11-5-2009

Independent Sch. Dist. V. Harris Fam. Ltd. Appellant's Brief Dckt. 36410

IN THE SUPREME COURT

OF THE

STATE OF IDAHO

HARRIS FAMILY LIMITED PARTNERSHIP, an Idaho limited partnership,

Third Party Plaintiff/Appellant,

v.

BRIGHTON INVESTMENTS LLC,

Third Party Defendant/Respondent

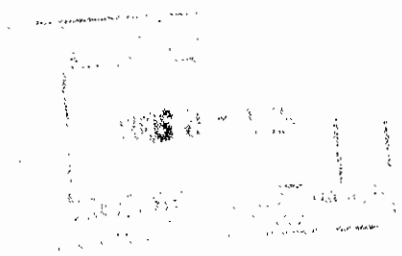
APPELLANT'S BRIEF
Docket No. 36410-2009

Appeal from the District Court of the Fourth Judicial District of the State of Idaho in and for Ada County
District Court No. CV OC 0709072

***The Honorable* Ronald J. Wilper**, *District Judge*

RICHARD H. GREENER
FREDRIC V. SHOEMAKER
LISA M. McGRATH
Attorneys for Appellant

DAVID R. LOMBARDI
ROBERT B. WHITE
Attorneys for Respondent



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STATEMENT OF THE CASE

I. Nature of the Case

This appeal concerns the district court's mistaken dismissal of well-pled breach of contract claims resulting in an unconstitutional interference with private contract rights and also the erroneous dismissal of an unjust enrichment claim. The case arose because on December 31, 2005, Harris Family Limited Partnership ("Harris") and Brighton Investments LLC ("Brighton") entered into a Purchase and Sale Agreement ("Agreement") involving the Harris Ranch East Parcel which consisted of 44 acres ("Harris Parcel"). (R. Vol. I, p. 185; Ex. "A" to Amended/Supplemental Third Party Complaint and Demand for Jury Trial ("Amended Third Party Complaint").) In the Agreement, the parties agreed to Restrictive Covenants[1], limiting the Harris Parcel to residential use and restricting development in order to protect and enhance the value of the Harris Parcel and surrounding property owned by the parties. (*See id.* at § 7.)

In defiance of the express terms of the Restrictive Covenants, Brighton later conveyed 21.54 acres of the Harris Parcel ("The Property") to BSU, and ultimately to the Independent School District of Boise ("School District"), a party with the power of eminent domain, for the purpose of constructing the new East Junior High School[2] without the consent or approval of Harris. (R. Exhibit[3] 12, ¶ 34, and Exs. 6, 7, 8 and 9; Affidavit of David W. Turnbull in Support of

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[1] The Restrictive Covenants expire by their terms on December 31, 2010.

[2] The transaction involved a Brighton to Boise State University ("BSU") sale and a subsequent trade by BSU to the School District for the old East Junior High School site.

[3] Citations herein to "R. Exhibit ___" refer to the numbered exhibits to the Record on Appeal listed on the District Court Clerk's "Certificate of Exhibits," R. Vol. II, pp. 421-422A.

Brighton Investments, LLC's Motion for Summary Judgment ("Turnbull Affidavit").) This breach of the Agreement and the resulting damage created valid claims for Harris which have been taken away by the lower court. Harris does not seek to enforce the breach of the Agreement against the Property now owned by the School District. Rather, Harris's claims against Brighton are for Brighton's breach resulting from the sale of the Property to the School District for a use violative of the Restrictive Covenants which was not agreed to by Harris.

After acquiring the Property, the School District filed its *Complaint for Condemnation*, on May 21, 2007, seeking condemnation of the Restrictive Covenants applicable to the portion of the Harris Parcel acquired for the school. (R. Vol. I, p. 16.) Brighton was in breach of the Agreement at that time and remains in breach to this day. The School District sought a "quick take" under I.C. § 7-721. Harris rightly determined any opposition would be groundless and futile. Harris, therefore, stipulated to the "quick take" and the statutory elements required to be found by the court under I.C. § 7-721 for such a proceeding.

On July 26, 2007, the district court entered its *Order and Partial Judgment* ordering that although Harris's right to enforce the Restrictive Covenants **as they applied to the School District's use of the Property** were condemned, and noting that the parties stipulated that Harris "reserves and is not waiving any other rights and claims Defendant (Harris) has asserted in the *Answer, Counterclaim, and Third Party Complaint* on file herein." (R. Vol. I, p. 171.) Harris by that time had filed a *Third Party Complaint and Demand for Jury Trial* ("Third Party Complaint") against Brighton. (R. Vol. I, p. 76.) Harris's *Third Party Complaint* clearly alleges claims against Brighton for its earlier breach of the Agreement. (R. Vol. I, p. 76.)

Nevertheless, on November 21, 2007, the district court ignored this plain language and entered an *Order,* (R. Vol. II, p. 250A), which dismissed all of Harris's breach of contract claims against Brighton on grounds that the condemnation of Harris's right to enforce the Restrictive Covenants **against the School District** eliminated Harris's contractual rights against Brighton for previous breaches which pre-dated the district court's own *Order and Partial Judgment.* (R. Vol. I, p. 171.) The district court's absolution of Brighton's earlier contract violations and elimination of Harris's private contractual rights and remedies under the Agreement was not only error, but an unconstitutional interference with the parties' contract rights, and its *Order* should be reversed.

