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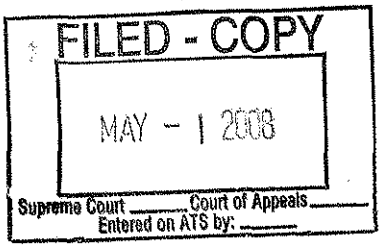
IN THE SUPREME COURT OF THE STATE OF IDAHO

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



APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County

Honorable Joel E. Tingey, District Judge

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MISCELLANEOUS

INCORRECT STATEMENTS OF FACT

Throughout the Respondent's Brief, Blair and Joann Grover (Grovers) repeat several incorrect statements of fact. Rather than argue these assertions each time they are inserted, the same are summarily discussed as follows:

1. Gaston was not Wadsworths' agent. Grovers make assertions such as "[t]hrough Gaston, Earl told the Grovers what the balance of the note was." (Resp't Br. 6.) This assertion was used to attempt to bridge the gap between Wadsworth and Grovers as to supposed representations made by Earl Wadsworth (Earl) to Grovers. William Porter Gaston (Gaston) was never the conduit of information or documents from Earl to Grovers related to the balance owed. Information received from Wadsworths, such as the 1996 statement of account may have been presented to Blair Grover (Blair) by Gaston,[1] but considering the circumstances,[2] nothing else was done. "The burden of proving agency is upon the party who asserts it." *Transamerica Leasing Corp. v. Van's Realty Co.*, 91 Idaho 510, 517, 427 P.2d 284, 291 (1967). The record is void of any proof that Gaston made representations or had authority to make representations on Earl's behalf to Grovers.

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[1] Gaston had in his possession the 1996 statement of account at the time of the assignment/assumption. (Resp't Br. 11.) In his paperwork, Blair used the figure $56,000.00 as the balance owed. This amount represents the 1996 year end declared balance.

[2] See Appellant's Br. 4, 10-11.

2. Grovers had the ability to determine the balance owed without reliance upon Earl's calculations. Grovers argue that "[t]he 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." (Resp't Br. 6.) This argument is directly opposite of the evidence and what Grovers constructively knew.[3] Gaston specifically told Blair that prepayments were prohibited.[4] Gaston never made any prepayment,[5] and Grovers never inquired about the same.[6] Any lack of knowledge by Grovers was self imposed. Grovers knew the payments were expected to continue at least through September 2010. In his deposition, when asked if he understood the obligation was to continue payments through 2010, Blair responded, "I don't have an independent recollection of that, but I got to believe that I did. That's what it says." (Grover Dep. 38:2-4.)

3. Norma has a sufficient foundation to testify as to amount owed. Grovers assert that "Norma has no knowledge of the amounts owed on the note." (Resp't Br. 7-8.) Although Norma did not keep any records and did not know how to amortize, she was

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[3] Equitable estoppel requires the party asserting estoppel to show that they could not have discovered the truth. *Sorensen v. St. Alphonsus Reg'l Med. Ctr., Inc.*, 141 Idaho 754, 759, 118 P.3d 86, 91 (2005).

[4] Blair Grover Dep. 33:8-9, 37:5-38:7, Sept. 14, 2007.

[5] William Porter Gaston Dep. 81:10-21, Sept. 14, 2007.

[6] Grover Dep. 48:23- 49:12.

aware of the payment history. Norma testified that no prepayments were made. She testified, and was competent to testify, that no payments were waived, nor were modifications made to the contract. (R. Vol. 1, p.106, ¶¶ 7-8.)

ARGUMENT

A. Account Stated.

The Grovers advocate that the 1996/1997 statement of account was received and relied upon prior to the assignment/assumption, based upon Blair's speculative testimony, wherein he testified he received the 1996/1997 statement of account from Gaston in March 1997. This statement of account was actually given to Grovers in March 1998, in accordance with Earl's standard practice of providing information to the purchaser to assist in preparation of income taxes.[7] In their Brief, Grovers assert the parties knew the document [1996/1997 statement of account] had been produced at the time of the sale because it was included in the packet of documents used at closing.[8] As noted on the last line of that document, Earl wrote "PORTER GASTON *SOLD* TO BLAIR GROVER, RIGBY MAY 1, 1997 BAL. DUE ON PRINCIPAL = $54,984.23." (R. Vol. 1, p. 12) (emphasis added). "Sold" is a past tense verb, which shows the document was made or completed after May 1, 1997.

