

11-13-2008

Callies v. O'Neal Respondent's Brief Dckt. 34968

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IN THE SUPREME COURT FOR THE STATE OF IDAHO

RANDY CALLIES, TRICIA CALLIES,
CHRISTOPHER PLANINSHEK, DAWN
PLANINSHEK and HERON STREET
PROPERTIES, LTD, LC.,

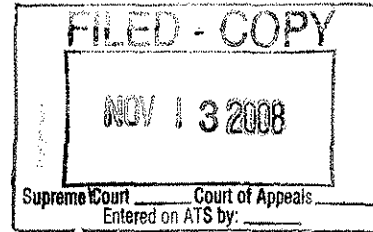
Plaintiffs/Appellants,

vs.

GEORGE P. O'NEAL; CHARTER
BUILDERS, INC., an Idaho Corporation;
PHEASANT RUN, LLC; SHAKESPEARE
CONDOMINIUMS, LLC; HAMPTON
PLACE, LLC; SILVER OAKS, LLC; CBI-
BVBI, LLC; FOXBORO, LLC; CRYSTAL
BLUE, LLC; and CHARTER POINTE
APARTMENTS, LLC,

Defendants/Respondents.

Supreme Court Docket No.: 34968



Respondents' Brief

Appeal from District Court of the Fourth Judicial District
in and for Ada County

The Honorable Kathryn Sticklen, District Judge, Presiding

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1 **1. STATEMENT OF THE CASE**

2 **i. Nature of the Case.**

3 This case is an appeal from orders of the trial court granting Respondents Charter
4 Builders, Inc., Charter Pointe Apartments, LLC and Silver Oaks, LLC's (collectively
5 "CBI") motion for summary judgment on Appellants Complete Property Management
6 and Investment Realty, Inc. and Tricia Callies' (hereinafter collectively "CPM") claims
7 for unpaid commissions by CBI, due to the lack of a legally enforceable description of
8 the properties on the listing agreements.
9
10

11 This appeal presents issues governed by existing legal principles. This case does
12 NOT involve issues of substantial public interest, matters of first impression, issues of
13 constitutional interpretation, questions of validity of statutes or ordinances, or any
14 inconsistency in decisions of the Court of Appeals or Supreme Court.
15

16 **ii. Course of Proceedings**

17 On or about March 1, 2005, CPM, and the Respondent, CBI, as managing
18 member of Charter Pointe and Silver Oaks, executed two RE-16 Exclusive Seller
19 Representation Agreements (hereinafter "Agreements"); one for the property owned by
20 Charter Pointe and one for the property owned by Silver Oaks. (R. Ex. 2, ¶¶ 3, 5). At the
21 time of execution of the Agreements there was no legal description attached to the
22 Agreements as addendums as noted on line 13, page 1 of said Agreements. (R. Ex. 2, ¶¶
23 4, 6).
24

25 Callies and CPM filed suit on October 3, 2006 against a myriad of defendants,
26 including CBI, Charter Pointe and Silver Oaks, in the Fourth Judicial District in the State
27 of Idaho, County of Ada, Case No. CV OC 0618504. (R., Vol. I, pp. 20-29). On
28
29

1 November 8, 2006 CPM filed suit in the Fourth Judicial District Court in the State of
2 Idaho, County of Ada, Case No. CV OC 0620977, against CBI, Charter Pointe and Silver
3 Oaks, among other parties, seeking to recover commissions CPM claims they were owed.
4 (R., Vol. I, pp. 78-117). On November 16, 2006, CBI filed an answer and counterclaim
5 against CPM and Callies in Case No. CV OC 0618504, seeking a declaratory judgment as
6 to the validity of the Agreements. (R., Vol. I, pp. 30-55). Those two cases were later
7 consolidated with a third separate action pending simultaneously. (R. Vol. I, pp. 6, 64,
8 77).

9
10
11 On April 18, 2007, CBI, Charter Pointe and Silver Oaks filed a motion for
12 summary judgment, moving the court to declare the listing agreements invalid for lack of
13 a legal description. (R., Vol. I, pp. 122-125; R., Vol. II, Ex. 1). The court heard oral
14 argument by the parties on July 18, 2007 and entered an order on August 31, 2007,
15 granting summary judgment in favor of CBI, CPA and Silver Oaks and declaring the
16 listing agreements invalid for lack of an accurate legal description. (R. Vol. I, pp. 302-
17 318). *This appeal followed.*

18
19 In the memorandum opinion on the motion for summary judgment, Judge Sticklen
20 found: the identity and exact boundaries of the Charter Pointe and Silver Oaks properties
21 cannot be determined from the face of the listing agreements; the listing agreements
22 erroneously stated that the legal descriptions were attached, when in fact no such
23 descriptions were affixed; and that construing controlling Idaho law, the legal
24 descriptions failed to satisfy the statute of frauds and failed to satisfy I.C. § 54-
25 2050(1)(b). (R. Vol. I, pp. 302-318).
26
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1 An Amended Judgment and I.R.C.P. 54(b) Certificate were entered on December
2 19, 2007, rendering judgment in favor of the CBI as to CPM's claims for unpaid
3 commissions. (R., Vol. II, pp. 325-329). CPM, through Callies, filed a Notice of Appeal
4 on January 28, 2008, appealing the Trial court's decision regarding the validity of the
5 Agreements. (R., Vol. II, pp. 330-335).
6

