1-27-2010

Thomas v. Thomas Appellant's Brief Dckt. 36857

IN THE SUPREME COURT OF THE STATE OF IDAHO

R. DREW THOMAS, Plaintiff/Appellant, vs. RONALD O. THOMAS, ELAINE K. THOMAS and THOMAS MOTORS, INC., an Idaho Corporation, Defendants/Respondents.	GEM COUNTY CASE NO. CV-2006-492 **Supreme Court Docket No. 36857-2009**

APPELLANT'S BRIEF

Appeal from the District Court of the Third Judicial District for Gem County.
Honorable Juneal C. Kerrick, District Judge presiding.

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case involves a lengthy and adversarial dispute between a father who promised his son the family business, and a son who worked tirelessly in establishing and managing the business as a result of such promise, only to get nothing. Plaintiff/Appellant Drew Thomas ("Drew") left a promising career as a sales manager at a well established car dealership to work for Thomas Motors, his father's car dealership, at a lesser salary. He did so based on Defendant/Respondent Ron Thomas' ("Ron") promise that he would give Drew Thomas Motors when he retired. However, after almost ten years of working at Thomas Motors, Ron sold Thomas Motors for nearly three million dollars, without including or even informing Drew of the decision. Drew received nothing from the sale.

Drew filed the present lawsuit in the District Court including claims for breach of contract or, in the alternative, quasi-contract. After multiple summary judgment motions by Defendants/Respondents, the Court dismissed all Drew's claims. The District Court found there was an express employment contract between Drew and Ron that did not include Ron's promise to transfer Thomas Motors to Drew. Accordingly, based on the Court's finding of an express contract, Drew's quasi-contract claim was dismissed. After dismissing Drew's quasi-contract claim, the Court, in a later decision, also dismissed Drew's breach of contract claim determining there was no contract to transfer the business because all the material terms had not been agreed

upon. For the reasons stated below, the District Court erred in its ruling on Drew's quasi-contract claim.

B. COURSE OF PROCEEDINGS

On June 21, 2006, Plaintiff/Appellant filed a *Verified Complaint and Demand for Jury Trial* including claims for breach of oral contract, breach of the implied covenant of good faith and fair dealing, quasi-contract, breach of written contract (in the alternative), and fraud.[1] Plaintiff/Appellant's breach of oral contract was based on Plaintiff leaving his job at Lanny Berg Chevrolet and managing and operating what would become Thomas Motors at a greatly reduced salary, in exchange for Defendants' promise to give Plaintiff Thomas Motors upon retirement.[2] Plaintiff/Appellant's quasi-contract claim was based on the same allegations as the breach of oral contract claim, in the event the Court found no contract existed, considering the inequity of Defendants retaining the benefit conferred on them by Plaintiff without repaying Plaintiff for the value of that benefit.[3] Although it is Plaintiff's position that no written contract was ever validly executed between the parties, Plaintiff/Appellant's breach of written contract (in the alternative) was alleged in the event it was determined a written contract had been formed based on certain documents drawn up by Defendants' attorney.[4]

On July 24, 2007, Defendants/Respondents filed a *Motion for Summary Judgment* on all five counts.[5] On November 26, 2007, the District Court entered an *Order on Defendants'*

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[1] R. Vol. 1 of 6, pp. 23-33.
[2] R. Vol. 1 of 6, pp. 23-33.
[3] R. Vol. 1 of 6, pp. 23-33.
[4] R. Vol. 1 of 6, pp. 23-33.
[5] R. Vol. 1 of 6, pp.137-139.

Motion for Summary Judgment denying summary judgment on Plaintiff/Appellant's claims for breach of oral contract and breach of the implied covenant of good faith and fair dealing, but granting summary judgment on Plaintiff/Appellant's claims for quasi-contract, breach of written contract (in the alternative), and fraud.[6] In denying summary judgment on the breach of contract claim, the District Court found sufficient evidence of an agreement wherein Defendants promised to transfer Thomas Motors upon the retirement of Ron Thomas in exchange for Plaintiff leaving his employment at Lanny Berg and contributing his efforts and experience to building Thomas Motors.[7] On the other hand, in granting summary judgment on the quasi-contract claim, the District Court found "uncontroverted evidence" of an "express employment agreement," of which it would be improper to change the terms by application of the doctrine of quasi-contract.[8] The Court therefore concluded, "Plaintiff's assertion that he agreed to go to work for Thomas Motors at a reduced salary in consideration for Defendants' promise to transfer the business should stand or fall based upon the jury's determination of his express contract claim in Count I."[9]

On March 18, 2007, Defendants/Respondents filed a *Motion for Partial Summary Judgment* requesting dismissal of Plaintiff/Appellant's claim that the oral contract included any real property or land.[10] On May 19, 2008, the District Court entered an *Order on Defendants' Motion for Partial Summary Judgment* granting summary judgment on Plaintiff/Appellant's

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[6] R. Vol. 4 of 6, pp. 742-760.
[7] R. Vol. 4 of 6, pp. 749-750.
[8] R. Vol. 4 of 6, p. 754.
[9] R. Vol. 4 of 6, p. 754.
[10] R. Vol. 4 of 6, pp. 739-741.

claim the oral contract included conveyance of real property.[11]

On April 6, 2009, Defendants/Respondents filed a *Second Motion for Summary Judgment* on the remaining counts of breach of oral contract and breach of the implied covenant of good faith and fair dealing.[12] On May 18, 2009, the District Court entered an *Order on Defendants' Second Motion for Summary Judgment* granting summary judgment on Plaintiff/Appellant's remaining claims of breach of contract and breach of the covenant of good faith and fair dealing.[13] The District Court found the parties did not enter into a valid, enforceable contract for the transfer of Thomas Motors because: (1) a material term of the alleged agreement was for Plaintiff to pay a monetary price for the business; and (2) the parties never reached an agreement on the price or an objective means for determining the price.[14]

