

3-26-2010

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IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

DAVID and SHIRLEY FULLER,
a married couple,
PLAINTIFFS-APPELLANTS-CROSS RESPONDENTS.

vs.

DAVE CALLISTER, an individual,
CONFLUENCE MANAGEMENT, LLC, an Idaho
limited liability company, and LIBERTY
PARTNERS, INC., an Idaho corporation,
DEFENDANTS-RESPONDENTS-CROSS APPELLANTS.

*Appealed from the District Court of the Fourth Judicial
District of the State of Idaho, in and for ADA County
Hon RONALD J. WILPER, District Judge*

ED GUERRICABEITIA
Attorney for Appellants-Cross Respondents

MICHAEL R. JONES
Attorney for Respondents-Cross Appellants

COPY

FILED - COPY
MAR 26 2010
Supreme Court Court of Appeals
Entered on AJS by

37035

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID and SHIRLEY FULLER, a married couple,

Plaintiffs-Appellants-Cross Respondents,

vs.

DAVE CALLISTER, an individual, CONFLUENCE
MANAGEMENT, LLC, an Idaho limited liability
company, and LIBERTY PARTNERS, INC., an Idaho
corporation,

Defendants-Respondents-Cross Appellants.

Supreme Court Case No. 37035

CLERK'S RECORD ON APPEAL

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

HONORABLE RONALD J. WILPER

ED GUERRICABEITIA

ATTORNEY FOR APPELLANTS

CROSS RESPONDENTS

BOISE, IDAHO

MICHAEL R. JONES

ATTORNEY FOR RESPONDENTS

CROSS APPELLANTS

BOISE, IDAHO

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David Fuller, Shirley Fuller vs. Dave Callister, Confluence Management LLC, Liberty Partners Inc

Date	Code	User		Judge
10/21/2008	NCOC	CCGARDAL	New Case Filed - Other Claims	Ronald J. Wilper
	COMP	CCGARDAL	Complaint Filed	Ronald J. Wilper
	SMFI	CCGARDAL	Summons Filed (3)	Ronald J. Wilper
12/1/2008	AMCO	CCGARDAL	Amended Complaint Filed	Ronald J. Wilper
12/12/2008	NOID	CCDWONCP	Three Day Notice Of Intent To Take Default	Ronald J. Wilper
12/22/2008	NOAP	MCBIEHKJ	Notice Of Appearance M Jones for Callister, Confluence and Liberty	Ronald J. Wilper
	ANSW	MCBIEHKJ	Answer Jones for Callister Confluence and Liberty	Ronald J. Wilper
12/31/2008	NOTC	DCJOHNSI	Notice of Status Conf	Ronald J. Wilper
	HRSC	DCJOHNSI	Hearing Scheduled (Status 02/03/2009 04:00 PM)	Ronald J. Wilper
1/14/2009	NOSV	CCGWALAC	Notice Of Service	Ronald J. Wilper
2/3/2009	STIP	MCBIEHKJ	Stipulation for Scheduling and Planning	Ronald J. Wilper
	HRVC	DCJOHNSI	Hearing result for Status held on 02/03/2009 04:00 PM: Hearing Vacated	Ronald J. Wilper
2/13/2009	HRSC	DCABBOSM	Hearing Scheduled (Jury Trial 10/21/2009 09:00 AM) 4 days	Ronald J. Wilper
	HRSC	DCABBOSM	Hearing Scheduled (Civil Pretrial Conference 10/13/2009 03:30 PM)	Ronald J. Wilper
	ORDR	DCABBOSM	Order Setting Proceedings and Trial	Ronald J. Wilper
2/18/2009	NOSV	CCGARDAL	Notice Of Service	Ronald J. Wilper
3/19/2009	NOTS	CCDWONCP	Notice Of Service	Ronald J. Wilper
3/26/2009	NOTS	CCRANDJD	Notice Of Service	Ronald J. Wilper
6/23/2009	MOTN	CCTOWNRD	Motion for Order Shortening Time	Ronald J. Wilper
	AFSM	CCTOWNRD	Affidavit In Support Of Motion	Ronald J. Wilper
	NOHG	CCTOWNRD	Notice Of Hearing	Ronald J. Wilper
	HRSC	CCTOWNRD	Hearing Scheduled (Motion for Partial Summary Judgment 07/20/2009 11:00 AM)	Ronald J. Wilper
	MOSJ	CCBOYIDR	Motion For Partial Summary Judgment	Ronald J. Wilper
	AFFD	CCBOYIDR	(2) Affidavit in Support of Motion for Partial Summary Judgment	Ronald J. Wilper
	MEMO	CCBOYIDR	Memorandum in Support of Motion for Summary Judgment	Ronald J. Wilper
6/25/2009	ORDR	DCJOHNSI	Order to Shorten Time	Ronald J. Wilper
7/6/2009	MEMO	CCWRIGRM	Defendants Memorandum in Opposition to Plaintiffs Motion for Partial Summary Judgment	Ronald J. Wilper
	AFFD	CCWRIGRM	Affidavit of Michael R Jones	Ronald J. Wilper
7/10/2009	REPL	CCHOLMEE	Reply Brief to Memorandum in Opposition to Motion for Partial Summary Judgment	Ronald J. Wilper
	AFFD	CCHOLMEE	Supplemental Affidavit of Ed J Guerricabeitia in Support of Motion for Partial Summary Judgment	Ronald J. Wilper