7 **iii. Statement of Facts**

8 In March of 2005, CBI was the managing member of Charter Pointe and Silver
9 Oaks and had the authority to make business decisions and act as an agent for those
10 companies. (R. Ex. 2, ¶¶ 3, 5). On or about March 1, 2005, CPM and CBI executed two
11 RE-16 Exclusive Seller Representation Agreements (the "Agreements"); one for the
12 property owned by Charter Pointe and one for the property owned by Silver Oaks. (R.
13 Ex. 2, ¶¶ 3-6, Exs. A-B). The Agreements, identical in form, both stated that a "Legal
14 Description [was] Attached as addendum # 1" and added that the "[a]ddendum must
15 accompany original listing." (R. Ex. 2, ¶¶ 3-6, Exs. A-B). At the time of execution of
16 the Agreements, a legal description was not attached to either of the Agreements, and
17 instead the properties were described as "TBD Charter Pointe" in the Charter Pointe
18 Agreement and "TBD Ten Mile/Franklin" in the Silver Oaks Agreement. (R. Ex. 2, ¶¶ 3-
19 6, Exs. A-B).
20
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23 On or about March 8, 2005, CBI executed the closing papers for the acquisition of
24 properties which are the subject matter of the Agreements. (R. Ex. 2, ¶ 7, Ex. C). The
25 closing papers for those properties contained only a proposed legal description of the
26 properties. (R. Ex. 2, ¶ 7, Ex. C). A final legal description was not recorded for Charter
27 Pointe until April 11, 2006, when the Declaration of Covenants for Charter Pointe
28
29

1 Village 4-Plex Condominiums was recorded with the Ada County Recorder. (R. Ex. 2, ¶
2 8, Ex. D). The final legal description contained in that document for CPA was created
3 after March 8, 2005. (R. Ex. 2, ¶ 8, Ex. D).
4

5 Callies filed a **NOTICE OF OBLIGATION TO PAY COMMISSIONS**
6 (hereinafter "Notice") dated June 7, 2006, subscribed and sworn to by Callies, and
7 recorded said notice as Instrument No. 106091057. (R. Ex. 3, ¶ 3, Ex. A). The Notice
8 incorporates the Charter Pointe Agreement. (R. Ex. 3, ¶ 3, Ex. A). The incorporated
9 listing agreement also had no "Legal Description Attached as addendum #1." (R. Ex. 3, ¶
10 3, Ex. A).
11

12 On August 16, 2006, Callies, through her agent Taryn Dolan, requested via
13 facsimile that the legal description for the Silver Oaks Agreement be "added" to that
14 Agreement. (R. Ex. 2, ¶ 9, Ex. E). On August 30, 2006, Callies, through her agent Taryn
15 Dolan, requested via facsimile that the legal description for the CPA Agreement be
16 "added" to that Agreement. (R. Ex. 2, ¶ 10, Ex. F). At no time did CBI, Charter Pointe
17 or Silver Oaks consent to the legal descriptions being added to the Agreements. (R. Ex.
18 2, ¶¶ 9-10).
19
20

21 In October of 2006, Callies sent a demand letter to CBI, which made reference to
22 "[t]he legal description relative to the Silver Oaks listing agreement appears to have been
23 provided seven days after the listing agreement was executed." (R. Ex. 3, ¶ 4, Ex. B).
24 Further, the verified complaint filed by CPM on November 8, 2006 unequivocally states
25 that "[a]t the time of the initial listing for the Charter Point (sic) properties, a final plat
26 had not yet been recorded which delineated the separate four-plexes [...]" (R., Vol. I, p.
27 80).
28
29

1 CBI, Charter Pointe and Silver Oaks filed a motion for summary judgment on
2 April 18, 2007, seeking to have the Agreements declared invalid due to the lack of a valid
3 and enforceable legal description in the Agreements. (R., Vol. I., pp. 122-125). The
4 Trial court heard oral argument by the parties on July 3, 2007. (R., Vol. I., p. 10). In its
5 opinion filed August 31, 2007, the Court held that the Agreements were invalid due to the
6 lack of a legally enforceable legal description and that CPM was not entitled to recover
7 under the theories of quasi estoppel or partial performance due to the fact that the
8 underlying agreements were unenforceable. (R., Vol. II., pp. 302-318).
9
10

11 **2. ISSUES PRESENTED ON APPEAL**

12 (1) Did the trial court err in finding that there was no genuine issue of material
13 fact which would have precluded the court from entering summary judgment in favor of
14 CBI?
15

16 (2) Did the trial court err when it concluded that the Agreements were
17 unenforceable due to the lack of a valid and enforceable legal description of the
18 respective properties to be sold on the Agreements?
19

20 (3) Was it in error for the trial court to rely on I.C. § 9-503 and I.C. § 54-2050
21 when determining whether the Agreements were valid contractual agreements?
22

23 (4) Did the trial court err in its holding that CPM was not entitled to recover
24 under the theories of quasi estoppel or partial performance due to the unenforceability of
25 the underlying Agreements?
26

27 (5) Should the Court award CBI reasonable attorney fees and costs incurred in
28 this appeal, pursuant to I.A.R. 41, I.A.R. 40, Idaho Code § 12-120(3) and Idaho Code §
29 12-121?
30

