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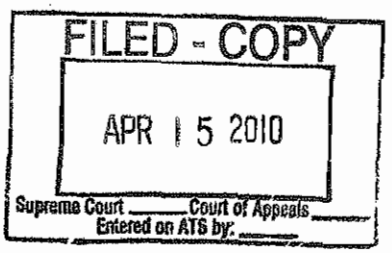
Fazzio v. Mason Appellant's Brief Dckt. 36068

IN THE SUPREME COURT OF THE STATE OF IDAHO

FRANK J. FAZZIO, JR. and CINDY ANN FAZZIO, husband and wife, and IDAHO LIVESTOCK COMPANY, LLC, an Idaho Limited Liability Company, Plaintiffs/Respondents, vs. EDWARD J. MASON, an individual, Defendant/Appellant.	)	Supreme Court Case No. 36068



APPELLANT'S BRIEF

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

Honorable Kathryn A. Sticklen and Richard D. Greenwood, District Judges, Presiding

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I.

STATEMENT OF THE CASE

A. Nature Of The Case

This case is about the appropriate remedy to be applied in the case of a breach by the purchaser of a contract to purchase real estate. Rather than award the standard measure of damages recognized by this Court – the difference between the contract price and the value of the real estate at the time of breach – the District Court ordered specific performance of the contract. The District Court's order of specific performance is erroneous in that it ignored two fundamental rules of equity: (1) that a court should not order an equitable remedy, including specific performance, that is not feasible; and (2) that equity will not intervene where the aggrieved party has a plain, speedy, adequate, and complete remedy at law.

B. Statement Of Facts And Course Of Proceedings

1. Background Of Mr. Mason

Mr. Mason has been developing and building single-family and multi-family communities in Idaho for seventeen years. Since 1990, he has been involved in the development of approximately 30 single-family subdivisions and 8 multi-family projects. Each of those subdivisions/projects involved some element of bank or investor financing. *See* R., Exh. 1 (sealed)[1] (Affidavit of Edward J. Mason, ¶ 3).

2. The Agreements To Purchase The Subject Properties, And Mr. Mason's Breach Of Those Agreements

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[1] Many of the facts relevant to this case are taken from Mr. Mason's financial records, which are confidential in nature and are subject to a Protective Order entered by the District Court. The affidavits setting forth confidential financial information were filed under seal with the District Court and have been lodged with this Court as part of a sealed record.

On April 12, 2006, Mr. Mason entered into two separate Real Estate Purchase and Sale Agreements. *See* R., Exh. 2 (Affidavit of Frank J. Fazzio, Jr., ¶¶ 2-3). The first Real Estate Purchase and Sale Agreement provided that Mr. Mason would purchase a residence and a parcel of real property on which the residence is located from Respondents Dr. and Mrs. Fazzio for the price of $1,530,000. *Id.* The second Real Estate Purchase and Sale Agreement provided that Mr. Mason would purchase two parcels of real property consisting of farmland from Respondent Idaho Livestock Company, LLC, for the price of $2,000,000. *Id.* at ¶ 4. Each Real Estate Purchase and Sale Agreement provided for a closing date of February 26, 2007. *Id.* Mr. Mason was not able to close on the purchase of the properties on February 26, 2007. *Id.* at ¶ 6. Thus, Mr. Mason was in breach of both Real Estate Purchase and Sale Agreements as of that date.

The parties subsequently entered into two separate Agreements to Resolve Dispute Arising Out of Real Estate Purchase and Sale Agreement Dated April 12, 2006 (the "Agreements to Purchase the Subject Properties").[2] *Id.* at ¶ 9, Exhs. A-B. The Agreements to Purchase the Subject Properties provided that they superseded the original Real Estate Purchase and Sale Agreements. *Id.* The terms of the Agreements to Purchase the Subject Properties required Mr. Mason to close on the purchase of the Subject Properties by December 21, 2007 if Mason obtained plat approval by that date from the city of Kuna. *Id.* If plat approval was not obtained by December 21, 2007, then Mr. Mason was required to close by March 21, 2008. *Id.* The city of Kuna approved the preliminary plat prior to December 21, 2007, but Mr. Mason was not able

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[2] The properties that are the subject of the Agreements to Purchase the Subject Properties are the same properties Mr. Mason had previously agreed to purchase and will hereinafter be referred to as the "Subject Properties."

to close on the purchase of the properties. *Id.* at ¶ 11. Thus, Mr. Mason was in breach of the Agreements to Purchase the Subject Properties as of December 21, 2007.

3. Mr. Mason's Inability To Close On The Purchase Of The Subject Properties

At all times during the negotiations for the purchase of the Subject Properties, Mr. Mason believed that he would be able to close on the purchase of the Subject Properties. The real estate market in Idaho was strong and bank and/or investor financing for real estate developments was readily available. Subsequent to the negotiations to purchase the Subject Properties, however, there has been a significant downturn in the Idaho real estate market, property values have fallen, and the availability of financing for real estate developments has decreased substantially. *See* R., Exh. 1 (sealed) (Affidavit of Edward J. Mason, ¶¶ 5-6).

At all times subsequent to the negotiations to purchase the Subject Properties, Mr. Mason has made diligent efforts to close on the purchase of the Subject Property. However, he simply has been unable to do so because he cannot obtain the necessary financing. Attempts have been made to obtain financing from many different sources. *See id.* at 7-8.

The original plan was to obtain financing through First Horizon Construction Lending ("First Horizon"). First Horizon initiated an appraisal on the Subject Property, which indicated an "infeasibility issue with the project, in that the costs to acquire/develop exceed values generated." Furthermore, with the downturn in the Idaho real estate market, the Boise office of First Horizon closed in December 2007, laying off all employees, including its loan manager. Before going out of business in December 2007, after extensive financial documentation and meetings, First Horizon approved a financing package that required a high equity position. First Horizon agreed to finance just over $1,800,000 of the purchase price. When Mr. Mason was

unable to obtain an equity partner for the remainder of the purchase price, he informed Dr. Fazzio of the situation and requested that he agree to carry a portion of the financing through an owner-financing arrangement. Dr. Fazzio refused. *See id.* at 9.

In January 2008, First Horizon announced that it was closing its national construction lending division and all pending loan financing was terminated. Thus, financing through First Horizon is no longer a viable option. *See id.* at 10-11.

Mr. Mason also attempted to obtain financing through Eagle Equity Group, which is an investor group that has helped finance some of Mr. Mason's other developments. The Eagle Equity Group declined to finance the purchase of the Subject Property. *See id.* at 12.

Mr. Mason attempted to obtain financing through the RBC Builder Financial Group, which helped finance the acquisition and development of the Galiano Subdivision, a subdivision Mr. Mason is developing adjacent to the Subject Property. RBC informed Mr. Mason that no additional financing of a large subdivision would be approved due to the excess lot inventory and poor market conditions in the area. RBC announced in March 2008 that it was closing its western offices and that it would only have ongoing U.S. operations in the Southeast and Texas. Thus, financing in Idaho through the RBC is no longer available. *See id.* at 13.

Mr. Mason attempted to obtain financing through Fred Berman, who has invested in many of his developments. Mr. Berman declined to invest in the project. *See id.* at 14.

Mr. Mason attempted to obtain financing through Magnet Bank, which is currently financing one of his developments, the Ambleside subdivision. The Magnet Bank declined to help finance the purchase of the Subject Properties due to the depressed market conditions and the excess lot inventory and current financing of the Ambleside subdivision. In November 2007,

the Eagle Magnet Bank was shut down overnight with employees arriving to locked doors. *See id.* at 15.

