4-9-2008

Grover v. Wadsworth Respondent's Brief Dckt. 34810

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 34810

BLAIR AND JOANN GROVER,
Plaintiff/Respondent

v.

NORMA E. WADSWORTH, individually, and NORMA E. WADSWORTH and or JANE DOE as Personal Representative of the Estate of A. EARL WADSWORTH
Defendants/Appellant

RESPONDENT BRIEF

Appeal from the District Court of the Seventh Judicial District
of the State of Idaho, in and for the County of Bonneville.
Honorable Joel E. Tingey, District Judge, presiding.

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I. STATEMENT OF THE CASE

A. Nature of the Case.

The dispute between Blair and Joann Grover (the Grovers) and the defendants (collectively the Wadsworths) centers on a piece of commercial property located in Idaho Falls, Idaho. In 1997, the Grovers purchased the property for $104,000.00. The Grovers paid approximately $48,000.00 in cash. The Grovers assumed, and the Wadsworths consented to the assumption, of a Promissory Note in the amount of $54,984.23.

The Grovers have fully performed their obligations under the contract.

B. Course of Proceedings.

On June 7, 2006, the Grovers filed suit to quiet title in Bonneville County concerning the subject property.[1] The Wadsworths filed their Answer, Counterclaim, and Request for Jury Trial on October 17, 2006.[2] Norma Wadsworth verified the pleading.[3] The Grovers filed their Reply to Counterclaims on November 8, 2006.[4]

On February 8, 2007, the Wadsworths moved for summary judgment.[5] The Grovers filed a cross-motion for summary judgment on February 21, 2007.[6] The Court heard oral argument on

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[1] R Vol. I, pp. 7-26.

[2] R Vol. I, pp. 27-61.

[3] R Vol. I, p. 38.

[4] R Vol. I, pp. 66-71.

[5] R Vol. II, pp. 126-27.

[6] *See* R Vol. II, p. 159.

March 21, 2007.[7] The Court rendered its decision on April 5, 2007.[8] The Court denied both motions for summary judgment.[9]

Prior to trial, the Grovers filed a Motion for Reconsideration with the Court on September 27, 2007.[10] The Wadsworths also moved for reconsideration on October 5, 2007.[11] The Court heard oral argument on October 10, 2007.[12] At the hearing the parties both stipulated to proceeding in this matter without a jury.[13] The Court granted the Grovers' Motion for Reconsideration on October 18, 2007.[14] The Wadsworths filed a Second Motion for Reconsideration or Motion for Clarification on October 24, 2007.[15] The Court denied the Second Motion for Reconsideration or Motion for Clarification on November 16, 2007.[16] The Court entered Judgment quieting title in the Grovers and dismissing the Wadsworths'

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[7] R Vol. II, p. 183

[8] R Vol. II, pp. 185-94.

[9] R Vol. II, pp. 185-94.

[10] R Vol. II, p. 211.

[11] R Vol. III, p. 226A

[12] R Vol. III, p. 237.

[13] R Vol. III, p. 238; Tr. Hr'g p. 38, ll.21-24 (October 10, 2007).

[14] R Vol. III, p. 240-56.

[15] R Vol. III, p.317A

[16] R Vol. IV, p. 376

counterclaims with prejudice on November 16, 2007.[17]

The Grovers timely filed their Memorandum of Costs and Attorney Fees and Affidavit of Counsel on November 2, 2007.[18] The Wadsworths filed their objections to the Grovers' memorandum on November 5, 2007,[19] to which the Grovers responded on November 13, 2007.[20] The Court issued a decision regarding the Grovers' request for attorney fees on December 5, 2007.[21] The Court granted judgment to the Grovers for attorney fees and costs.[22]

The Wadsworths filed their first Notice of Appeal on November 20, 2007.[23] A Second Amended Notice of Appeal was filed on January 9, 2008.[24]

C. Statement of Facts.

In 1990, William Porter Gaston (Gaston) and Dennis Jensen (Jensen) purchased the subject property from A. Earl Wadsworth (Earl) for $115,000.00.[25] Gaston and Jensen paid Earl a down payment and Earl took a Promissory Note in the amount of $80,500.00 and secured the

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[17] R Vol. IV, pp. 373-74.

[18] R Vol. IV, pp. 340-57.

[19] R Vol. IV, pp. 361-63.

[20] R Vol. IV, pp. 364-72.

[21] R Vol. IV, pp. 385-89.

[22] R Vol. IV., pp. 390-91

[23] R Vol. IV, pp. 378-82.

[24] R Vol. IV, pp. 405-09

[25] R Vol. I, pp. 40-54.

Promissory Note by a Deed of Trust.[26] The parties do not dispute that Earl sent Gaston and Jensen yearly amortization schedules written by hand. These amortizations show the application to interest and principal from the $777.28 monthly payment as set out in the Promissory Note.

In 1997, the Grovers negotiated with Gaston and Jensen[27] for the purchase of the subject property.[28] During the course of these negotiations, Gaston told the Grovers that there was an outstanding note on the building from Gaston's purchase of the building in 1990.[29] Gaston told the Grovers that they would have to assume the note in order to purchase the building.[30] The Grovers responded that assuming the note would not be a problem but that the Grovers would have to know the outstanding balance on the note.[31] Gaston told the Grovers that he believed the balance on the note was approximately $56,000.00, and that he would find out the exact amount from Earl, who held the note.[32]

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[26] R Vol. I, pp. 50-54.

[27] It is important to point out that Jensen died some time prior to the 1997 transaction and was involved in the transaction only by virtue of his estate. For all intents and purposes, Gaston was the primary individual with whom the Grovers negotiated.

[28] R Vol. II, pp. 128-33.

[29] R Vol. II, p. 129; R Vol. III, p. 283, ll. 4-15.

[30] R Vol. III, p. 283, ll. 4-15.

[31] R Vol. III, p. 283, ll. 4-15.

[32] R Vol. III, p 283, Blair Grover Dep. 33:16-21.

Gaston later presented the Grovers with a handwritten statement from Earl showing that in May 1997, the principal balance due on the Note was $54,984.23.[33] The Wadsworths concede that the 1996/1997 amortization schedule is written entirely in Earl's handwriting. The Grovers agreed to pay $104,000.00 by assuming the balance of the Promissory Note owed to Earl, and paying the difference between the balance owed and the purchase price in cash to Gaston.[34]

Blair Grover prepared the Consent to Assignment and Assumption, and Release (the Consent).[35] Earl and Norma E. Wadsworth signed the Consent on April 30, 1997.[36] The Consent provides "Attached hereto marked Exhibits A and B is a copy of a proposed Warranty Deed, and an Assignment and Assumption Agreement for [the] purpose [of transferring Gaston and Jensen's interest in the property]."[37] The Consent continues, "As set forth therein, Grovers will assume the balance owed on the note and continue making the payments thereon according to its terms."[38] The language refers to the Assignment. The Assignment provides:

> Assignors have heretofore entered into an agreement to purchase the following described real property located in Bonneville County, Idaho:

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[33] R Vol. I, p. 129; R Vol. III p. 277; Norma Wadsworth Dep. Ex. 3; R Vol. III, p. 283; Grover Dep. 35:20-24 .