The term "amortization schedule" is loosely used. An amortization schedule is "[a] schedule of periodic payments of interest and principal owed on a debt obligation; specif., a loan

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[7] Appellant's Br. 5, 10-11.

[8] Resp't Br. 23 n.91.

schedule showing both the amount of principal and interest that is due at regular intervals over the loan term and the remaining unpaid balance after each scheduled payment is made." BLACK'S LAW DICTIONARY 66 (7th abr. ed. 2000). As discussed at length in Appellant's Brief, the handwritten statements are statements of account. An amortization schedule covers the future payment breakdown, but a statement of account does not.

B. Mutual Examination of the Claims.

Over and over, Grovers allege that Earl was the exclusive "bookkeeper" and "note holder." (Resp't Br. 11, 12, 14, 21, 22, 27.) Regardless of the number of times those allegations are repeated, Earl had no duty, nor assumed function, to act as Gaston's, and then Grovers' bookkeeper. The fact that Earl was a payee under the terms of the Promissory Note did not impose any requirement for bookkeeping, nor did this fact provide additional, special, or exclusive knowledge of facts necessary to calculate the outstanding balance at any given time.

Grovers also assert that they "could not have gone to a third party, i.e., a bank, and figured out the balance of the Note . . . ." (Resp't Br. 12.) This assertion is absurd. Blair possessed a copy of the Promissory Note. He knew, or could have known, all of the requisite terms to determine the outstanding balance (original balance, interest rate, frequency of payments, duration and a historical payment history). Blair admitted he had, in his own law office, software to generate amortization schedules.

Grovers assert that "[b]oth the original seller and the original buyer agreed to the Note's balance." (Resp't Br. 12.) The cited authority for this assertion is Blair's own words and is without proper foundation.

Grovers attempt to persuade the Court to infer that, because two partial year schedules were prepared in 1997, there is proof the 1996/1997 statement was prepared in response to Blair's inquiry in March 1997. Again, the most logical inference is that these statements were prepared in March 1998, in conformity with Earl's practice of providing information to assist the purchasers in preparation of income taxes. The reason for two separate statements was because other were two different debtors in 1997. Gaston's four months of payments were simply added to the 1996 statement.

Grovers also state "[t]he 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." (Resp't Br. 14) (emphasis added). Wadsworths also advocate the 1996/1997 schedule was a statement of account. As discussed previously, a "statement of account" is not the equivalent of an "account stated." The 1996/1997 schedule was not intended to be a final statement, as is required to be an account stated.

Grovers continue to attempt to transform the requirement of mutual examination into a unilateral responsibility, by arguing that Earl did not catch his own error. For the reasons argued elsewhere herein, this is error.

C. Mutual Assent.

Like the requirements of mutual examination, Grovers attempt to transform mutual assent into unilateral assent. They argue that Wadsworths' silence, failure to object, etc., to their own document(s) shows mutual assent. The cases cited by Grovers for this proposition *(Needs v. Hebener*, 118 Idaho 438, 443, 797 P.2d 146, 151 (Ct. App. 1990); *Argonaut Ins. Cos. v. Tri-West Constr. Co.*, 107 Idaho 643, 646, 691 P.2d 1258, 1261 (Ct. App. 1984)), all have the factual pattern wherein a creditor sent a statement to a debtor who did not object or remain silent. This is factually different from the present case. Grovers attempt to contort *M.T. Deaton & Co. v. Leibrock*, 114 Idaho 614, 616, 759 P.2d 905, 907 (Ct. App. 1988), in which an accounting firm provided accounting services for an engineering company, and assert the present case is factually similar because "Wadsworths functioned as the accountant for the Note." (Resp't Br. 16.) The facts are not similar, nor are the inferences logical. As discussed above, Earl did not have the duties of the accountant or bookkeeper.