In February 2008, Mr. Mason attended a National Association of Homebuilders convention. Mr. Mason presented information regarding the financing of the Subject Properties to various banking and investor professionals attending the conference. He encountered a general lack of financing available for development projects due to the depressed real estate and financial markets. The only individual who expressed interest in the project was Meg Kelley, who is a Commercial & Residential Loan Officer with the Patriot National Bank in Stamford, Connecticut, and who also has ties to several independent investors and hedge funds. *See id.* at 16.

Mr. Mason provided additional information and financial documentation to Meg Kelley, but the Patriot National Bank was not interested in providing financing. However, Meg Kelley located an investor from New York that was interested in a conference call to discuss the project. Ted Mason Signature Homes, Inc. staff, Meg Kelley and the investor had a conference call to discuss feasibility. The investor reviewed the financial ratio requirements of investment as well as terms. Mr. Mason is not able to satisfy these high equity-to-debt ratios or liquidity requirements, so the investor was not interested in investing in any project at this time with Mr. Mason. In further conversations with Meg Kelly, she indicated that Mr. Mason and his companies would need to have a stronger balance sheet before national investors would be interested in reviewing specific projects. *See id.* at 17.

Mr. Mason has also spoken with three other private lenders: Hopkins Financial Services; Excelsior Management; and Seattle Funding Group, Ltd. Each of these private lenders would require an equity investor, which Mr. Mason has not been able to obtain. *See id.* at 18.

Mr. Mason continues to look for a way to finance the purchase of the Subject Property. Indeed, he would still like to close on the purchase of the Subject Property. However, given his current financial situation, the depressed real estate market and the increasingly tightened credit market, there is no way he can close on the purchase of the Subject Property. *See id.* at 4, 19.

Moreover, closing on the properties in question would not be made possible by liquidating assets. The vast majority of Mr. Mason's assets are in the form of real property, which serves as the collateral on bank loans. Not only would it be extremely difficult to sell that property under the current real estate market conditions, but in most cases Mr. Mason already owes the banks more than the appraised value of the property. Thus, liquidating those assets would not provide any cash with which to close on the properties. *See* R., Exh. 3 (sealed) (Supplemental Affidavit of Edward J. Mason, ¶¶ 3-11).

In order to close on the Idaho Livestock Company, LLC property, Mr. Mason would need to have cash available in the amount of $2,000,000.00 plus interest at the rate of 12% per annum. In order to close on the Fazzio property, Mr. Mason would need to have cash available in the amount of $1,530,000.00 plus interest at the rate of 12% per annum. Thus, the total amount of cash that would be required to close on the Subject Properties is well over $3.5 Million. Mr. Mason does not have in his possession, nor does he have access to, the over $3.5 Million that would be required to close on the purchase of the Subject Properties. *See* R., Exh. 1 (sealed) (Affidavit of Edward J. Mason, ¶ 22).

If this Court were to affirm the District Court's Order of specific performance ordering Mr. Mason to close on the Subject Property, he simply will not be able to comply with that order.

4. Procedural Posture

Respondents filed the Complaint on January 22, 2008. R., p. 6-68. The Complaint alleged that Mr. Mason breached his contractual obligations under the Agreements to Purchase the Subject Properties. Respondents subsequently filed a Motion for Summary Judgment asking the Court to either (1) confirm the Agreements to Purchase the Subject Properties as arbitration awards; or (2) enter a judgment for specific performance. Specifically, Respondents requested a "Judgment for specific performance . . . . [r]equiring Mason to immediately close on the purchase of the Subject Properties." R., Exh. 1, p. 10.

Mr. Mason opposed the motion for summary judgment on grounds that specific performance should not be ordered because it would be impossible for Mr. Mason to close on the purchase of the subject properties. R., Exh. 2 (sealed). Mr. Mason relied on this Court's repeated recognition of the equitable rules that a court of equity should not order a remedy, including specific performance, that is not feasible and that an equitable remedy should not be ordered where there exists and adequate remedy at law. Mr. Mason did not contest the fact that he breached the Agreements to Purchase the Subject Properties, nor did Mr. Mason assert the substantive impossibility of performance defense. Despite the fact that the substantive impossibility of performance defense was never asserted by Mr. Mason, the District Court, the Honorable Kathryn A. Sticklen, asked the parties to provide supplemental briefing on the substantive impossibility of performance defense. R., Exhs. 4-5. Mr. Mason responded by

explaining that the substantive impossibility of performance defense is inapplicable to this case and is a different defense than that being asserted by Mr. Mason. R., Exh. 4.

In a December 30, 2008 Order, Judge Sticklen granted Respondents' Motion for Summary Judgment, ordering that "[s]pecific performance on the contract is to be completed within thirty days of the date of this order; if not so accomplished, a judgment for the purchase price may be entered, upon satisfaction of which the properties must be conveyed to Mason." R., pp. 78-83. As Mr. Mason had previously made clear, he was unable to comply with the order of specific performance because he did not have the means to close on the Subject Properties.

Mr. Mason appealed from the Order, but that appeal was dismissed as premature because a final judgment had not yet been issued. Mr. Mason then sought reconsideration of the Order, which was denied by the Honorable Richard D. Greenwood, who had since replaced Judge Sticklen. Judge Greenwood entered a final Judgment (the "Judgment") in favor of Respondents Dr. and Mrs. Fazzio in the principal amount of $1,530,000, plus interest in the amount of $412,471.08. *See* Order to Augment the Record, dated November 17, 2009, Exh. 1. Judge Greenwood also entered Judgment in favor of Respondent Idaho Livestock Company, LLC, in the amount of $2,000,000, plus interest in the amount of $539,177.66. *Id.* The Judgment further provides that Respondents have a valid, subsisting vendor's lien against the Subject Properties and that said vendor's liens may be enforced through sale of the Subject Properties in the same manner and subject to the same restrictions as the execution sale of property subject to a decree of foreclosure as set forth in Chapter 1 of Title 6, Idaho Code. *Id.* Judge Greenwood also awarded attorneys' fees and costs in favor of respondents in the sum of $36,999.50. *See* Order Granting Motion to Augment Record, dated October 6, 2009.

II.

ISSUES PRESENTED ON APPEAL

(1) Whether the District Court erred in ordering specific performance of the Agreements to Purchase the Subject Properties, where the Respondent had an adequate remedy at law and where the order of specific performance was not feasible.

(2) Whether, upon reversal of the order granting specific performance, this Court should also reverse the award of attorney fees on grounds that Respondent is not the prevailing party.[3]

III.

ARGUMENT

A. Standard Of Review

The Court reviews an order of specific performance for an abuse of discretion. *Mallory v. Watt*, 100 Idaho 119, 123, 594 P.2d 629, 633 (1979). When determining whether a district court abused its discretion, the Court considers three factors: "(1) whether the trial court correctly perceived the issue as one of discretion, (2) whether it acted within the boundaries of its discretion and consistently with applicable legal principles, and (3) whether it reached its

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[3] Mr. Mason had initially indicated that he would be appealing the District Court's order of attorney fees with regard to the amount of the attorneys' fees award. After further review of the issue, Mr. Mason has elected not to pursue an appeal of the reasonableness of the amount of the attorney fees award and to focus this appeal only on the order of specific performance. Upon reversal of the order of specific performance, however, Respondent will not be the prevailing party, and the award of attorney fees should also be reversed as premature.

decision through an exercise of reason." *Edmunds v. Kraner*, 142 Idaho 867, 873, 136 P.3d 338, 344 (2006).