[34] R Vol. III, p. 285, Blair Grover Dep. 42:1-7.

[35] R Vol. III, p. 285, Blair Grover Dep. 15-19.

[36] R Vol. I, pp. 58-59.

[37] R Vol. I, pp. 58-59.

[38] R Vol. I, pp. 58-59.

> Lots 17, 18, 19 and 20 lying East of U.S. Highway 191, in Block 12, Capitol Hill Addition to the City of Idaho Falls, County of Bonneville, State of Idaho, according to the recorded plat thereof.
>
> From A. Earl Wadsworth and Norma E. Wadsworth, husband and wife. In connection with the agreement they have executed a Promissory Note with an approximate balance due of $56,000.00 secured by a Deed of Trust dated September 17, 1990 and recorded under Bonneville County Record's No. 793643.[39]

The Assignment continues:

> **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.[40]

Through Gaston, Earl told the Grovers what the balance of the note was. Thus, the Grovers agreed to pay the balance of the note, as expressly represented by Earl in his amortizations, until it was paid in full, whenever that would be.[41] The Grovers did not know whether there had been prepayments on the note, whether there had been any forgiveness of the note, or any other alteration of the amount owed.[42] The Grovers similarly did not know whether Gaston and Jensen had missed payments extending the pay-off of the note.[43]

Following the execution of these documents, Gaston, Jensen, and the Grovers closed on the sale of the subject property. The closing documents specify the exact amount the Grovers

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[39] R Vol. I, pp. 55-56.

[40] R Vol. I, pp. 55-56.

[41] R Vol. III, p. 285, Blair Grover Dep. 42:1-7.

[42] R Vol. III, p. 284, Blair Grover Dep. 38:19-39:6.

[43] R Vol. III, p. 284: Blair Grover Dep. 38:19-39:6.

were agreeing to assume on the note.[44] The Letter of Closing Instructions states that the sales price for the subject property was $104,000.00.[45] The $104,000.00 was comprised of $1,000.00 of earnest money, approximately $47,524.93 in cash, and an assumption of $54,984.23.[46] Grover actually paid $48,000.00 in cash to Gaston and Jensen.[47] The closing Settlement Statement provides that the Grovers assumed the Deed of Trust only in the amount of $54,984.23.[48] The Wadsworths consented to this assumption in writing.[49]

Earl furnished amortizations to the Grovers every calendar year commencing in 1997 showing how Earl applied the payments to the balance of the Promissory Note.[50] The amortization schedules were always consistent with the $54,984.23 balance as represented at the time of the sale.

Earl died on March 18, 2006.

Norma Wadsworth (Norma) had no involvement in keeping the books for the transaction.[51] The amortizations were exclusively kept and prepared by Earl.[52] Norma has no

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[44] R Vol. II, pp. 213-26.

[45] R Vol. II, pp. 213-26.

[46] R Vol. II, pp. 213-26.

[47] R Vol. II, pp. 213-26.

[48] R Vol. II, pp. 213-26.

[49] R Vol. I, pp. 58-59.

[50] R Vol. II, pp. 128-55.

[51] R Vol. III, p. 274, Norma Wadsworth Dep. 15:14-20.

knowledge of the amounts owed on the note. Norma failed to establish that the amount owning at the time of the assumption was anything other than $54,984.23. Norma misrepresented the amount owed in her verified pleadings. Norma does not know how the amounts were calculated. The Grovers timely paid the assumption amount of $54,984.23 plus interest.

II. ATTORNEY FEES ON APPEAL

The Grovers are entitled to attorney fees on appeal pursuant to Idaho Code section 12-120(3) and as the prevailing party under Rule 54 of the Idaho Rules of Civil Procedure. *See Tyler v. Keeney*, 128 Idaho 524, 915 P.2d 1382 (Ct. App. 1996). Idaho Appellate Rule 41 justifies the Grovers' request for attorney fees on appeal and the Court may determine the amount of fees to be awarded pursuant to its discretion under this Rule.

III. ARGUMENT

A. The district court properly granted summary judgment.

1. Standard of Review.

The standard of review for cases decided on cross-motions for summary judgment is the same standard as used by the district judge when originally ruling on the motion. *Intermountain Eye and Laser Ctrs., P.L.L.C. v. Miller*, 142 Idaho 218, 222, 127 P.3d 121, 125 (2005). Summary judgment is proper 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' *See Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 360, 93 P.3d 685, 691 (2004); *see also* IDAHO R. CIV. P. 56(c)(2007). The fact that

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[52] R Vol. III, p. 274, Norma Wadsworth Dep. 15:14-20.

both parties move for summary judgment does not in and of itself establish that there is no genuine issue of material fact. *Kromei v. AID Ins. Co.*, 110 Idaho 549, 551, 716 P.2d 1321 (1986). On cross-motions for summary judgment, the applicable standard of review is the summary judgment standard and this Court must evaluate each party's motion on its own merits. *Shawver*, 140 Idaho at 360, 93 P.3d at 691.

In this case, the parties stipulated to trying this case without a jury. In *Shawver*, the court said:

> When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. . . . The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences.

Id. at 360-61, 93 P.3d at 691-92. Thus, the court must evaluate whether the district court made *reasonable* inferences even though conflicting inferences may be supported in the record. If the record supports the inferences made by the district court, then this Court must affirm. *Id.*

2. The district court properly granted summary judgment based on an account stated.

The yearly amortization schedules generate the favorable inferences that Earl agreed with the $54,984.23 balance, had investigated that balance, and knew that the Grovers would rely on his representations for the transaction with Gaston. The Wadsworths make the gratuitous comment in their brief that they "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."[53] The

[53] Appellant Br. 8.

Wadsworths do not point out any case law that suggests that the doctrine of account stated is inapplicable to contracts for the sale of real estate. There is no rule of law preventing the theory's application where a piece of land is the subject matter of a contract. However, the Idaho Court of Appeals commented that "any" written account may become an account stated. *M.T. Deaton & Co. v. Leibrock*, 114 Idaho 614, 616, 759 P.2d 905, 907 (Ct. App. 1988). Thus, it does not appear that a real estate contract is excluded from becoming an account stated.