On May 28, 2009, Defendants/Respondents filed *Defendants' Motion for Award of Attorney's Fees and Costs.*[15] On June 2, 2009, Plaintiff/Appellant filed a *Motion for Reconsideration* of the Court's May 18, 2009 *Order on Defendants' Second Motion for Summary Judgment.* On that same day, Defendants/Respondents filed *Defendants' Motion for Additional Sanctions for Plaintiff's Failure to Comply with Court's Order* based on Plaintiff's failure to pay attorney fees and costs awarded previously by the Court on a motion to compel.[16] On June 22, 2009, all three motions were scheduled to be heard by the Court. However, at such hearing the Court refused to hear Plaintiff's *Motion for Reconsideration* until such time that Plaintiff paid the

[11] R. Vol. 4 of 6, pp. 795-804.
[12] R. Vol. 5 of 6, pp. 954-956.
[13] R. Vol. 6 of 6, pp. 1075-1087.
[14] R. Vol. 6 of 6, p. 1085.
[15] R. Vol. 6 of 6, pp. 1130-1132.
[16] R. Vol. 6 of 6, pp. 1135-1138.

outstanding fees and costs from its previous order.[17] On July 10, 2009, the Court entered an *Order Re: Defendants' Motion for Additional Sanctions* reflecting its ruling that Plaintiff be precluded from proceeding on his Motion for Reconsideration until he pays Defendants the sum of $5,259.50.[18] On July 31, 2009, the Court entered an Order on Plaintiff's Motion to Disallow Costs and Fees awarding Defendants costs in the amount of $2,334.81 and fees in the amount of $115,749.20.[19] Plaintiff paid the sum of $5,259.50 to Defendants pursuant to such ruling and on July 10, 2009. The District Court entered an Order refusing to hear Plaintiffs' *Motion for Reconsideration* on September 18, 2009.

On August 27, 2009, following the Court's refusal to hear Plaintiff's *Motion for Reconsideration*, Plaintiff/Appellant filed a *Notice of Appeal* pursuant to which the present brief is filed.

C. STATEMENT OF FACTS

As of July 1997, Drew had been employed at Lanny Berg Chevrolet in Caldwell, Idaho for eight years.[20] He was a salesperson in the new and used car departments for approximately seven and half years before being promoted to the new car sales manager in early 1997.[21] Lanny Berg Chevrolet was a successful established car dealership and through working closely with the

[17] Tr., p. 147, ll. 10-23.
[18] R. Vol. 6 of 6, pp. 1180-1182.
[19] R. Vol. 6 of 6, pp. 1169-1179.
[20] R. Vol. 2 of 6, pp. 276
[21] R. Vol. 2 of 6, pp. 276-278, 281.

owner/general manager, Lanny Berg Sr., Drew had acquired significant, valuable knowledge about how to operate a successful new car dealership.[22]

In the summer of 1997, Ron began talking about purchasing a car dealership called Johansen Motors in Emmett, Idaho.[23] Despite the fact he did not have any experience with new car sales, or owning and operating a new car dealership, Ron wanted to convert Johansen Motors into a new car dealership.[24] Ron consistently expressed to members of his family that he wanted to purchase Johansen Motors but could not do so on his own because he did not have experience operating a new car dealership or working with auto manufacturers/franchisors.[25] Ron further expressed he had no desire to learn to satisfy manufacturer/franchisor requirements and to work within the constraints placed upon dealerships by franchisors.[26] Based on Drew's knowledge and experience in operating a new car dealership, Ron requested Drew leave his employment at Lanny Berg and apply his knowledge and experience to establishing a new car dealership, which Ron would in turn give Drew when Ron retired.[27]

During late July or early August 1997, Ron and Drew formed an oral contract or understanding whereby Ron would purchase Johansen Motors to establish a Chrysler dealership called Thomas Motors.[28] Pursuant to the contract or understanding, Drew agreed to leave his employment with Lanny Berg and contribute his knowledge and experience and make all

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[22] R. Vol. 3 of 6, pp. 415-426.
[23] R. Vol. 1 of 6, p. 172.
[24] R. Vol. 3 of 6, pp. 415-444.
[25] R. Vol. 3 of 6, pp. 416, 428, 436, 453.
[26] R. Vol. 3 of 6, pp. 417, 430.
[27] R. Vol. 2 of 6, pp. 281-283; R. Vol. 3 of 6, pp. 415-439.
[28] R. Vol. 2 of 6, pp. 281-283.

necessary efforts (at below-market compensation if necessary), to establish the dealership which Ron agreed to give to Drew upon Ron's retirement.[29] Drew relied on this contract or understanding in leaving his employment with Lanny Berg. Although Ron estimated his time of retirement might be at age sixty-two or sixty-three, he also indicated he might retire, or semi-retire, at an earlier or later time.[30] Because Thomas Motors was to be a family business built by his father's contributions as well as his own, Drew and Ron discussed, and Drew felt it would be fair, that his father and mother receive some retirement income from the business once Ron retired.[31] Pursuant to the contract or understanding, Drew would receive the business in exchange for his efforts in establishing and managing Thomas Motors's day-to-day operations, period.[32] As evidence of such, Ron always spoke in terms of "giving" Drew the business upon Ron's retirement.[33]