B. The District Court Erred In Ordering Specific Performance

1. Specific Performance Is Not Appropriate Because It Would Not Be Possible For Mr. Mason To Comply With The Order Of Specific Performance

"There is no legal right to specific performance." *Kessler v. Tortoise Development, Inc.* 134 Idaho 264, 270, 1 P.3d 292, 298 (2000). Instead, specific performance "is an extraordinary remedy that can provide relief when legal remedies are inadequate." *Id.* "[S]pecific performance is an equitable remedy and should not be granted when it would be unjust, oppressive, or unconscionable." *Id.* The decision to grant specific performance is a matter within the District Court's discretion. *Id.* "When making its decision the court must balance the equities between the parties to determine whether specific performance is appropriate." *Id.*

In ordering specific performance, the District Court did not recognize, much less follow, the well-established rule that a court should not order an equitable remedy, including specific performance, which is not feasible. *See, e.g., Anderson v. Whipple*, 71 Idaho 112, 125, 227 P.2d 351, 359 (1951), overruled on other grounds by *David Steed and Associates, Inc. v. Young*, 115 Idaho 247, 766 P.2d 717 (1988) ("Equity will not enter a decree for specific performance the enforcement of which is not practicable or feasible."); *Paloukos v. Intermountain Chevrolet Co.*, 99 Idaho 740, 745-46, 588 P.2d 939, 944-45 (1978) (dismissing claim for specific performance because "[i]t is well established that the courts will not order the impossible"); *Childs v. Reed*, 34 Idaho 450, 202 P. 685, 686 (1921) ("Where the contract is of such a nature that obedience to the

decree cannot be obtained by the ordinary processes of the court, equity will decline to interfere.").

It is indisputable that Mr. Mason does not have the approximately $3.5 Million that would be required to close on the Subject Properties as ordered by the Court. *See* R., Exhs. 1, 3 (sealed). Thus, the District Court erred in ordering specific performance.

2. The Equitable Rule That Equity Courts Should Not Order The Impossible Is Separate And Distinct From The Substantive Impossibility Of Performance Defense

The rule that equity should not order the impossible is an equitable rule, not a substantive defense. Rather than apply the equitable rule, the Court applied and rejected the substantive contract defense of impossibility of performance as if the two rules were one and the same. The District Court's analysis was erroneous in that the two rules are not one and the same. The equitable rule merely precludes an order of equitable relief and leaves the plaintiff with a remedy in law, i.e., damages. *See, e.g., Suchan v. Rutherford*, 90 Idaho 288, 410 P.2d 434 (1966) (reversing the district court's order of specific performance of a real estate contract, and remanding to the district court to calculate damages). In other words, the equitable rule cited by Mr. Mason goes not to the issue of liability, but to the issue of what remedy is appropriate. The substantive impossibility of performance doctrine is a complete defense to a contract and leaves the plaintiff with no remedy at all, either equitable or at law. *See Landis v. Hodgson*, 109 Idaho 252, 257, 706 P.2d 1363, 1368 (Ct. App. 1985) (explaining that the substantive doctrine of impossibility of performance results in the party asserting the defense being "relieved of his duty to perform") (quoting RESTATEMENT (SECOND) OF CONTRACTS § 264 (1981)).

"The doctrine of impossibility operates to excuse performance when the bargained-for performance is no longer in existence or is no longer capable of being performed due to the unforeseen, supervening act of a third party." *Haessly v. Safeco Title Ins. Co. of Idaho*, 121 Idaho 463, 465, 825 P.2d 1119, 1121 (1992). "A *sine qua non* for application of the doctrine is that the parties must have contracted, expressly or in necessary contemplation, with reference to continued existence of the specific thing as a condition essential to performance." *Id.*

The above described impossibility of performance doctrine serves as a defense to a breach of contract claim. In other words, the impossibility of performance excuses the breach. However, Mr. Mason has not ever asserted impossibility of performance as a defense to Respondents' breach of contract claim because the authorities generally hold that financial inability to perform does not excuse a breach. Moreover, "impossibility that is only temporary will not act to discharge a contractual obligation if the contract can yet be performed after the impossibility ceases." *Sutheimer v. Stoltenberg*, 127 Idaho 81, 85, 896 P.2d 989, 993 (Ct. App. 1995). Impossibility of performance for purposes of excusing a breach of contract is simply not an issue in this case.

Despite the fact that the impossibility of performance defense was never asserted by Mr. Mason, Judge Sticklen asked the parties to provide supplemental briefing on the impossibility of performance doctrine in connection with Plaintiff's Motion for Summary Judgment. *See* R., Exhs. 3-4. Mr. Mason provided supplemental briefing on the issue, explaining the difference between the equitable rule that equitable courts should not order the impossible and the substantive defense of impossibility of performance. *See* R., Exh. 4. Mr. Mason expressly stated that he was not relying on the substantive impossibility of

performance defense. *Id.* at p. 3 ("Mr. Mason is not currently asserting impossibility of performance as a defense to Dr. Fazzio's breach of contract claim because the authorities generally hold that financial inability to perform does not excuse a breach. . . . Impossibility of performance for purposes of excusing a breach of contract is not at issue for purposes of Dr. Fazzio's motion for summary judgment.").

Even though Mr. Mason specifically disclaimed any reliance on the substantive impossibility of performance defense, Judge Sticklen proceeded to grant Plaintiff's Motion for Summary Judgment by concluding that the substantive impossibility of performance doctrine is inapplicable. Specifically, she explained:

> Furthermore, the Idaho Court of Appeals recently noted that "[m]ost importantly it is the task itself which must be impossible – it is not enough that the particular promissor is unable to perform the task if it would be possible for a different promissor to perform." *State v. Chacon*, [146 Idaho 520, (Ct. App. 2008)]. While this case was criminal in nature, it is still persuasive Idaho dicta on the issue as it relates to the enforcement of contracts.

R., p. 83; *see also, id.* at p. 82 (citing *Christy v. Pilkington*, 273 S.W. 2d 533 (Ark. 1954), for the proposition that the substantive defense of impossibility of performance does not apply to a "subjective impossibility" of performing).

Mr. Mason does not disagree with the District Court's conclusion that the substantive impossibility of performance defense is inapplicable. Indeed, Mr. Mason conceded the point. The problem is that the District Court did not address the equitable rule that a court in equity should not order the impossible.

In ordering specific performance, the District Court abused its discretion in that it applied the wrong legal principle. *See Edmunds v. Kraner*, 142 Idaho at 873 (explaining that, in

determining whether a district court has abused its discretion, the Court should look to whether the district court "acted within the boundaries of its discretion and consistently with applicable legal principles.") (emphasis added); *see also State of Idaho v. Watkins*, ___ Idaho ___, ___ P.3d ___, 2009 Opinion No. 151, Docket No. 35687 (December 24, 2009), wherein the Court defined "judicial discretion" to mean:

> the discretionary action of a judge or court . . . bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained. It is not the indulgence of a judicial whim, but the exercise of judicial judgment, based on facts and guided by law, or the equitable decision of what is just and proper under the circumstances. It is a legal discretion to be exercised in discerning the course prescribed by law and is not to give effect to the will of the judge, but to that of the law.

Id. (citing BLACK'S LAW DICTIONARY).

Although applied in the context of the standard of review for evidentiary rulings, the principles guiding the exercise of judicial discretion in determining an equitable remedy should be the same. The District Court did not recognize, much less apply, the equitable rule that a court in equity should not order the impossible. Rather, the District Court reached its decision by applying the substantive impossibility of performance of defense, which simply is inapplicable to this case.