1 **3. STANDARD OF REVIEW**

2 When reviewing a trial court's decision on a motion for summary judgment, the
3 same standard is employed as that employed by the trial court when originally ruling on
4 the motion. *Kolln v. Saint Luke's Regional Medical Center*, 130 Idaho 323, 327, 940
5 P.2d 1142, 1146 (1997) (citing *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 529,
6 887 P.2d 1034, 1036 (1994)). "Summary judgment is proper 'if the pleadings,
7 depositions, and admissions on file, together with the affidavits, if any, show that there is
8 no genuine issue as to any material fact and that the moving party is entitled to judgment
9 as a matter of law.'" *Id.* (citing I.R.C.P. 56(c)). "The moving party is entitled to a
10 judgment when the non-moving party 'fails to make a showing sufficient to establish the
11 existence of an element essential to that party's case on which that party will bear the
12 burden of proof at trial.'" *Doe v. City of Elk River*, 144 Idaho 337, 338, 160 P.3d 1272,
13 1273 (2007) (citing *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000)).
14 "The standard for reviewing a district court's ruling on a motion for summary judgment is
15 free review, however [the] Court is bound by the same standards that control the district
16 court's decision." *Lloyd v. DeMott*, 124 Idaho 62, 65, 856 P.2d 99, 102 (1993) (citing
17 *East Lizard Butte Water Corp. v. Howell*, 122 Idaho 679, 681, 837 P.2d 805, 807 (1992)).

18 **4. ARGUMENT**

19 **i. The Trial Court Was Correct When it Held There Was No Genuine**
20 **Issue of Material Fact In the Record Which Would Have Precluded**
21 **the Court From Granting Summary Judgment.**

22 CPM, in their brief, attempt to divert attention from the relevant facts in the
23 record, specifically that the Agreements are void for lack of a legally enforceable
24 description of the properties, by highlighting irrelevant disputed facts in the record. CBI
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1 is not arguing that there are no disputed facts in the record. Rather, those disputed facts
2 are not material to the court's decision. The applicable statute requires that a brokerage
3 representation agreement/commission agreement be written and contain a legally
4 enforceable description of the property being sold. I.C. § 54-2050(1)(b).
5

6 There is no dispute in the record that the Agreements did not contain a valid or
7 enforceable legal description at the time they were entered into. It is clear from the
8 record that the only descriptions given of the properties contemplated by the Agreements
9 were "TBD Charter Pointe" and "TBD Ten Mile/Franklin." (R., Vol. II, Ex. 2, ¶¶ 3, 5,
10 Exs. A-B). It is also clear from the record that CBI at no time agreed to add legal
11 descriptions to the Agreements subsequent to their execution. (R., Vol. II, Ex. 2, ¶¶ 9-
12 10). These are the only facts that are relevant to the dispute at hand.
13

14 A contract which is rendered ambiguous due to the lack of a valid and enforceable
15 legal description will not have the same standard applied as do other ambiguous contracts
16 and thus, extrinsic or parol evidence is not admissible to clarify the terms of such an
17 agreement. *White v. Rehn*, 103 Idaho 1, 3, 644 P.2d 323, 325 (1982). Although the
18 agreement at issue in *White* was for the transfer of property, as compared to the
19 Agreements at dispute here, both still require a legal description of the property they
20 contemplate. That description must be able to sufficiently identify the property without
21 resorting to parol evidence to determine intent of the parties. "The description [cannot
22 be] so inadequate that to allow parol evidence and the surrounding circumstances to be
23 considered would be to supply a description of the property which was omitted from the
24 writing in order to ascertain and locate the land about which the parties negotiated." *Id.*
25
26
27
28 What CPM and Callies do is confuse alteration and modification with formation. An
29

1 unenforceable agreement cannot be modified, as formation is lacking. *White v. Rehn*,
2 644 P.2d 323.

3 Further, a party has the right to rescind an agreement that is unenforceable. *Good*
4 *v. Hansen*, 110 Idaho 953, 719 P.2d 1213 (Idaho App.,1986). There is undisputed
5 evidence in the record that the legal descriptions were not included or attached to the
6 Agreements, nor had they even been created at the time of execution of the Agreements.
7 (R., Vol. II, Ex. 2, ¶¶ 3, 5, Exs. A-B; R., Vol. II, Ex. 2, ¶¶ 9-10; R. Vol. I, p. 80-81, ¶¶ 11,
8 16). There is also undisputed evidence in the record that shows an agent of Callies' and
9 CPM's requested that those legal descriptions be added to the Agreements in August of
10 2006. (R., Vol. II, Ex. 2, ¶¶ 9-10). Even if the Agreements could have been made
11 enforceable by later addition of the legal descriptions, the record is clear that CBI did not
12 authorize the addition of the legal descriptions to the Agreements subsequent to their
13 execution. (R., Vol. II, Ex. 2, ¶¶ 9-10). Therefore, as described in further detail below,
14 there is no relevant issue of material fact that would have precluded the trial court from
15 granting the CBI's motion for summary judgment as to the unenforceability of the
16 Agreements due to the lack of valid and enforceable legal descriptions.
17

18 The facts surrounding the execution of the Agreements and the fact that those
19 Agreements did not contain a legally enforceable description of the Charter Pointe and
20 Silver Oaks properties are the only pertinent facts that should be afforded any
21 examination for purposes of this appeal. They are also the only facts that should be
22 examined to determine the appropriateness of the trial court's ruling that summary
23 judgment should have been granted to CBI, deeming the Agreements unenforceable.
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1 ii. **Idaho Code § 54-2050 is the Controlling Statute Regarding the**
2 **Sufficiency of Brokerage Representation Agreements, is Unambiguous**
3 **and Should Be Interpreted as the Legislature Intended**

4 CPM argues that the trial court erred when it applied the analysis of *Garner v.*
5 *Bartschi*, 139 Idaho 430, 80 P.3d 1031 (2003), and further argue that I.C. § 9-508 is the
6 controlling statute for purposes of this appeal. Idaho Code § 9-508 states:

7 REAL ESTATE COMMISSION CONTRACTS TO BE IN WRITING.
8 No contract for the payment of any sum of money or thing of value, as
9 and for a commission or reward for the finding or procuring by one person
10 of a purchaser of real estate of another shall be valid unless the same shall
11 be in writing, signed by the owner of such real estate, or his legal,
12 appointed and duly qualified representative.