The court subsequently granted summary judgment dismissing Harris's unjust enrichment claim. (R. Vol. II, p. 393.) Harris contends this ruling is also in error and for the reasons set forth in this brief, the court's determination should be reversed.

II. Facts and Procedural History

This case involves a dispute between members of a limited liability company, Harris/Brighton, LLC, consisting of Harris and Brighton. The limited liability company was formed on June 5, 1998, to assist the overall development of certain property owned by Harris Family Ranch, LLC, commonly known as the "Harris Ranch Project" located in east Boise, Idaho. (R. Exhibit 12, ¶¶ 36-38 and Exs. 10-11; Turnbull Affidavit.) The purpose of the formation of Harris/Brighton, LLC, was to develop the Harris Ranch Project which is referred to in Section 1.34 of the Operating Agreement as the Harris Family Ranch, as conceptually approved by the Boise City Council in 1997 in various phases. (R. Exhibit 12, Article I, § 1.34

and Article III; Ex. 11 to Turnbull Affidavit; *see also* R. Exhibit 14, ¶ 2; Affidavit of Mildred H. Davis in Opposition to Brighton Investments, LLC's Motion for Summary Judgment ("Davis Affidavit").)

The parties then entered into the Agreement which contains the Restrictive Covenants at issue. (R. Vol. I, p. 185, ¶ 2; Ex. "A" to Amended Third Party Complaint.) Under the terms of the Agreement, Brighton agreed to pay Harris the sum of $4,307,000 for an approximately 44-acre parcel referred to in this brief as the Harris Parcel. *Id.* By the terms of the Agreement, Harris and Brighton agreed to further execute a Memorandum of Agreement to evidence the Restrictive Covenants. (*See id.* at § 7.6; *see also* R. Vol. I, p. 160; Memorandum of Agreement dated January 17, 2006, Ex. B to Amended Answer, Counterclaim and Demand for Jury Trial Pursuant to I.R.C.P. Rule 38(b) ("Amended Answer").) This Memorandum of Agreement was intended to ensure that the Restrictive Covenants set forth in the Agreement would apply to any and all "property and adjacent properties, which are or will be owned by Brighton and/or Harris and/or entities related to Brighton and/or Harris," and provided a promise in the covenant that the Restrictive Covenants, set forth in Section 7 of the Agreement, would be applicable to both parties reciprocally and all related parties. (R. Vol. I, p. 160; Ex. "B" to Amended Answer.)

Paragraph 7 of the Agreement contains what are styled as "Post-Closing Obligations" ("Restrictive Covenants"), which survived the closing of the sale, providing:

> Prior to the development of the Property and/or the Harris Property, each party agrees to submit to the other party the final landscape plan, unrecorded restrictive covenants and architectural guidelines in connection with such party's property (the "Final Plans"). The Final Plans shall provide for landscaping,

> architectural guidelines and restrictive covenants consistent with: (i) the quality and common theme of the Spring Creek and/or Mill District developments in Harris Ranch; and (ii) the Existing Governmental Approvals ("Development Standards"). The parties shall use all good faith efforts to work together and cooperate in reviewing, possibly modifying and approving the proposed Final Plans within two (2) weeks after the Final Plans have been delivered to the relevant party, which approval shall be signified in writing executed by both parties, and shall not to be unreasonably withheld, delayed or conditioned. Notwithstanding the foregoing, neither party shall have the right to disapprove or request modifications to the Final Plans if the Final Plans are consistent with: (i) the Development Standards; (ii) the Initial Plans previously approved by such party; and (iii) the requirements of the Existing Governmental Approvals (as amended from time to time).

(R. Vol. I, p. 185, ¶ 7.3; Ex. "A" to Amended Third Party Complaint.)

Brighton requested that Harris waive the requirements of Section 7 of the Agreement in order to convey approximately 21.54 acres of the Harris Parcel to BSU, ultimately traded to the School District, for the purpose of constructing a new East Junior High School. (R. Exhibit 14, ¶ 11; Davis Affidavit.)

After due consideration, Harris declined to approve waiver of the Restrictive Covenants. Nevertheless, Brighton sold the Property to BSU/School District for the construction of a junior high school on May 2, 2007. (R. Exhibit 12, ¶ 34, and Exs. 6, 7, 8 and 9; Turnbull Affidavit.) The sale of the 21.54 acres for this purpose was in direct violation of the terms and conditions of the Restrictive Covenants contained in the Agreement. (R. Exhibit 14, ¶ 11; Davis Affidavit.)

On or about July 20, 2007, Harris sent a Notice of Default to Brighton, notifying Brighton that it was in default of the Agreement and invoking the default and remedy provisions

of Section 9, including subsections 9.1 and 9.4, seeking return of the subject property, and also sent Notices of Default to BSU and the School District. Brighton refused to comply with the Notice of Default. (R. Exhibit 14, ¶ 13, Davis Affidavit, and Ex. "C" thereto.)