The Idaho Supreme Court in *O'Harrow v. Salmon River Uranium Dev., Inc.*, 84 Idaho 427, 373 P.2d 336 (1962), required two things of an account stated:

- Mutual examination of the claims of each other by the parties; and,
- Mutual agreement between [the parties] as to the correctness of the allowance and disallowance of the respective items or claims and of the balance as struck upon the final adjustment of the whole account and demands on both sides.

Id. at 430-31, 373 P.2d at 338. After *O'Harrow*, the Idaho Court of Appeals stated:

> An account stated is a document, a writing, which exhibits the state of account between [the] parties and the balance owed one to the other, and when assented to, either expressly or impliedly, it becomes a new contract . . . . But the account, in order to constitute a contract, 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.

Needs v. Hebener, 118 Idaho 438, 442-43, 797 P.2d 146, 150-51 (Ct. App. 1990). The requirement from the *Needs* court that the "intent" be expressed with clearness and certainty, does not establish a substantive burden of proof for an account stated.

In these circumstances, the creditor bears the burden of establishing the existence and amount of the original debt. *See Corbin on Contracts* § 72.1.4 (2003).

The facts of this case satisfy both elements of an account stated.

a. The parties mutually examined the respective claims.

The most probable inference from the evidence is that the Grovers did precisely what is expected of buyers under these circumstances: the Grovers asked the bookkeeper and Note holder about the Note's balance. The Grovers' conduct was appropriate under the circumstances. The facts strongly support the reasonable and logical inference that the Wadsworths, or more specifically Earl, performed the requisite examination of the balance.

In this case, the Grovers adequately examined the Wadsworths' claims. Blair Grover (Blair) testified:

> [Gaston] told me that there was a contract that he was paying off and that I would have to assume it because you couldn't pay it early. That's what I remember him telling me.
>
> I said, well, that's okay. I can assume a contract, we'll have to know what the balance is. I agreed to pay him $104,000. I said, if we're going to assume the contract, we have to subtract that from the amount you're going to get. That's pretty elementary. He understood that.
>
> In those conversations, I said to him, how much do you owe, and he said in substance, about $56,000.00. I'm not sure. The seller, Mr. Wadsworth, keeps track of that. In substance, that's what he told me. I said, well, we'll have to get the figures then from Mr. Wadsworth.
>
> At the time I did the earnest money, we didn't have them. I wrote in there that I would assume the balance of approximately 56,000 because that's what he thought, and I think it was based on his last schedule he'd received from Mr. Wadsworth, which showed on what exhibit we looked at $56,234. I think that's where he came up with 56,000 that he thought he owed.

> The way I remember it, Mr. Johnson, is that within a few days he brought to me the schedule that shows the 54,984.23 and said that Earl had furnished that to him, and this was now the balance owed. I said, are you satisfied with that. He indicated that that was the amount due, that Earl was keeping track of it, and if that's what Earl said, that's what it was.[54]

The Wadsworths do not dispute this testimony with any admissible evidence. Any amortization schedule run by the Grovers would have been based solely on the balance represented by Earl. Consequently, the Grovers' reliance on Earl's representations was reasonable. The Grovers could not have gone to a third party, i.e., a bank, and figured out the balance of the Note. Earl held the note and did the bookkeeping. Earl prepared yearly amortization schedules for Gaston, Jensen, and subsequently the Grovers.[55] Earl possessed all of the information that the Grovers could have possibly used in examining the balance of the Note.[56] When Gaston came to the Grovers after receiving the 1996/1997 amortization schedule, Blair asked Gaston if the balance looked correct.[57] Gaston concurred with the balance as stated by Earl.[58] Both the original seller and the original buyer agreed to the Note's balance.[59] The only logical and reasonable inference

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[54] R Vol. III, p. 283, Blair Grover Dep. 33:4-34:12

[55] *See* R. Vol. III, p. 274, Norma Wadsworth Dep. 15:5-19.

[56] R Vol. III, p. 274, Norma Wadsworth Dep. 15:5-19.

[57] R Vol. III, p. 283, Blair Grover Dep. 34:5-12.

[58] R Vol. III, p. 283, Blair Grover Dep. 34:5-12.

[59] R Vol. III, p. 283, Blair Grover Dep. 34:5-12; R Vol. III, p. 284, Blair Grover Dep. 39:25-40:19.

and construction of the evidence was that Earl represented the accurate amount.[60] Thus, the district court committed no error.

Similarly, there is no dispute that Earl prepared the 1996/1997 amortization schedule. Earl's wife, Norma, authenticated Earl's handwriting. The 1996/1997 amortization schedule is unique among all of the other handwritten amortizations that Earl prepared. This particular amortization has a balance calculated in the middle of the year.[61] No other amortization schedule contains a balance interpolation.[62] The most probable inference from this fact is that the 1996/1997 amortization was specially created due to the Grovers' inquiry into the balance owed on the Note. This inference is corroborated by the clear statement, in Earl's handwriting, that at the time the building was sold to the Grovers the "Bal[ance] due on principal = $54,984.23."[63]

Unfortunately, Earl's death precludes a full inquiry into the extent of his examination of the claims. However, the Wadsworths have no admissible evidence demonstrating that Earl's investigation was somehow defective. Norma possesses no personal knowledge of the

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[60] In fact, there has never been a sufficient showing by the Wadsworths that a mistake was actually made. There is an equal and compelling inference based on the admissible evidence that *no* mistake was made and that this is merely an effort to get more money than the Wadsworths are owed from the Grovers.

[61] R Vol. II, p. 223.

[62] R Vol. II, pp. 128-55.

[63] R Vol. II, p. 223.

transaction.[64] She was not involved in the sale of the property beyond her signing the Consent.[65] However, as noted by the district court, the most probable and logical inference from the evidence is that Earl would have provided an accurate balance and a figure that would maximize his return.[66] As the bookkeeper for the Note, it is a probable and logical inference that Earl evaluated the outstanding balance before reaching the $54,984.23 amount. The Wadsworths presented the district court with no evidence suggesting that the 1996/1997 amortization schedule was not intended as a definite statement of account to Gaston and the Grovers. There is no qualifying language in the balance statement. The only probable and logical inference is that Earl investigated the balance before delivering the 1996/1997 amortization schedule to Gaston.

The Wadsworths' suggestion that an account stated is "not necessarily created, even if the parties had met and mutually signed a document" is inapplicable to this case. The Wadsworths rely upon *Gunn v. Perseverance Mining & Milling Co.*, 23 Idaho 418, 130 P.458 (1913), for their suggestion. However, *Gunn* involved different facts than the present case. In *Gunn*, the Court found that the evidence suggested that the parties had not settled specific accounts. *Id.* at 421, 130 P. at 459. In this case, there was only one account examined by the parties. The most probable inference from the evidence is that both parties desired to accurately ascertain the balance of the Note. The *Gunn* decision is of no value in this case.

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[64] R Vol.III, p. 274, Norma Wadsworth Dep. 15:5-20.

