

9-11-2008

## Callies v. O'Neal Appellant's Brief Dckt. 34968

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Plaintiffs/Appellants,

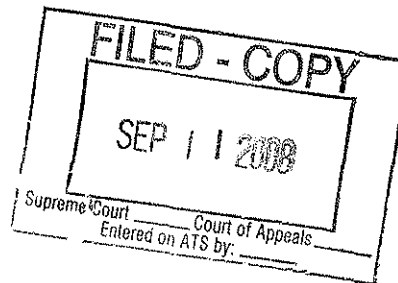
vs.

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 No. 34968

APPELLANTS' BRIEF



Appeal from the District Court of the Fourth Judicial District of

The State of Idaho, in and for the County of Ada

---

Honorable Kathryn A. Sticklen

---

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**TABLE OF CONTENTS**

TABLE OF CASES AND AUTHORITIES ..... ii

STATEMENT OF THE CASE ..... 1

    Nature of the Case ..... 1

    Course of Proceedings Below ..... 1

    Statement of Facts ..... 3

ISSUES PRESENTED ON APPEAL ..... 6

STANDARD OF REVIEW ..... 6

ARGUMENT ..... 7

    1. The Trial Court Erred in Failing to Recognize the Genuine Issues  
    of Material Fact Created by the Affidavits of Tricia Callies  
    That Precluded the Summary Judgment at Issue in This Appeal ..... 7

    2. The Trial Court Erred in Concluding that the Listing  
    Agreements Were Not Enforceable for Lack of Legally  
    Enforceable Descriptions of the Property ..... 10

    3. The District Court Erred in Failing to Apply Idaho Code  
    Section 9-508 Rather Than Idaho Code Section 9-503  
    to the Motions for Summary Judgment ..... 15

    4. The District Erred in its Dismissing the Claims of Callies  
    and CPM to Recover by Virtue of Part Performance ..... 21

    5. The District Court Erred in Dismissing the Claims of Callies  
    and CPM to Recover on the Theory of Quasi Estoppel ..... 24

    6. Callies and CPM are Entitled to the Attorney Fees  
    Incurred in Prosecuting This Appeal ..... 27

CONCLUSION ..... 28

## TABLE OF CASES AND AUTHORITIES

### CASES

<i>Allen v. Kitchen</i> , 16 Idaho 133, 100 P. 1052 (1909) . . . . .	19, 20
<i>Allen v. Dunston</i> , 131 Idaho 464, 958 P.2d 1150 (1998) . . . . .	25
<i>Central Idaho Agency, Inc. v. Turner</i> , . . . . . 11, 12, 13, 16, 17, 18, 19, 20, 21 92 Idaho 306, 442 P.2d 442 (1968)	
<i>Chapin v. Linden</i> , 144 Idaho 393, 162 P.3d 772 (2007) . . . . .	21, 22
<i>Cf., Armand v. Opportunity Management Co., Inc.</i> . . . . . 14, 15 141 Idaho 709, 117 P.3d 123 (2005)	
<i>City of Kellogg v. Mission Mountain Interests Ltd., Co.</i> . . . . . 19, 20 135 Idaho 239, 16 P. 3d 915 (2000)	
<i>City of Sandpoint v. Sandpoint Independent Highway District</i> . . . . . 17 126 Idaho 145, 879 P.2d 1078 (1999)	
<i>Collord v. Cooley</i> , 92 Idaho 789, 451 P.2d 535 (1969) . . . . .	10
<i>Commercial Credit Corp. v. S&amp;E Enterprises, Inc.</i> . . . . . 9 97 Idaho 441, 546 P.2d 396 (1976)	
<i>Cox v. St. Anthony Barle &amp; Trust Co</i> , 41 Idaho 776, 242 P. 785 (1928). . . . .	17
<i>Dennett v. Kuenzli</i> , 130 Idaho 21, 936 P.2d 219 (Ct. App. 1997) . . . . .	14
<i>G&amp;M Farms v. Funk Irrigation Co</i> , 119 Idaho 514, 808 P.2d 851 (1991). . . . .	10
<i>Garner v. Bartschi</i> . . . . . 13, 19, 20, 21, 24, 25, 27 139 Idaho 430, 80 P.3d 1031 (2003). (R. Vol. II, 307-313)	
<i>Harrington v. McCarthy</i> , 91 Idaho 307, 420 P.2d 790 (1966) . . . . .	8, 14
<i>Hayes v. Union Pacific Railroad Co.</i> , 143 Idaho 204, 41 P.3d 1073 (2006) . . . . .	8
<i>Hei v. Holzer</i> , 139 Idaho 31, 73 P.2d 94 (2003) . . . . .	9
<i>Hess v. Wheeler</i> , 127 Idaho 151, 823 P.2d 183 (Ct. App. 1995) . . . . .	13

<i>Holscher v. James</i> , 124 Idaho 443, 860 P.2d 646 (1993) .....	26
<i>Hunt v. Capital State Bank</i> , 12 Idaho 588, 87 P. 1129 (1906) .....	14
<i>Intermountain Forest Management v. Louisiana Pacific Corp.</i> .....	6
136 Idaho 233, 235, 31 P.3d 921, 923 (2001)	
<i>Iron Eagle Development, LLC v. Quality Design Systems, Inc.</i> .....	25
138 Idaho 487, 65 P.3d 509 (2003)	
<i>Jones v. Micron Technology, Inc.</i> , 129 Idaho 241, 923 P.2d 486 (Ct.App. 1996) .....	8
<i>Laker Land &amp; Loans v. Ney</i> , 40 Idaho 793, 237 P. 630 (1925) .....	19
<i>Lettunich v. Key Bank Nat'l Ass'n</i> .....	7
141 Idaho 362, 366, 109 P.3d 1104, 1108 (2005)	
<i>Lexington Heights Development, LLC v. Crandlemire</i> .....	13, 16, 19, 20
140 Idaho 276, 92 P.3d 526 (2004)	
<i>Margaret H. Wayne Trust v. Lipsky</i> , 123 Idaho 253, 846 P.2d 904 (1993) .....	26, 27
<i>Martin v. Spalding</i> , 133 Idaho 469, 988 P.2d 695 (Ct.App. 1998) .....	11
<i>Matter of Estate of Keeven</i> , 126 Idaho 290, 882 P.2d 457 (Ct.App. 1994) .....	3
<i>McCuskey v. Canyon County</i> , 123 Idaho 657, 851 P.2d 953 (1993) .....	11
<i>Messina v. Ker</i> , 96 Idaho 75, 524 P.2d 536 (1974) .....	15
<i>Miller v. Estate of Prater</i> , 141 Idaho 208, 108 P.3d 355 (2005) .....	15
<i>Murphy v. Livesay</i> , 34 Idaho 793, 197 P. 536 (1921) .....	19
<i>Resource Engineering, Inc. v. Siler</i> , 94 Idaho 935, 500 P.2d 836 (1972) .....	8
<i>Rudd v. Merritt</i> , 138 Idaho 256, 66 P.3d 230 (2003) .....	7
<i>Sacred Heart Medical Center v. Boundary County</i> .....	6
138 Idaho 534, 66 P.3d 238 (2003)	
<i>Seeling v. Security National Bank of Fairfield</i> .....	26
40 Idaho 574, 235 P. 976 (1925)	