On May 21, 2007, the School District filed a *Complaint for Condemnation* against Harris, seeking condemnation of the Restrictive Covenants. (R. Vol. I, p. 16.) As noted, the School District then filed a motion for a "quick take" pursuant to I.C. § 7-721 requesting judicial condemnation of the covenants "that purport or delimit the development of the subject real property for the construction of a facility that would replace the [old] East Junior High School." A hearing was set for July 23, 2007, for the "quick take." Harris determined that it had no valid grounds to oppose the motion. Harris, at the court's request, therefore agreed to the court finding the requisite elements for a "quick take" required under I.C. § 7-721 in the interest of avoiding delay of the construction of the new East Junior High School facility and to avoid needless expense and a waste of court time. The district court subsequently entered its *Order and Partial Judgment* on July 26, 2007, condemning the Restrictive Covenants **as they applied to the School District's** use of the Property and reserving all of Harris's rights against Brighton for its earlier breach of the Restrictive Covenants under the Agreement. (R. Vol. I, p. 171.)

The language of this *Order and Partial Judgment* is critical to this appeal. (R. Vol. I, p. 171.) Therefore, it is displayed in full for the convenience of the Court and found in the record as noted below:

ORDER AND PARTIAL JUDGMENT

The Plaintiff, Independent School District of Boise City, filed a complaint for condemnation of the Defendant's interest in the subject property under the restrictive covenants and all rights to enforce same as the covenants may apply to School Site more particularly described in Exhibit A, (hereinafter "the property")[1] against the Defendant, the Harris Family Limited Partnership. Prior to the trial on the matter and pursuant to I.C. § 7-721, the Plaintiff moved to condemn the Defendant's interest in the subject property.

Following a hearing pursuant to § 7-721, the Plaintiff and Defendant stipulated that: (a) the School Board has the right of eminent domain; (b) the use to which the property is to be applied is a use authorized by law; and that Defendant does not oppose the Court finding (c) that the condemnation and taking of the subject restrictive covenant **and all Defendant's right to enforce same[**[4]**]** is necessary to such use, and (d) that the Plaintiff sought in good faith to purchase the Defendant's interest in the restrictive covenants to be taken.

Therefore, pursuant to § 7-721, this Court hereby orders the subject restrictive covenants and Defendant's right to enforce same as the covenants may apply to School Site described in Exhibit A are hereby condemned and are no longer enforceable. The parties stipulated to nominal compensation of one dollar solely for the quick take, with the understanding and agreement that the actual value of the property interest condemned will be determined at a later date pursuant to § 7-721(4)(5)(6)(7) and (8). **Provided it was further stipulated and it is ordered that Defendant reserves and is not waiving any other rights or claims Defendant has asserted in the Answer, Counterclaim and Third Party Complaint on file herein and any other right or claim it may have or right to assert in this proceeding or any other proceeding against any person or party.**

[4] The underlying language of the order is not found in the parties' discussion in the court transcript of July 23, 2007, which is the basis for the court's reference to a stipulation.

Order on Partial Judgment

> The Plaintiff's motion for an order granting immediate condemnation of the Defendant's interest in the subject property under the restrictive covenants and all rights to enforce same as the covenants may apply to School Site more particularly described in Exhibit A is hereby GRANTED. Following the Plaintiffs deposit of the sun) of one dollar with the Court, the subject restrictive covenants and the Defendant's right to enforce same are hereby condemned and of no effect. The matter will proceed to trial pursuant to § 7-721 (4)(5)(6)(7) and (8).
>
> IT IS SO ORDERED.
>
> [1] The Court notes that the Plaintiff acquired the property via a warranty deed from Boise State University. The Plaintiff is seeking to condemn the restrictive covenants burdening the 21.54 acres acquired via warranty deed from Boise State University.

(*Id.* at pp. 171-72) (emphasis added).

The sales price that Brighton ultimately received in terms of consideration from BSU for the approximately 21.54 acres was calculated based upon an appraisal. The 21.54 acres was appraised for $6,100,000, which was necessary to justify the $6,099,682.04 BSU paid Brighton. (R. Exhibit 12, ¶¶ 31-33; Turnbull Affidavit and Ex. 5 thereto.) The sum paid included $3,500,000 in cash and a note and a Real Estate Non-Cash Charitable Contribution Agreement (*Id.* at Ex. 7) for property conveyed by Special Warranty Deed from Brighton to BSU (*Id.* at Ex. 9) together with $2,599,683.01 for an undivided 42.62% interest conveyed by a Gift Deed from Brighton to BSU to effectuate its "charitable contribution" to BSU. (*Id.* at Ex. 8.)

The value of the Restrictive Covenants has been determined by Hyde Appraisal, a licensed appraiser and MAI. Hyde determined the value of the subject property in the "after"

condition to be $6,200,000 (without restrictions), and compared that to the value of the property with the restrictions in the "before" condition (with the uses restricted to single family). This resulted in a valuation of $2,250,000 for the Restrictive Covenants. (R. Exhibit 15, pp. 18-19; Ex. "A" to Affidavit of Paul R. Hyde, EA, MCBA, ASA, MAI in Opposition to Brighton Investments, LLC's Motion for Summary Judgment ("Hyde Affidavit").) Mildred H. Davis, a member of Harris Ranch, also has stated her opinion that the Restrictive Covenants taken by the School District have a value of $2,250,000. (R. Exhibit 14, ¶ 17; Davis Affidavit.)