From the time Drew left his employment with Lanny Berg in September 1997 until late summer 2000, Drew spent twelve to fourteen hours, six days a week working at Thomas Motors.[34] Drew was responsible for getting the Johansen Motors premises converted and equipped for a new car dealership and for ensuring Thomas Motors met and maintained Chrysler's franchise requirements.[35] Drew not only handled all human resource matters, he functioned as the general manager, the sales manager, the inventory manager, the finance

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[29] R. Vol. 2 of 6, pp. 281-284, 287; R. Vol. 3 of 6, pp. 415-457.
[30] R. Vol. 3 of 6, pp. 415-439.
[31] R. Vol. 2 of 6, pp. 294-295; R. Vol. 3 of 6, pp. 419-420.
[32] R. Vol. 3 of 6, pp. 419-420.
[33] R. Vol. 2 of 6, pp. 281-284, 300; R. Vol. 3 of 6, pp. 415-451.
[34] R. Vol. 3 of 6, pp. 420, 429, 431, 447.
[35] R. Vol. 2 of 6, pp. 286-287; R. Vol. 3 of 6, pp. 420-421.

manager and the insurance manager.[36] Drew also spent a number of hours each day dealing directly with customers.[37] In most medium size auto dealerships, such as Thomas Motors, separate full-time employees would have performed each of these management functions.[38]

During the eight and a half years Drew managed Thomas Motors (from September 1997 through March of 2006), he took only two vacations and his salary and other financial incentives were far below the market rate paid to general managers at other medium size car dealerships in the Treasure Valley.[39] Additionally, due to the demands at Thomas Motors, Drew sacrificed significant time with his family and gave up pursuing his hobbies.[40] From September 1997 through August 2000, Ron never participated in the day-to-day operations of Thomas Motors.[41] He made only short visits to the Thomas Motors three or four times each week.[42] Ron never attempted to learn about or observe the day-to-day operations of Thomas Motors, and continuously expressed his disinterest in and resentment of Chrysler's franchise requirements and restrictions.[43] When Drew went away on vacation during August of 2000, Ron was completely unable to manage Thomas Motors and begged Drew to return early.[44]

Despite the fact Drew was expected to manage Thomas Motors' day-to-day operations and build a successful Chrysler dealership, Ron maintained strict control of all the business

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[36] R. Vol. 3 of 6, pp. 420, 429-431, 443, 446
[37] R. Vol. 3 of 6, pp. 421, 430-431.
[38] R. Vol. 3 of 6, pp. 420-421.
[39] R. Vol. 2 of 6, pp. 288, 292-293, 347.
[40] R. Vol. 2 of 6, pp. 285-286, 306; R. Vol. 3 of 6, pp. 415-426.
[41] R. Vol. 3 of 6, pp. 421, 430, 443, 447.
[42] R. Vol. 2 of 6, p. 306; R. Vol. 3 of 6, pp. 430, 447.
[43] R. Vol. 3 of 6, pp. 421, 430, 443, 447.
[44] R. Vol. 2 of 6, p. 292.

finances.[45] Ron received all sales proceeds and other income generated from Thomas Motors and decided how that revenue would be applied.[46] However, Ron refused to apply revenue to things which were absolutely crucial to building a successful new car dealership. Ron refused to pay competitive salaries and commissions to keep good salespeople[47], he refused to pay for a full-time finance and insurance manager, he refused to designate funds for improvement of the premises, and he refused to apply funds to increase the inventory so Thomas Motors could remain competitive with other dealerships.[48] As a result, Drew's efforts to build a successful new-car dealership were seriously undermined.[49]

From September 1997 through August 2000, Thomas Motors had a line of credit ("flooring line") issued by Wells Fargo used to purchase inventory for Thomas Motors.[50] Although the flooring line was to be paid with proceeds from car sales, Ron manipulated Thomas Motors's finances to obtain the benefit of the flooring line and sales proceeds without paying for inventory purchases, expenses, and debts.[51] Ron also manipulated Thomas Motors' financing by selling used cars from his used car dealership, Lot-of-Cars, to Thomas Motors at inflated prices to maximize his Lot-of-Cars' profits while minimizing Thomas Motors' profits.[52] Ron further submitted bills to Thomas Motors for repairs, purportedly performed at a body shop he owned,

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[45] R. Vol. 2 of 6, p. 348; R. Vol. 3 of 6, pp. 421, 430, 447
[46] R. Vol. 2 of 6, p. 348; R. Vol. 3 of 6, pp. 448.
[47] Ron even went so far as to refuse to pay employees overtime and to manipulate the Thomas Motors's books in order to create the appearance salespeople were entitled to lesser commissions than they had earned. *See* R. Vol. 3 of 6, pp. 449.
[48] R. Vol. 3 of 6, pp. 415-426, 440-444.
[49] R. Vol. 3 of 6, pp. 415-426, 440-444.
[50] R. Vol. 3 of 6, pp. 415-426, 445-457.
[51] R. Vol. 3 of 6, pp. 415-426, 445-457.
[52] R. Vol. 2 of 6, pp. 305; R. Vol. 3 of 6, pp. 445-457.

on vehicles that were not owned by Thomas Motors.[53] Additionally, Ron purchased used cars at auction with funds from Thomas Motors' flooring line and then sold the cars from his business, Lot-of-Cars, without transferring the sale proceeds to Thomas Motors.[54]

As of August 2000, due to Ron's improper handling and misuse of Thomas Motors' finances, Thomas Motors was indebted to Wells Fargo in the amount of approximately $300,000 for disbursements made from the flooring line.[55] Wells Fargo threatened to foreclose.[56] At that time, Drew began to reconsider investing his time and efforts in Thomas Motors based on Ron's financial mismanagement and the threat of foreclosure.[57]