<i>Silver Syndicate, Inc. v. Sunshine Mining Co.</i> . . . . .	8
101 Idaho 226, 611 P.2d 1011 (1979)	
<i>Sulik v. Central Valley Farms, Inc.</i> , 95 Idaho 826, 521 P.2d 144 (1974) . . . . .	15
<i>Tentinger v. McPheters</i> , 132 Idaho 620, 977 P.2d 234 (Ct.App. 1999) . . . . .	27
<i>Thompson v. City of Lewiston</i> , 137 Idaho 473, 50 P.3d 488 (2002) . . . . .	17
<i>Tingley v. Harrison</i> , 125 Idaho 86, 89, 867 P.2d 960, 963 (1994) . . . . .	6
<i>Traylor v. Henkels &amp; McCoy, Inc.</i> , 99 Idaho 560, 585 P.2d 970 (1978) . . . . .	8

**STATUTES**

Idaho Code Section 9-503 . . . . .	6, 11, 13, 15, 16, 17, 19, 21, 28
Idaho Code Section 9-508 . . . . .	6, 11, 12, 15, 16, 17, 19, 20, 21, 28
Idaho Code Section 12-120(3) . . . . .	27
Idaho Code Section 54-2040 (1)(b) . . . . .	17
Idaho Code Section 54-2050 . . . . .	16, 17
Idaho Code Section 54-2050 (1)(b) . . . . .	15, 16, 17

**RULES**

Idaho Rules of Civil Procedure Rule 54(b) . . . . .	2
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## **STATEMENT OF THE CASE**

### **Nature of Case**

Insofar as is germane to this appeal, this lawsuit arises out of a dispute between Complete Property Management and Investment Realty, Inc., henceforth called "CPM" in this document, and Tricia Callies, henceforth called "Callies" in this document, on one side and Charter Builders, Inc., Charter Pointe Apartments, LLC, and Silver Oaks, LLC, henceforth respectively called "CBI", "Charter Pointe" and "Silver Oaks" in this document, on the other over real estate commissions claimed by CPM and Callies to be owed by CBI, Charter Pointe and Silver Oaks. The crux of the dispute for purposes of this appeal is the sufficiency of the legal descriptions in the listing agreements executed by the parties.

### **Course of Proceedings Below**

On October 3, 2006, October 24, 2006 and November 8, 2006, Tricia Callies, the broker for CPM, henceforth called "Callies" in this document, CPM and other plaintiffs filed a series of three complaints against a number of defendants, including CBI, Charter Pointe, Silver Oaks and George O'Neal, the president of CBI, henceforth called "O'Neal" in this document. R, Vol. I, pp. 20-29, 65-71, and 78-117. These lawsuits asserted a number of causes of action connected with the limited liability companies, including claims for breach of contract, unjust enrichment and judicial dissolution. It is the third of these complaints, that filed on November 8, 2006, as case no. CV OC 0620977, R, Vol. I, pp. 78-117, that set forth the claims for the real estate commissions at issue in this appeal. On November 15, 2006, CBI, Charter Pointe and Silver Oaks filed counterclaims against Callies in the first of the lawsuits, that filed on October 3, 2006, as case no. CV OC 0618504. R, Vol. I, pp. 30-55. Those counterclaims sought, among other things, a declaration that the listing

agreements at issue in the third lawsuit were invalid for failure to set forth a legally enforceable description of the property concerned by the contracts. R, Vol. I, pp. 38-42. Callies denied this counterclaim on November 30, 2006, referring in her answer to the complaint previously filed in the third case. R, Vol. I, pp. 56-63. On March 16, 2007, the three lawsuits were consolidated into the first action, case no. 0618504, which brought together, into one case, the conflicting pleadings described above. R, Vol. I, pp. 6, 64 and 77.

On April 18, 2007, CBI and Charter Pointe filed motions for partial summary judgment seeking the dismissal of the claims for payment of the commissions and a judicial determination that the listing agreements were unenforceable for want of a valid property description. R, Vol. I, pp. 122-125. While undersigned counsel, who substituted into this action only after the appeal had been filed, does not see a comparable motion filed by Silver Oaks in the record, it is clear that the parties and court deemed that defendant to have joined in the motions as well. R, Vol. II, p. 302.

The trial court granted the requested partial summary judgments by memorandum decision and order entered on August 31, 2007. R, Vol. II, pp. 302-318. On the strength of this decision, an amended judgment was entered on December 19, 2007, in which the court recited that CBI, Charter Pointe and Silver Oakes had recovered judgment on all claims regarding the commissions, including their request for declaratory relief and CPM's and Callies' claim for monetary damages. R, Vol. II, pp. 325-327. This amended judgment included a certificate executed pursuant to Rule 54(b) of the Idaho Rules of Civil Procedure. R, Vol. II, p. 327. CPM and Callies filed their notice of appeal on January 28, 2008. R, Vol. II, pp. 330-335.



## Statement of Facts

Consistent with the rules by which summary judgments are to be evaluated on appeal, Callies and CPM state the facts in the record in the light most favorable to them, taking advantage of any inferences that may reasonably be drawn in their favor from the facts appearing of record and resolving any doubts against the moving party. *Matter of Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (Ct.App. 1994). Those facts show the claims against Charter Pointe and Silver Oaks to be generally alike for purposes of this appeal.

Callies and CPM entered into their listing agreement with Charter Pointe on March 1, 2005. R, Exh. 7, paragraph 2. The property that they were to sell for Charter Pointe consisted of 32 four-plexes, comprising a total of 128 units. R, Exh. 8, paragraph 2. The legal description of the property on which the units were to be placed had been prepared before the contract was signed, but the final plat detailing the individual units was not recorded until April 11, 2006. R, Exh. 8, paragraph 2. Before that recording, on February 28, 2006, the listing agreement had been extended. R, Exh. 8, paragraph 2. Moreover, before the execution of the extension agreement, R, Exh. 8, p. 15, O'Neal had provided Callies with individual legal descriptions based upon a preliminary plat showing the location of the individual units. R, Exh. 8 paragraph 2. At that time, this plat was inserted by the parties into their files pertaining to the listing agreement. R, Exh. 8, paragraph 2. Once the plat was approved but before any closings occurred on the purchase and sale of any individual units, O'Neal provided Callies with definitive legal descriptions for each of the individual units in the project. R, Exh. 8, paragraph 2. This description tied the individual units to the final plat. R, Exh. 8, pp. 12-13.