An account stated is a manifestation of assent involving two parties, but does not alter the original debt. Restatement (Second) Contracts § 282 clarifies the requirements of mutual assent under an account stated, which does not operate in the manner held by the District Court. This section reads:

> (1) An account stated is a manifestation of assent by *debtor and creditor* to a stated sum as an accurate computation of an amount due the creditor. A party's retention without objection for an unreasonable long time of a statement of account *rendered by the other party i*s a manifestation of assent.

(2) *The account stated does not itself discharge any duty* but is an admission by each party of the facts asserted and a promise *by the debtor* to pay according to its terms.

RESTATEMENT (SECOND) CONTRACTS § 282 (emphasis added).

Comment *c* to § 282 states that the effect of an account stated operates as an admission and a promise to pay. Accounts stated appear to be primarily evidentiary in nature. The District Court discussed the "rebuttable presumption" as discussed in the *Needs* case. As Restatement of Contracts shows, accounts stated are premised upon an existing creditor/debtor relationship, which, as to Wadsworths and Grovers, did not take place until the time of closing. Grovers assumed full responsibility to pay the Promissory Note in accordance with its terms. Now, Grovers seek to avoid discharge of their remaining obligation under this Promissory Note. As shown by Restatement (Second) Contracts §282(2), accounts stated are not intended to provide such relief.

In discussing the Consent to Assignment and Assumption, and Release (Consent) signed by Wadsworths, Grovers argue that the Consent incorporates the Assumption and Assignment Agreement, and, for that reason, Wadsworths are bound by the terms of the Assumption and Assignment Agreement. (Resp't Br. 16-18.) Grovers' argument culminates in Grovers' statement that "[t]hus, the Wadsworths clearly assented to the Grovers' assumption of a Note with a $54,984.23 balance." (Resp't Br. 19.) Grovers' claim that Wadsworths were contractually bound is flawed. Particularly, as the drafter of the documents, Blair is not allowed any leniency in the interpretation and construction of the documents. Blair divided both the

Consent and the Assignment and Assumption Agreement into a recital section and an agreement section. (R. Vol. I, pp.55-59.) In both documents, Blair used the words "WITNESSETH" and "NOW THEREFORE." (R. Vol. 1, pp. 55, 58.) The term "witnesseth" is "usually set in all capitals, commonly separates the preliminaries in a contract, up through the recitals, from the contractual terms themselves, but modern drafters increasingly avoid it as an antiquarian relic." BLACK'S LAW DICTIONARY 1295 (7th abr. ed. 2000). "Therefore" is defined as "[f]or that reason; on that ground or those grounds" or "to that end." BLACK'S LAW DICTIONARY 1201 (7th abr. ed. 2000). The reference to the Assumption and Assignment Agreement in the Consent is only found in the recital section and is not part of any contractual obligation. Wadsworths are not bound by the Assignment and Assumption Agreement. Conversely, Groves are bound by the terms of the Promissory Note which they fully assumed.

D. Mistake is a Defense.

Grovers assert Earl made only a unilateral mistake and it is therefore not a defense to an account stated claim. (Resp't Br. 20-21.) First, there are no mistakes in the Promissory Note or other 1990 contractual documents, which clearly state the payment responsibilities. These responsibilities were understood by Grovers. (Grover Dep. 36:25-37:9.) The mistake at issue is with the interim computations of principal and interest. Grovers argue that only a mutual mistake can be the basis of a defense against an account stated, but provide no authority to support this argument. (Resp't Br. 21.) A mutual mistake is generally required to modify a contract. "A mutual mistake occurs when both parties, at the time of contracting, share a

misconception regarding a basic assumption or vital fact upon which the bargain is based." *Hughes v. Fisher*, 142 Idaho 474, 482, 129 P.3d 1223, 1231 (2006). In an account stated, there is no such requirement. In *Rustlewood Assoc. v. Mason County,* 969 P.2d 535 (1999), the Washington Court of Appeals specifically held that a unilateral mistake of fact may overcome the prima facie evidence established by an account stated.