However, based on Ron's promise of future cooperation and his begging Drew to continue, Drew proceeded with managing Thomas Motors.[58] Accordingly, in August 2000, Ron assembled the Thomas Motors' staff and informed them that Thomas Motors belonged to Drew and only Drew would be making management decisions from that time forward.[59]

Shortly thereafter, Thomas Motors' accountant negotiated with Wells Fargo and succeeded in forestalling the foreclosure and gaining additional time to pay the outstanding flooring line.[60] To increase sales to pay the flooring line and maintain the inventory, Drew opened Thomas Motors for business seven days a week.[61] Thus, Drew continued to work twelve to fourteen hours a day seven days a week, rather than six, and increased the amount of time he

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[53] R. Vol. 3 of 6, pp. 448.
[54] R. Vol. 2 of 6, pp. 305; R. Vol. 3 of 6, pp. 445-457.
[55] R. Vol. 3 of 6, pp. 422, 431, 454.
[56] R. Vol. 3 of 6, pp. 422, 454.
[57] R. Vol. 3 of 6, pp. 422-423.
[58] R. Vol. 2 of 6, pp. 283, 292, 335, 359-360.
[59] R. Vol. 3 of 6, pp. 427-434, 445-451.
[60] R. Vol. 3 of 6, pp. 415-426, 452-457.
[61] R. Vol. 2 of 6, pp. 306-307; R. Vol. 3 of 6, pp. 423, 431

spent on the sales floor.[62] In addition, Drew increased compensation and commissions to Thomas Motors' sales staff and hired a full-time finance and insurance manager.[63] Drew's efforts were successful and Thomas Motors' was able to avoid foreclosure and increase its revenue.[64] Chrysler even awarded Thomas Motors a "Five-Star" rating, normally awarded to larger more established dealerships.[65]

Although Thomas Motors' finances improved significantly from August 2001, during 2002 Ron obtained a new flooring line from Key Bank.[66] Ron once again began manipulating Thomas Motors's finances and misapplying revenues.[67] By March of 2006, Thomas Motors owed more than $200,000 for funds advanced on the flooring line issued by Key Bank.[68]

In March of 2006, without informing any of his sons, including Drew, and without informing the staff, Ron sold Thomas Motors to an investment group headed by Bill Buckner for nearly three million dollars.[69] Ron denied he was selling Thomas Motors right up to the point of closing, and after closing he refused to give Drew any explanation for his actions.[70] Ron flatly refused to compensate Drew for the tremendous efforts Drew had expended with the expectation

[62] R. Vol. 3 of 6, pp. 415-434, 445-451.
[63] R. Vol. 3 of 6, pp. 415-426, 440-444.
[64] R. Vol. 3 of 6, pp. 423, 455
[65] R. Vol. 2 of 6, pp. 306-307; R. Vol. 3 of 6, pp. 423, 432.
[66] R. Vol. 3 of 6, pp. 415-426.
[67] R. Vol. 3 of 6, pp. 423-424.
[68] R. Vol. 3 of 6, pp. 424.
[69] R. Vol. 3 of 6, pp. 415-439, 445-457.
[70] R. Vol. 2 of 6, pp. 307-308.

Thomas Motors would someday belong to him.[71] Thomas Motors became Bill Buckner Chrysler Dodge Jeep.[72]

II.

ISSUES PRESENTED ON APPEAL

Appellant presents the following issues on appeal:

1. Whether the District Court erred in dismissing Plaintiff's quasi-contract claim based on its finding uncontroverted evidence of an express employment agreement between the parties, separate from Defendants' agreement to convey the business to Plaintiff;

2. Whether the District Court abused its discretion in awarding the full amount of attorney fees requested by Defendants/Respondents.

III.

ATTORNEY FEES ON APPEAL

Appellant hereby requests attorney fees on appeal pursuant to Idaho Code §§ 12-120, 12-121 and Idaho Appellate Rules 35(a)(5) and 41. As a Result of the District Court's errors, this Court should grant the Appellant attorney fees expended in obtaining reversal of the District Court's decisions. Appellant reserves the right to supplement argument on this point, should this Court request the same at the conclusion of the matter.

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[71] R. Vol. 2 of 6, pp. 307-308.
[72] R. Vol. 3 of 6, p. 425, 433.

IV.

ARGUMENT

A. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF/APPELLANT'S QUASI-CONTRACT CLAIM.

On November 26, 2007, the District Court granted summary judgment on Drew's quasi-contract claim.[73] The District Court erroneously found "uncontroverted evidence" of an "express employment agreement," separate and apart from Ron's promise to transfer Thomas Motors to Drew upon Ron's retirement.[74] The Court found it would be improper to change the terms of the express employment agreement by application of the doctrine of quasi-contract.[75] Accordingly, the Court concluded, "Plaintiff's assertion that he agreed to go to work for Thomas Motors at a reduced salary in consideration for Defendants' promise to transfer the business should stand or fall based upon the jury's determination of his express contract claim in Count I."[76] Despite the Court's finding, the evidence in the record does not support an employment contract separate and apart from Ron's promise to transfer Thomas Motors to Drew upon retirement. Thus, as discussed in further detail below, the District Court's decision to grant summary judgment on Drew's quasi-contract claim must be reversed.