Not until after the recording of the final plat did Charter Pointe and the purchasers located by Callies and CPM proceed to closing. Some of the closings occurred as scheduled, but in other instances the buyers backed out of the contracts because Charter Pointe failed to complete the units on time. R, Exh. 8, paragraphs 9 and 13. Not until immediately before the closings began to occur did anyone question whether Callies or CPM were entitled to the commissions from Charter Pointe. R, Exh. 8, paragraphs 6 and 7.

The facts concerning the Silver Oaks development differed from those of Charter Pointe in that the execution of the listing agreement was not completed until March 7, 2005, and this project consisted of 70 four-plexes, or 280 units. R, Exh. 9, paragraph 2. Moreover, the legal description of the property on which the Silver Oaks units were to be placed was not prepared until March 14, 2005, after the listing agreement had been signed. R, Exh. 9, paragraph 2. However, once this occurred, the general progression of the Silver Oaks project was like that of Charter Pointe. O'Neal provided Callies with legal descriptions for the individual units based upon the preliminary plat showing the location of the individual units before the listing agreement was extended on February 28, 2006. R, Exh. 9, paragraphs 2 and 5. This plat was placed by the parties into their files pertaining to the listing agreement. R, Exh. 9, paragraph 2. Not until Callies raised some of the financial issues involved in the litigation did anyone question whether Callies and CPM were entitled to the commissions from Silver Oaks. R, Exh. 9, paragraphs 7 and 8.

The differences in the facts relating to the two projects are not significant for present purposes. Distilled to their essence, the facts show that, when the listing agreements were originally signed, there was no legal description available for the individual units that Callies

and CPM were to sell for either Charter Pointe or Silver Oakes. However, in both instances, the parties later added legal descriptions for the individual units set forth in preliminary plats to their contracts and included the plats in the relevant files before any transaction closed. In the case of Charter Pointe, O'Neal provided Callies with definitive legal descriptions for the individual units before any sales of the individual units closed.

At no time in the marketing of either project was there any confusion between Callies on one side and Charter Pointe and Silver Oakes on the other as to what property was being sold. R, Exh. 8, paragraphs 2 and 6 and Exh. 9, paragraphs 2 and 7. The contracts and the process followed by the parties in the Charter Pointe and Silver Oakes projects were the same as those which they had successfully used in the marketing of seven other projects: Concord Commons, Boomer, Fenway Park Fourplexes and Townhomes, Pheasant Run, Lake Forest, Hampton Estates and Foxboro. R, Exh. 8, paragraph 2 and Exh. 9, paragraph 2. These procedures were intended to enable the developers, Charter Pointe and Silver Oakes, to pay for the development of their projects with the funds generated by contracts negotiated by Callies and CPM before the legal descriptions for the property were available. R, Exh. 8, paragraphs 2 and Exh. 9, paragraph 2. All of the contracts that were signed and sales that occurred were brokered by Callies. R, Exh. 8, paragraph 9 and Exh. 9, paragraph 11. Callies devoted substantial time to the projects and incurred costs of \$97,219.26 in marketing the properties. In addition, she turned down many offers to work on other projects because of her involvement in the projects at issue in this litigation. R, Exh. 8, paragraphs 10 and 12 and Exh. 9, paragraphs 14 and 15.

### **ISSUES PRESENTED ON APPEAL**

1. Did the trial court err in failing to recognize the genuine issues of material fact that precluded it from entering summary judgment in this action?
2. Did the trial court err in concluding that the listing agreements were unenforceable for lack of legally enforceable descriptions of the property to be sold pursuant to the agreements?
3. Did the trial court err in analyzing the motions for summary judgment on the basis of Idaho Code Section 9-503 rather than Idaho Code Section 9-508?
4. Did the trial court err in its analysis of the rights of CPM and Callies to recover damages on the theory of partial performance?
5. Did the trial court err in its analysis of the rights of CPM and Callies to recover damages on the basis of quasi-estoppel?
6. Is Callies entitled to the attorney fees incurred in the course of this appeal?

### **STANDARD OF REVIEW**

On appeal from the grant of a summary judgment, this Court's standard of review is the same as the standard used by the district court in ruling on the original motion. *Intermountain Forest Management v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001). Summary judgment is appropriate only if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. *Sacred Heart Medical Center v. Boundary County*, 138 Idaho 534, 66 P.3d 238 (2003). The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). The appellate court liberally construes the record in the light most

favorable to the party opposing the motion for summary judgment and draws all reasonable inferences and conclusions in that party's favor. *Rudd v. Merritt*, 138 Idaho 256, 66 P.3d 230 (2003). When questions of law are presented, this Court exercises free review, is not bound by findings of the district court, and is free to draw its own conclusions from the evidence presented. *Lettunich v. Key Bank Nat'l Ass'n*, 141 Idaho 362, 366, 109 P.3d 1104, 1108 (2005).

### **ARGUMENT**

#### **1. The Trial Court Erred in Failing to Recognize the Genuine Issues of Material Fact Created by the Affidavits of Tricia Callies That Precluded the Summary Judgment at Issue in This Appeal.**

In its analysis of the facts of the case, the trial court focused upon the state of the property descriptions as of the signing of the contracts and failed to take into account the additions to, and revisions of, the original agreements as the projects evolved:

Here, although the listing agreement explicitly stated that a legal description was attached as 'addendum # 1,' and provided that the 'addendum must accompany the original listing,' the addenda were not attached to any of the agreements. . . . Moreover, because the record unequivocally establishes that the listing agreements erroneously stated that the legal descriptions were attached, when in fact no such descriptions were affixed, when construing I.C. § 9-503 in conjunction with I.C. § 54-2050 as in *Garner*, the Court finds that the property descriptions are insufficient to satisfy the statute of frauds and fail to meet the statutory requirement of I.C. § 54-2050(1)(b).

R, Vol. II, pp. 311-312. Neither CPM nor Callies has claimed that the original agreements included a detailed description of the property to be sold at the time that they were signed. However, both CPM and Callies assert that, whatever the deficiencies of the agreements in their original form, the parties remedied those problems by subsequently adding legally enforceable property descriptions to the contracts before any transactions closed and before CPM or Callies made any claim that commissions were due. In taking this position,

CPM and Callies recognize that O'Neal has taken a contrary position in his affidavit by claiming that he never consented to the addition of the property descriptions to the agreement. R, Exh. 2, paragraphs 9 and 10. But all that testimony does is give rise to an issue of fact that should have been resolved by a jury after hearing all of the evidence rather than by the court on the motions for partial summary judgment. *Hayes v. Union Pacific Railroad Co.*, 143 Idaho 204, 41 P.3d 1073 (2006).