Subtracting the prorated $2,154,000 sales price paid by Brighton under the Agreement for the subject 21.54 acres from the $6,099,682.04 May 2007 sales price from Brighton to BSU (and thence to the School District) establishes a gain or profit to Brighton of $3,945,682.04.

On July 20, 2007, Harris filed its *Third Party Complaint,* asserting claims against Brighton for breach of contract, termination of the agreement, breach of the implied covenant of good faith and fair dealing, specific performance, disgorgement of profits resulting from the breach, breach of fiduciary duty, intentional interference with prospective economic gain, and fraud. (R. Vol. I, p. 76.) Brighton filed its *Motion to Dismiss Third Party Complaint Pursuant to I.R.C.P. 12(b)(6) and 12(g)(2)* ("Motion to Dismiss") on October 11, 2007. (R. Vol. II, p. 248.) The district court subsequently entered its *Order*, holding that the condemnation of the Property's Restrictive Covenants, as applied to the School District, absolved Brighton of its earlier breaches of the Restrictive Covenants, and eliminated Harris's corresponding private contractual remedies under the Agreement. (R. Vol. II, p. 250A.)

Brighton later filed a *Motion for Summary Judgment* on June 13, 2008, (R. Vol. II, p. 329D), on Harris's claims for breach of fiduciary duty and unjust enrichment which the district court subsequently granted in its *Memorandum Decision and Order*. (R. Vol. II, p. 393.)

On March 18, 2009, Harris and the School District entered into a *Mutual Release and Settlement Agreement*, in which the School District agreed to pay Harris $175,000 in settlement of the School District's *Complaint for Condemnation*. (R. Vol. I, p. 16.) The parties subsequently executed a *Stipulation in Support of Plaintiff's Motion to Dismiss with Prejudice*, March 16, 2009.

Harris now appeals.

ISSUES ON APPEAL

I. Did the district court err in granting Brighton's Motion to Dismiss?

   a. Did Harris's Third Party Complaint state valid claims for breach of contract and breach of the implied covenant of good faith and fair dealing which the court declined to consider?

   b. Did the court rule correctly by eradicating Harris's constitutionally protected right to enter into a private contract, by ruling that the condemnation of the Restrictive Covenants as to the School District destroyed Harris's private contractual rights against Brighton arising under the Restrictive Covenants contained in the Agreement?

II. Did the district court err in granting Brighton's Motion for Summary Judgment?

a. Does Harris have a claim for unjust enrichment as a result of Brighton's breach of the Restrictive Covenants contained in the Agreement if Harris has no contractual right to enforce them?

STANDARD OF REVIEW

"If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . ." I.R.C.P. 12(b). Upon review by this Court of an order dismissing a case pursuant to I.R.C.P. 12(b)(6), the non-moving party is entitled to have all inferences from the record viewed in his favor. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002); *Orthman v. Idaho Power Co.*, 126 Idaho 960, 961, 895 P.2d 561, 562 (1995) (citations omitted). After drawing all inferences in the non-moving party's favor, this Court determines whether a claim for relief has been stated. *Young*, 137 Idaho at 104, 44 P.3d at 1159 (citations omitted).

In this case, Harris has sufficiently pled breach of contract and breach of the covenant of good faith and fair dealing claims to survive a Rule 12(b)(6) motion to dismiss. The pivotal issue is whether the lower court was correct in determining Harris's constitutionally protected right to enter into and enforce a private contract was eliminated by the School District's condemnation of the Restrictive Covenants as they could be applied against what became the

School District property. Harris contends that the district court erred in its determination, and that the decision granting the motion to dismiss should be reversed. (R. Vol. II, p. 250A.)

When reviewing an order for summary judgment, this Court applies the same standard of review that was used by the trial court in ruling on a motion for summary judgment. *See Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 307, 160 P.3d 743, 746 (2007). Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Estate of Becker v. Callahan*, 140 Idaho 522, 525, 96 P.3d 623, 626 (2004). "The moving party is entitled to a judgment when the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial." *Doe v. City of Elk River*, 144 Idaho 337, 338, 160 P.3d 1272, 1273 (2007) (citations omitted). On appeal of summary judgment, the Supreme Court will construe all disputed facts liberally in favor of the non-moving party, and all reasonable inferences will be drawn in favor of the non-moving party. *Cristo Viene Pentecostas Church*, 144 Idaho at 307, 160 P.3d at 746. "If the evidence reveals no genuine issue as to any material fact, then all that remains is a question of law over which this Court exercises free review." *Estate of Becker*, 140 Idaho at 525, 96 P.3d at 626 (citations omitted).

Applying these standards, the lower court's decision dismissing the unjust enrichment claim is clear error. This is even more compelling because the court had previously dismissed Harris's breach of contract and covenant of good faith and fair dealing claims.

ARGUMENT

I. The District Court Erred in Granting Brighton's Motion to Dismiss Harris's Third Party Complaint Pursuant to I.R.C.P. 12(b)(6) and 12(g)(2).