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[73] R. Vol. 4 of 6, pp. 742-760.
[74] R. Vol. 4 of 6, pp. 749-750.
[75] R. Vol. 4 of 6, p. 754.
[76] R. Vol. 4 of 6, p. 754.

i. Standard of Review

A quasi-contract is not an actual contract, but rather a contract implied in law which imposes an obligation for the purpose of bringing about justice and equity.[77] Unjust enrichment, or restitution, is the measure of recovery under a contract implied in law.[78] The unjust enrichment doctrine allows recovery where the defendant has received a benefit from the plaintiff which it would be inequitable to retain without compensating the plaintiff for the value thereof.[79] The following three elements must be established for a claim of unjust enrichment: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation of such benefit by the defendant; and (3) acceptance and retention of the benefit without payment from the defendant to the plaintiff for the value thereof.[80]

Because unjust enrichment is an equitable doctrine involving an implied contract, a party cannot recover under the theory of unjust enrichment if there is an enforceable express contract covering the same subject matter.[81] However, the mere fact that an express agreement exists does not mean an action for unjust enrichment is improper.[82] A court is only precluded from

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[77] *See Barry v. Pacific West Const., Inc.*, 140 Idaho 827, 834, 103 P.3d 440, 447 (2004).
[78] *Id.*
[79] *Hausam v. Schnabl*, 126 Idaho 569, 573-574, 887 P.2d 1076, 1080 - 1081 (Idaho App.,1994) (citing *Continental Forest Products, Inc. v. Chandler*, 95 Idaho 739, 743, 518 P.2d 1201, 1205 (1974); *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 744, 710 P.2d 647, 654 (Ct.App.1993)).
[80] *Brewer v. Washington RSA No. 8 Ltd. Partnership*, 184 P.3d 860, 864 (Idaho, 2008) (citing *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 88, 982 P.2d 917, 923 (1999).
[81] *See Blaser v. Cameron*, 121 Idaho 1012, 1017, 829 P.2d 1361, 1366 (Idaho App.,1991) (citing *Marshall v. Bare*, 107 Idaho 201, 205, 687 P.2d 591, 595 (Ct.App.1984)).
[82] *Blaser v. Cameron*, 121 Idaho 1012, 1017, 829 P.2d 1361, 1366 (Idaho App.,1991) (citing *Wolford v. Tankersley*, 107 Idaho 1062, 1064, 695 P.2d 1201, 1203 (1985)).

applying the unjust enrichment doctrine in contravention of an express contract when the express agreement is found to be enforceable.[83]

ii. The Court Erred in Determining There Was an Express Employment Agreement Separate from Ron's Promise to Convey Thomas Motors to Drew.

As set forth above, Drew alleged a breach of oral contract as Count I in his complaint.[84] The contract involved Drew leaving his previous employment to establish and manage Thomas Motors at a reduced salary in exchange for Ron's promise to convey the business to Drew upon Ron's retirement.[85] Drew's quasi-contract claim, pled in the alternative to his breach of contract claim, is based on the possibility that a judge or jury might determine there was not a valid enforceable contract. If, as the District Court concluded, there is not a valid enforceable contract, then Drew's quasi-contract claim is the appropriate method of recovery.

It is wholly inequitable for Ron to retain the benefit of all those years of Drew putting his efforts into the business for a reduced salary only to receive nothing from the sale of the business. In this case, the evidence undisputedly establishes Drew conferred benefits upon Ron, which Ron actually sought and also accepted under circumstances that would be wholly inequitable for Ron not to compensate Drew. With talk of creating a long-lasting family business and of giving Drew Thomas Motors when Ron retired, Ron convinced Drew to leave a highly satisfactory position in order to apply his knowledge of and experience in new car sales towards

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[83] *Id.*
[84] R. Vol. 1 of 1, p. 27.
[85] R. Vol. 1 of 1, p. 27.

establishing and building Thomas Motors.[86] For eight years, Drew spent twelve to fourteen hours a day, including weekends, operating Thomas Motors.[87] Drew functioned in the roles of general manager, sales manager, inventory manager, finance manager, insurance manager, and salesperson simultaneously.[88] While performing all these functions, which would normally be performed by multiple employees, Drew received a salary far below the market rate paid to general managers at medium size dealerships in the Treasure Valley.[89] Consequently, Thomas Motors and Ron were benefited by the value of services, which Drew provided at well-below market rates in order to get Thomas Motors off the ground. In fact, Thomas Motors simply would not have become a viable business without the benefit of Drew's services.

Despite Ron's mismanagement of Thomas Motors's finances and lack of cooperation with respect to making necessary improvements, Drew managed to establish a new car dealership which received a "Five-Star" rating from Chrysler.[90] Moreover, it was through Drew's efforts alone that Thomas Motors was able to avoid foreclosure after Ron had caused the business to fall behind in payments on its flooring line of credit.[91] Without Drew's experience, hard work, and persistence, Ron would not have had a viable business to sell to the Bill Bucker group. The evidence clearly establishes Drew expected, and Ron knew he expected, compensation for his efforts beyond the below-market compensation he received while he was operating Thomas Motors.

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[86] R. Vol. 2 of 6, pp. 281-284, 287; R. Vol. 3 of 6, pp. 415-457.
[87] R. Vol. 3 of 6, pp. 420, 429, 431, 447.
[88] R. Vol. 3 of 6, pp. 420-421, 429-431, 443, 446.
[89] R. Vol. 2 of 6, pp. 288, 292-293, 347.
[90] R. Vol. 2 of 6, pp. 306-307; R. Vol. 3 of 6, pp. 423,432.
[91] R. Vol. 2 of 6, pp. 306-307; R. Vol. 3 of 6, pp. 415-434, pp. 440-451, 455.