There is no rule of law to the effect that the parties to a contract cannot amend the agreement to correct an omission, oversight or error in the original documentation or even just because they choose to do so. To the contrary, Idaho law expressly permits such revisions when the evidence supports the conclusion that they actually occurred. Parties are free to amend their agreements. *Traylor v. Henkels & McCoy, Inc.*, 99 Idaho 560, 585 P.2d 970 (1978). The terms of a written contract may be varied, modified, waived, annulled or wholly set aside by any subsequently executed contract, whether the later agreement be in writing or parol. *Silver Syndicate, Inc. v. Sunshine Mining Co.*, 101 Idaho 226, 611 P.2d 1011 (1979); *Harrington v. McCarthy*, 91 Idaho 307, 420 P.2d 790 (1966). Consent to a modification of a prior written agreement may be implied from a course of conduct consistent with the asserted modification. *Resource Engineering, Inc. v. Siler*, 94 Idaho 935, 500 P.2d 836 (1972); *Jones v. Micron Technology, Inc.*, 129 Idaho 241, 923 P.2d 486 (Ct.App. 1996).

The listing agreements at issue in this lawsuit are "RE-16 EXCLUSIVE SELLER REPRESENTATION AGREEMENT" forms. In relevant part, the form documents provide:

**"2. PROPERTY ADDRESS AND LEGAL DESCRIPTION.** The property address and the complete legal description of the property are as set forth below.

Address

County

Legal Description

City

Zip

or "Legal Description Attached as addendum #  
listing)"

(Addendum must accompany original  
listing)"

(Exhibits # 8 and 9 to Clerk's Record on Appeal). Nothing in this printed language states when the addendum must be attached to or accompany the printed contract. The district simply assumed that the description had to be attached when the contract was originally signed. In so doing, the court ignored the rule that the conduct of the parties to the contract is an important factor that should be considered in interpreting an agreement in the event of a dispute as to its meaning, *Commercial Credit Corp. v. S&E Enterprises, Inc.*, 97 Idaho 441, 546 P.2d 396 (1976), and all of the historical evidence offered by Callies concerning the seven other subdivisions that the parties had sold using the same contract forms and following the same process that was employed in the marketing of the two projects at issue. That evidence uniformly militates in favor of the interpretation that the agreement permitted the parties to incorporate legally enforceable property descriptions into their agreements at some time after the documents were originally signed.

Moreover, this conclusion corroborates other testimony by Callies that, after the execution of the original documents, the parties added to their contracts legal descriptions of the individual units provided by O'Neal in the form of preliminary and final plats as those documents became available in the course of developing the two projects at issue in this appeal. Since on a motion for summary judgment, all of Callies' testimony must be presumed to be true, *Hei v. Holzer*, 139 Idaho 31, 73 P.2d 94 (2003), this court cannot reasonably hold, as a matter of law, that the parties did not contemplate the addition of

property descriptions to their agreements as those descriptions became available.

Moreover, even if the parties did originally contemplate the attachment of the property descriptions at the time that they executed the original documents, the case law cited above amply demonstrates that they were free to alter and amend their original contracts at a later time. The testimony by Callies regarding the later inclusion by the parties of detailed property descriptions into their agreements is entirely consistent with the conclusion that the parties did, in fact, amend their agreements as they progressed through the projects.

The trial court's analysis simply assumed away these factual issues and adopted the contested testimony of O'Neal to the effect that he had not consented to any addition to, or revision of, the original agreements. R, Exh. 2, paragraphs 9 and 10. By doing that, the court implicitly decided the disputed issue of fact in favor of CBI, Charter Pointe and Silver Oaks based upon its perception of relative merits of the affidavits of O'Neal and Callies. It is well established that this is erroneous on the context of summary judgment proceedings. *Collord v. Cooley*, 92 Idaho 789, 451 P.2d 535 (1969). If the record permits conflicting inferences, or where reasonable minds can reach difference conclusions from the evidence, summary judgment must be denied. *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991). The summary judgment granted by the district court in this case should be reversed on account of its failure to recognize the issues of fact that precluded that judgment.

## **2. The Trial Court Erred in Concluding that the Listing Agreements Were Not Enforceable for Lack of Legally Enforceable Descriptions of the Property.**

The analysis of Section 1 of this brief now brings us to the question of whether the



legal descriptions added to the agreements after they were signed, whether by original intent or by subsequent amendment of the contracts, were “legally enforceable” under Idaho Code Section 9-508 or Idaho Code Section 9-503. It is important to note that the trial court never reached this issue, because neither CBI, Charter Pointe nor Silver Oaks made any argument that the property descriptions used by Callies and CPM in marketing the property were deficient. Instead, the only claim advanced in the motions for summary judgment was the position, shown in Section 1 of this brief to be untenable, that the agreements were not enforceable simply because the property descriptions were not a part of the agreements when they were originally signed. The sufficiency of the descriptions that Callies asserts to have been added to the contracts may be important, however, given this court’s power to affirm the decision of the trial court on grounds not used by the trial court as the basis for its decision. See *McCuskey v. Canyon County*, 123 Idaho 657, 851 P.2d 953 (1993); *Martin v. Spalding*, 133 Idaho 469, 988 P.2d 695 (Ct.App. 1998).

As explained by this court in *Central Idaho Agency, Inc. v. Turner*, 92 Idaho 306, 442 P.2d 442 (1968), Idaho Code Section 9-508 provides that, in the context of listing agreements like those at issue in this case, the descriptions of the property affected by the agreements are sufficient where it is shown that there is no misunderstanding between the seller and broker as to the property involved and where the descriptions are sufficient to enable the broker to locate the property, show it and point out its boundaries to the prospective purchasers.

In this case, viewed on the light most favorable to CPM and Callies, the record shows that O’Neal gave Callies legal descriptions of the individual units in the projects at issue that were based either on preliminary or final plats, depending upon the status of the

project at the time. No one has claimed any misunderstanding as to the property that was involved in any one of the many agreements brokered by Callies that are at issue in this lawsuit. No one has claimed that Callies was not able to show the property to the prospective buyers. There is no evidence that any agreement brokered by Callies failed to close on account of a misunderstanding by anyone as to what property was being bought or sold. To the contrary, the fact that many of the transactions brokered by Callies actually closed reasonably suggests that she was, in fact, able to show the property adequately. Thus, the record establishes that the descriptions appended to the listing agreements at issue in this lawsuit meet the standards established by Idaho Code Section 9-508 and *Central Idaho Agency*.

Stated in other terms, while it is undisputed that the listing agreements included only vague descriptions of the property to be sold when they were originally signed, they included precise definitions of the property when transactions began to close, which is when Callies and CPM made their claims for commissions. The sufficiency of the legal description when the listing agreement was originally signed is not the real issue. Instead, the issue is, or at least should be, the sufficiency of those descriptions when the claims for commissions were asserted. Callies' testimony indicates those descriptions to be very precise at that time, and O'Neal's testimony to the contrary must, for purposes of analyzing the motion for partial summary judgment, be disregarded. This court should rule accordingly by reversing the summary judgment granted by the trial court.