A motion to dismiss for failure to state a claim should not be granted unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of the claim that would entitle plaintiff to relief. *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156, 160 (2005) (citations omitted). In determining whether a complaint states a cause of action, every reasonable intendment will be made to sustain it. *Ernst v. Hemenway and Moser Co.*, 120 Idaho 941, 945, 821 P.2d 996, 1000 (Ct. App.1991) (citations omitted). As a practical matter, a dismissal under I.R.C.P. 12(b)(6) is likely to be granted only in the unusual case in which the plaintiff includes allegations showing on the face of the complaint that there is some insurmountable bar to relief. *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992) (citations omitted). In this case, the court erred in its *Order* by relying upon a flawed determination that Harris could not state a claim for relief under breach of contract claims because the condemnation of the Restrictive Covenants resulted in Harris losing the right to bring these claims. (R. Vol. II, p. 250A.) The bottom line is that the court erred in dismissing Harris's breach of contract and breach of the covenant of good and fair dealing claims, and should be reversed.

A. Harris's Third Party Complaint States A Valid Claim Against Brighton For Breach of Contract And Breach Of The Implied Covenant Of Good Faith And Fair Dealing.

"It is well settled that a contract includes not only that which is stated expressly, but also that which is . . . implied from its language." *Independence Lead Mines Co. v. Hecla Mining Co.*,

143 Idaho 22, 26, 137 P.3d 409, 413 (2006) (citations omitted). The covenant of good faith and fair dealing may be implied, however, if it arises only regarding terms agreed to by the parties, and requires that the parties perform, in good faith, the obligations imposed by their agreement. *Id; see Lettunich v. Key Bank Nat. Ass'n*, 141 Idaho 362, 368, 109 P.3d 1104, 1110 (2005); *see also Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 243, 108 P.3d 380, 390 (2005) (holding that an action by one party that violates, qualifies or significantly impairs any benefit or right of the other party under a contract, whether express or implied, violates the covenant).

A material breach by one party will allow the other party to rescind the contract. *Ervin Const. Co. v. Van Orden*, 125 Idaho 695, 700, 874 P.2d 506, 511 (1993). A material breach is more than incidental and touches the fundamental purpose of the contract, defeating the object of the parties entering into the agreement. *Borah v. McCandless*, 147 Idaho 73, 79, 205 P.3d 1209, 1215 (2009). Whether there was a breach of the terms of the contract is a question of fact. *Id.*

Here, Brighton covenanted to preserve the Property for residential use by agreeing to the following Restrictive Covenants:

> 7. POST-CLOSING AGREEMENTS. In order to protect and enhance the value of the Property and adjacent properties, which are or will be owned by Buyer and/or Seller and/or entities related to Buyer and/or Seller, the parties covenant and agree to comply with the following requirements from and after the Closing Date (collectively, "Post-Closing Obligations"): . . .
>
> . . . .
>
> 7.2 Prior to the development of the Property and/or the Harris Property, each party agrees to submit to the other party the final landscape plan, unrecorded restrictive covenants and architectural guidelines in connection with

> such party's property (the "Final Plans"). The Final Plans shall provide for landscaping, architectural guidelines and restrictive covenants consistent with: (i) the quality and common theme of the Spring Creek and/or Mill District developments in Harris Ranch; and (ii) the Existing Governmental Approvals ("Development Standards").

(R. Vol. I, p. 185, § 7; Ex. "A" to Amended Third Party Complaint.)

In late 2006, however, far from enforcing the Restrictive Covenants in good faith, Brighton proactively negotiated the Property's conveyance to BSU, and ultimately to the School District, for the purpose of constructing a new East Junior High School, which Brighton knew could not be accomplished without eviscerating the application of the Restrictive Covenants to the Property. Brighton breached Section 7 of the Agreement by negotiating the conveyance to the School District, a party with eminent domain power, which "significantly impair[ed]" Harris's interest in the Restrictive Covenants, appraised at $2,250,000. *See Jenkins*, 141 Idaho at 243, 108 P.3d at 390 (holding that an action by one party that violates, qualifies or significantly impairs any benefit or right of the other party under a contract, whether express or implied, violates the covenant). Brighton not only breached the Agreement, but also impaired the monetary value of the Restrictive Covenants to Harris. *See id.*

Brighton's conduct is an abject failure to act in good faith to "protect and enhance the value of the Property" for residential use by negotiating the Property's conveyance to the School District, which resulted in the condemnation of the Restrictive Covenants in order to build a junior high school. (R. Vol. I, p. 185, § 7; Ex. "A" to Amended Third Party Complaint.) Further, Brighton's breach of the Agreement preceded the School District filing its *Complaint for*

Condemnation on May 21, 2007. (R. Vol. I, p. 16.) The district court cannot destroy Harris's previously existing breach of contract claims against Brighton simply by virtue of its finding that Harris no longer has the right to enforce the Restrictive Covenants against the 21.54 acres to be taken by the School District. *See Thompson v. Squibb,* 183 So. 2d 30, 33-34 (Fla. 2d DCA 1966) (holding that a landowner may not voluntarily and without at least some substantial prospect that some public authority will exercise the power of eminent domain covey or dedicate his property for a use, public or private, which would violate his covenants); *see also Crayder v. Seidman*, 87 Pa. D. & C. 118, (Pa. Com. Pl.1953) (holding that a restrictive covenant cannot be held to restrict the power of eminent domain but, where there is an act of an individual in an attempt to evade the restriction, and because a public body is given a gift, that does not force the conclusion that ipso facto the right to enforce the right to enforce the restriction evaporates). Accordingly, Brighton breached the Agreement and the implied covenant of good faith and fair dealing. *See Independence Lead Mines Co.*, 143 Idaho at 27, 137 P.3d at 414.