13 I.C. § 9-508 was originally codified in 1919, and was the controlling statute in the
14 analysis of *Central Idaho Agency, Inc. v. Turner*, 92 Idaho 306, 442 P.2d 442 (1968), the
15 case most heavily relied upon by CPM.

16 However, the Idaho State legislature enacted the Idaho Real Estate License Law
17 in 2000, which created additional requirements for a valid brokerage agreement. I.C. §
18 54-2001 *et seq.* I.C. § 54-2050 specifically identifies those requirements as follows:

19 BROKERAGE REPRESENTATION AGREEMENTS -- REQUIRED
20 ELEMENTS. All real estate brokerage representation agreements,
21 whether with a buyer or seller, must be in writing in the manner required
22 by section 54-2085, Idaho Code, and must contain the following contract
23 provisions: (1) Seller representation agreements. Each seller
24 representation agreement, whether exclusive or nonexclusive, must
25 contain the following provisions: (a) Conspicuous and definite beginning
26 and expiration dates; (b) **A legally enforceable description of the**
27 **property;** (c) price and terms; (d) All fees or commissions; and (e) The
28 signature of the owner of the real estate or the owner's legal, appointed
29 and duly qualified representative, and the date of such signature. (3)
 Prohibited provisions and exceptions -- Automatic renewal clauses. No
 buyer or seller representation agreement shall contain a provision
 requiring the party signing the agreement to notify the broker of the
 party's intention to cancel the agreement after the definite expiration date,
 unless the representation agreement states that it is completely

1 nonexclusive and it contains no financial obligation, fee or commission
2 due from the party signing the agreement.

3 (Emphasis added). The legislature, when it enacted this statute in 2000, subsequent to
4 both the codification of I.C. § 9-508 and the decision in *Central Idaho Agency*, added the
5 requirement that commission agreements contain a legally enforceable description of
6 property, as detailed in I.C. § 54-2050(1)(b).
7

8 What CPM is effectively attempting to do is to have this Court render the
9 language of I.C. § 54-2050(1)(b) void, and to give it no legal effect. “It is well
10 established that statutes should be interpreted to mean what the legislature intended them
11 to mean.” *Walker v. Nationwide Financial Corporation of Idaho*, 102 Idaho 266, 268,
12 629 P.2d 662, 664 (1981). “[I]t is incumbent upon [the Supreme] Court to give a statute
13 an interpretation that will not in effect nullify it...” *Id.* (citations omitted).
14

15
16 This Court in *Hartley v. Miller-Stephan* stated that it would “assume that the
17 legislature intended what it said in a statute, and [it] will construe statutory terms
18 according to their plain, obvious, and rational meanings.” 107 Idaho 688, 690, 692 P.2d
19 332, 334 (1984) (overruled on other grounds) (citations omitted). This Court went
20 further to state that it would “not construe a statute in a way which makes mere
21 surplusage of the provisions included therein.” *Id.* (citations omitted). However, that is
22 exactly what CPM is requesting of the Supreme Court.
23

24 The language of I.C. § 54-2050 is clear and unambiguous. It is obvious that the
25 legislature intended brokerage representation agreements to be in writing and contain a
26 valid and enforceable legal description. The Agreements at issue did not. The intent of
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1 the legislature should not now be questioned and the governing law changed to give new
2 meaning to plainly unambiguous statutory language.

3
4 The Supreme Court of Idaho addressed the issue of a brokerage representation
5 agreement being unenforceable due to the lack of a legally enforceable description
6 subsequent to its ruling in *Central Idaho Agency*, which CPM is now relying on. In
7 *Garner v. Bartschi*, both a purchase and sale agreement and a brokerage representation
8 agreement were at issue, where the brokerage representation agreement contained a
9 property description that solely stated “4565 Nounan Road, County Bear Lake, City
10 Nounan, Zip 83254, legally described as approx. 500 acres mountain property.” 139
11 Idaho 430, 434, 80 P.3d 1031, 1035 (2003). The Supreme Court, analyzing the
12 requirements of I.C. § 54-2050(1)(b), stated that brokerage representation agreements are
13 required to be in writing and “contain a legally enforceable description of the property.”
14 *Garner* at 1037. The Court found that the description contained in the brokerage
15 representation agreement at issue in *Garner* was “not a ‘legally enforceable description of
16 the property’ as required by I.C. § 54-2050(1)(b) and I.C. § 9-503.” *Id.*

17
18
19 The trial court, as in *Garner*, analyzed the enforceability of the Agreements
20 pursuant to I.C. § 54-2050(1)(b) and found that the legal descriptions contained in the
21 Agreements were not enforceable and thus did not comply with that statute. The trial
22 court further made mention of the fact that the Agreements did not comply with the
23 statute of frauds. The fact that the trial court simply made mention of I.C. § 9-503 does
24 not mean that either court intended that to be the controlling statute.
25
26

27 It is immaterial whether the trial court applied I.C. § 9-503 or § 9-508. I.C. § 54-
28 2050 postdates both of those code sections and was obviously created to require
29