[65] R Vol.III, p. 274, Norma Wadsworth Dep. 15:5-20.

[66] R Vol. III, pp. 249-50.

b. The parties mutually assented to the $54,984.23 balance.

"An account stated action requires showing of mutual assent that an amount is the final balance of account agreed to by the parties and a writing evidencing the final balance. Assent may be implied from failure to object to a billing within a reasonable time." *M.T. Deaton & Co. v. Leibrock*, 114 Idaho 614, 616, 759 P.2d 905, 907 (Ct. App. 1988). Silence may be used to support the inference of an agreement as to the correctness of the amount. *Needs v. Hebener*, 118 Idaho 438, 443, 797 P.2d 146, 151 (Ct. App. 1990); *see also Argonaut Ins. Cos. v. Tri-West Constr. Co.*, 107 Idaho 643, 646, 691 P.2d 1258, 1261 (Ct. App. 1984).

The only logical and reasonable construction of the evidence is that both the Grovers and the Wadsworths intended for the $54,984.23 balance to be used as a definite and final account stated on the Note. It is important to note that Judge St. Clair wrote that it appeared from the evidence that "all parties agreed to an amount due under the original sales contract and promissory note."[67] The Wadsworths used the $54,984.23 balance for seven years following the sale.[68] The most logical inference from this evidence is that Earl agreed that the $54,984.23 balance was correct. Gaston agreed with the Wadsworth's statement of the account.[69] Blair testified that he accepted Earl's and Gaston's representations that the balance was $54,984.23.[70]

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[67] R Vol. II, pp. 185-94.

[68] R Vol. II, pp. 128-55.

[69] R Vol. III, p. 283, Blair Grover Dep. 34:5-12.

[70] R Vol. III, p. 283, Blair Grover Dep. 34:5-12.

The Wadsworths failed to timely object to the $54,984.23 balance. The Wadsworths used this number over a seven year period.[71] There is also no dispute that the Wadsworths provided the handwritten amortization schedules. Since the Wadsworths sent the amortizations schedules to the Grovers, there is sufficient evidence in the record that the Wadsworths assented to the contents of those amortization schedules. *See M.T. Deaton & Co. v. Leibrock*, 114 Idaho 614, 617, 759 P.2d 905, 908 (Ct. App. 1988). In *M.T. Deaton*, an accounting firm had sent its client regular statements of account, including a balance. *Id.* at 615, 759 P.2d at 906. The Court of Appeals found that since the accountant sent the statements of account to Deaton's client there was sufficient evidence of assent. *Id.* at 617, 759 P.2d at 908. This case is factually similar. The Wadsworths functioned as the accountant for the Note. The Wadsworths sent the amortization schedules to Gaston and the Grovers. Therefore, even if there are conflicting inferences that could be drawn from this evidence, the inference drawn by the district court should be sustained because it is logical and probable inference.

Furthermore, the Wadsworth's assent to the $54,984.23 balance is supported by the signed Consent. In the Consent, Earl and Norma Wadsworth both consented to a limited assumption of the Promissory Note by the Wadsworths.[72] Earl ratified the number he represented to Gaston and the Grovers repeatedly over a period of approximately seven years.

Idaho recognizes the axiom that when "construing a written instrument, [courts] must consider it as a whole and give meaning to all provisions of the writing to the extent possible."

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[71] R Vol. II, pp. 128-55.

[72] R Vol. III, pp.279-81, Norma Wadsworth Dep. Ex. 5.

Selkirk Seed Co. v. State Ins. Fund, 135 Idaho 434, 437, 18 P.3d 956, 959 (2000); *see also Intermountain Eye and Laser Ctrs., P.L.L.C. v. Miller*, 142 Idaho 218, 222, 127 P.3d 121, 125 (2005)(quoting *Daugharty v. Post Falls Highway Dist.*, 134 Idaho 731, 735, 9 P.3d 534, 538 (2000)); *Magic Valley Radiology, P.A. v. Kolouch*, 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991). When an agreement is unambiguous, then the Court has the power to construe it and apply its language. *Billow v. Preco. Inc.*, 132 Idaho 23, 227, 966 P.2d 23, 27 (1998). One treatise on contract law commented:

> In many instances, however, the terms of agreement may be expressed in two or more separate documents, some of these containing promises and statements as to consideration, and others, such as deeds, mortgages and trust indentures, embodying the performances agreed upon rather than a statement of terms to be performed. In every such case, these documents should interpreted together, each one assisting in determining the meaning intended to be expressed by the others.

5-24 *Corbin on Contracts* § 24.21 (2007). The treatise continued:

> There are numerous additional examples of cases in which courts have interpreted contracts by viewing the entire context, consisting of the additional parts of the contract and the circumstances surrounding the making and performance of the contract. . . .
>
> A business transaction in which a contract is made will often consist of many communications and other actions. Although it is not always possible to determine the exact boundaries of each transaction, i.e., the act with which it began and that with which it ended, one transaction can generally be separated from another for purposes of interpretation and adjudication.

Id.

The Supreme Court of Ohio stated that "most important to this case, a writing, or writings, executed as part of the same transaction, will be read as a whole, and the intent of each part will be gathered from a consideration of the whole." *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Auth.*, 78 Ohio 3d 353, 361, 678 N.E.2d 519, 526 (1997).

The Kansas Appellate Court commented that "two or more instruments executed in the course of the same transaction, concerning the same subject matter, may generally be construed together." *Giefer v. Swenton*, 23 Kan. App. 2d 172, 928 P.2d 906 (1960). These views are consistent with the second Restatement of Contracts. The Restatement opines that "a writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together." RESTATEMENT (SECOND) OF CONTRACTS § 202(2). Idaho has cited the Restatement's guidance with approval. *See Costello v. Watson*, 111 Idaho 68, 72, 720 P.2d 1033, 1037 (Ct. App. 1986).

The Consent expressly refers to Exhibits A and B.[73] By virtue of those references, they are a part of the agreement even if they were not physically attached to the document at the time Earl and Norma signed the Consent. *See, e.g., Russell v. Russell*, 99 Idaho 151, 154, 578 P.2d 1082, 1085 (1978) (stating that in the real estate transaction context that "it would be pure semantics to say that although the legal description was referred to in the earnest money agreement, it was not part of the contract because it was not attached by a staple. Attachment does not require any specific physical act.") The failure to fully read a contract prior to signing the contract does not excuse performance. *Swanson v. Beco Constr. Co., Inc.*, 2007 Ida. LEXIS 210 (January 10, 2008). Thus, any arguments that those Exhibits were not a part of the Consent are frivolous. The Consent clearly referenced the Exhibits, the Exhibits were a part of the Consent, and the Exhibits' contents were agreed to by the Wadsworths.[74]

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[73] R Vol. III, pp. 279-81.