Stated in other terms, under Idaho Code Section 9-508 and *Central Idaho Agency*, the test is whether the parties had a meeting of the minds as to the property subject to the brokerage agreement. Whether there has been a meeting of the minds on any issue is

generally a determination left to the trier of fact. *Hess v. Wheeler*, 127 Idaho 151, 823 P.2d 183 (Ct. App. 1995). Given the conflicting testimony by O'Neal and Callies in their affidavits, and the rules regarding that evidence on summary judgment proceedings, this court cannot reasonably uphold a grant of summary judgment against CPM and Callies on the basis that the record fails to establish a meeting of the minds in this case. *Central Idaho Agency, Inc. v. Turner, supra*.

Under Idaho Code Section 9-503, the standard is different: the description of the property must be such that it can be ascertained without resort to parol evidence or such that the quantity, identity or boundaries of the property can be determined from the face of the agreement. *Lexington Heights Development, LLC v. Crandlemire*, 140 Idaho 276, 92 P.3d 526 (2004). As stated in *Garner v. Bartschi*, 139 Idaho 430, 80 P.3d 1031 (2003):

“As a general rule, a written instrument purporting to convey real property must contain a sufficient description of the property. A description contained in a deed will be sufficient so long as quantity, identity or boundaries of property can be determined from the face of the instrument, or by reference to extrinsic evidence to which it refers.”

In this case, if the court agrees with the proposition that it is an issue of fact as to whether the property descriptions that O'Neal gave Callies were incorporated into the agreements between the parties, the conclusion that the trial court should have denied the motions for summary judgment under this standard follows immediately because those descriptions tie the individual units to either preliminary or final plats for the projects at issue. Since the property descriptions referred to a plat, it is hard to imagine how they could be more precise. Certainly, this court cannot hold at this stage of the proceedings, as a matter of law, that a reference to a plat is not a legally enforceable description of the property.

CPM and Callies believe that the district court's error in this regard lay in its failure to consider the property descriptions to which Callies testified as additions to, or revisions of, the parties' agreements. Instead, the court treated the documents originally signed by the parties as their entire agreements and Callies' testimony regarding the property descriptions only as parol evidence intended to provide descriptions that were not otherwise included in the agreement, apparently because they were not "attached" to and did not "accompany" the printed agreement as called for in the printed contract. R, Vol. II, p. 312. This analysis, however, overlooks the possibility that the parties waived or modified this term of the original contract by means of the subsequent additions to, or revisions of, the original agreement by means of the property descriptions to which Callies testified. "Parties to an unperformed written contract may, by mutual consent, modify it by altering, excising or adding provisions, and such modification may be by parol agreement or inferred from the conduct of the parties." *Harrington v. McCarthy, supra*. In view of Callies' testimony, it is a question of fact whether or not the parties modified or eliminated any requirement in the contract that the property descriptions be attached to, or accompany those documents.

There is no legal reason why the property descriptions absolutely had to be attached to the original contract documents, for it is well settled in Idaho that a contract may be comprised of several documents. *Hunt v. Capital State Bank*, 12 Idaho 588, 87 P. 1129 (1906). The question of whether a written contract has been modified by oral agreement is for the trier of fact. *Dennett v. Kuenzli*, 130 Idaho 21, 936 P.2d 219 (Ct. App. 1997). Similarly, the question of whether the parties intended their contract to be comprised of several documents is a question of fact, not properly resolved on summary judgment. *Cf.*,

*Armand v. Opportunity Management Co., Inc.*, 141 Idaho 709, 117 P.3d 123 (2005); *Miller v. Estate of Prater*, 141 Idaho 208, 108 P.3d 355 (2005).

For all of the reasons set forth here, this court should reverse the summary judgment against CPM and Callies to permit a finding of fact to evaluate the sufficiency of the legal descriptions appended by the parties to their original agreements.

**3. The District Court Erred in Failing to Apply Idaho Code Section 9-508 Rather Than Idaho Code Section 9-503 to the Motions for Summary Judgment.**

While the summary judgment granted by the trial court should be reversed in any event for the reasons set forth in sections 1 and 2 of this brief, the trial court and parties will, on remand, once again be faced with the issue of deciding, in light of all the evidence, whether the property descriptions in the listing agreements at issue in this case are legally enforceable. When they reach that point, they need to know what statute is controlling. Therefore, to assist the district court and the parties on remand, CPM and Callies request the court to review the final court's conclusion that Idaho Code Section 9-503 rather than Idaho Code Section 9-508 defines the proper standard. See *Messina v. Ker*, 96 Idaho 75, 524 P.2d 536 (1974); *Sulik v. Central Valley Farms, Inc.*, 95 Idaho 826, 521 P.2d 144 (1974).

Idaho Code Section 54-2050(1)(b) requires brokerage representation agreements such as those involved in this action to include "a legally enforceable description of the property." The question then becomes one of determining exactly what that means. One possible point of reference is Idaho Code Section 9-503, which is a statute of frauds that concerns, by its express terms, transfers of interests in real property. The other possible point of reference is Idaho Code Section 9-508, which is a statute of frauds that deals

specifically with real estate commission agreements. Having identified the possible points of reference, the issue becomes one of choosing between them. Neither statute expressly requires a description of the property at issue. However, both statutes have been held by the courts to require such a description. See *Lexington Heights Development, LLC v. Crandlemire, supra* (I.C. Section 9-503), and *Central Idaho Agency, Inc. v. Turner, supra* (I.C. Section 9-508).

Nevertheless, the choice between the two statutes is rendered easy by the maxim of statutory construction that statutes concerning the same subject matter, or which are “in pari materia”, must be construed together. *Matter of Adoption of Chaney*, 126 Idaho 554, 887 P.2d 1061 (1995). Both Idaho Code Section 54-2050 and Idaho Code Section 9-508 concern real estate brokerage agreements. Idaho Code Section 9-503 concerns, as noted above, transfers of real property.

Idaho’s Supreme Court has recognized that brokerage contracts are not intended to transfer real property. See *Central Idaho Agency, Inc. v. Turner, supra*. Therefore, in analyzing the sufficiency of a legal description under Idaho Code Section 54-2050, Idaho Code Section 9-508, rather than Idaho Code Section 9-503, should control, since like Idaho Code Section 54-2050, Section 9-508 specifically concerns real estate commission agreements. By contrast, Idaho Code Section 9-503 simply does not apply to this case because the controversy because the commission agreements at issue are not intended as contracts for the transfer of real property.

The trial court’s choice of Idaho Code Section 9-503 as the controlling statute followed from its conclusion that Idaho Code Section 54-2050(1)(b) was intended by the legislature to negate the holding of *Central Idaho Agency*. R, Vol. II, p. 313. That

conclusion, however, is contrary to the rule of statutory construction that the court should presume that the legislature did not intend to change the common law unless the language of the statute clearly indicates the legislature's intent to do so. *Thompson v. City of Lewiston*, 137 Idaho 473, 50 P.3d 488 (2002). In this case, Idaho Code Section 54-2050(1)(b) provides only that the legal description should be "legally enforceable" without defining the context in which the description had to be "legally enforceable" or the standard by which this had to be determined.