1 additional information to be present on a commission agreement; that is, in addition to
2 the requirement that the commission agreement being in writing. I.C. § 9-508 merely
3 addresses one of the requirements that I.C. § 54-2050 addresses. Where there is a general
4 statute, and a special or specific statute, dealing with the same subject, the provisions of
5 the special or specific statute will control those of the general statute. *State v. Roderick*,
6 85 Idaho 80, 84, 375 P.2d 1005, 1007 (1962) (citations omitted). I.C. § 9-508 simply
7 requires that commission agreements be in writing; whereas I.C. § 54-2050 not only
8 requires that they be in writing, but adds five additional requirements, including that they
9 contain a legally enforceable description of the property. I.C. § 9-508 is a generalized
10 version of I.C. § 54-2050, therefore rendering the latter the controlling statute for
11 purposes of this appeal.
12
13

14 Even if it were not immaterial and the trial court was incorrect in analyzing I.C. §
15 9-503 instead of I.C. § 9-508, it would be a harmless error and would not change the
16 outcome of this case. Real estate commission contracts and brokerage agreements are
17 required in the State of Idaho to be written and to contain a valid legal description which
18 accurately describes the property contemplated in the agreement. If the legislature had
19 intended that there be no requirement of an enforceable legal description in a commission
20 agreement, then they would not have enacted a statute specifically requiring such when a
21 statute was already in effect that required a commission agreement to be in writing.
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23

24 There is no dispute that the legal descriptions for the Charter Pointe and Silver
25 Oaks properties were not attached to the Agreements executed on March 1, 2005. In fact,
26 the legal description for the properties was not even generated for the properties until
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1 after the Agreements had been executed. Therefore, they did not meet the requirements
2 of I.C. § 54-2050 and were at no time enforceable agreements.

3 **iii. The Trial Court Was Correct in Concluding That the Listing**
4 **Agreements Were Unenforceable Due to the Lack of Valid and**
5 **Enforceable Legal Description of the Properties**

6 It is important to note that the Trial court's Memorandum Decision and Order
7 indicated that the summary judgment was being granted because the legal descriptions
8 contained on the listing agreements "did not satisfy the statute of frauds and fail[ed] to
9 meet the statutory requirements of I.C. § 54-2050(1)(b)." The Court did not specifically
10 state that the listing agreements failed to meet the requirements of I.C. § 9-503, but
11 simply included reference to that statute when it stated that the Agreements failed to meet
12 the statute of frauds. Thus, CPM's argument that I.C. § 9-508 should be applied rather
13 than I.C. § 9-503 is rendered ineffectual, as both code sections are encompassed within
14 the statute of frauds.
15

16
17 CPM did not create valid, enforceable legal descriptions pursuant to Idaho law,
18 regardless of whether I.C. § 9-503 or I.C. § 9-508 was applied. Pursuant to Idaho law, a
19 commission agreement must be in writing and must contain an enforceable legal
20 description of the property. The Agreements in question did not contain valid and
21 enforceable legal descriptions. In fact, CPM did not even request that a legal description
22 of the property be attached until one year and five months after the Agreements were
23 executed and litigation between the parties had erupted. Clearly this is not allowed by
24 Idaho law.
25

26
27 Although CPM and Callies further argue that the Agreements do not state "when
28 the addendum must be attached to or accompany the printed contract," this argument is in
29

1 error. The Agreements do in fact state that the legal descriptions must accompany the
2 original listing; and further state that such description is attached to the listing. (R. Vol.
3 II, Ex. 2, ¶¶ 3-6, Exs. A-B). There is no factual dispute in the record that the legal
4 descriptions for Charter Pointe and Silver Oaks were not attached to the listing
5 agreements at the time of execution of the Agreements, nor had they even been created
6 and finalized at the time the Agreements were entered into. Therefore, for the reasons
7 discussed above, the Agreements were at all times unenforceable for lack of a legally
8 enforceable description of the Charter Pointe and Silver Oaks properties.
9
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11 **iv. The Trial Court Correctly Ruled that Parol and Extrinsic Evidence**
12 **Could Not be Admitted to Supply a Legal Description to the**
13 **Agreements.**

14 CPM incorrectly compares the concept of listing/brokerage representation
15 agreements with other types of contracts; in that they argue that parol and extrinsic
16 evidence can be admitted to supply a valid and enforceable legal description to the
17 Agreements. However, there is a unique difference between these types of contractual
18 agreements due to statutory requirements related to commission agreements; specifically,
19 the requirement that the agreements contain a valid and enforceable legal description.
20 Where a legal description is not included on an agreement which is statutorily required to
21 contain a valid and enforceable legal description, parol and extrinsic evidence will not be
22 allowed to supply such a legal description to the agreement. *Lexington Heights*
23 *Development, LLC v. Crandlemire*, 140 Idaho 276, 281, 92 P.3d 526, 531 (2004);
24 *Garner*, 139 Idaho at 435, 80 P.3d at 1036; and *Allen v. Kitchen*, 16 Idaho 133, 142, 100
25 P. 1052, 1054 (1909).
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1 The trial Court cited *Lexington Heights* in its memorandum decision, stating that
2 the general rule that a “legal description would be sufficient ‘so long as quantity, identity,
3 or boundaries of property can be determined from the face of the instrument.’” (R., Vol.
4 II, p. 311). Therefore, the Court followed *Lexington Heights* holding that because the
5 Agreements did not contain a “street address, acreage designation, or any other adequate
6 identification of the boundaries of the property to be conveyed, parol evidence [would]
7 not be admitted to supply any of [those] terms.” *Lexington Heights*, 92 P.3d at 531;
8 *Garner*, 139 Idaho at 435, 80 P.3d at 1036; and *Allen v. Kitchen*, 16 Idaho 133, 142, 100
9 P. 1052, 1054 (1909).

12 CPM argues that *Lexington Heights* and *Allen* do not apply because they deal with
13 real estate purchase and sale agreements and not with commission agreements.
14 However, the trial Court only compared these cases with the current dispute at hand,
15 utilizing *Garner* as the controlling precedent for which it ruled that the Agreements were
16 unenforceable. Therefore, this argument by CPM is inapplicable.