The Agreement specifically provided Harris with the following remedies in the event of Brighton's default: "If Buyer defaults under this Agreement, Seller may, at its sole and exclusive remedy, either: (i) terminate the Agreement and the Deposit previously delivered to Seller shall become liquidated damages; or (ii) seek specific performance of the terms of this Agreement." (R. Vol. I, p. 185, § 9.1; Ex. "A" to Amended Third Party Complaint.) Brighton's nullification of these remedies was itself a breach of the Agreement and the implied covenant of good faith of fair dealing. Further, even though these remedies are no longer available to Harris due to Brighton's breach, the district court has the discretion to fashion an equitable remedy for Harris.

See Kessler v. Tortoise Development, Inc., 134 Idaho 264, 265, 1 P.3d 292, 293 (2000) (holding that a court must balance the equities between the parties to determine whether specific performance is appropriate; if it would be inequitable to grant specific performance, the court has the discretion to award an equitable remedy based upon the unique circumstances of the case); *see also Murr v. Selag Corp.*, 113 Idaho 773, 785, 747 P.2d 1302, 1314 (Ct. App. 1987) (holding that a court in equity possesses discretion to fix a remedy so long as the court's choice is not contrary to established principles and is least disruptive to the underlying transaction from which the dispute arises). Under this precedent, Harris should be entitled to a meaningful remedy of the clearly established breach by Brighton.

Drawing all inferences in Harris's favor, Harris has sufficiently alleged the elements of claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Brighton impaired Harris's legitimate contractual interest in the Restrictive Covenants. Brighton, by its conduct, made the remedy provision of the Agreement meaningless. It failed to act in good faith to "protect and enhance the value of Property" for residential use by negotiating the Property's conveyance to the School District for the purpose of building a junior high school. *See Jenkins*, 141 Idaho at 243, 108 P.3d at 390. Because Harris stated a claim for relief, the district court erred in dismissing the breach of contract and breach of implied covenant of good faith and fair dealing claims. This is a separate, independent basis for reversing the lower court's decision. Harris should be permitted to present evidence of the damage caused by Brighton's breach of the Agreement and urge application of equitable remedies.

B. The Court Erred by Eradicating Harris's Constitutionally Protected Right to Enter into a Private Contract by Ruling that the Condemnation of the Restrictive Covenants as to the School District Destroyed Harris's Private Contractual Rights Against Brighton Arising Under the Restrictive Covenants Contained in the Agreement.

The lower court's *Order*, (R. Vol. II, p. 250A), eliminating Brighton's duties and obligations and Harris's remedies under the Agreement is neither a logical nor a legal application of the condemnation *Order and Partial Summary Judgment*. (R. Vol. I, p. 171.) It is, indeed, more seriously, unconstitutional. Harris and Brighton's right to contract freely without unreasonable restraint by the government is protected by the Idaho Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. *See e.g. Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972); *Witt v. U.S. Dept. of Air Force*, 444 F. Supp. 2d 1138, 1147 (W.D. Wash. 2006); *U.S. v. Seven Oaks Dairy Co.*, 10 F. Supp. 995 (D. Mass. 1935); *Curr v. Curr*, 124 Idaho 686, 691-692, 864 P.2d 132, 137-138 (1993) (*citing Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 1495, 84 L. Ed. 2d 494 (1985); *Application of Forde L. Johnson Oil Co.*, 84 Idaho 288, 372 P.2d 135 (1962)).

The Fifth Amendment to the United States Constitution provides that no person shall be "deprived of life, liberty, or property without due process of law." U.S.C.A. Const. Amend. 5. The Fourteenth Amendment also states that no State "shall deprive any person of life, liberty, or property, without due process of law." U.S.C.A. Const. Amend. 14. The Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual to contract . . ." *Roth*, 408 U.S. at 572. Further, the Constitution of the State of Idaho provides that all "men are by nature free and equal, and have certain inalienable right, among which are enjoying and

defending life and liberty; acquiring, possessing and protecting property . . ." IDAHO CONST. Art. 1, § 1. "The right to make contracts is both a liberty right and a property right, and is within the protection of the guarantee against the taking of property without due process of law." *Application of Forde L. Johnson Oil Co.*, 84 Idaho at 292. 372 P.2d at 137. Absent illegality, unconscionability, fraud, duress, or mistake, Harris and Brighton are bound by the terms of their Agreement. *See e.g. Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1460 (9th Cir. 1988). The district court may not interfere with their constitutionally protected right to contract. *Id.*