[74] R Vol. III, pp. 279-81.

The Wadsworths incorrectly argue that the Consent did not incorporate the Assignment and Assumption Agreement or any other document. The Consent clearly states that "attached hereto marked as Exhibits A and B is a copy of a proposed Warranty Deed, and an Assignment and Assumption Agreement for that purpose."[75] Part of the Consent is the Assignment and Assumption Agreement by virtue of it being attached as an exhibit. Paragraph two reads:

> Buyers now desire to transfer their interest in the property to BLAIR GROVER and JOANN Grover (Grovers), his wife, of 309 North 4500 East, Rigby, Idaho. Attached hereto marked Exhibits A and B is a copy of a proposed Warranty Deed, and an Assignment and Assumption Agreement for that purpose. As set forth therein, Grovers will assume the balance owed on the note and continue making payments thereon according to its terms.[76]

The Grovers agreed "as set forth [in the Assignment and Assumption Agreement]" to make payments pursuant to the terms of the Assignment and Assumption Agreement. The Grovers agreed to pay approximately $56,000 for the property and that number was specifically stated in the closing documents as $54,984.23.[77] Grammatically, the only antecedent that the "therein" could possibly be referring to is the Assignment and Assumption Agreement. Thus, the Wadsworths clearly assented to the Grovers' assumption of a Note with a $54,984.23 balance.

The requirement of *Arnold v. Burgess*, 113 Idaho 786, 747 P.2d 1315 (Ct. App. 1987), that "some form of assent or agreement is required to convert [a statement of account] to an account stated" has been fully satisfied in this case. Here, Earl drafted the amortization

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[75] R Vol. III, pp. 279-81.

[76] R Vol. III, pp. 279-81.

[77] R Vol. II, pp. 213-26.

schedule.[78] The Wadsworths consented to the $54,984.23 balance in a written, signed document.[79] The Wadsworths used the $54,984.23 amount for approximately seven years following the 1997 transaction.[80]

The Wadsworths' efforts to distinguish *Needs* fail. First, the Wadsworths fail to recognize that the Wadsworths sent the regular statements to the Grovers. The Wadsworths were the source of the information and the statements of account. Since the Wadsworths were the source of the statements, they acquiesced to the correctness of the account stated. *See M.T. Deaton & Co. v. Leibrock*, 114 Idaho 614, 617, 759 P.2d 905, 908 (Ct. App. 1988). The Wadsworths repeatedly sent the statements to the Grovers over nearly a decade. All of the statements were based on the original $54,984.23 number. Thus, there was mutual assent and the decision of the district court should be affirmed.

3. Any mistake was unilateral and is not a defense.

The Wadsworths argue that a mistake was made. However, the Wadsworths never presented any evidence to the Court or the Grovers establishing a mistake. The Wadsworths have never explained what error occurred and how it was made. Norma Wadsworth testified that she would have to assume that a mistake was made when Earl started keeping the books for the Note.[81] The Wadsworths have only *alleged* that a mistake was made in the calculation of the

[78] R Vol. II, p. 223.

[79] R Vol. II, pp. 221-22.

[80] R Vol. II, pp. 128-55.

[81] R Vol. III, p. 275, Norma Wadsworth Dep. 19:18-20.

Note's payments. Earl was the exclusive bookkeeper for the payments on the building.[82] Norma Wadsworth did not then, and does not now, understand interest or principal.[83] Norma was not involved in the transaction and only briefly assisted Earl in 2005 when he claimed a mistake.[84]

There were several unknown factors to the Grovers that could have affected the balance of the Note. The Wadsworths could have forgiven a portion of the loan, Jensen could have pre-paid part of the loan, and there could have been off-sets. All of these were unknowns to the Grovers at the time they inquired into the Note's balance.[85]

Regardless, any mistake that would have been made as to the Note's balance would have been a unilateral mistake. Judge St. Clair correctly found that Earl made a unilateral mistake regarding the balance of the Promissory Note.[86] "A unilateral mistake is not normally grounds for relief for the mistaken party, whereas a mutual mistake is." *Bailey v. Ewing*, 105 Idaho 636, 639, 671 P.2d 1099, 1102 (Ct. App. 1983). "The mistake must be material or, in other words, so substantial and fundamental as to defeat the object of the parties." *Id.* "A mutual mistake occurs when *both* parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they based their bargain." *Id.* The Wadsworths should not be allowed to recover based on their own unilateral mistake.

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[82] R Vol. III, p. 274, Norma Wadsworth Dep. 15: 5-20.

[83] R Vol. III, p. 275, Norma Wadsworth Dep. 18:9-10.

[84] R Vol. III, p. 275, Norma Wadsworth Dep. 18:19-19:13.

[85] R Vol. III, p. 285, Blair Grover Dep. 41:9-10.

[86] R Vol. II, p. 191

The Restatement comments:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake.

RESTATEMENT (SECOND) CONTRACTS § 153.

Here, the Grovers did not make a mistake. The only party mistaken as to the amount owing was Earl. Earl was the only party who could have known what the balance on the Promissory Note was in any of the years preceding 1997 and after. He alone held the note. He did all the book-keeping for the transaction.[87] If any party should have known of an error in the 1996/1997 amortization schedule it would have been the Wadsworths and not the Grover. "Courts have traditionally been reluctant to allow a party to avoid a contract on the ground of mistake, even as to a basic assumption, if the mistake was not shared by the other party." RESTATEMENT (SECOND) CONTRACTS § 153 cmt. a. Since the Grovers could not possibly have known whether the amount provided by the Wadsworths was incorrect, the Wadsworths should be bound to Earl's representation. Otherwise, the Grovers will suffer a gross inequity.

The Wadsworths acknowledge that both the Grovers and the Wadsworths "believed the stated outstanding balance was consistent with the amortized payment schedule."[88] The Grovers could not, then, have known otherwise. The Wadsworths have cited *no* authority that states that

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[87] R Vol. III, p. 274, Norma Wadsworth Dep. 15:5-20.

[88] Appellant Br. 15.

the contract should be reformed under these circumstances. Indeed, the Wadsworths' suggestion that "the mistake does not need to be a mutual mistake to act as a defense to an account stated" does not defeat the black letter Idaho law on unilateral mistakes.

The Wadsworths rely on *Mathis v. Wendling*, 962 P.2d 160 (Wyo. 1988).[89] However, this non-binding Wyoming case is distinguishable from the facts of this case. *Mathis* involved the original contract for sale between the original seller and the original buyer. *Id.* at 162-63. Here, the Grovers are not the original buyers of the property. At the time the Grovers stepped into the transaction and assumed the balance of the Note, the Grovers had no knowledge of whether there had been pre-payments by Jensen, forgiveness, off-sets, or other adjustments.[90] The Grovers requested an accurate statement of the Note's balance from the Wadsworths and the Wadsworths provided the Grovers with the handwritten amortization.[91] The Wadsworths also signed the Consent.[92] Therefore, this case is entirely distinct from the *Mathis* decision.