3. The Appropriate Remedy Is An Award Of Damages

This Court has recognized on many occasions that the "usual measure of actual damages for a purchaser's breach of contract for sale of realty is the difference between the contract price and the market value of the property at time of breach, plus rental value for any period of possession by the purchaser." *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 261, 846 P.2d

904, 912 (1993); *see also Lawrence v. Franklin*, 113 Idaho 895, 749 P.2d 1020 (Ct. App. 1988); *Smith v. King*, 100 Idaho 331, 597 P.2d 217 (1979). The Court has adopted the following analysis with regard to damages for breach of a real estate contract:

> The general rule applied where the purchaser under a real estate contract refuses to go through with his purchase is that he is liable for the vendor's loss of bargain, plus any appropriate consequential damages. This means the vendor will recover the difference between the market value and the contract price on the date of breach or on the date at which he regains possession of the land.... The rule is that the vendor's loss is measured by the market price of the property as of breach date, not the price he obtained on resale at a later date. The price obtained on resale may, however, be sufficient evidence of the market value at the date of breach, provided market conditions are similar and the time lapse between the date of breach and the resale is not great.

Lipsky, 123 Idaho at 261 (quoting Dobbs, HANDBOOK ON THE LAW OF REMEDIES, § 12.11 p. 855).

The measure of damages is clear, and specific performance of the Agreements to Purchase the Subject Properties is not appropriate in light of the availability of this legal remedy. "The basic, underlying rule is that equity will not intervene where the aggrieved party has a plain, speedy, adequate, and complete remedy at law." *Suchan v. Rutherford*, 90 Idaho 288, 295, 410 P.2d 434 (1966). In *Suchan*, this Court held that the district court had abused its discretion in ordering specific performance in favor of the vendor of real estate because the vendor had an adequate remedy at law in the form of damages:

> It cannot be seriously contended that the remedy at law via damages was not adequate, plain, speedy, and complete in this case. Plaintiffs commenced the action thirty-seven days after execution of the contract. They had not taken possession of the property. There was no rental value, nor any depreciation or enhancement in the value of the property, to be considered.

> Vendors' damages were readily ascertainable. They could have been made whole with a minimum of delay and inconvenience. A judgment for the amount determined would have ended the controversy promptly.

Id., 90 Idaho at 303.

Those facts can be contrasted with the facts in *Perron v. Hale*, 108 Idaho 578, 701 P.2d 198 (1985), wherein the Court ordered specific performance of a real estate contract. In awarding specific performance, the Court focused on the fact that the house was of a "unique construction" and was "located in a seasonal recreation area with a limited marketing season." *Id.*, 108 Idaho at 583. More importantly, the house had substantially deteriorated due to the lack of occupancy and "the buyers had the lower level of the house altered and partially finished to their particular desires, and buyers had done substantial damage to the walls upstairs and down while attempting to discover building defects." *Id.* These facts would have made it difficult to calculate damages. Notably, in ordering specific performance, the Court specifically recognized that the order of specific performance was feasible in that the buyers "had sufficient cash (the proceeds from the sale of the Nevada property) to purchase the house." *Id.*

Here, there is no reason Respondents would not be fully compensated by an award of damages. Mr. Mason breached the Agreements to Purchase the Subject Properties on December 21, 2007, and the Respondents filed their Complaint just 31 days later. Damages can be easily calculated by ascertaining the value of the Subject Properties as of that date, and awarding Respondents the difference between that value and the contract price. There is no evidence that

any the Subject Properties are unique or have deteriorated in any way.[4] Thus, the standard measure of damages – the difference between the contract price and the value of the Subject Properties as of December 21, 2007 – is the appropriate measure of damages. Given the availability of an adequate remedy, it was an abuse of discretion for the District Court to order specific performance.

4. The Order Of Specific Performance Results In A Windfall To Respondents

The remedy ordered by the District Court is clearly inappropriate as it will result in a windfall to Respondents. The District Court entered a Judgment totaling almost $4.5 Million, which is the entire contract price of the Subject Properties, plus interest. Mr. Mason obviously cannot satisfy the Judgment. The Judgment further provides that Respondents have a valid, subsisting vendor's lien against the Subject Properties and that said vendor's liens may be enforced through sale of the Subject Properties in the same manner and subject to the same restrictions as the execution sale of property subject to a decree of foreclosure as set forth in Chapter 1 of Title 6, Idaho Code. Thus, Respondents will be able to satisfy the Judgment by foreclosing on their vendor's lien and having the properties sold at a foreclosure sale. When the Subject Properties are sold, Respondents will be entitled to a deficiency judgment. *See* Idaho Code § 6-108. That deficiency judgment will be measured by the difference between the total judgment and the "reasonable value" of the Subject Property on the date of foreclosure.

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4 Respondents may contend that Mr. Mason's actions resulted in a Kuna sewer LID (Local Improvement District) encumbrance on the Subject Properties in the amount of approximately $400,000. Any damages resulting from the LID encumbrance, however, are easily ascertainable and can be included as a measure of damages.

Respondents will likely credit bid a portion of the judgment and walk away with the Subject Property and a very large deficiency judgment.

Upon first glance, the measure of the deficiency judgment may look similar to the standard measure of damages on breach of contract cases. Upon closer inspection, however, there is a substantial difference. The standard measure of damages for a breach of real estate contract is the "difference between the contract price and the market value of the property at time of breach." *Lipsky*, 123 Idaho at 261, 846 P.2d 904, 912 (1993). In contrast, the measure of a deficiency judgment would be the difference between the total Judgment and the value of the Subject Properties at the time of the foreclosure sale. *See* Idaho Code § 6-108. The difference is likely substantial in light of the declining real estate values in Idaho.

Mr. Mason agreed to purchase the Subject Properties on April 12, 2006, close to the height of the Idaho real estate bubble. He was in breach of the Agreements to Purchase the Subject Properties on December 21, 2007. By that time, the Idaho real estate bubble had burst, and real estate values were declining. The value of the Subject Properties as of December 21, 2007 was certainly lower than the contract price, and the Respondents would be entitled to damages in the amount of the difference (likely hundreds of thousands of dollars).

Since that time, however, real estate values have plummeted. By the time the Subject Properties are sold in a foreclosure sale, the value of the Subject Properties will almost certainly be much lower (likely hundreds of thousands, if not over a million, dollars). At the end of the day, the deficiency judgment against Mr. Mason will certainly be much higher than a damages judgment would have been. The deficiency judgment will be much larger than the difference

between the contract price and the value of the property at the time of the breach. Thus, Respondents will walk away with a windfall.

C. The Order Of Attorneys' Fees Should Be Reversed

If this Court reverses the order of specific performance, this case should be remanded to the District Court for a determination of an appropriate remedy at law. Upon remand, Respondent will no longer be the prevailing party. Respondent may be the prevailing party at some future time, but not until after an appropriate remedy at law has been ordered after remand.

IV.

CONCLUSION

This case is a standard, run-of-the-mill breach of contract case. Mr. Mason has never contested that he is in breach of the Agreements to Purchase the Subject Properties. Rather, the only issue in this case is the appropriate remedy for that breach. The appropriate remedy is the standard damages remedy – the difference between the contract price and the value of the property at the time of breach – that this Court has awarded on multiple occasions in connection with the breach of a real estate contract. By ordering specific performance, the District Court ignored the "basic, underlying rule . . . that equity will not intervene where the aggrieved party has a plain, speedy, adequate, and complete remedy at law." *Suchan*, 90 Idaho at 295. Moreover, the District Court erred by failing to apply the correct legal principle that a court should not order an equitable remedy that is not feasible. Instead, the Court applied and rejected the inapplicable legal defense of impossibility of performance. For these reasons, Mr. Mason respectfully asks that this Court reverse the order of summary judgment and remand to the District Court with instructions to conduct proceedings to determine an appropriate remedy

measured by the difference between the contract price and the value of the Subject Property at the time of breach.