18 Due to the trial court’s holding regarding the disallowance of extrinsic evidence to
19 provide legal descriptions to the Agreements, where no previous legal descriptions of any
20 kind had been attached, the court declined to follow *Central Idaho Agency, Inc. v.*
21 *Turner*, 92 Idaho 306, 442 P.2d 442 (1968). The trial court found that the difference in
22 *Central Idaho Agency* from the case at bar, there was some type of legal description,
23 albeit an insufficient description. (R., Vol. II, p. 313). However, due to the existence of
24 some type of description, parol evidence was used to supplement that description, but not
25 to provide it in its entirety. (R., Vol. II, p. 313).
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1 This is where the facts in *Central Idaho Agency* differentiate from the current
2 issue at hand, as the legal descriptions clearly were not attached to the Agreements at the
3 time of their execution, nor could they have been attached because they had yet to be
4 created. In fact, the record clearly shows that the Appellant only requested that the legal
5 descriptions be attached to the Agreements in August of 2006, one year and five months
6 following the execution of the Agreements, and at no other time. Pursuant to Idaho law,
7 CPM cannot now seek to supply a legal description to the Agreements where no legal
8 description previously existed.
9

10
11 Further, as the trial court further stated, *Central Idaho Agency* was effectively
12 overruled by the enactment of the Idaho Real Estate Brokers' License Law, which was
13 enacted in 2000; 32 years after the holding in *Central Idaho Agency* which CPM is now
14 relying on to support their position. (R., Vol. II, p. 313). I.C. § 54-2050(1)(b), the
15 controlling statute as to the requirements of a brokerage representation agreement,
16 specifically requires that they be in writing and include a legally enforceable legal
17 description. Therefore, the trial court correctly held that *Central Idaho Agency* was in
18 essence negated by the enactment of I.C. § 54-2001 *et seq.* and was not precedent for
19 these proceedings.
20
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22 As such, CPM's argument fails that parol and/or extrinsic evidence should be
23 allowed to supply legal descriptions to the Agreements when legal descriptions were not
24 originally affixed as required by both the express language of the Agreements, and by
25 Idaho law.
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1 v. **The Trial Court was Correct in Dismissal of CPM's Claims to**
2 **Recover on the Theories of Quasi Estoppel and the Doctrine of Part**
3 **Performance**

4 The law regarding the necessity of an enforceable legal description in listing
5 contracts has evolved over time; this evolution comes full circle to the current state of the
6 law and is important when considering CPM's equitable arguments. CBI provided the
7 district court with detailed analysis of this evolution in its summary judgment
8 memorandum, but provides a summary version of that history here for the Court's
9 convenience. Initially, Idaho courts required a legally enforceable property description,
10 and eliminated the applicability of equitable remedies, such as the doctrine of part
11 performance. This was eroded by judicial decisions, legislative enactments overruled
12 these judicial decisions, and recently we have judicial acknowledgment that a listing
13 contract requires a legally enforceable description of the property that satisfies the statute
14 of frauds and, furthermore, that equitable defenses do not apply. See *Weatherhead v.*
15 *Cooney*, 32 Idaho 127, 180 P. 760 (1919), *Murphy v. Livesay*, 34 Idaho, 793, 197 P. 536
16 (1921), *Laker Land & Loans v. Nye*, 40 Idaho 793, 237 P. 630 (1925), *Robison v. Frasier*,
17 89 Idaho 326, 404 P.2d 877 (1965), *Central Idaho Agency v. Turner*, 92 Idaho 306, 442
18 P.2d 442 (1968), I.C. §9-503, I.C. §9-508, I.C. §54-2050 (2000) and *Garner v. Bartschi*,
19 139 Idaho 430, 80 P.3d 1031 (2003).

20
21
22 In short, the Court has returned to the legal standard stated in *Weatherhead*:

23
24 [t]o hold that performance takes a claim of this character out of the
25 operation of the statute would, in our opinion, leave nothing for the
26 statute to operate on. Such construction would render the statute
27 useless and meaningless and would be tantamount to saying that
28 any contract for a commission or reward for the finding or
29 procuring of a purchaser of the real estate of another is valid,
though not in writing and not signed by the owner of such real

1 estate, which is directly opposite to the expressed will of the
2 legislature.

3 *See Weatherhead*, at 128.

4 As noted in *41 A.L.R. 2d 905*, the return to *Weatherhead* places Idaho with the
5 majority of states on this issue regarding commission agreements. In particular the
6 Report notes the conclusion of the American Law Institute as supported by the
7 Restatements that a real estate broker cannot recover under equity without compliance
8 with the governing statutes. In particular, the Report cites *Restatement, Contracts § 355*
9 *(3), Illustration 7*, which states:

11 It is provided by statute that a real estate broker shall have no right
12 to a commission for making a sale unless he has a contract or
13 authority in writing from his principal. A broker who makes a sale
14 for his principal without such written contract or authority cannot
get judgment for the value of his services.

15 Furthermore, the Report cites *Restatement, Agency § 468, Comment subsec (2)*,
16 which states:

17 Statutes similar to the one stated in this Subsection are not
18 infrequently enacted with reference to contracts with brokers. The
19 memorandum commonly required under such statutes is one which
20 describes the thing to be sold and the terms of compensation. In the
21 absence of such a memorandum, the employer, although benefited
22 by the service of the agent who has been orally employed by him,
23 is under no duty to give compensation in any form. As stated in §
414 (3), however, unless the principal is willing to make a
memorandum, the agent is under no duty to perform.