In his Decision, Judge Tingey determined there was a unilateral mistake because Earl was responsible for the mistake. (R. Vol. 3, p. 252.) A mistake is based upon a misconception, not on who is responsible for creating the misconception.

Although Judge Tingey mentioned Wadsworths' argument regarding Grovers "conscious ignorance," and even though it has strong applicability to this case, the District Court never discussed conscious ignorance. Grovers cite Restatement (Second) Contracts § 153, which deals with unilateral mistake. (Resp't Br. 22.) Judge Tingey referenced Restatements (Second) Contracts §152, which deals with mutual mistakes. Both §§152 and 153 refer to Restatements (Second) Contracts §154 as to who bears the risk of a mistake. Section 154 reads:

> A party bears the risk of mistake when
>
> (a) the risk is allocated to him by agreement of the parties, or
>
> (b) *he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as* sufficient, or
>
> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

RESTATEMENT (SECOND) CONTRACTS §154 (emphasis added).

Comment *c* to § 154 reads:

> Conscious ignorance. Even though the mistaken party did not agree to bear the risk, he may have been aware when he made the contract that his knowledge with respect to the facts to which the mistake relates was limited. If he was not only so aware that his knowledge was limited but undertook to perform in the face of that awareness, he bears the risk of the mistake. It is sometimes said in such a situation that, in a sense, there was not a mistake but "conscious ignorance."

RESTATEMENT (SECOND) CONTRACTS §154.

Grovers argue they had very limited knowledge, did nothing to investigate, and were satisfied with the information they had.[9] In his deposition, Blair stated "I don't remember talking directly to him [Gaston] at the time of this transaction. After I had this document that he represented was Earl's statement of the balance that was owed, I was satisfied with that." (Grover Dep. 34:19-22.) Blair was willing to accept the terms of payment, whatever they were. Blair testified he did not perform a calculation of the monthly payments and the payment obligations, which could have been through 2012. (Grover Dep. 41-42.)

Grovers assert that "[t]he Wadsworth have cited no authority that states that the contract should be reformed under this circumstances." (Resp't Br. 22-23.) This statement implicitly references the purported account stated, not the 1990 contract. Wadsworths do not seek to reform the 1990 contract and related documents.

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[9]"Grovers had no knowledge whether there had been prepayments by Jensen, forgiveness, off-sets, or other adjustments." (Resp't Br. 23.) Grovers could not have known of a different outstanding balance. (Resp't Br. 22.)

Grovers request this Court disregard *Matthis v. Wendling*, 962 P.2d 160 (Wyo. 1988) because it is a Wyoming case and is supposedly factually different. Idaho's appellant courts have not taken an elitist view of other states' cases in the past, nor would it be prudent to do so now. Grovers' make a feeble attempt to distinguish this case on the basis that they were not a party to the original transaction and did not have actual knowledge as to whether or not there had been any prepayments, forgiveness, offsets, or other adjustments. (Resp't Br. 23.) These attempts to distinguish the facts falls short. Factually, Grovers knew that no prepayments were made because of Gastons' comments to him about the same being prohibited. The circumstances are such that no one could logically infer there were offsets, forgiveness of the obligation, or other obligations.[10] Grovers are not entitled to renegotiate the transaction with Wadsworths through their exclusive dealings with Gaston. Rather, they step into Gaston's and Jensens' position.

Grovers reference the District Court's finding that "the final payment date is not a material term of the Note . . . [which] is only tangentially related to the ultimate obligation to pay a specified amount." (Resp't Br. 24.) Wadsworths agree the final payment date is not material, but timely payments are material. Grovers' argument is rooted in the District Court stating that "once Grovers became aware of the balance owed and the applicable interest rate, the final payment date was of minimal significance." (R. Vol. 3, pp. 252-53.) Such statements and arguments assume the formation of a new contract, rather than the correct analysis of looking at the assumption of

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[10] These would be affirmative defenses and the party raising the defenses has the burden of proof, pursuant to IRCP 8(c).

the existing 1990 contract. "Awareness," or lack thereof, of a person assuming a contract does not change or modify the terms of the contract. If that were the case, Grovers were aware of the existing terms of the contract, which required the payments to be made as consideration for the acquisition of the Northgate property. The District Court's ruling infers only the balance owed is relevant at any given time. However, monthly payments by themselves are sufficient consideration. *Fix v. Fix* , 125 Idaho 372, 375, 870 P.2d 1331, 1334 (Ct. App.1993).