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[89] Appelant Br. 15-16

[90] R Vol. III, p. 284, Blair Grover Dep. 38:19-39:6.

[91] The reason the parties know that the document had been produced at the time of the sale is because the 1996/1997 amortization schedule was included in the packet of documents used at closing. R Vol. II, pp. 223.

[92] Norma Wadsworth claims to not have read or seen the entire document that she signed. This is immaterial. Failure to read a contract does not absolve a signor of responsibility under the contract. *Belk v. Martin*, 136 Idaho 652, 658, 39 P.3d 592, 598 (2001).

The district court appropriately noted 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."[93] The district court's comment is entirely logical. The original contract between Gaston and the Wadsworths allowed for prepayments.[94] The Grovers agreed to pay a certain amount: $54,984.23.[95] The Grovers agreed to pay that at $777.28 per month at 10 percent interest. The date that the last payment would be made is immaterial to the agreement to pay a specific amount. The ultimate pay-off date is only tangentially related to the ultimate obligation to pay a specified amount. No one disputes that the Grovers are obligated to pay $54,984.23 and did so. Thus, the Wadsworths are not allowed to benefit from their own unilateral mistake and the decision of the district court should be upheld.

4. The district court properly applied the doctrine of estoppel.

The Wadsworths raise their objection to the application of the doctrine of promissory estoppel for the first time on appeal. The Court has long recognized that an issue raised for the first time on appeal will not be considered by the Court. *Mihalka v. Shepherd*, 2008 Ida. LEXIS 57, *14-*15 (March 28, 2008) (citing *McPheters v. Maile*, 138 Idaho 391, 397, 64 P.3d 317, 323 (2003)). Thus, the Court should not address the Wadsworths' argument concerning the applicability of promissory estoppel.

Even if this Court is inclined to consider the Wadsworths' objection, the elements of

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[93] R Vol. III, p. 252.

[94] R Vol. I, p. 82.

[95] R Vol. I, pp. 96-100.

promissory estoppel have all been met. The elements of promissory estoppel[96] are the following:

1. The detriment suffered in reliance was substantial in an economic sense;
2. Substantial loss to the promise acting in reliance was or should have been foreseeable by the promisor; and,
3. The promissee must have acted reasonably in justifiable reliance on the promise as made.

Gillespie v. Mountain Park Estates, L.L.C., 138 Idaho 27, 29, 56 P.3d 1277, 1279 (2002). This doctrine was applied alternatively as another theory supporting judgment to the Grovers. It is not necessary for the district court's judgment to be sustained on this theory. However, the district court correctly applied this theory in awarding summary judgment to the Grovers.

a. The Wadsworths made specific representations to the Grovers.

The Wadsworths' representations to the Grovers that the balance of the Note was $54,984.23 constitute a promise that the Grovers would only be required to pay that amount in order to satisfy their obligations. The Wadsworths' efforts to parse the definition of promise are simply unavailing. The Wadsworths' representation of the Note's balance was a "promise" that the balance was $54,984.23. It was a promise as to what the Grovers would ultimately pay-off

[96] The concept of promissory estoppel is an extension of the doctrine of estoppel. Estoppel prevents a person from showing the truth contrary to a representation of fact made by him after another has relied on the representation. RESTATEMENT (SECOND) CONTRACTS § 90, cmt. a. Thus, even if the court misapplied the doctrine of promissory estoppel, the doctrine of estoppel certainly applies in this case.

for the building. Earl's representation was an assurance as to the balance of the Note. Any reasonable person would have taken Earl's representation to be a final and accurate statement of the ultimate obligation under the Note. In essence, Earl promised that if $54,984.23 at ten percent interest was paid, that he would not exercise his rights under that contract.[97] The Wadsworths consented to the $54,984.23 amount, promised that the amount was accurate, and promised that the Wadsworths would not contest it. The reasonable and logical inference from the evidence is that the Wadsworths represented an accurate amount to the Grovers.

The Wadsworths agree that the handwritten amortization schedules were statements of the Note's balance. They were not estimates, opinions, or predictions; instead, the handwritten amortizations were definite statements of the Note's balance and the evidence only suggests that the Grovers believed that the Wadsworths' representations were accurate. Further, the Wadsworths cannot seriously argue that the Grovers did not have the document at the time of the sale because the handwritten amortization schedule is a part of the closing documents.[98] There is no proof that the Wadsworths received anything less than what they were entitled to under the Contract. Thus, the Wadsworths made specific representations to the Grovers.

b. The Grovers' reliance was foreseeable.

The Wadsworths blatantly misrepresent the record to the Court when they argue that "there is no evidence showing Wadsworths even knew of Grovers' identity, let alone what

[97] Setting aside any consideration of the new contract that was formed between the Grovers and the Wadsworths on the account stated theory.

[98] R Vol. II, p. 223.

contract negotiations were taking place between Gaston and Grover."[99] That statement is inaccurate for several reasons. First, Gaston requested the 1996/1997 amortization schedule from the Wadsworths for the express purpose of ascertaining the balance of the Note at the time of the sale from Gaston to the Grovers.[100] Second, the 1996/1997 amortization schedule expressly refers to the sale of the property to Blair Grover.[101] Third, the 1996/1997 amortization schedule was included in the closing documents for the sale.[102] Fourth, the Wadsworths signed the Consent prior to the sale closing between the Grovers and Gaston.[103] The Grovers only agreed to assume the debt as represented by the Wadsworths in the amount of $54,984.23. The Wadsworths' arguments are simply untenable. Thus, the Grovers' reliance was foreseeable.

c. The Grovers' reliance was reasonable and justified.

The Grovers' reliance on the Wadsworths' representations of the Note's balance was justified and reasonable under the circumstances. The Wadsworths held the Note. The Wadsworths did all of the book-keeping related to the payments on the Note. Gaston agreed with the Wadsworths' representation of the amount owed on the Note. The Grovers were unaware of any of the payments that had or had not been made prior to the transaction. There

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[99] Appellant Br. 19.

[100] R Vol. III, p. 283, Blair Grover Dep. 34:5-12.

[101] R Vol. II, p. 223.

[102] R Vol. II, p. 223.

[103] R Vol. III, pp. 314-15.

was simply no way for the Grovers to verify the accuracy of the amounts. Any amortization schedule that the Grovers would have created would have been based on Earl's representations.

The Wadsworths make several arguments why the Grovers' reliance was unreasonable.[104] The Wadsworths' arguments fail for several reasons.