24 The Report concludes that cases amply bear out the foregoing conclusions of the
25 Restatements, and that the overwhelming weight of authority holds that if the broker's
26 listing contract does not satisfy a statute providing that a contract for compensation or
27 commissions for procuring a purchaser for real property must be in writing, or a like
28 statute, the broker cannot recover under equitable principles. *See 41 A.L.R. 2d 905 §3[a]*.

1 CPM argues that regardless of the enforceability of the Agreements, CPM is
2 entitled to recover commissions based upon their alleged reliance on the Agreements.
3 However, CPM had no right to rely on an unenforceable agreement. Idaho law does not
4 provide any equitable remedy where the underlying listing agreement is unenforceable.
5 For the reasons set forth in *Weatherhead*, CPM's arguments lack merit.
6

7 **1. Quasi Estoppel Does Not Apply Where There is No**
8 **Enforceable Underlying Agreement.**

9 The doctrine of quasi-estoppel "prevents a party from asserting a right, to the
10 detriment of another party, which is inconsistent with a position previously taken."
11 *Atwood v. Smith*, 143 Idaho 110, 138 P.3d 310 (2006) (citing *C & G, Inc. v. Canyon*
12 *Highway Dist. No. 4*, 139 Idaho 140, 144, 75 P.3d 194, 198 (2003)). "This doctrine
13 applies when: (1) the offending party took a different position than his or her original
14 position and (2) either (a) the offending party gained an advantage or caused a
15 disadvantage to the other party; (b) the other party was induced to change positions; or
16 (c) it would be unconscionable to permit the offending party to maintain an inconsistent
17 position from one he or she has already derived a benefit or acquiesced in." *Id.*; *Thomas*
18 *v. Arkoosh Produce, Inc.*, 137 Idaho 352, 357, 48 P.3d 1241, 1246 (2002). "To prove
19 quasi-estoppel, it is not necessary to show detrimental reliance; instead, there must be
20 evidence that it would be unconscionable to permit the offending party to assert allegedly
21 contrary positions." *Id.* (citing *Thomas*, 137 at 357, 48 P.3d at 1246).
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25 "Unlike equitable estoppel, quasi estoppel does not require a misrepresentation by
26 one party or actual reliance by the other." *Medical Services Group, Inc. v. Boise Lodge*
27 *No. 310, Benev. and Protective Order of Elks*, 126 Idaho 90, 96, 878 P.2d 789, 795
28 (1994) (citing *Keese v. Fetzek*, 111 Idaho 360, 362, 723 P.2d 904, 906 (Ct.App.1986)).
29

1 "To constitute quasi estoppel, the person against whom the estoppel is sought must have
2 gained some advantage for himself, produced some disadvantage to the person seeking
3 the estoppel, or induced such party to change his position." *Id.* In addition it must be
4 unconscionable to allow the person against whom the estoppel is sought to maintain a
5 position which is inconsistent with the one in which he accepted a benefit. *Id.* (citing
6 *Tommerup v. Albertson's, Inc.*, 101 Idaho 1, 607 P.2d 1055 (1980) (overruled on other
7 grounds)).
8

9
10 However, "[p]romissory estoppel is simply a substitute for consideration, not a
11 substitute for an agreement between parties." *Lettunich v. Key Bank Nat. Ass'n*
12 141 Idaho 362, 367-368, 109 P.3d 1104, 1109-1110 (2005). (citing *Smith v. Boise*
13 *Kenworth Sales, Inc.*, 102 Idaho 63, 68, 625 P.2d 417, 422 (1981)). "Consideration
14 includes 'action by the promisee which is bargained for and given in exchange for the
15 promise.'" *Id.* (citing *Day v. Mortgage Ins. Corp.*, 91 Idaho 605, 607, 428 P.2d 524, 526
16 (1967)). "It may also consist of a 'detriment to the promisee or a benefit to the
17 promisor.'" *Id.* (citing *Surety Life Ins. Co. v. Rose Chapel Mortuary, Inc.*, 95 Idaho 599,
18 603, 514 P.2d 594, 598 (1973)).
19
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21 In *Lettunich*, the court found that although one party had "clearly suffered a
22 detriment when he purchased cattle without a way to pay for them...[t]he doctrine of
23 promissory estoppel [was] of no consequence in [that] case because there [was] evidence
24 of adequate consideration. What [was] lacking [was] a sufficiently definite agreement."
25 *Id.* (citing *Black Canyon Racquetball v. First Nat'l*, 119 Idaho 171, 178, 804 P.2d 900,
26 907 (1991)). Therefore, the Supreme Court held that in the absence of an enforceable
27 agreement, the doctrine of part performance and equitable estoppel did not apply. The
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1 Court found that “even though it could be inferred that Lettunich partially
2 performed...there is no evidence in the record of a complete and enforceable agreement.”

