in nature. The District Court referenced the contract dispute and the requirements to quiet title that Grovers needed to prove their fulfillment of their contractual duties. However, these facts are the same regardless of whether the property was commercial or held personally.

This is a quiet title action. The only commercial aspect is that it involved a building in a commercial zone, which does not make the transaction commercial. Idaho courts have consistently held that quiet title actions are more analogous to situations involving the determination of property rights which have "uniformly denied an award of attorney fees"

C & G, Inc. v. Rule, 135 Idaho 763, 25 P.3d 76 (Idaho 2001). *Jerry J. Joseph C.L.U. Ins. Assoc. v. Vaught*, 117 Idaho 555, 789 P.2d 1146 (Ct. App.1990).

b. The District Court erred in awarding attorney fees to Grovers, even though Grover was a member of the law firm which handled this case, which by policy should not be allowed.

The District Court distinguished *Swanson & Setzke, Chtd. v. Henning*, 116 Idaho 199, 774 P.2d 909 (Ct. App. 1989) from the present case by stating in *Swanson* that the firm was the client. In the present case, the party is the individual attorney handling a personal matter. The District Court cited dicta in *Swanson* in support of its decision to award Grovers' their attorney fees. The District Court held that "[f]inally, if the fundamental objective of fee-award statutes is to help litigants obtain counsel by providing a potential source of fees in meritorious cases, then such assistance is available to lawyer and nonlawyer litigants alike." (R. Vol. 4, pp. 387-89.) The *Swanson* court found that one of the policies in denying attorney fees for the law firm was to promote the benefit of having "the detached and objective perspective that a separate attorney brings to the litigation process. *Falcone v. Internal Revenue Service*, 714 F.2d at 647. . . . " *Swanson*, 774 P.2d at 912. Being a member of, or partner in, the same law firm handling the case does not provide the detached and objective perspective as that of being an outside attorney. Filtering the case through the same law firm where the attorney is employed and has a financial interest is the same as *pro se* representation. *Swanson* specifically stated that the status of a professional service corporation would not have altered the court's decision. It stated that:

> When a rule of law is enunciated on whether pro se lawyer litigants are entitled to attorney fee awards, that rule should be applied consistently. It should not turn on distinctions among proprietorships, partnerships, corporations or other modes of law practice. Cf. Renfrew v. Loysen, 222

> Cal.Rpt. 413, 415, 175 Cal.App.3d 1105, 1107 (Ct.App.1985) . . . . Our view in this regard is consistent with I.C. § 30-1306, which provides that the existence of a professional service corporation does not affect the professional relationship and liabilities between a professional practitioner and a client.

Swanson, 774 P.2d at 913, n.3.

Only if an attorney hires an attorney or law firm at arms length outside of his own firm, one in which that attorney has no financial interest, can such public policies be adequately fulfilled for the required objectivity.

c. Assessing attorney fees against Norma Wadsworth is error.

As Wadsworth's spouse, Norma would appropriately be listed as a defendant for purposes of quieting title in a community property state. However, Norma was not an owner of the Northgate property, provided none of the statements, and should not be individually responsible for attorney fees.

4. WADSWORTHS SHOULD HAVE BEEN GRANTED SUMMARY JUDGMENT TOGETHER WITH AN AWARD OF ATTORNEY FEES AND COSTS.

For a real estate contract to be specifically enforced, the contract must typically contain the minimum provisions of the parties involved, the subject matter thereof, the price or consideration, a description of the property, and all the essential terms of the agreement. *Chapin*, 162 P.3d at 775. The 1990 documents entered into between Wadsworths and Gaston, were, as Judge St. Clair correctly ruled, unambigious and complete. The Contract of Sale, Promissory Note, and Deed of Trust, which Grovers assumed without reservation, required monthly payments of $777.28 to be paid pursuant to its terms. Gaston and Grovers only made the regular monthly payments. (Gaston Dep. 81:10-21.) When Grovers stopped making the

monthly payments in February 2006, they became in default. Consequently, Wadsworths were entitled to commence foreclosure proceedings to enforce collection. (R. Vol.1, p. 84.) Such facts dictate that Wadsworths are entitled to summary judgment on their Counterclaim.

5. WADSWORTHS ARE ENTITLED TO ATTORNEY FEES

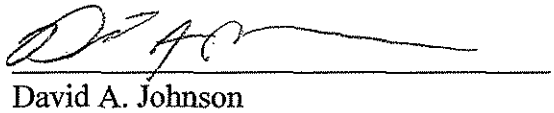
The Contract entitles Wadsworths, in the event of default, an award of attorney fees and costs, including fees and costs on appeal. (R. Vol.1, p. 85.) Such provisions have repeatedly been enforced by the Courts. *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 361, 48 P.3d 1241, 1250 (2002). Upon reversal, Wadsworths are entitled to attorney fees and costs at the District Court and on appeal.

CONCLUSION

The District Court rulings should be reversed and the Contract should be enforced according to its terms.

DATED: March 11, 2008.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I hereby certify that two (2) true and accurate copies of the foregoing was served by placing the copies in the U.S. Mail postage prepaid on March 11, 2008, addressed to the following:

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