Drew left his previous employment to establish and manage Thomas Motors at a reduced salary because Ron promised to convey the business to Drew upon Ron's retirement.[92] Despite the uncontroverted evidence that Drew spent eight and a half years working outrageous hours and essentially giving up his life outside of work to build a successful business based on a promise that he would someday be given the business, the Court found Ron's promise to convey Thomas Motors to Drew was a separate promise having nothing to do with his express employment agreement.[93] The Court specifically stated:

> Here, Plaintiff essentially seeks additional compensation for the services he performed for Thomas Motors while employed there based upon the assertion that, pursuant to another agreement, he agreed to accept less compensation for his services. Since the uncontroverted evidence establishes that the parties had an express employment agreement pursuant to which Plaintiff was paid a salary, including one or more raises during his employment, the Court finds that it would be improper to change the terms of that employment agreement by application of the doctrine of Quasi-contract. Plaintiff's assertion that he agreed to go to work for Thomas Motors at a reduced salary in consideration for Defendants' promise to transfer the business should stand or fall based upon the jury's determination of his express contract claim in Count I.[94]

The Court adds to its analysis with the following footnote:

> As Defendants correctly point out, applying the doctrine of unjust enrichment on these facts would have ht potentially pernicious effect of permitting parties to change the terms of an otherwise enforceable express contract by asserting a claim for unjust enrichment based upon an entirely separate unenforceable promise that supposedly altered or modified the terms of the express contract.[95]

Despite the evidence in the record, the Court essentially concluded that there are two separate contracts: (1) an express employment agreement pursuant to which Drew was paid a salary in

[92] R. Vol. 2 of 6, pp. 281-284, 287; R. Vol. 3 of 6, pp. 415-457;
[93] R. Vol. 4 of 6, pp. 753-754.
[94] R. Vol. 4 of 6, p. 754.
[95] R. Vol. 4 of 6, p. 754.

exchange for working at Thomas Motors; and (2) another agreement pursuant to which Drew worked at a reduced salary in exchange for Ron's promise to transfer the business. The Court draws this conclusion despite the fact that Drew's work and compensation at Thomas Motors were directly dependent on Ron's promise to convey the business to Drew upon Ron's retirement.

The District Court's determination that Drew had an express employment agreement with Defendants separate and apart from Ron's promise to convey the business has no basis. The record clearly demonstrates Drew left another promising career and dedicated eight and a half years of his life to developing a business that was promised to him. The District Court, following Defendants' lead, created a two contract analysis when such a suggestion was not based on the facts or pleadings. Accordingly, the District Court's bifurcation of Drew's employment and his reliance on his father's promise to give him the business is clearly in error.

iii. The Court's Dismissal of Drew's Quasi-Contract Claim Was Premature Considering the Court's Later Determination there Was Not a Valid Enforceable Contract.

Even if by this Court determines the District Court was correct in finding two separate agreements, it becomes apparent the District Court still erred in dismissing Drew's quasi-contract claim. As demonstrated by the language from the District Court's opinion quoted above, the Court found it could not apply the unjust enrichment doctrine to the employment contract because it would be changing the terms of an otherwise enforceable express contract.[96] The Court went on to state: "Plaintiff's assertion that he agreed to go to work for Thomas Motors

[96] R. Vol. 4 of 6, p. 754.

at a reduced salary in consideration for Defendants' promise to transfer the business should stand or fall based upon the jury's determination of his express contract claim in Count I."[97] The Court went on to make the following comparison between this case and the Supreme Court case of *Harbough v. Myron Harbough Motor, Inc.*, 100 Idaho 295 (1979):

> The Court's determination might have been different if Plaintiff were either challenging the validity of this employment agreement or if Plaintiff were relying on terms of the oral agreement clearly distinct from his employment contract with Thomas Motors, such as the plaintiffs in *Harbough v. Myron Harbough Motor, Inc.*, 100 Idaho 295 (1979). In *Harbough*, the plaintiffs alleged that they left other careers to take control of their father's business in consideration for the father's promise to transfer the business to them. *Id.* at 298. The plaintiffs also contended the agreement provided that, in addition to their salaries, they would receive a credit for a portion of the net profits of the business which would accrue toward the eventual purchase of the business. *Id.* If there were a similar term in Plaintiff's alleged agreement here, clearly separate and distinct from his salary, the court would have been more inclined to find that an unjust enrichment claim is proper here.[98]

The District Court's analysis is clearly flawed. The Court completely disregards the fact that, similar to the plaintiffs in *Harbough*, Drew left another career to establish Thomas Motors in consideration of his father's promise to transfer the business to him. Also similar to the plaintiffs in *Harbough*, in addition to his salary Drew was to eventually receive the business. Ron's promise to convey the business to Drew and Drew's salary are separate and distinct terms of their understanding. Accordingly, there is a similar term in this situation comparable to the term in *Harbough* and the fact that the situations are not identical (i.e., Drew was not receiving credits from the net profits) does not justify the District Court's dismissal of Drew's unjust enrichment claim.

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[97] R. Vol. 4 of 6, p. 754.
[98] R. Vol. 4 of 6, p. 754.

In a later decision, following the District Court's dismissal of Drew's quasi-contract claim, the Court dismissed Drew's express contract claim in Count I finding the parties did not enter into a valid, enforceable contract for the transfer of Thomas Motors.[99] Clearly the Court's dismissal of Drew's unjust enrichment claim was premature. When the District Court ruled there was not a valid enforceable contract to transfer Thomas Motors it had already dismissed Drew's equitable claim, thus, leaving him without a contract remedy and without an equitable remedy.