3 *Lettunich* at 1109.
4

5 The same is true in these circumstances. Although CPM claims that they partially
6 performed by finding purchasers to enter into purchase and sale agreements for the
7 purchase of units in the Charter Pointe and Silver Oaks project, and expended funds on
8 the same, there are two fatal flaws to CPM’s argument. First, there is no evidence in the
9 record of the funds purportedly expended by the appellant in reliance on the Agreements.
10 Secondly, as explained in detail above, there is no evidence in the record that contradicts
11 the fact that no legal description accompanied the Agreements when they were executed
12 as required by both the Agreements and by Idaho statute. Further, CPM failed to put any
13 evidence into the record that CBI, Charter Pointe or Silver Oaks were in some way
14 responsible for the fact that the Agreements did not contain valid enforceable legal
15 descriptions.
16
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18 Therefore, the lack of factual evidence in the record that supports CPM’s claims
19 of reliance, coupled with the unenforceability of the Agreements, renders CPM’s claims
20 of quasi estoppel and partial performance inapplicable to the current dispute.
21

22 **vi. CPM is Not Entitled to Attorney Fees and Costs Pursuant to the**
23 **Agreements Due to the Unenforceability of the Agreements.**

24 To the extent that CPM is requesting an award of fees and Costs from the Court
25 on appeal pursuant to the terms of the Agreements, the Court should deny said request
26 due to the unenforceability of the Agreements as explained above.
27
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1 **vii. CBI is Entitled to an Award of Attorneys' Fees and Costs on Appeal**
2 **Pursuant to I.A.R. 40 and I.A.R. 41**

3 There are no disputed facts that would have precluded the trial court from
4 granting summary judgment. Summary judgment was properly granted by the trial court
5 and said decision should not be overturned on appeal. Therefore, CBI should recover all
6 attorneys' fees and costs incurred as the prevailing party on appeal.
7

8 **viii. The Court Should Award CBI Reasonable Attorney Fees and Costs**
9 **Incurred in this Appeal, Pursuant to I.A.R. 40, I.A.R. 41, Idaho Code**
10 **§ 12-120(3) and Idaho Code § 12-121.**

11 The case of *Garner v. Bartschi* is analogous to the case at hand, and supports an
12 award of attorney fees and costs to Respondent incurred in responding to this appeal.

13 Idaho Code § 12-120(3) states:

14 In any civil action to recover on an open account, account stated, note,
15 bill, negotiable instrument, guaranty, or contract relating to the purchase
16 or sale of goods, wares, merchandise, or services and in any commercial
17 transaction unless otherwise provided by law, the prevailing party shall be
18 allowed a reasonable attorney's fee to be set by the court, to be taxed and
19 collected as costs.

20 “The award of attorney fees is not warranted every time a commercial transaction is
21 remotely connected with the case. Rather, the test is whether the commercial transaction
22 comprises the gravamen of the lawsuit. Attorney’s fees are not appropriate under I.C. §
23 12-120(3) unless the commercial transaction is integral to the claim, and constitutes the
24 basis upon which the party is attempting to recover.” *Garner* at 1040 (*citing Brower v.*
25 *E.I. DuPont De Nemouurs & Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990)).

26 The Court in *Garner* cited *Hilbert v. Hough*, 132 Idaho 203, 207, 969 P.2d 836,
27 840 (Ct.App.1998), stating that “[i]t is of no consequence that the underlying contractual
28 obligation is unenforceable. A prevailing party may recover attorney fees even though
29

1 no liability under a contract was established or where no contract was, in fact, ever
2 formed.” *Garner* at 1040. Here, like in *Garner*, the Agreements contain language in
3 Paragraph 23 of the Agreements, which states:

4
5 “[i]n the event either party shall initiate any suit or action or appeal on any
6 matter relating to this Agreement the defaulting party shall pay the
7 prevailing party all damages and expenses resulting from the default,
8 including all reasonably attorneys’ fees and all court costs and all other
9 expenses incurred by the prevailing party.”

10 (R., Vol. II, Ex. 2, ¶¶ 3, 5, Exs. A-B).

11 As in *Garner*, due to the fact that the commercial transaction was the gravamen of
12 the lawsuit, and although unenforceable, the Agreements provide for an award of
13 attorney’s fees to the prevailing party, CBI should be awarded their attorney’s fees and
14 costs for defending this appeal.

15 Further, attorney’s fees are to be awarded if the Court finds, from the facts
16 presented to it “that the case was brought, pursued, or defended frivolously unreasonably
17 or without foundation.” *See* Idaho Code § 12-121. Clearly this appeal was brought
18 frivolously, as the Agreements clearly were unenforceable, and therefore, CBI should be
19 entitled to an award of attorneys’ fees pursuant to I.C. § 12-121.

20 **5. CONCLUSION**


21
22 In light of the well established legal principles governing this case, and the facts
23 in record, there is simply no identifiable error by the trial court in the proceedings
24 incident to the grant of summary judgment. Furthermore, there is no legal authority for
25 overturning grant of summary judgment. The Court should entirely affirm the decisions
26 of the trial court.
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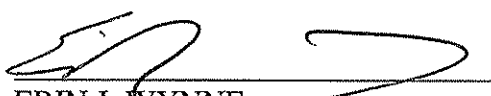
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Additionally, for the reasons set forth above, the facts and circumstances of this appeal certainly seem to warrant an award of attorney fees and costs to CBI for the expenses they have incurred in responding to the appeal. CBI therefore respectfully requests leave to submit a memorandum of costs and fees in accord with IAR 40 and 41 upon issuance of a decision by the Court.

DATED this 13th day of November, 2008.

ANGSTMAN, JOHNSON AND ASSOCIATES, PLLC

By: 
T. J. ANGSTMAN


ERIN J. WYNNE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of November, 2008, caused to be served a true copy of the foregoing RESPONDENTS' BRIEF by the method indicated below, and addressed to those parties marked served below:

<u>Served</u>	<u>Party</u>	<u>Counsel</u>	<u>Means of Service</u>
<input checked="" type="checkbox"/>	Appellant	Jeffrey A. Strother Strother Law Office 200 North 4 th Street, Suite 30 Boise, Idaho 83702 Facsimile: (208) 342-2429	<input type="checkbox"/> U.S. Mail, Postage Paid. <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Fax Transmittal


Erin J. Wynne