Grovers boldly, but falsely, state that "[n]o one disputes that Grovers are obligated to $54,984.23 and did so." (Resp't Br. 24.) Wadsworths do dispute such assertion. Grovers assumed liability without reservation for the payments required under the Promissory Note.

E. Promissory Estoppel.

Grovers make the absurd argument that Wadsworths are raising their "objection" to the application of the doctrine of promissory estoppel for the first time on appeal, which they advocate is not possible under an issue preclusion rule. (Resp't Br. 25). To the extent raised as a claim by Grovers or as an issue by the District Court, Wadsworths have raised their objection and defenses. (R. Vol. 1, pp. 11, 27.)[11]

Grovers provides little defense to Judge Tingey's ruling related to promissory estoppel. Grovers state "[t]hus, even if the court misapplied the doctrine of promissory estoppel, the doctrine of estoppel certainly applies in this case." (Resp't Br. 25 n.96.) Shortly thereafter, Grovers state that "[e]ven if the Court agrees with the Wadsworths that the district court

[11] Action to Quiet Title ¶ 9; Answer ¶ 3 and affirmative defenses.

improperly granted the Grovers' motion based on promissory estoppel, the Court may still affirm the district court *upon the correct theory.*" (Resp't Br. 30) (emphasis added). Grovers fail to discuss or rebut Wadsworths arguments that promissory estoppel is only a substitute for consideration, not a basis for a substituted contract. (Appellant's Br. 21, et. seq.)

F. Specific Recommendations or Representations.

Grovers start out their discussion in this section with an incorrect statement that Wadsworths represented a balance to Grovers prior to assuming the obligation, which constituted a promise. (See discussion above.) Regardless of how many times Grovers repeat this statement, it is still incorrect; there is no proof.

Grovers do not discuss the distinction between a "promise" and a "representation." As defined by law, a promise lies in the intent of the parties to act or refrain from acting. In this particular instance, the action, which needed to be performed or refrained from being performed, was to receive fewer payments and consequently less money than what was promised, pursuant to the 1990 contract. Although Earl believed the statement of account (his representation of fact) was correct, there is a complete void of evidence to show he intended to accept less than the required consideration.

Grovers make the self-serving argument that "[a]ny reasonable person would have taken Earl's representation to be a final and accurate statement of the ultimate obligation under the Note." (Resp't Br. 26.) Wadsworths submit that a "reasonable person," knowing he is assuming a monthly payment obligation, would concern himself with knowing what his responsibilities would

be (i.e., amount and number of monthly payments), rather than just knowing the outstanding balance. This concern is heightened by the fact that Blair was an experienced attorney. Although Blair avoided admitting it outright, he accepted the written document at face value and believed his obligation was to continue to make the payments exactly as outlined in the Promissory Note. As established, knowing the outstanding balance was only used to determine the amount of money Grovers would pay to the original purchasers. In this case, Blair did not question the payment obligation and did not see any inconsistency between the amount he used to calculate the buyout to Gaston. Blair even stated his payment obligations may continue longer than what was stated in the contract.[12]

G. Wadsworths Could Not Foresee Grovers Reliance.

Grovers allege Wadsworths "blatantly misrepresented the record to the Court" in their assertion that they did not know of Grovers' identity or contract negotiations. (Resp't Br. 26-27.) These are strong words with no support. In support of their attack, Grovers present five "reasons," discussed as follows:

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[12] Grover Dep. 42:1-7. Grovers challenge the use of depositions on appeal. (Resp't Br. 28 n.104.) The full depositions were presented to the Court as part of Defendant's Second Motion for Reconsideration or Motion for Clarification. (R. Vol. 3, pp. 317A-317E.) Wadsworths' Second Amended Notice of Appeal (R. Vol. 4, pp. 405-09) contains the appeal from the Court's denial of this Motion. For simplicity of argument, granting of summary judgment and denial of the Motion for Reconsideration as considered and presented collectively. Using the same arguments, many parts of Grovers' arguments and cited support would be inconsistent. To support the proposition that Blair had the 1996/1997 statement of account at the time of closing, Grovers refer to the Clerk's Record on Appeal, Vol. 2, p. 223, (Resp't Br. 26. n 98) which is the document itself. Only by referencing Gaston's deposition could any reference be made to having the documents at closing (Gaston Dep. 92).

1. *"First, Gaston requested the 1996/1997 amortization schedule from the Wadsworths for the express purpose of asserting the balance of the note at the time of the sale from Gaston to the Grovers."* (Resp't Br. 27.) For supporting authority, Grovers cite Blair's deposition. Blair was without any knowledge as to whether or not Gaston ever contacted Wadsworths prior to the time of closing when he requested the consent. Gaston and Wadsworths both deny any contact with each other. (Gaston Dep. 46:19-23, 89:22-90:11; Norma Wadsworth Dep. 37:9-21, Sept. 14, 2007.) Even if Blair made the request, the request does not show actual or constructive knowledge on Wadsworths' part.

2. *"Second, the 1996/1997 amortization schedule expressly refers to the sale of the property to Blair Grover."* (Resp't Br. 27) (emphasis added). This statement is correct on its face, but does not support Grovers' attempted use. This statement supports the fact that the notation was prepared after closing, not before. The past tense verb "sold" was used.

3. *"Third, the 1996/1997 amortization schedule was included in the documents for the sale." Id* (emphasis added). For support, Grovers refer to the 1996/1997 statement. There is nothing on the face of the statement to indicate the document was included in the closing documents. Certainly, Blair did not present any proof that the closing documents included the 1996/1997 statement.

4. *Fourth, the Wadsworths signed a consent prior to the sale closing between the Grovers and Gaston." Id* (emphasis added). This statement is technically correct. However, the closing took place on April 30, 1997, the same day the Assumption and Assignment Agreement

was signed. Wadsworths were not privy to either the signing of the Assumption and Assignment Agreement or the closing. At this time, Wadsworths knew of Grovers' identity and assumption, but it was substantively contemporaneous with the assignment and closing.

5. *"The Grovers only agreed to assume the debt as represented by the Wadsworths in the amount of $54,984.23." Id* (emphasis added). Such statement is contrary to the document Grovers signed, which indicates they assumed the contract in accordance with the terms and conditions of the 1990 contract. Grovers have substantial legal difficulties in this matter. First, the Assignment and Assumption Agreement did not involve the Wadsworths. Second, pursuant to the existing terms, Wadsworths consented only to the substitution of debtors and did not agree to accept a lesser amount than what was owed. Third, in the Assumption and Assignment Agreement, Blair stated he assumed and agreed to be bound by the Note and Deed of Trust, and to pay the balance of the Note, in accordance with the terms thereof.

H. Grovers Reliance, If Any, Was Not Reasonable.

Grovers argue that Blair being an attorney is irrelevant. (Resp't Br. 28.) This assertion is not true. "Evaluation of the reasonableness of a party's reliance must take account of the totality of the circumstances, including the nature of the transaction and the relative sophistication of the parties." *Young v. State Farm Mut. Auto. Ins. Co.*, 127 Idaho 130, 135-136, 898 P.2d 61, 66-67 (Ct. App.1994). Throughout their Brief, Grovers assert they lacked knowledge of the true outstanding balance. "Lack of knowledge can be shown by lack of understanding regarding the contract terms arising from the use of inconspicuous print, ambiguous wording, or complex

legalistic language, Id.; the lack of opportunity to study the contract and inquire about its terms, Id.; or disparity in the sophistication, knowledge, or experience of the parties, Walker v. American Cyanamid Co., 130 Idaho 824, 948 P.2d 1123 (1997)." *Lovey v. Regence BlueShield of Idaho* 139 Idaho 37, 42, 72 P.3d 877, 882 (2003). Blair's legal background is relevant to his alleged reliance.