RESPECTFULLY SUBMITTED this 15th day of April, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 2010, I caused to be served a true copy of the foregoing APPELLANT'S BRIEF by the method indicated below, and addressed to each of the following:

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IN THE SUPREME COURT OF THE STATE OF IDAHO

FRANK J. FAZZIO, JR. and CINDY ANN FAZZIO, husband and wife, and IDAHO LIVESTOCK COMPANY, LLC, an Idaho Limited Liability Company, Plaintiffs/Respondents, vs. EDWARD J. MASON, an individual, Defendant/Appellant.	)	Supreme Court Case No. 36068

APPELLANT'S BRIEF

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

Honorable Kathryn A. Sticklen and Richard D. Greenwood, District Judges, Presiding

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I.

STATEMENT OF THE CASE

A. Nature Of The Case

This case is about the appropriate remedy to be applied in the case of a breach by the purchaser of a contract to purchase real estate. Rather than award the standard measure of damages recognized by this Court – the difference between the contract price and the value of the real estate at the time of breach – the District Court ordered specific performance of the contract. The District Court's order of specific performance is erroneous in that it ignored two fundamental rules of equity: (1) that a court should not order an equitable remedy, including specific performance, that is not feasible; and (2) that equity will not intervene where the aggrieved party has a plain, speedy, adequate, and complete remedy at law.

B. Statement Of Facts And Course Of Proceedings

1. Background Of Mr. Mason

Mr. Mason has been developing and building single-family and multi-family communities in Idaho for seventeen years. Since 1990, he has been involved in the development of approximately 30 single-family subdivisions and 8 multi-family projects. Each of those subdivisions/projects involved some element of bank or investor financing. *See* R., Exh. 1 (sealed)[1] (Affidavit of Edward J. Mason, ¶ 3).

2. The Agreements To Purchase The Subject Properties, And Mr. Mason's Breach Of Those Agreements

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[1] Many of the facts relevant to this case are taken from Mr. Mason's financial records, which are confidential in nature and are subject to a Protective Order entered by the District Court. The affidavits setting forth confidential financial information were filed under seal with the District Court and have been lodged with this Court as part of a sealed record.

On April 12, 2006, Mr. Mason entered into two separate Real Estate Purchase and Sale Agreements. *See* R., Exh. 2 (Affidavit of Frank J. Fazzio, Jr., ¶¶ 2-3). The first Real Estate Purchase and Sale Agreement provided that Mr. Mason would purchase a residence and a parcel of real property on which the residence is located from Respondents Dr. and Mrs. Fazzio for the price of $1,530,000. *Id.* The second Real Estate Purchase and Sale Agreement provided that Mr. Mason would purchase two parcels of real property consisting of farmland from Respondent Idaho Livestock Company, LLC, for the price of $2,000,000. *Id.* at ¶ 4. Each Real Estate Purchase and Sale Agreement provided for a closing date of February 26, 2007. *Id.* Mr. Mason was not able to close on the purchase of the properties on February 26, 2007. *Id.* at ¶ 6. Thus, Mr. Mason was in breach of both Real Estate Purchase and Sale Agreements as of that date.

The parties subsequently entered into two separate Agreements to Resolve Dispute Arising Out of Real Estate Purchase and Sale Agreement Dated April 12, 2006 (the "Agreements to Purchase the Subject Properties").[2] *Id.* at ¶ 9, Exhs. A-B. The Agreements to Purchase the Subject Properties provided that they superseded the original Real Estate Purchase and Sale Agreements. *Id.* The terms of the Agreements to Purchase the Subject Properties required Mr. Mason to close on the purchase of the Subject Properties by December 21, 2007 if Mason obtained plat approval by that date from the city of Kuna. *Id.* If plat approval was not obtained by December 21, 2007, then Mr. Mason was required to close by March 21, 2008. *Id.* The city of Kuna approved the preliminary plat prior to December 21, 2007, but Mr. Mason was not able

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2 The properties that are the subject of the Agreements to Purchase the Subject Properties are the same properties Mr. Mason had previously agreed to purchase and will hereinafter be referred to as the "Subject Properties."

to close on the purchase of the properties. *Id.* at ¶ 11. Thus, Mr. Mason was in breach of the Agreements to Purchase the Subject Properties as of December 21, 2007.

3. Mr. Mason's Inability To Close On The Purchase Of The Subject Properties

At all times during the negotiations for the purchase of the Subject Properties, Mr. Mason believed that he would be able to close on the purchase of the Subject Properties. The real estate market in Idaho was strong and bank and/or investor financing for real estate developments was readily available. Subsequent to the negotiations to purchase the Subject Properties, however, there has been a significant downturn in the Idaho real estate market, property values have fallen, and the availability of financing for real estate developments has decreased substantially. *See* R., Exh. 1 (sealed) (Affidavit of Edward J. Mason, ¶¶ 5-6).

At all times subsequent to the negotiations to purchase the Subject Properties, Mr. Mason has made diligent efforts to close on the purchase of the Subject Property. However, he simply has been unable to do so because he cannot obtain the necessary financing. Attempts have been made to obtain financing from many different sources. *See id.* at 7-8.

The original plan was to obtain financing through First Horizon Construction Lending ("First Horizon"). First Horizon initiated an appraisal on the Subject Property, which indicated an "infeasibility issue with the project, in that the costs to acquire/develop exceed values generated." Furthermore, with the downturn in the Idaho real estate market, the Boise office of First Horizon closed in December 2007, laying off all employees, including its loan manager. Before going out of business in December 2007, after extensive financial documentation and meetings, First Horizon approved a financing package that required a high equity position. First Horizon agreed to finance just over $1,800,000 of the purchase price. When Mr. Mason was

unable to obtain an equity partner for the remainder of the purchase price, he informed Dr. Fazzio of the situation and requested that he agree to carry a portion of the financing through an owner-financing arrangement. Dr. Fazzio refused. *See id.* at 9.

In January 2008, First Horizon announced that it was closing its national construction lending division and all pending loan financing was terminated. Thus, financing through First Horizon is no longer a viable option. *See id.* at 10-11.

Mr. Mason also attempted to obtain financing through Eagle Equity Group, which is an investor group that has helped finance some of Mr. Mason's other developments. The Eagle Equity Group declined to finance the purchase of the Subject Property. *See id.* at 12.

Mr. Mason attempted to obtain financing through the RBC Builder Financial Group, which helped finance the acquisition and development of the Galiano Subdivision, a subdivision Mr. Mason is developing adjacent to the Subject Property. RBC informed Mr. Mason that no additional financing of a large subdivision would be approved due to the excess lot inventory and poor market conditions in the area. RBC announced in March 2008 that it was closing its western offices and that it would only have ongoing U.S. operations in the Southeast and Texas. Thus, financing in Idaho through the RBC is no longer available. *See id.* at 13.

Mr. Mason attempted to obtain financing through Fred Berman, who has invested in many of his developments. Mr. Berman declined to invest in the project. *See id.* at 14.

Mr. Mason attempted to obtain financing through Magnet Bank, which is currently financing one of his developments, the Ambleside subdivision. The Magnet Bank declined to help finance the purchase of the Subject Properties due to the depressed market conditions and the excess lot inventory and current financing of the Ambleside subdivision. In November 2007,

the Eagle Magnet Bank was shut down overnight with employees arriving to locked doors. *See id.* at 15.

In February 2008, Mr. Mason attended a National Association of Homebuilders convention. Mr. Mason presented information regarding the financing of the Subject Properties to various banking and investor professionals attending the conference. He encountered a general lack of financing available for development projects due to the depressed real estate and financial markets. The only individual who expressed interest in the project was Meg Kelley, who is a Commercial & Residential Loan Officer with the Patriot National Bank in Stamford, Connecticut, and who also has ties to several independent investors and hedge funds. *See id.* at 16.