The district court pointed to none of those factors in summarily dismissing Harris's claims in its *Order.* (R. Vol. II, p. 250A.) Further, it eliminated Brighton's duties and obligations and Harris's remedies under the Agreement, based on an incorrect application of its own holding in the *Order and Partial Judgment*, when Brighton was not even a party to the suit. The court entered its *Order and Partial Judgment* on July 26, 2007. (R. Vol. I, p. 171.) Harris had filed its *Third Party Complaint* against Brighton, (R. Vol. I, p. 76), six days earlier, but Brighton did not appear until it filed its *Answer to Third Party Complaint* on August 21, 2007. (R. Vol. II, p. 225.) The court's *Order* adjudicating the parties' contract rights, to Brighton's benefit, on the basis of its *Order and Partial Judgment,* when Brighton had not appeared as a party to the suit, was unconstitutional and the court therefore erred. Drawing all inferences in Harris's favor, Harris has sufficiently alleged the elements of its claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Harris is entitled to offer evidence to support these claims, and the granting of the Motion to Dismiss was, therefore, an error. *See Young*, 137 Idaho at 104, 44 P.3d at 1159 (citations omitted).

II. The District Court Erred in Granting Brighton's Motion For Summary Judgment.

Summary judgment is an extreme remedy. *Real v. Driscoll Strawberry Assoc., Inc.*, 603 F.2d 748, 753 (9th Cir. 1979) (citations omitted). A motion for summary judgment should not be granted unless it is clear, beyond controversy, that the non-moving party is not entitled to recovery under any discernable circumstances. *Id.*

A motion for summary judgment must be construed "with due regard . . . for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (stating that "neither do we suggest that trial courts should act other than with caution in granting summary judgment").

A. There Is a Genuine Issue of Material Fact as to Whether Brighton Was Unjustly Enriched.

Unjust enrichment is the measure of recovery under a contract implied in law. *Gray v. Tri-Way Const. Serv., Inc.*, 147 Idaho 378, 388, 210 P.3d 63, 73 (2009); *Barry v. Pacific West Const., Inc.*, 140 Idaho 827, 834, 103 P.3d 440, 447 (2004). "A contract implied in law . . . 'is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent of the agreement of the parties . . .'" *Gray*, 147 Idaho at 388, 210 P.3d at 73 (citations omitted). The measure of recovery on an unjust enrichment claim is the actual amount of an enrichment which, as between two parties would be unjust for one party to retain. *See Farrell v. Whiteman*, 146 Idaho 604, 612, 200 P.3d 1153, 1161 (2009); *Gray*, 147 Idaho at 388-389, 210 P.3d at 73-74 (citations omitted); *Beco Constr. Co. v. Bannock Paving Co.*, 118 Idaho 463, 466, 797 P.2d 863, 866 (1990).

The plaintiff has the burden of proving that the defendant received a benefit and of proving the amount of the benefit which the defendants unjustly retained. *Gray,* 147 Idaho at 389, 210 P.3d at 74. Although damages need not be proven with mathematical precision, the damages, i.e., the value of any benefit unjustly received by the defendant in an action based on unjust enrichment, must be proven to a reasonable certainty. *Gillette v. Storm Circle Ranch*, 101 Idaho 663, 667, 619 P.2d 1116, 1120 (1980). "The amount of recovery to which a party is entitled in an unjust enrichment action is a question of fact." *Blaser v. Cameron*, 121 Idaho 1012, 1017, 829 P.2d 1361, 1366 (Ct. App. 1991) (*citing Anderson v. Schwegel*, 118 Idaho 362, 365, 796 P.2d 1035, 1038 (Ct. App. 1990); *Nelson v. Gish*, 103 Idaho 57, 59, 944 P.2d 980, 982 (Ct. App. 1982)).

The existence of an express agreement does not in and of itself signify that an action for unjust enrichment cannot be brought. *DBSI/TRI V v. Bender*, 130 Idaho 796, 805, 948 P.2d 151, 160 (1997). Rather, only when the express agreement is found to be enforceable is a court precluded from applying the equitable doctrine of unjust enrichment in contravention of the express contract. *Id.*; *see Wilhelm v. Johnston*, 136 Idaho 145, 152, 30 P.3d 300, 307 (Ct. App. 2001).

Here, if this Court affirms the district court's *Order* that the condemnation of the Restrictive Covenants makes the Restrictive Covenants unenforceable, Harris is without a real remedy under the Agreement for the breach of contract and implied covenant of good faith and fair dealing claims. Under these circumstances, the district court should, at a minimum, have

allowed Harris to proceed under the equitable doctrine of unjust enrichment. *See DBSI/TRI V,* 130 Idaho at 805, 948 P.2d at 160.