It is presumed that the legislature knew of *Central Idaho Agency* when it enacted Idaho Code Section 54-2050. *City of Sandpoint v. Sandpoint Independent Highway District*, 126 Idaho 145, 879 P.2d 1078 (1999). Given that presumption, the language of 54-2050(1)(b) cannot reasonably be understood clearly to indicate the legislature's disapproval of *Central Idaho Agency* and therefore should be read as an expression of the legislature's satisfaction with the court's construction of Idaho Code Section 9-508. The legislature could easily have made any dissatisfaction plain by adding an explicit reference to Idaho Code Section 9-503 in Idaho Code Section 54-2040(1)(b) with such language as, "A description of the property that is legally enforceable under Idaho Code Section 9-503". That would clearly have indicated the legislature's disagreement with *Central Idaho Agency*. In the absence of such clarity, Idaho law requires Idaho Code Section 54-2040(1)(b) to be understood as an endorsement of the court's prior construction of Idaho Code Section 9-508. *Cox v. St. Anthony Bank & Trust Co.*, 41 Idaho 776, 242 P. 785 (1928).

The requirements of Idaho Code Section 9-508, including the adequacy of the legal description of the property concerned by a brokerage contract are defined in *Central Idaho*

*Agency, Inc. v. Turner, supra.* That case, in fact, expressly deals with at length with the question of legal descriptions.

Despite that fact, the trial court in this case mentioned *Central Idaho Agency* in the course of its opinion only to state that it was not controlling. R, Vol. II, p. 312. In so doing, however, the trial court failed to recognize the full import of the holding in that case:

By a strained construction of the decision in *Allen v. Kitchen*, it would be possible to hold that the description involved in this case could be corrected by parol or extrinsic evidence so as to "apply" it to the property to be sold. However, we think it illogical to apply the rule of the *Allen* case-in which the plaintiff sought specific performance of a contract for the sale of real estate-to an action upon a brokerage contract as was done in *Murphy v. Livesay*. A contract employing a broker to find a purchaser of real property, is not a contract to sell, convey, or encumber real property or any interest therein. It is purely a contract of employment for services to be performed by the broker for a commission to be paid upon the occurrence of certain specified events. Ordinarily such a contract would not support an action to compel conveyance of the property involved. The present action does not seek any such relief. It was brought solely for the recovery of the commission provided for in the agreement. In such a case the description in the agreement is sufficient where it is shown that there is no misunderstanding between the property owner and the broker as to the property to be offered for sale, and where it is sufficient to enable the broker to locate the property, show it, and point out its boundaries to the prospective purchaser. In this case both plaintiff and defendant knew from the description contained in the agreement that the property to be sold was the entire "Clara Turner farm." The farm was well known in the neighborhood. Its exact acreage and location as to county and section numbers was readily available and could be established by parol or other extrinsic evidence without varying, adding to, or subtracting from the agreement which the parties intended to make. Such evidence would apply the description to the land in harmony with the manifest intention of the parties.

We conclude that the description in the brokerage agreement involved herein was sufficient for the purposes of this action. The decisions in *Murphy v. Livesay, supra*, and *Laker Land & Loans v. Nye, supra*-in some respects distinguishable from the case at bar-to the extent that they are in conflict herewith, are overruled.

The applicable rule as variously stated by the following authorities is that the listing agreement must, inter alia, identify the real property adequately as between the broker and the vendor. If it is thus sufficient to identify the property, although defective, ambiguous, or uncertain, it may be supplemented by parol or extrinsic evidence. Such evidence may be presented, not to create a description,



but to cure a defective one otherwise sufficient. When that is done it will be held in compliance with the statute, I.C. § 9-508. See *Sherwood v. Gerking*, 209 Or. 493, 306 P.2d 386 (1957) and cases cited therein; *Johnson v. Allen*, 108 Utah 148, 158 P.2d 134, 159 A.L. R. 256 (1945) and cases cited therein; See generally, Anno. 38 A.L.R.2d 542, at 557, § 6; Anno. 80 A.L.R. 1456, at 1466; 12 Am.Jur.2d, Brokers, §§ 46, 252; 12 C.J.S. Brokers, § 62; contra, see *Heim v. Faulstich*, Wash., 424 P.2d 1012 (1967).

*Central Idaho Agency v. Turner*, *supra*. It is worth noting that *Murphy v. Livesay*, 34 Idaho 793, 197 P. 536 (1921) and *Laker Land & Loans v. Ney*, 40 Idaho 793, 237 P. 630 (1925), the two cases overruled in *Central Idaho Agency*, were listing/commission cases which applied Idaho Code Section 9-503 in their analysis. That is exactly what the trial court did in this case. If that approach was erroneous when *Central Idaho Agency* was decided, it is still erroneous now.

The language quoted from *Central Idaho Agency* is broad enough to cover the issues involved in this case. Whatever the deficiency in the legal descriptions alleged in this action, Idaho Code Section 9-508 is still the controlling statute. Stated in other words, the lack of a description of the property in the original agreement does not render Idaho Code Section 9-503 the controlling statute. Instead, the effect of that omission should be analyzed under Idaho Code Section 9-508 rather than Idaho Code Section 9-503.

The cases cited by the trial court do not alter this conclusion. These cases include: *Lexington Heights Development, LLC v. Crandlemire*, *supra*; *Allen v. Kitchen*, 16 Idaho 133, 100 P. 1052 (1909); *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 16 P. 3d 915 (2000), and *Garner v. Bartschi*, *supra*. (R. Vol. II, 307-313).

*Lexington Heights* concerned the sufficiency of a property description in a case involving the transfer of real property. In the course of its analysis, the Court stated: "The

instant case is not one to enforce a listing agreement." 140 Idaho at 285. Logically enough in view of that statement, the court never mentioned Idaho Code Section 9-508 in the course of its opinion.

*Allen* was an "action by the plaintiff for the specific performance of an executory contract for the sale of real estate." 16 Idaho at 134. Therefore, like *Lexington Heights* and *Allen*, did not address the issue in the instant case which involves, not a transfer of real property, but commission agreements between the seller and real estate broker. And, probably because the decision was announced in 1909, and Idaho Code Section 9-508 was first enacted in 1919, the court did not consider Idaho Code Section 9-508 in the course of its decision.

Like *Lexington Heights* and *Allen*, *City of Kellogg* concerned the sufficiency of the legal description in a case involving a contract for the transfer of real property, not a commission agreement. Therefore, the court's analysis did not address Idaho Code Section 9-508. Given the issues of the case, there was no reason for the court to have discussed that statute and that Central Idaho Agency is the controlling precedent. See R, Vol. II, pp. 312-313.