Mr. Mason provided additional information and financial documentation to Meg Kelley, but the Patriot National Bank was not interested in providing financing. However, Meg Kelley located an investor from New York that was interested in a conference call to discuss the project. Ted Mason Signature Homes, Inc. staff, Meg Kelley and the investor had a conference call to discuss feasibility. The investor reviewed the financial ratio requirements of investment as well as terms. Mr. Mason is not able to satisfy these high equity-to-debt ratios or liquidity requirements, so the investor was not interested in investing in any project at this time with Mr. Mason. In further conversations with Meg Kelly, she indicated that Mr. Mason and his companies would need to have a stronger balance sheet before national investors would be interested in reviewing specific projects. *See id.* at 17.

Mr. Mason has also spoken with three other private lenders: Hopkins Financial Services; Excelsior Management; and Seattle Funding Group, Ltd. Each of these private lenders would require an equity investor, which Mr. Mason has not been able to obtain. *See id.* at 18.

Mr. Mason continues to look for a way to finance the purchase of the Subject Property. Indeed, he would still like to close on the purchase of the Subject Property. However, given his current financial situation, the depressed real estate market and the increasingly tightened credit market, there is no way he can close on the purchase of the Subject Property. *See id.* at 4, 19.

Moreover, closing on the properties in question would not be made possible by liquidating assets. The vast majority of Mr. Mason's assets are in the form of real property, which serves as the collateral on bank loans. Not only would it be extremely difficult to sell that property under the current real estate market conditions, but in most cases Mr. Mason already owes the banks more than the appraised value of the property. Thus, liquidating those assets would not provide any cash with which to close on the properties. *See* R., Exh. 3 (sealed) (Supplemental Affidavit of Edward J. Mason, ¶¶ 3-11).

In order to close on the Idaho Livestock Company, LLC property, Mr. Mason would need to have cash available in the amount of $2,000,000.00 plus interest at the rate of 12% per annum. In order to close on the Fazzio property, Mr. Mason would need to have cash available in the amount of $1,530,000.00 plus interest at the rate of 12% per annum. Thus, the total amount of cash that would be required to close on the Subject Properties is well over $3.5 Million. Mr. Mason does not have in his possession, nor does he have access to, the over $3.5 Million that would be required to close on the purchase of the Subject Properties. *See* R., Exh. 1 (sealed) (Affidavit of Edward J. Mason, ¶ 22).

If this Court were to affirm the District Court's Order of specific performance ordering Mr. Mason to close on the Subject Property, he simply will not be able to comply with that order.

4. Procedural Posture

Respondents filed the Complaint on January 22, 2008. R., p. 6-68. The Complaint alleged that Mr. Mason breached his contractual obligations under the Agreements to Purchase the Subject Properties. Respondents subsequently filed a Motion for Summary Judgment asking the Court to either (1) confirm the Agreements to Purchase the Subject Properties as arbitration awards; or (2) enter a judgment for specific performance. Specifically, Respondents requested a "Judgment for specific performance . . . . [r]equiring Mason to immediately close on the purchase of the Subject Properties." R., Exh. 1, p. 10.

Mr. Mason opposed the motion for summary judgment on grounds that specific performance should not be ordered because it would be impossible for Mr. Mason to close on the purchase of the subject properties. R., Exh. 2 (sealed). Mr. Mason relied on this Court's repeated recognition of the equitable rules that a court of equity should not order a remedy, including specific performance, that is not feasible and that an equitable remedy should not be ordered where there exists and adequate remedy at law. Mr. Mason did not contest the fact that he breached the Agreements to Purchase the Subject Properties, nor did Mr. Mason assert the substantive impossibility of performance defense. Despite the fact that the substantive impossibility of performance defense was never asserted by Mr. Mason, the District Court, the Honorable Kathryn A. Sticklen, asked the parties to provide supplemental briefing on the substantive impossibility of performance defense. R., Exhs. 4-5. Mr. Mason responded by

explaining that the substantive impossibility of performance defense is inapplicable to this case and is a different defense than that being asserted by Mr. Mason. R., Exh. 4.

In a December 30, 2008 Order, Judge Sticklen granted Respondents' Motion for Summary Judgment, ordering that "[s]pecific performance on the contract is to be completed within thirty days of the date of this order; if not so accomplished, a judgment for the purchase price may be entered, upon satisfaction of which the properties must be conveyed to Mason." R., pp. 78-83. As Mr. Mason had previously made clear, he was unable to comply with the order of specific performance because he did not have the means to close on the Subject Properties.

Mr. Mason appealed from the Order, but that appeal was dismissed as premature because a final judgment had not yet been issued. Mr. Mason then sought reconsideration of the Order, which was denied by the Honorable Richard D. Greenwood, who had since replaced Judge Sticklen. Judge Greenwood entered a final Judgment (the "Judgment") in favor of Respondents Dr. and Mrs. Fazzio in the principal amount of $1,530,000, plus interest in the amount of $412,471.08. *See* Order to Augment the Record, dated November 17, 2009, Exh. 1. Judge Greenwood also entered Judgment in favor of Respondent Idaho Livestock Company, LLC, in the amount of $2,000,000, plus interest in the amount of $539,177.66. *Id.* The Judgment further provides that Respondents have a valid, subsisting vendor's lien against the Subject Properties and that said vendor's liens may be enforced through sale of the Subject Properties in the same manner and subject to the same restrictions as the execution sale of property subject to a decree of foreclosure as set forth in Chapter 1 of Title 6, Idaho Code. *Id.* Judge Greenwood also awarded attorneys' fees and costs in favor of respondents in the sum of $36,999.50. *See* Order Granting Motion to Augment Record, dated October 6, 2009.

II.

ISSUES PRESENTED ON APPEAL

(1) Whether the District Court erred in ordering specific performance of the Agreements to Purchase the Subject Properties, where the Respondent had an adequate remedy at law and where the order of specific performance was not feasible.

(2) Whether, upon reversal of the order granting specific performance, this Court should also reverse the award of attorney fees on grounds that Respondent is not the prevailing party.[3]

III.

ARGUMENT

A. Standard Of Review

The Court reviews an order of specific performance for an abuse of discretion. *Mallory v. Watt*, 100 Idaho 119, 123, 594 P.2d 629, 633 (1979). When determining whether a district court abused its discretion, the Court considers three factors: "(1) whether the trial court correctly perceived the issue as one of discretion, (2) whether it acted within the boundaries of its discretion and consistently with applicable legal principles, and (3) whether it reached its

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[3] Mr. Mason had initially indicated that he would be appealing the District Court's order of attorney fees with regard to the amount of the attorneys' fees award. After further review of the issue, Mr. Mason has elected not to pursue an appeal of the reasonableness of the amount of the attorney fees award and to focus this appeal only on the order of specific performance. Upon reversal of the order of specific performance, however, Respondent will not be the prevailing party, and the award of attorney fees should also be reversed as premature.

decision through an exercise of reason." *Edmunds v. Kraner*, 142 Idaho 867, 873, 136 P.3d 338, 344 (2006).