The record establishes that in December 2005, Brighton bought the Property, subject to the Restrictive Covenants contained in the Agreement, for $2,154,000.[5] (R. Vol. I, p. 185; Ex. "A" to Amended Third Party Complaint.) Less than a year later, Brighton violated its Restrictive Covenants and negotiated the sale of approximately one-half of the Property for $6,099,682.04. (R. Exhibit 12, ¶¶ 31-33; Turnbull Affidavit and Exs. 5-9 thereto.) If the lower court is correct that Brighton's breach of the Agreement is absolved because of the condemnation of Harris's interest in the Restrictive Covenants destroying Harris's right to enforcement, then Harris is entitled to bring its unjust enrichment claim. The record establishes that Harris is in a position to prove that Brighton was unjustly enriched in the amount of the difference, $3,945,682 and certainly no less than the $2,250,000 for the value of the Restrictive Covenants, according to Paul Hyde, MAI. (R. Exhibit 15, pp. 18-19; Ex. "A" to Hyde Affidavit.) The record below proves a material issue of fact exists on the unjust enrichment claim. We ask this Court to rule that if the district court is upheld in its decision, that Harris lost its private contractual rights under the Agreement because of the condemnation, then Harris be allowed to pursue the unjust enrichment claim. If the Court should so rule, we respectfully ask the Court to remand the case

[5] The purchase price for the entire property was $4,307,000 under the Agreement, which was based on the estimated acres, to be adjusted based on a survey with the ultimate purchase price calculated at $100,000 per acre. Thus, the prorated price Brighton paid for the 21.54-acre portion of the Property for the East Junior High School parcel was $2,154,000. (R. Vol. I, p. 185, ¶ 2; Ex. "A" to Amended Third Party Complaint.)

to the lower court for trial on the unjust enrichment claim. *See Estate of Becker*, 140 Idaho at 525, 96 P.3d at 626 (citations omitted).

III. Harris is Entitled to an Award of Costs and Attorney Fees on Appeal Pursuant to the Agreement, I.C. §§ 12-107, 12-120(3), and Idaho Appellate Rules ("I.A.R.") 40 and 41.

I.C. § 12-120(3) provides for reasonable attorney fees for the prevailing party "in any commercial transaction." *Cannon v. Perry*, 144 Idaho 728, 731, 170 P.2d 393, 396 (2007). Commercial transactions are "all transactions except transactions for personal or household purposes." I.C. § 12-120(3); *Cannon*, 144 Idaho at 732, 170 P.2d at 397. For a prevailing party to avail itself of I.C. § 12-120(3), there must be a commercial transaction that is integral to the claim, and the commercial transaction must be the basis upon which recovery is sought. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001). The critical test is whether the commercial transaction comprises the gravamen of the lawsuit. *Rahas v. Ver Mett*, 141 Idaho 412, 415, 111 P.3d 97, 100 (2005). I.C. § 12-120(3) does not require that there be a contract. *Blimka v. My Web Wholesaler, L.L.C.*, 143 Idaho 723, 152 P.3d 594 (2007). Costs of appeal are awarded in the discretion of the courts when a new trial is ordered, when a judgment is modified, and in all other cases, to the prevailing party. I.C. § 12-107.

Here, Harris seeks recovery on the basis of the Agreement between it and Brighton for the purchase and sale of the Property which, because it is not for household or personal purposes, constitutes a commercial transaction. *See Cannon*, 144 Idaho at 732, 170 P.2d at 397. In addition, the Agreement and the Restrictive Covenants regarding the enhancement and future

development of the Property, and Brighton's breach thereof, comprise the "gravamen of the lawsuit." *Rahas*, 141 Idaho at 415, 111 P.3d at 100. Further, the Agreement provides the prevailing party to an action filed to enforce the terms and conditions of the Agreement "reasonable attorneys' fees and costs through all levels of the action." (R. Vol. I, p. 185, § 9.4; Ex. "A" to Amended Third Party Complaint.) Because the district court erred in both granting Brighton's Motion to Dismiss and Motion for Summary Judgment, Harris is the prevailing party, and is entitled to an award of costs and attorney fees. I.C. §§ 12-107, 12-120(3); I.A.R. 40, 41; (*see* R. Vol. I, p. 185, § 9.4; Ex. "A" to Amended Third Party Complaint.)

CONCLUSION

Harris's Third Party Complaint states a valid claim against Brighton for breach of contract and breach of the implied covenant of good faith and fair dealing, and the district court erred in granting Brighton's Motion to Dismiss. The district court likewise erred in granting Brighton's Motion for Summary Judgment because genuine issues of material fact exist as to whether Brighton was unjustly enriched. Harris is entitled to a reversal of the lower court's flawed decision and to have its day in court.

RESPECTFULLY SUBMITTED this 5th day of November, 2009.

GREENER BURKE SHOEMAKER P.A.
Richard H. Greener
Fredric V. Shoemaker
Lisa M. McGrath
950 W. Bannock Street, Suite 900
Boise, ID 83702
Telephone: 208/319-2600
Facsimile: 208/319-2601
Email: *rgreener@greenerlaw.com*
fshoemaker@greenerlaw.com
lmcgrath@greenerlaw.com

By _____
Richard H. Greener
Attorneys for Third Party Plaintiff/Appellant
Harris Family Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of November, 2009, two true and correct copies of the within and foregoing instrument was served in the designated manner upon:

David R. Lombardi
Robert B. White
Givens Pursley LLP
601 W. Bannock Street
P.O. Box 2720
Boise, ID 83701-2720

☒ U.S. Mail
☐ Facsimile: (208) 388-1300
☐ Hand Delivery
☐ Overnight Delivery
☐ Email: *drl@givenspursley.com*
rbw@givenspursley.com

Richard H. Greener
Fredric V. Shoemaker
Lisa M. McGrath