The case of *Garner v. Bartschi*, *supra*, involved the sufficiency of the legal description both as to a purchase and sale agreement and as to a listing agreement. In affirming a summary judgment against the real estate agent, the court relied upon Idaho Code Sections 54-2050 and 9-503. There is, however, no indication in the opinion that any of the parties had asserted Idaho Code Section 9-508 to be controlling. In fact, the court's discussion in *Garner* never once mentions Idaho Code Section 9-508 or *Central Idaho*

*Agency*. Hence, the precedential value of *Garner* in this action is doubtful because Callies and CPM have consistently argued that Idaho Code Section 9-508 is the controlling statute.

This is not to say that the bottom-line result of *Garner* was wrong. Taking the court's analysis of the facts involved in that case at face value, it appears that the property description in that case would have failed under either Idaho Code Section 9-503 or Section 9-508. CPM and Callies do assert, however, that *Garner* is of limited precedential value in the case at bar, because for whatever reason, the court did not analyze Idaho Code Section 9-508 or *Central Idaho Agency* in the course of reaching its decision.

For all of the reasons set forth here, this court should reverse the conclusion by the trial court that Idaho Code Section 9-503 was the controlling statute for purposes of this action.

#### **4. The District Erred in its Dismissing the Claims of Callies and CPM to Recover by Virtue of Part Performance**

In its memorandum decision, the district court disallowed any claims based upon the doctrine of partial performance on the theory that the parties to this action never reached a "complete agreement" on the terms of their listing contract. R, Vol. II, pp. 313-314. This court recently explained the doctrine of partial performance in *Chapin v. Linden*, 144 Idaho 393, 162 P.3d 772 (2007):

The doctrine of part performance provides that when the parties to an agreement fail to reduce the agreement to writing, or otherwise fail to satisfy the statute of frauds, the agreement "may nevertheless be specifically enforced when the purchaser has partly performed the agreement." *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 722, 874 P.2d 528, 533 (1994).

The doctrine of part performance works in conjunction with the doctrine of equitable estoppel. "Under Idaho law, part performance per se does not remove a contract from the operation of the statute of frauds. Rather, the doctrine of part performance is best understood as a specific form of the more general principle of equitable estoppel." *Lettunich*, 141 Idaho at 367, 109 P.3d at 1109. (citing *Sword v. Sweet*, 140 Idaho 242, 249, 92 P.3d 492, 499 (2004)). Equitable estoppel generally, and the doctrine of part performance specifically, assume the existence of a complete agreement. See *Lettunich*, 141 Idaho at 367, 109 P.3d at 1109. Like any contract for the sale of land, an oral agreement "must be complete, definite, and certain in all its terms, or contain provisions which are capable in themselves of being reduced to certainty," before it will be specifically enforced by operation of the doctrine of part performance. *Lettunich*, 141 Idaho at 367, 109 P.3d at 1109 (citing *Bear Island Water Ass'n, Inc.*, 125 Idaho at 723, 874 P.2d at 534).

The threshold question for this Court, then, is whether there was a meeting of the minds between the Chapins and the Lindens on the essential terms of their agreement.

*Chapin*, 144 Idaho at 396, 162 P.3d at 775 (emphasis added).

As explained in Sections 1 and 2 of this brief, the district court's analysis of the issue of whether there was a meeting of the minds never went beyond its discussion of the documents signed by the parties at the outset of the projects in question. And, even in that context, the court never considered the issue of whether the oral agreement of the parties was complete, confusing that issue with that of whether the written statement of the agreement was complete enough to satisfy the statute of frauds. This is evident from the fact that the district court's analysis of the merits of the motion for partial summary judgment that preceded its conclusions on the issue of partial performance focused only upon the efficiency of the property descriptions in the written documents and not on the different question of whether the parties had actually reached an oral understanding. See *R*, Vol. II, pp. 307-312. Hence, the district court had no basis for concluding, as quoted above, that the parties had not reached a complete oral agreement.

Had the district court studied the issue, it would have found that the record did not

permit the entry of summary judgment. The motions for partial summary judgment were grounded on O'Neal's affidavit to the effect that the written contracts did not include any descriptions of the concerned property. R, Exh. 2. Callies and CPM responded to that affidavit with evidence asserting that there were complete understandings between the parties and that those understandings had been reduced to writings that had been made a part of the contract. R, Exh. 8, paragraph 2 and Exh. 9, paragraph 2. And, as explained above, Callies corroborated that assertion with testimony concerning the other projects completed by the parties using the same contract forms and following the same procedure. R, Exh. 8, paragraph 2 and Exh. 9, paragraph 2. O'Neal never rebutted either Callies' assertion that the understanding was complete or the historical evidence that she offered in support of that position. Hence, there is no factual basis in the record for the district court's conclusion that the parties' oral understanding was incomplete. The summary judgment granted by the court on that issue of partial performance should be reversed for that reason.

A further basis for overturning the district court's judgment lies in its failure to analyze the extent to which Callies and CPM had performed their end of the agreements. In this connection, the record established, without contradiction: (1) reservation agreements for all property subject to the brokerage agreements had been secured by Ms. Callies, R, Exh. 8, paragraph 3 and Exh. 9, paragraph 3; (2) earnest money checks for all of the property were made out and delivered to Charter Builders, Inc., and received by O'Neal himself, R, Exh. 8, paragraph 4 and Exh. 9, paragraph 4; (3) that many of the transactions brokered by Callies actually closed, R, Exh. 8, paragraph 9; (4) Callies and CPM invested substantial time into the projects and incurred \$97,219.26 of expenses in

the course of performing their work, R, Exh. 8, paragraphs 10 and 12 and Exh. 9, paragraphs 14 and 15; (5) the failure of the transactions that did not close was due only to the failure of CBI, Charter Pointe and Silver Oaks to complete the improvements on time. R, Exh. 8, paragraph 13. For purposes of this appeal, there is no question but that the record establishes the performance by CPM and Callies of their obligations under the listing agreements.

For all of the reasons set forth in this section of the memorandum, the district court's summary judgment on the issue of partial performance should be reversed.

**5. The District Court Erred in Dismissing the Claims of Callies and CPM to Recover on the Theory of Quasi Estoppel**

In its memorandum decision, the district court rejected the claims of CPM and Callies on the theory of quasi estoppel with the following comments:

Here, while Defendants obtained earnest monies from potential buyers for the Silver Oaks and Charter Pointe projects, presumably through Callies' efforts, their subsequent repudiation of the listing agreements is permitted due to the invalidity of the property descriptions contained therein. . . . Further the Defendants' conduct is not unconscionable as a matter of law and the Plaintiffs have failed to provide any evidence that the agreements were consummated due to any wrongful act of the Defendants. . . .