B. The District Court Erred In Ordering Specific Performance

1. Specific Performance Is Not Appropriate Because It Would Not Be Possible For Mr. Mason To Comply With The Order Of Specific Performance

"There is no legal right to specific performance." *Kessler v. Tortoise Development, Inc.* 134 Idaho 264, 270, 1 P.3d 292, 298 (2000). Instead, specific performance "is an extraordinary remedy that can provide relief when legal remedies are inadequate." *Id.* "[S]pecific performance is an equitable remedy and should not be granted when it would be unjust, oppressive, or unconscionable." *Id.* The decision to grant specific performance is a matter within the District Court's discretion. *Id.* "When making its decision the court must balance the equities between the parties to determine whether specific performance is appropriate." *Id.*

In ordering specific performance, the District Court did not recognize, much less follow, the well-established rule that a court should not order an equitable remedy, including specific performance, which is not feasible. *See, e.g., Anderson v. Whipple*, 71 Idaho 112, 125, 227 P.2d 351, 359 (1951), overruled on other grounds by *David Steed and Associates, Inc. v. Young*, 115 Idaho 247, 766 P.2d 717 (1988) ("Equity will not enter a decree for specific performance the enforcement of which is not practicable or feasible."); *Paloukos v. Intermountain Chevrolet Co.*, 99 Idaho 740, 745-46, 588 P.2d 939, 944-45 (1978) (dismissing claim for specific performance because "[i]t is well established that the courts will not order the impossible"); *Childs v. Reed*, 34 Idaho 450, 202 P. 685, 686 (1921) ("Where the contract is of such a nature that obedience to the

decree cannot be obtained by the ordinary processes of the court, equity will decline to interfere.").

It is indisputable that Mr. Mason does not have the approximately $3.5 Million that would be required to close on the Subject Properties as ordered by the Court. *See* R., Exhs. 1, 3 (sealed). Thus, the District Court erred in ordering specific performance.

2. The Equitable Rule That Equity Courts Should Not Order The Impossible Is Separate And Distinct From The Substantive Impossibility Of Performance Defense

The rule that equity should not order the impossible is an equitable rule, not a substantive defense. Rather than apply the equitable rule, the Court applied and rejected the substantive contract defense of impossibility of performance as if the two rules were one and the same. The District Court's analysis was erroneous in that the two rules are not one and the same. The equitable rule merely precludes an order of equitable relief and leaves the plaintiff with a remedy in law, i.e., damages. *See, e.g., Suchan v. Rutherford*, 90 Idaho 288, 410 P.2d 434 (1966) (reversing the district court's order of specific performance of a real estate contract, and remanding to the district court to calculate damages). In other words, the equitable rule cited by Mr. Mason goes not to the issue of liability, but to the issue of what remedy is appropriate. The substantive impossibility of performance doctrine is a complete defense to a contract and leaves the plaintiff with no remedy at all, either equitable or at law. *See Landis v. Hodgson*, 109 Idaho 252, 257, 706 P.2d 1363, 1368 (Ct. App. 1985) (explaining that the substantive doctrine of impossibility of performance results in the party asserting the defense being "relieved of his duty to perform") (quoting RESTATEMENT (SECOND) OF CONTRACTS § 264 (1981)).

"The doctrine of impossibility operates to excuse performance when the bargained-for performance is no longer in existence or is no longer capable of being performed due to the unforeseen, supervening act of a third party." *Haessly v. Safeco Title Ins. Co. of Idaho*, 121 Idaho 463, 465, 825 P.2d 1119, 1121 (1992). "A *sine qua non* for application of the doctrine is that the parties must have contracted, expressly or in necessary contemplation, with reference to continued existence of the specific thing as a condition essential to performance." *Id.*

The above described impossibility of performance doctrine serves as a defense to a breach of contract claim. In other words, the impossibility of performance excuses the breach. However, Mr. Mason has not ever asserted impossibility of performance as a defense to Respondents' breach of contract claim because the authorities generally hold that financial inability to perform does not excuse a breach. Moreover, "impossibility that is only temporary will not act to discharge a contractual obligation if the contract can yet be performed after the impossibility ceases." *Sutheimer v. Stoltenberg*, 127 Idaho 81, 85, 896 P.2d 989, 993 (Ct. App. 1995). Impossibility of performance for purposes of excusing a breach of contract is simply not an issue in this case.

Despite the fact that the impossibility of performance defense was never asserted by Mr. Mason, Judge Sticklen asked the parties to provide supplemental briefing on the impossibility of performance doctrine in connection with Plaintiff's Motion for Summary Judgment. *See* R., Exhs. 3-4. Mr. Mason provided supplemental briefing on the issue, explaining the difference between the equitable rule that equitable courts should not order the impossible and the substantive defense of impossibility of performance. *See* R., Exh. 4. Mr. Mason expressly stated that he was not relying on the substantive impossibility of

performance defense. *Id.* at p. 3 ("Mr. Mason is not currently asserting impossibility of performance as a defense to Dr. Fazzio's breach of contract claim because the authorities generally hold that financial inability to perform does not excuse a breach. . . . Impossibility of performance for purposes of excusing a breach of contract is not at issue for purposes of Dr. Fazzio's motion for summary judgment.").

Even though Mr. Mason specifically disclaimed any reliance on the substantive impossibility of performance defense, Judge Sticklen proceeded to grant Plaintiff's Motion for Summary Judgment by concluding that the substantive impossibility of performance doctrine is inapplicable. Specifically, she explained:

> Furthermore, the Idaho Court of Appeals recently noted that "[m]ost importantly it is the task itself which must be impossible – it is not enough that the particular promissor is unable to perform the task if it would be possible for a different promissor to perform." *State v. Chacon*, [146 Idaho 520, (Ct. App. 2008)]. While this case was criminal in nature, it is still persuasive Idaho dicta on the issue as it relates to the enforcement of contracts.

R., p. 83; *see also, id.* at p. 82 (citing *Christy v. Pilkington*, 273 S.W. 2d 533 (Ark. 1954), for the proposition that the substantive defense of impossibility of performance does not apply to a "subjective impossibility" of performing).

Mr. Mason does not disagree with the District Court's conclusion that the substantive impossibility of performance defense is inapplicable. Indeed, Mr. Mason conceded the point. The problem is that the District Court did not address the equitable rule that a court in equity should not order the impossible.

In ordering specific performance, the District Court abused its discretion in that it applied the wrong legal principle. *See Edmunds v. Kraner*, 142 Idaho at 873 (explaining that, in

determining whether a district court has abused its discretion, the Court should look to whether the district court "acted within the boundaries of its discretion and consistently with applicable legal principles.") (emphasis added); *see also State of Idaho v. Watkins*, ___ Idaho ___, ___ P.3d ___, 2009 Opinion No. 151, Docket No. 35687 (December 24, 2009), wherein the Court defined "judicial discretion" to mean:

> the discretionary action of a judge or court . . . bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained. It is not the indulgence of a judicial whim, but the exercise of judicial judgment, based on facts and guided by law, or the equitable decision of what is just and proper under the circumstances. It is a legal discretion to be exercised in discerning the course prescribed by law and is not to give effect to the will of the judge, but to that of the law.

Id. (citing BLACK'S LAW DICTIONARY).

Although applied in the context of the standard of review for evidentiary rulings, the principles guiding the exercise of judicial discretion in determining an equitable remedy should be the same. The District Court did not recognize, much less apply, the equitable rule that a court in equity should not order the impossible. Rather, the District Court reached its decision by applying the substantive impossibility of performance of defense, which simply is inapplicable to this case.