Blair states his practice as an attorney "was to accept those representations" between the parties involved in the transactions he is handling, and therefore shouldn't be responsible for the terms of the Promissory Note because Gaston and Wadsworth had come to an agreement as to the outstanding balance. This reasoning is flawed and would be a double standard. Blair refuses to accept responsibility for documents he prepared and voluntarily signed, yet he advocates Wadsworths be held responsible for documents they neither saw or signed.

Next, Grovers argue the fact that the statements of account are handwritten is irrelevant. (Resp't Br. 28-29.) These statements are the basis for Grovers' claim of reliance. Blair was familiar with amortization schedules, prepared them, and had them prepared. If, as he alleges, he didn't trust the computer generated amortized schedules, *a fortiori*, he shouldn't trust the hand written calculations of a stranger as represented by another stranger (assuming such representation was made).

I. Doctrine of Estoppel.

Grovers refer to the "doctrine of estoppel" as "the correct theory" (Resp't Br. 30), but fail to define the doctrine. Apparently, Grovers believe this doctrine is different from promissory

estoppel. Black's Law Dictionary does not define "doctrine of estoppel." Idaho Courts have used doctrine of estoppel to refer to insurance contract disputes, *Shoup v. Union Sec. Life Ins. Co.*, 142 Idaho 152, 154, 124 P.3d 1028, 1030 (2005); induced reliance, *Gafford v. State*, 127 Idaho 472, 477, 903 P.2d 61, 66 (1995); equitable estoppel, *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 151, 879 P.2d 1078, 1084 (1994); judicial estoppel, etc. Probably intentionally, Grovers do not define or list the elements of doctrine of estoppel, nor do they cite any case that would definitely refer to a particular type of estoppel. The only hint is found in Grovers' statement that "[t]he doctrine of estoppel should prevent the Wadsworths from taking a position opposite of their previous position that the $54,984.23 balance was correct." (Resp't Br. 30.) Typically, this argument refers to equitable estoppel. Equitable estoppel is not applicable to the present case because: (1) Wadsworths did not intentionally misrepresent or conceal a material fact with actual or constructive knowledge of the truth, (2) Grovers had the ability to know the truth, (3) any representation as to the amount owed was not made with the intent it be relied on, and (4) as proved herein, Grovers did not rely upon the representation to determine what they would pay Wadsworths in the future. Also, there would not be a "manifest injustice" in light of Blair's indolence and state of mind, wherein he thought the outstanding balance was consistent with the number of remaining payments. *Christensen v. City of Pocatello*, 142 Idaho 132, 124 P.3d 1008 (2005).

ATTORNEY FEES AND COSTS

A. Commercial Transaction.

Grovers assert *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 152 P.3d 594 (2007) supports their position, that a commercial transaction took place in the present case. The present case is very dissimilar. In Blimka, the number of jeans caused the matter to be deemed a commercial transaction because the amount proved the jeans could only be inventory and not for personal use. Although land could also be classified as inventory, this is not the case herein.

The nature of this case was to quiet title, which Wadsworths discussed, in the Appellant's Brief, with supportive authorities showing this case to be a commercial transaction. Grovers did not refute or discuss these cases in their Brief. (*See* Appellant's Br. 24, et. seq).

B. Blair Grover's Status as Member of the Law Firm Prohibits Attorney Fees.

Ironically, a few sentences after arguing the commercial nature of the transaction, Grovers argue that "[t]he subject matter is exclusively personal to the Grovers in their individual capacity. . . ." (Resp't Br. 34.) Grovers assert they regularly paid Beard, St. Clair, Gaffney, P.A., which demonstrates the precise relationship. No citation is given, nor can Wadsworths find any reference in the record, that would show actual payments were made or that funds were not paid back to Grovers were not given any profits, dividends, or other compensation from the firm. In *Swanson & Setzke, Chtd. v. Henning*, 116 Idaho 199, 774 P.2d 909 (Ct. App. 1989), the reasoning was based upon sound policy to have a detached and objective perspective. The small differences in fact, as advocated by Grovers, do not change this overall policy. The policy the Court should

follow is that if, and only if, a law firm or attorney obtains representation from a disinterested law firm or attorney, should attorney fees be considered.