Had the District Court found a valid enforceable contract pursuant to Count I, there would be no reason for Drew's equitable quasi-contract claim. As set forth above, the Court initially found an enforceable contract, justifying dismissal of the quasi-contract.[100] However, when the District Court later reversed itself determining there was no contract[101] the Court's error in dismissing the quasi-contract claim became critical considering a court is only precluded from applying the unjust enrichment doctrine in contravention of an express contract when the express agreement is found to be enforceable.[102] Clearly the District Court erred in dismissing the unjust enrichment claim only to later find the contract unenforceable.

As set forth above, not only did the Court err in determining there were two separate agreements, the Court further erred in determining unjust enrichment should be dismissed as to both agreements. Accordingly, the District Court's grant of summary judgment on Drew's quasi-contract claim must be reversed.

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[99] R. Vol. 6 of 6, pp. 1075-1087.
[100] R. Vol. 4 of 6, p. 754.
[101] R. Vol. 6 of 6, p. 1085.
[102] *Blaser*, 121 Idaho at 1017, 829 P.2d at 1366 (citing *Wolford,* 107 Idaho at 1064, 695 P.2d at 1203).

B. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY FEES WHICH ARE EXCESSIVE AND UNREASONABLE.

On July 31, 2009, the District Court granted attorney fees and costs to Defendants in the amount of $118,084.01, pursuant to I.C. § 12-120(3) and I.R.C.P. 54(e).[103] Of the total amount awarded, $115,749.20 was attorney fees and $2,334.81 was costs as a matter of right. The fees awarded represented the full amount of fees requested by Defendants.[104] Despite the fact that this case did not go to trial and was dismissed at summary judgment, the Court found $115,749.20 to be a reasonable amount of attorney fees and awarded the full amount.[105] As discussed in further detail below, the District Court's award of fees in this case was unreasonable and excessive and must be reduced.

i. Standard of Review

This Court reviews the District Court's determination of the amount of fees to be awarded under the factors set forth in I.R.C.P. 54(e)(3) for an abuse of discretion.[106] Rule 54(e)(3) factors include:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law; (4) the prevailing charges for like work; (5) whether the fee is fixed or contingent; (6) the time limitations imposed by the client or the circumstances of the case; (7) the amount involved and the results obtained; (8) the undesirability of the case; (9) the nature and length of the professional relationship with the client; (10) awards in similar cases; and (11) the reasonable cost of automated legal research, if the court finds it was reasonably necessary in preparing a party's case.

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[103] R. Vol. 6 of 6, pp. 1169-1178.
[104] R. Vol. 6 of 6, p. 1170.
[105] R. Vol. 6 of 6, pp. 1176-1178.
[106] *See Meikle v. Watson*, 138 Idaho 680, 684, 69 P.3d 100, 104 (2003).

The court may also consider any other factor it deems appropriate in the particular case. I.R.C.P. 54(e)(3)(L).

Because the court's discretion to award attorney fees is limited to awarding fees which are reasonable, and because in determining a reasonable amount of fees the court must consider the specific factors set forth in Rule 54(e)(3), a party seeking fees must present the court with sufficient information from which to determine a reasonable fee award based upon the Rule 54(e)(3).[107] In other words, the party seeking fees has the burden to supply the court with sufficient information from which to determine the reasonableness of the fees requested and a reasonable amount to be awarded.[108] In *Sun Valley Potato Growers, supra*, the Supreme Court of Idaho addressed the moving party's burden to supply information to the court:

> If we require the trial court to consider the enumerated factors in rule 54(e)(3), then it logically follows as a corollary that **the court must have sufficient information at its disposal concerning those factors**. Some information may come from the court's own knowledge and experience, some may come from the record of the case, but some obviously can only be supplied by the attorney of the party who is requesting the fee award....
>
> We believe **it is incumbent upon a party seeking attorney fees to present sufficient information for the court to consider factors as they specifically relate to the prevailing party or parties seeking fees**.[109]

Further, among the factors the trial court should consider in determining a reasonable fee award is whether the moving party's counsel has made a good faith effort to exclude from the fee request hours that are excessive, redundant, or otherwise unnecessary.[110]

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[107] *See Sun Valley Potato Growers,* 139 Idaho 761, 769, 86 P.3d 475, 483 (2004)
[108] *See Sun Valley Potato Growers, supra*; *Lettunich v. Lettunich*, 141 Idaho 425, 435, 111 P.3d 110, 120 (2005).
[109] *Sun Valley Potato Growers, supra* (citing *Hackett v. Streeter*, 109 Idaho 261, 264, 706 P.2d 1372, 1375 (Ct. App. 1985) (emphasis added) (affirming the district court's denial of a fee award on the basis the moving party failed to present sufficient information for the court to consider the Rule 54 factors).

ii. The District Court Abused its Discretion When it Applied the Factors Set Forth in I.R.C.P. 54(e)(3) and Awarded Defendants All of the Fees Sought.

In this case, the fees sought by Defendants, and granted by the District Court, are clearly unreasonable and excessive. In its decision, the District Court was not specific in its application of the 54(e)(3) factors but rather provided the following analysis:

> After considering the record in this action and applying the factors set forth in I.R.C.P. 54(e)(3), the court awards Defendants attorney fees in the amount of $115,749.20. Although Plaintiff objects to the reasonableness of the attorney fees, Defendants were in the position that they had to respond to and defend against the litigation driven by the Plaintiff. A very significant amount of time and labor had to be expended by Defendants to conduct discovery, to respond to the activity of Plaintiff's counsel, and to raise the matters Defendants believed were important. From the Court's own perspective, this case has demanded a significant amount of time on a myriad of matters. The Court certainly cannot find that Defendants were wasteful in their approach to this litigation, caused unnecessary expense, or were not reasonable in the way they conducted this lawsuit. The Court finds that the attorney fees claimed by the Defendants are reasonable.[111]