R. Vol. II, 315.

This court explained the elements of quasi estoppel in a case very similar to that at bar, *Garner v. Bartschi, supra*, in the following words:

Quasi-estoppel prevents a party from reaping an unconscionable advantage, or from imposing an unconscionable disadvantage upon another, by changing positions. *Lunders v. Estate of Snyder*, 131 Idaho 689, 695, 963 P.2d 372, 378 (1998). Quasi-estoppel, unlike equitable estoppel, does not require misrepresentation by one party or actual reliance by the other. *Id.*

The elements of quasi-estoppel have been defined as follows:

[I]t precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him or her. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced or of which he accepted a benefit. The act of the party against whom the estoppel is sought must have gained some advantage to himself or produced some disadvantage to another; or the person invoking the estoppel must have been induced to change his position. *Eastern Idaho Agricultural Credit Ass'n v. Neibaur*, 133 Idaho 402, 410, 987 P.2d 314, 322 (1999).

*Garner v. Bartschi, supra*. In this case, Callies' affidavit establishes, for purposes of this appeal, that CBI, Charter Pointe and Silver Oaks allowed Callies and CPM to invest substantial amounts of time and effort into the marketing and sale of the properties at issue. R, Exh. 8, paragraphs 2-5 and 8-12 and Exh. 9, paragraphs 2-4 and 10-15. At one point, O'Neal implicitly represented to Callies that the sellers could honor the listing agreements. R, Exh. 8, paragraph 5 and Exh. 9, paragraph 6. The seller, Charter Pointe and Silver Oaks, accepted the earnest moneys collected by Callies and CPM, amounting to more than \$1,000,000.00, R, Exh. 8, paragraph 8 (\$391,875.00) and Exh. 9, paragraph 10 (\$656,000.00). Callies worked hard enough on the projects at issue that she was required to pass on other opportunities to work and incurred \$97,219.26 in the course of her marketing efforts. R, Exh. 8, paragraphs 10 and 12 and Exh. 9, paragraphs 14 and 15. None of this evidence is contradicted in the record. Thus, it would appear that, measured by the standard enunciated in *Garner v. Bartschi, supra*, CPM and Callies have established a prima facie case of quasi estoppel.

The district court's holding to the contrary is virtually inexplicable. Estoppel is an equitable remedy. *Allen v. Dunston*, 131 Idaho 464, 958 P.2d 1150 (1998). Claims arising in equity will not be considered when an adequate legal remedy is available. *Iron Eagle Development, LLC v. Quality Design Systems, Inc.*, 138 Idaho 487, 65 P.3d 509 (2003).

Thus, for the district court to point out the legal impediment to recovery of damages for breach of contract should have established the basis for seeking equitable relief. See *Holscher v. James*, 124 Idaho 443, 860 P.2d 646 (1993). The district court, however, cited the legal impediment as a basis for denying equitable relief, which would appear to turn the rules cited above on their head.

One who tacitly encourages work to be done and who accepts the benefits of that work cannot afterwards exercise rights contrary to the prior consent and acceptance of benefits, if the consent and benefits have induced the opposite party to change his position to his prejudice. See *Seeling v. Security National Bank of Fairfield*, 40 Idaho 574, 235 P. 976 (1925). In this case, CBI, Charter Point and Silver Oaks allowed CPM and Callies to secure numerous contracts at a substantial cost of time and money (\$97,219.26) and accepted more than \$1,000,000.00 of benefits resulting from that work. The trial court held, as a matter of law, that this was not taking an unconscionable advantage. Intuitively, this conclusion appears to be unsupportable. The law school example of requiring the homeowner to pay the child who mows his lawn, even in the absence of a legally binding contract, pales in comparison to the facts of this case, which appear, even on the face of O'Neal's affidavit to present a classic case of "lying in the weeds" by allowing CPM and Callies to perform substantial work for the benefit of CBI, Charter Pointe and Silver Oaks, while refusing to agree to the correction of the contract that would allow the broker to be paid for that work.

Finally, the district court's reliance upon *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 846 P.2d 904 (1993), R, Vol. II, p. 15, is predicated upon a misreading of that case. The only reference in that case to a wrongful act appeared in the court's discussion



of how a seller's wrongful refusal to close a contract negotiated by the broker could not defeat the right of the broker to payment of a commission. 123 Idaho at 260. That holding provides no justification for the requirement imposed by the district court in this case that CPM and Callies had to prove that the listing agreements were consummated due to a wrongful act of CBI, Charter Pointe or Silver Oaks. This requirement appears to contradict the statement in *Garner v. Bartschi, supra*, that quasi estoppel does not require proof of a misrepresentation by anyone. Given the fact that the district court's reliance upon *Margaret H. Wayne Trust* is questionable, the following conclusion, which itself is contrary to unimpeachable precedent, cannot withstand appellate review.

For all of the reasons set forth in this section of the brief, the summary judgment granted by the district court dismissing the claims of CPM and Callies on the theory of quasi estoppel should be reversed.

#### **6. Callies and CPM are Entitled to the Attorney Fees Incurred in Prosecuting This Appeal.**

Callies and CPM are entitled to the attorney fees incurred in prosecuting this appeal, because paragraph 23 of the listing agreements includes an attorney fee clause:

In the event either party shall initiate and suit or action or appeal on any matter related to this Agreement the defaulting party shall pay the prevailing party all damages and expenses resulting from the default, including all reasonable attorneys' fees and all court costs and other expenses incurred by the prevailing party.

In addition, the listing agreements are both contracts for services and commercial transactions, which means that Callies and CPM are also entitled to attorney fees under Idaho Code Section 12-120(3). See *Tentinger v. McPheters*, 132 Idaho 620, 977 P.2d 234 (Ct.App. 1999).

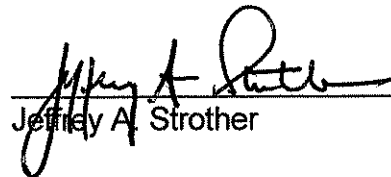
In making this request, Callies and CPM acknowledge that a reversal of the summary judgment at this stage of the proceedings does not guarantee that they will ultimately be the parties who prevail in this action. At a minimum, however, they are entitled to a ruling to the effect that, if they ultimately prevail in this action, they are entitled to the attorney fees incurred in the prosecution of this appeal.

### CONCLUSION

For the reasons set forth above, CPM and Callies request this Court to reverse the summary judgment granted by the district court in all respects and to remand all of the claims at issue in this appeal, including those for breach of contract, partial performance and quasi estoppel, for a trial on the merits. Callies and CPM also request the court to hold that any issues concerning the legal enforceability of the property descriptions in the listing agreements should ultimately be resolved under Idaho Code Section 9-508 rather than Idaho Code Section 9-503. Finally, Callies and CPM request the court to hold that they are entitled to the attorney fees incurred in the prosecution of this appeal, if not immediately, then at least in the event that they ultimately prevail on the claims at issue in this appeal.

DATED this 11th day of September, 2008.

STROTHER LAW OFFICE

  
\_\_\_\_\_  
Jeffrey A. Strother

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 11th day of September, 2008, two true and correct copies of the foregoing document were served by first-class mail, postage prepaid, and addressed to the offices indicated below:

T.J. Angstman  
Erin Wynne  
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U.S. Mail  
 Overnight Delivery  
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\_\_\_\_\_  
Jeffrey A. Strother