3. The Appropriate Remedy Is An Award Of Damages

This Court has recognized on many occasions that the "usual measure of actual damages for a purchaser's breach of contract for sale of realty is the difference between the contract price and the market value of the property at time of breach, plus rental value for any period of possession by the purchaser." *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 261, 846 P.2d

904, 912 (1993); *see also Lawrence v. Franklin*, 113 Idaho 895, 749 P.2d 1020 (Ct. App. 1988); *Smith v. King*, 100 Idaho 331, 597 P.2d 217 (1979). The Court has adopted the following analysis with regard to damages for breach of a real estate contract:

> The general rule applied where the purchaser under a real estate contract refuses to go through with his purchase is that he is liable for the vendor's loss of bargain, plus any appropriate consequential damages. This means the vendor will recover the difference between the market value and the contract price on the date of breach or on the date at which he regains possession of the land.... The rule is that the vendor's loss is measured by the market price of the property as of breach date, not the price he obtained on resale at a later date. The price obtained on resale may, however, be sufficient evidence of the market value at the date of breach, provided market conditions are similar and the time lapse between the date of breach and the resale is not great.

Lipsky, 123 Idaho at 261 (quoting Dobbs, HANDBOOK ON THE LAW OF REMEDIES, § 12.11 p. 855).

The measure of damages is clear, and specific performance of the Agreements to Purchase the Subject Properties is not appropriate in light of the availability of this legal remedy. "The basic, underlying rule is that equity will not intervene where the aggrieved party has a plain, speedy, adequate, and complete remedy at law." *Suchan v. Rutherford*, 90 Idaho 288, 295, 410 P.2d 434 (1966). In *Suchan*, this Court held that the district court had abused its discretion in ordering specific performance in favor of the vendor of real estate because the vendor had an adequate remedy at law in the form of damages:

> It cannot be seriously contended that the remedy at law via damages was not adequate, plain, speedy, and complete in this case. Plaintiffs commenced the action thirty-seven days after execution of the contract. They had not taken possession of the property. There was no rental value, nor any depreciation or enhancement in the value of the property, to be considered.

> Vendors' damages were readily ascertainable. They could have been made whole with a minimum of delay and inconvenience. A judgment for the amount determined would have ended the controversy promptly.

Id., 90 Idaho at 303.

Those facts can be contrasted with the facts in *Perron v. Hale*, 108 Idaho 578, 701 P.2d 198 (1985), wherein the Court ordered specific performance of a real estate contract. In awarding specific performance, the Court focused on the fact that the house was of a "unique construction" and was "located in a seasonal recreation area with a limited marketing season." *Id.*, 108 Idaho at 583. More importantly, the house had substantially deteriorated due to the lack of occupancy and "the buyers had the lower level of the house altered and partially finished to their particular desires, and buyers had done substantial damage to the walls upstairs and down while attempting to discover building defects." *Id.* These facts would have made it difficult to calculate damages. Notably, in ordering specific performance, the Court specifically recognized that the order of specific performance was feasible in that the buyers "had sufficient cash (the proceeds from the sale of the Nevada property) to purchase the house." *Id.*

Here, there is no reason Respondents would not be fully compensated by an award of damages. Mr. Mason breached the Agreements to Purchase the Subject Properties on December 21, 2007, and the Respondents filed their Complaint just 31 days later. Damages can be easily calculated by ascertaining the value of the Subject Properties as of that date, and awarding Respondents the difference between that value and the contract price. There is no evidence that

any the Subject Properties are unique or have deteriorated in any way.[4] Thus, the standard measure of damages – the difference between the contract price and the value of the Subject Properties as of December 21, 2007 – is the appropriate measure of damages. Given the availability of an adequate remedy, it was an abuse of discretion for the District Court to order specific performance.

4. The Order Of Specific Performance Results In A Windfall To Respondents

The remedy ordered by the District Court is clearly inappropriate as it will result in a windfall to Respondents. The District Court entered a Judgment totaling almost $4.5 Million, which is the entire contract price of the Subject Properties, plus interest. Mr. Mason obviously cannot satisfy the Judgment. The Judgment further provides that Respondents have a valid, subsisting vendor's lien against the Subject Properties and that said vendor's liens may be enforced through sale of the Subject Properties in the same manner and subject to the same restrictions as the execution sale of property subject to a decree of foreclosure as set forth in Chapter 1 of Title 6, Idaho Code. Thus, Respondents will be able to satisfy the Judgment by foreclosing on their vendor's lien and having the properties sold at a foreclosure sale. When the Subject Properties are sold, Respondents will be entitled to a deficiency judgment. *See* Idaho Code § 6-108. That deficiency judgment will be measured by the difference between the total judgment and the "reasonable value" of the Subject Property on the date of foreclosure.

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[4] Respondents may contend that Mr. Mason's actions resulted in a Kuna sewer LID (Local Improvement District) encumbrance on the Subject Properties in the amount of approximately $400,000. Any damages resulting from the LID encumbrance, however, are easily ascertainable and can be included as a measure of damages.

Respondents will likely credit bid a portion of the judgment and walk away with the Subject Property and a very large deficiency judgment.

Upon first glance, the measure of the deficiency judgment may look similar to the standard measure of damages on breach of contract cases. Upon closer inspection, however, there is a substantial difference. The standard measure of damages for a breach of real estate contract is the "difference between the contract price and the market value of the property at time of breach." *Lipsky*, 123 Idaho at 261, 846 P.2d 904, 912 (1993). In contrast, the measure of a deficiency judgment would be the difference between the total Judgment and the value of the Subject Properties at the time of the foreclosure sale. *See* Idaho Code § 6-108. The difference is likely substantial in light of the declining real estate values in Idaho.

Mr. Mason agreed to purchase the Subject Properties on April 12, 2006, close to the height of the Idaho real estate bubble. He was in breach of the Agreements to Purchase the Subject Properties on December 21, 2007. By that time, the Idaho real estate bubble had burst, and real estate values were declining. The value of the Subject Properties as of December 21, 2007 was certainly lower than the contract price, and the Respondents would be entitled to damages in the amount of the difference (likely hundreds of thousands of dollars).

Since that time, however, real estate values have plummeted. By the time the Subject Properties are sold in a foreclosure sale, the value of the Subject Properties will almost certainly be much lower (likely hundreds of thousands, if not over a million, dollars). At the end of the day, the deficiency judgment against Mr. Mason will certainly be much higher than a damages judgment would have been. The deficiency judgment will be much larger than the difference

between the contract price and the value of the property at the time of the breach. Thus, Respondents will walk away with a windfall.

C. The Order Of Attorneys' Fees Should Be Reversed

If this Court reverses the order of specific performance, this case should be remanded to the District Court for a determination of an appropriate remedy at law. Upon remand, Respondent will no longer be the prevailing party. Respondent may be the prevailing party at some future time, but not until after an appropriate remedy at law has been ordered after remand.

IV.

CONCLUSION

This case is a standard, run-of-the-mill breach of contract case. Mr. Mason has never contested that he is in breach of the Agreements to Purchase the Subject Properties. Rather, the only issue in this case is the appropriate remedy for that breach. The appropriate remedy is the standard damages remedy – the difference between the contract price and the value of the property at the time of breach – that this Court has awarded on multiple occasions in connection with the breach of a real estate contract. By ordering specific performance, the District Court ignored the "basic, underlying rule . . . that equity will not intervene where the aggrieved party has a plain, speedy, adequate, and complete remedy at law." *Suchan*, 90 Idaho at 295. Moreover, the District Court erred by failing to apply the correct legal principle that a court should not order an equitable remedy that is not feasible. Instead, the Court applied and rejected the inapplicable legal defense of impossibility of performance. For these reasons, Mr. Mason respectfully asks that this Court reverse the order of summary judgment and remand to the District Court with instructions to conduct proceedings to determine an appropriate remedy

measured by the difference between the contract price and the value of the Subject Property at the time of breach.

RESPECTFULLY SUBMITTED this 2nd day of February, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of February, 2010, I caused to be served a true copy of the foregoing APPELLANT'S BRIEF by the method indicated below, and addressed to each of the following:

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