1. Blair Grover being an attorney is irrelevant. When an original seller and an original buyer agreed on a Note's balance, Blair's practice was to accept those representations.[105] The most reasonable and logical inference from the evidence is that Blair was justified relying on both Gaston's and Earl's representations of the $54,984.23 amount.
2. That the amortization schedules were handwritten is similarly irrelevant. There is no evidence in the record that Earl did not use an amortization program or financial

[104] There is an endemic problem with much of the Wadsworths' arguments. Throughout their brief they rely on citations to depositions that were never made a part of the record on summary judgment or on appeal. The following citations are not, and were not, a part of the record: Norma Wadsworth Dep. 32:1-33:18; Grover Dep. 12:3-15:25; 22:1-19; 62:21-63:20; and all citations to Gaston's deposition. The district court could not draw inferences on evidence not in the record. This Court cannot fault the district court and reverse its decision. *See Hunting v. Clark County Sch. Dist.No. 161*, 129 Idaho 634, 637, 931 P.2d 628, 631 (1997) (stating that an appellate court reviews the record before the trial court to determine if there are genuine issues of material fact preventing summary judgment.)

[105] R Vol. III, p.284, Blair Grover Dep. 40:8-19.

calculator when calculating the amortized amounts. That Earl hand-wrote the amortization schedule is not probative of accuracy or inaccuracy. Mistakes can be made even in computer generated amortization schedules.[106] Earl repeatedly affirmed the $54,984.23 amount over the course of seven years. Thus, there was never any reason for the Grovers to suspect that the amount the Wadsworths represented was incorrect.

3. The Grovers knew that there was a Note. The Grovers were fine assuming the payments on the Note; however, the Grovers had to know the precise amount owed on the Note at the time they assumed the payment obligations. Both the Wadsworths and Gaston agreed that the balance was $54,984.23.
4. Whether the Grovers ever met with the Wadsworths is immaterial. The Wadsworths prepared and furnished the 1996/1997 amortization schedule. The Wadsworths signed the Consent. There is no authority that requires a face to face meeting in order for there to be justified reliance. The Wadsworth's proposition is absurd.
5. The Grovers understood that they would be obligated to pay $54,984.23 at ten percent interest. The Grovers were aware that payments would be $777.28 per month. The Grovers were not aware that an alleged mistake had ever been made. Indeed, the Wadsworths have never explained what caused the mistake or how it occurred in this

[106] The verified counterclaim alleges that the Wadsworths were owed in excess of $40,000.00. This, of course, is inaccurate according to the Wadsworths' own "corrected" amortization table and amended counterclaims.

litigation. All that the Wadsworths have presented are assumptions, supposition, and allegations that a mistake was made. No testimony or other evidence has ever been admitted establishing the mistake and the Grovers have never conceded the existence of a mistake.

6. The Grovers never knew whether Earl had received prepayments from Jensen or Gaston. The Grovers did not know if all the payments had been timely made by Jensen or Gaston. The Grovers did not know whether Earl forgave part of the debt. The Grovers did not know whether there had been any additional off-sets of the debt. The only thing that the Grovers did know was the representation by the Wadsworths that the balance of the Note was $54,984.23. Thus, the Grovers' reliance on this amount was entirely justified.

The Wadsworths arguments all fail. The district court acted properly in determining that the Grovers reasonably relied on the Wadsworths' promises.

d. The Court should affirm even if Promissory Estoppel is improper.

Even if the Court agrees with the Wadsworths that the district court improperly granted the Grovers' motion based on promissory estoppel, the Court may still affirm the district court upon the correct theory. *See Reid v. Duzet*, 140 Idaho 389, 392, 94 P.3d 694, 697 (2004). The doctrine of estoppel should prevent the Wadsworths from taking a position opposite of their previous position that the $54,984.23 balance was correct. The most probable inference from the evidence suggests that the Grovers relied on the Wadsworths' representations. The Grovers

believed that those representations were entirely accurate. The Wadsworths should be estopped from claiming that a different amount is owed.

The Grovers needed to know the balance of the Note because the amount owed would define the Grovers' obligation to the Wadsworths. If the Note had a higher balance then the Grovers would have paid Gaston less than what the Grovers actually paid.

B. The district court appropriately awarded the Grovers their attorney fees.

1. Standard of Review.

The district court's decision to award attorney fees is reviewed under the abuse of discretion standard. *Contreras v. Rubley*, 142 Idaho 573, 576, 130 P.3d 1111, 1114 (2006). However, when an award of attorney fees depends on the interpretation of a statute, the standard of review for statutory interpretation applies. *Id.* "The interpretation of a statute is a question of law over which this Court exercises free review." *Carrier v. Lake Pend Oreille Sch. Dist. # 84*, 142 Idaho 804, 807, 134 P.3d 655, 658 (2006). The court must construe a statute to give effect to the legislature's intent. *Stout v. Key Training Corp.*, 158 P.3d 971, 973 (Idaho 2007).

The question of what constitutes a "reasonable" attorney fee involves a discretionary determination by the trial court. *Kelly v. Hodges*, 119 Idaho 872, 876, 811 P.2d 48, 52 (Ct. App. 1991). In exercising this discretion, the court must act consistently with the applicable legal standards listed in Idaho Rule of Civil Procedure 54(e)(3). *Id.*; *Assocs. Nw. v. Beets*, 112 Idaho 603, 605, 733 P.2d 824, 825 (Ct. App. 1987). Failure to specifically address each separate factor does not, by itself, constitute an abuse of discretion. *Irwin Rogers Ins. Agency, Inc. v. Murphy*, 122 Idaho 270, 277, 833 P.2d 128, 135 (Ct. App. 1992). In determining the amount of attorney

fees to award under Idaho Code § 12-120, a district court is vested with discretion. *Spidell v. Jenkins*, 111 Idaho 857, 860, 727 P.2d 1285, 1288 (Ct. App. 1986). The sequence of inquiry to determine whether a trial court abused its discretion is:

> (1)Whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.

Nalen v. Jenkins, 113 Idaho 79, 81, 741 P.2d 366, 368 (Ct. App. 1987). The district court did not abuse its discretion by awarding attorney fees to the Grovers.

2. The case involves a commercial transaction.

The Wadsworths' arguments about the nature of this case are wrong. The case involves a transaction that is not for personal or household purposes. The commercial transaction forms the basis upon which the Grovers and the Wadsworths both sought to recover. Consequently, the district court's finding that the suit involves a commercial transaction should be affirmed.

A commercial transaction is defined as all transactions except transactions for personal or household purposes. IDAHO CODE ANN. § 12-120(3). An award of attorney fees is proper if the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover. *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723 728, 152 P.3d 594, 599 (2007). There are some decisions that discuss whether the commercial transaction constituted the "gravamen" of the lawsuit. *See, e.g., Dennet v. Kuenzli*, 130 Idaho 21, 936 P.2d 219 (1997); *Cox v. Clayton*, 137 Idaho 492, 50 P.3d 987 (2002).