C. Attorney Fees Against Norma Wadsworth.

Grovers appear to infer that Norma instigated this action. Grovers brought Norma into this case, both individually and as the Personal Representative of Earl Wadsworth's Estate, by their Action to Quiet Title. Norma was a signatory to the various contract documents and a beneficiary under the Deed of Trust, as well as a payee under the Note. However, these were not the basis upon which Judge Tingey ruled. Judge Tingey ruled on the quiet title action and Earl's actions, not the 1990 contract.

D. Denial of Summary Judgment to Wadsworths.

The Idaho appellate courts have held that an order denying summary judgment is not reviewable on appeal by itself. The rationale is stated in *Garcia v. Windley*, 144 Idaho 539, 164 P.3d 819 (2007), as follows:

> By entering an order denying summary judgment, the trial court merely indicates the matter should proceed to trial on its merits. The final judgment in a case can be tested upon the record made at trial, not on the record made at the time summary judgment was denied. Any legal rulings made by the trial court affecting the final judgment can be reviewed at that time in light of the full record. This will prevent a litigant who loses a case after a full and fair trial from having an appellant court go back to the time when the litigant had moved for summary judgment to review the relative strengths of the witnesses of the litigants at that earlier stage. Were we to hold otherwise, one who has sustained his position after a fair hearing of the whole case may nevertheless lose because he has failed to prove his case fully on the interlocutory motion.

Garcia v. Windley, 164 P.2d at 822 (emphasis omitted).

The denial of summary judgment herein is neither an isolated interlocutory order nor an appeal taken after trial. Under the present circumstances on appeal, the denial of a summary judgment should be on equal footing with granting summary judgment. In the alternative, the Court has the authority to make specific directions to the District Court on remand. Recently, in *Steed v. Grant Teton Counsel of the Boy Scouts of Am.*, 144 Idaho 848, 172 P.3d 1123 (2007), the Idaho Supreme Court so held. In *Kenneth F. White Chtd. v. St. Alphonsus Reg'l Med. Ctr.*, 136 Idaho 238, 31 P.3d 926 (2001), the Idaho Court of Appeals specifically reversed granting summary judgment and remanded the case back to the district court for entry of judgment in favor of St. Alphonsus, the party whose motion of summary judgment was denied. *See also Roles v. Townsend*, 138 Idaho 412, 64 P.3d 338 (Ct. App. 2003); *Schneider v. Howe*, 142 Idaho 767, 133 P.3d 1232 (2006).

CONCLUSION

A basic tenet of contract law is to determine and enforce the mutual intent of the parties, which is also referred to as mutual assent or the meeting of the minds. In the present case, all parties believed and intended the monthly payments would continue as outlined in the Promissory Note. Grovers accepted the Promissory Note and other contract documents at face value, and even stated the payments may continue beyond the scheduled pay-off date. Unfortunately, when Grovers were informed they unknowingly paid Gaston and Jensen $13,000.00 more than they were obligated to pay them for their equity in the Northgate property, Grovers, even though Gaston was willing to pay Grovers one-half of the overpayment, refused to accept the money.

Instead Grovers seek to avoid paying Wadsworths future payments of more than $40,000.00, pursuant to a written and unambiguous Promissory Note. Wadsworths were not privy to either the negotiations or the terms of assumption arrived at by Grovers and Gaston. Any information provided by Earl was conveyed in good faith, but nevertheless inaccurate.

The District Court erred as discussed. This case should be reversed as to summary judgment for Grovers and remanded to the District Court for entry of judgment in favor of Wadsworths.

DATED: April 30, 2008.

RESPECTFULLY SUBMITTED,

David A. Johnson, Esq.

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 April 30, 2008, addressed to the following:

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