Although there were multiple issues involved in this case, it cannot be said that the issues involved—breach of contract and quasi-contract, breach of implied covenant of good faith and fair dealing and fraud—were particularly novel or complex. Further, all but two claims, breach of contract and breach of implied covenant of good faith and fair dealing, were dismissed early in the case in November 2007 pursuant to Defendants' initial summary judgment motion.[112]

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[110] *See Green v. Baca*, 225 F.R.D. 612, 614-15 (C.D. California 2005) (applying the same factors as those set forth in I.R.C.P. 54(e)(3) to determine a reasonable attorney fee award pursuant to F.R.C.P. 37(a)(4)(A)); *See Rohr v. Rohr*, 118 Idaho 689, 692, 800 P.2d 85, 88 (1990) ("It is well established that our adoption of the Idaho Rules of Civil Procedure is presumably with the interpretation placed upon similar language in the Federal Rules of Civil Procedure by the federal courts. [Citations omitted]."); *see also Hoopes v. Deere & Company*, 117 Idaho 386, 389, 788 P.2d 201, 204 (1990).

[111] R. Vol. 6 of 6, p. 1178.

[112] R. Vol. 4 of 6, pp. 742-760.

Defense counsel spent in excess of 50 hours between 6/27/2006 and 7/18/2007 compiling Defendants' first summary judgment motion.[113] Not to mention the more than 30 hours spent between 8/13/2007 and 8/17/2007 reviewing Plaintiff's opposition to summary judgment and preparing Defendants' reply.[114] Even after expending more than 80 hours on the first motion for summary judgment, which included briefing on the two remaining claims, defense counsel spent approximately 50 more hours briefing summary judgment motions on the remaining two claims, which were also briefed in the first motion.[115]

Despite the District Court's finding all Defendants' claimed attorney fees reasonable, clearly the amount of time spent by defense counsel is excessive considering the limited legal issues and the repetitive nature of the summary judgment memorandums. Further, the fact that such summary judgment memorandums, as well as the numerous other motions and responses and hearing notices, were drafted and redrafted and reviewed by a partner billing at $200/hour, rather than an associate or paralegal billing at a lesser rate, is demonstrative of the excessive and unreasonable fees incurred by Defendants.

In addition to the time spent drafting the motions for summary judgment, defense counsel John Janis spent 8 hours on 10/10/2007 reviewing pleadings and preparing his argument for the summary judgment hearing the following day.[116] This does not include the hours spent between 10/05/07 and 10/09/07 reviewing and organizing the motion pleadings and preparing for the

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[113] R. Vol. 6 of 6, pp. 1112-1113.
[114] R. Vol. 6 of 6, p. 1113.
[115] R. Vol. 6 of 6, pp. 1114-1117 (partial motion for summary judgment 3/7/08-4/28/08; second motion for summary judgment 4/3/09-4/30/09).
[116] R. Vol. 6 of 6, p. 1114.

hearing; not to mention the additional 8 hours spent the following day attending the hearing and then discussing the case with co-counsel and the clients.[117] Clearly 16 hours for preparation and argument at a motion hearing is excessive.

Further, it is important to note that this case never went to trial. The $115,000 plus in attorney fees did not include any trial preparation or trial time and from November 2007 forward was a case involving two claims, breach of contract and breach of implied covenant of good faith and fair dealing.

Despite the District Court's ruling that "this case has demanded a significant amount of time on a myriad of matters,"[118] Defendants failed to show that this case was particularly undesirable or involved difficult or novel questions that were time and labor intensive. Although Defendants claim the "ink dating" was something that made this case "unique and complicated,"[119] the ink dating issue was fairly minor and does not justify the huge amount of fees awarded in this case. It is also unclear how what relevance the ink dating issue has to do with the novelty of issues or the amount of time spent on such issue with respect to Defendants considering Plaintiff is the party who hired an expert to examine the documents. Defendants were not overly involved in the ink dating issue considering they merely were required to provide Plaintiff with the original documents in order that Plaintiff could provide them to his expert. Further, from the fee records provided, it does not appear the ink dating was an issue that

[117] R. Vol. 6 of 6, p. 1114.
[118] R. Vol. 6 of 6, p. 1178.
[119] R. Vol. 6 of 6, p. 1126.

took up the extreme amounts of time as Defendants' claim.[120] Clearly Defendants' limited involvement in the ink dating is not justification for awarding exorbitant fees on a fairly straightforward case.

The District Court found "a very significant amount of time and labor had to be expended" to conduct and respond to discovery and "to raise the matters Defendants believed were important."[121] However, discovery in this case was not unique from discovery in other contract cases and there is no reason why it should be characterized as overly time intensive. Clearly the legal issues in this case, breach of contract and quasi-contract, breach of implied covenant of good faith and fair dealing and fraud, were standard to many litigation cases and do not support the excessive fees awarded to Defendants. Accordingly, the exorbitant fees awarded Defendants by the District Court must be drastically reduced.

V.

CONCLUSION

Based on the foregoing arguments, Plaintiff/Appellant Drew Thomas respectfully requests this case be reversed and remanded back to the District Court based on the following: (1) the District Court erred in dismissing Plaintiff/Appellant's quasi-contract claim based on its finding an express employment agreement separate from the agreement to convey the business; and (2) the District Court abused its discretion in awarding excessive and unreasonable attorney fees in the full amount sought by Defendants/Respondents.

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[120] R. Vol. 6 of 6, pp. 1112-1118.
[121] R. Vol. 6 of 6 p. 1178.

DATED this 27th day of January, 2010.

MORROW & FISCHER, PLLC

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2010, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

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