Here, the legal claims raised in the Grovers' complaint and in the counterclaim assert a breach of contract. The subject contract was a real estate purchase contract. The real estate

purchased was a piece of commercial property. The building was purchased so the Grovers' son could run a business. The transaction had nothing to do with personal or household purposes.

In a sense, this case is similar to transaction in the *Blimka* decision. In *Blimka*, a party purchased 26,500 pairs of jeans. *Blimka*, 143 Idaho at 728, 152 P.3d at 599. Though the purchase of the jeans could have been for Blimka's personal use, it was clear to the court that the jeans were purchased in order to be marketed. *Id.* Here, the purchased building was to be used to market the Grovers' son's outdoor business. The transaction was not for the Grovers' or the Wadsworths' personal or household purposes and within § 12-120(3)'s parameters.

Indeed, as the district court aptly noted, in order for the Grovers to have title quieted in their name, the Grovers had to show that they satisfied their contractual duties and obligations. The underlying transaction, then, was integral to the Grovers' claim to quiet title in the property. The Wadsworths have not disputed that the underlying commercial transaction related directly to their claims against the Grovers. The Court should evaluate the claims in this lawsuit from an overall perspective. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005). The district court should determine which party prevailed *in the action* and awards a commensurate fee. *Id.*; IDAHO CODE ANN. § 12-120(3). As a result, the district court did not abuse its discretion in finding that § 12-120(3) applied to this lawsuit.

3. Blair Grover's status as an attorney with *Beard St. Clair Gaffney PA.*

The Wadsworths rely on *Swanson & Setzke, Chtd. v. Henning*, 116 Idaho 199, 774 P.2d 909 (Ct. App. 1989), for their suggestions that the Grovers should be barred from recovering their attorney fees since Blair Grover is "Of Counsel" at Beard St. Clair Gaffney PA. *Swanson*

& Setzke does not control in this case. The issue in *Swanson & Setzke*, centered on a law firm's suit against its former clients. *Id.* at 199, 774 P.2d at 909. The law firm itself was the client and sued the defendant to collect a debt due to the law firm. *Id.* In this case, the Grovers engaged Beard St. Clair Gaffney PA to represent the Grovers in this action. The subject matter of the lawsuit is not a collection of debt owed to Beard St. Clair Gaffney PA. The subject matter is exclusively personal to the Grovers in their individual capacity and is not a matter related to Blair Grover's occupation as an attorney or his employment with Beard St. Clair Gaffney PA.

"The phrase 'attorney fee' may be interpreted to denote a monetary obligation (a fee) paid or owed from one person (a client) to another person who has provided legal representation (an attorney.)" *Id.* at 200; 774 P.2d at 910. Such a relationship exists in this case. The Grovers regularly paid Beard St. Clair Gaffney PA. The payment of fees to Beard St. Clair Gaffney PA demonstrates the precise relationship discussed in the *Swanson & Setzke* decision. "Attorney fees 'presupposes a relationship of attorney and client' which does not exist in *pro se* situations." *Id.* "If the phrase 'attorney fee' denotes the existence of an attorney-client relationship, it matters not that the client also happens to be a lawyer." *Id.* at 202, 774 P.2d at 912.

The attorney-client relationship existed between Beard St. Clair Gaffney PA and the Grovers. The Grovers exercised attorney-client privilege in this case. The Grovers never appeared *pro se* at any of the hearings nor did the Grovers ever make oral argument, either personally or telephonically, before the district court. Instead, attorneys from Beard St. Clair Gaffney PA appeared and argued on its clients behalf. Beard St. Clair Gaffney PA's attorneys offered objective counsel to the Grovers throughout the course of the litigation. The Grovers

were actually in the People's Republic of China teaching English for more than a year after the litigation commenced. There is no question that the attorney-client relationship existed between the Grovers and Beard St. Clair Gaffney PA.

Therefore, the Grovers are entitled to their attorney fees and are not barred from recovering those fees merely because Blair Grover is an attorney or associated with Beard St. Clair Gaffney PA. The matter is not a firm matter for Beard St. Clair Gaffney PA. Beard St. Clair Gaffney PA is not attempting to recover on a debt from one of its former clients. Instead, the law firm is representing a client and a proper attorney-client relationship exists between the Grovers and their attorneys. The Grovers are entitled to their fees.

Regardless, the *Swanson & Setkze* decision should be overturned by this Court. The decision fails to recognize the opportunity costs incurred by *pro se* litigants. The time spent by *pro se* litigants can be substantial, especially in the event of non-lawyers appearing on their own behalf. For attorneys or law firms suing on their own behalf, the time spent by the law firm on its cases and matters is time that could have otherwise been spent on other clients' cases. There is a real opportunity cost that is incurred by *pro se* litigants and the law should provide a method through which all *pro se* litigants can be compensated for those costs. Thus, the *Swanson & Setkze* decision should be overruled by this Court.

4. Attorney fees were properly awarded against Norma Wadsworth.

The Wadsworths argue that Norma should not be responsible for attorney fees because "she was not an owner of the Northgate property, provided none of the statements, and should not be individually responsible for attorney fees." The Wadsworths' argument is specious.

The Wadsworths are essentially arguing that even though Norma Wadsworth sued the Grovers by virtue of her counterclaims that she should not be responsible for the attorney fees incurred in defending her lawsuit. The Wadsworths also suggest, without a legal basis, that Norma should receive the benefits of the Grovers' payments but should not be responsible for the attorney fees and costs in litigation that she is partially responsible for by virtue of her counterclaims. The Wadsworths' argument makes no sense and Norma is a proper person to have attorney fees awarded against.

C. Denial of Summary Judgment is not reviewable.

An order denying summary judgment after a jury trial is non-reviewable. *Gunter v. Murphy's Lounge, L.L.C.*, 141 Idaho 16, 26, 105 P.3d 676, 686 (2005). An order denying a motion for summary judgment is not an appealable order itself, nor is it reviewable on appeal from a final judgment. *Hunter v. Dep't of Corr.*, 138 Idaho 44, 46, 57 P.3d 755, 757 (2002). Therefore, the Court should not consider the Wadsworths' arguments that it was error for the district court to deny their motion for summary judgment. Instead, the Court should review the final judgment and order. *Id.*

IV. CONCLUSION

As a result of the foregoing, this Court should affirm the district court's findings.

DATED: April 8, 2008

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Attorneys for the Respondents

DATED: April 8, 2008

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CERTIFICATE OF SERVICE

I certify that I am a licensed attorney in the State of Idaho and am admitted to practice in the Idaho Supreme Court and on April 8, 2008, I served true and correct copies of the Respondent Brief on the following individuals by the method of delivery designated:

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