David Fuller, Shirley Fuller vs. Dave Callister, Confluence Management LLC, Liberty Partners Inc

Date	Code	User	Judge	
7/20/2009	DCHH	DCJOHNSI	Hearing result for Motion for Partial Summary Judgment held on 07/20/2009 11:00 AM: District Court Hearing Held Court Reporter: madsen Number of Transcript Pages for this hearing estimated:50	Ronald J. Wilper
8/24/2009	DEOP	DCJOHNSI	Memorandum Decision and Order on Motion for Partial Summary Judgment	Ronald J. Wilper
9/1/2009	OBJC	CCTOWNRD	Objection to the Form of Defendant's Proposed Judgment	Ronald J. Wilper
	NOHG	CCTOWNRD	Notice Of Hearing	Ronald J. Wilper
	HRSC	CCTOWNRD	Hearing Scheduled (Hearing Scheduled 09/28/2009 02:00 PM) Objection to Form of Defendant's Proposed Judgment	Ronald J. Wilper
9/28/2009	JDMT	DCJOHNSI	Judgment Against Plaintiffs	Ronald J. Wilper
	CDIS	DCJOHNSI	Civil Disposition entered for: Callister, Dave, Defendant; Confluence Management LLC, Defendant; Liberty Partners Inc, Defendant; Fuller, David, Plaintiff; Fuller, Shirley, Plaintiff. Filing date: 9/28/2009	Ronald J. Wilper
	STAT	DCJOHNSI	STATUS CHANGED: Closed	Ronald J. Wilper
10/9/2009	MEMC	CCPRICDL	Memorandum Of Costs And Attorney Fees	Ronald J. Wilper
	AFSM	CCPRICDL	Affidavit In Support Of Memorandum and Attorney Fees	Ronald J. Wilper
	APSC	CCTHIEBJ	Appealed To The Supreme Court	Ronald J. Wilper
10/21/2009	MOTN	CCPRICDL	Plaintiff's Motion to Disallow Defendant's Costs and Attorney Fees	Ronald J. Wilper
	MOTN	CCPRICDL	Plaintiff's Motion to Stay Decision on Attorney Fees and Costs Pending Appeal	Ronald J. Wilper
	MEMO	CCPRICDL	Plaintiff's Memorandum in Support of their Motion to Disallow Costs and Attorney Fees	Ronald J. Wilper
	NOTH	CCPRICDL	Notice Of Hearing	Ronald J. Wilper
	HRSC	CCPRICDL	Hearing Scheduled (Motion 11/09/2009 03:30 AM) to Disallow Defendant's Attorney Costs	Ronald J. Wilper
	STAT	CCPRICDL	STATUS CHANGED: Closed pending clerk action	Ronald J. Wilper
10/27/2009	CONT	DCJOHNSI	Continued (Motion 11/09/2009 03:30 PM) to Disallow Defendant's Attorney Costs	Ronald J. Wilper
11/6/2009	REPL	CCNELSRF	Defendants Reply to Plaintiffs Memorandum to Disallow Costs and Attorney Fees	Ronald J. Wilper
11/9/2009	DCHH	DCJOHNSI	Hearing result for Motion held on 11/09/2009 03:30 PM: District Court Hearing Held Court Reporter: cromwell Number of Transcript Pages for this hearing estimated: to Disallow Defendant's Attorney Costs-50	Ronald J. Wilper
	STAT	DCJOHNSI	STATUS CHANGED: closed	Ronald J. Wilper

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Date: 2/25/2010

Time: 08:01 AM

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Fourth Judicial District Court - Ada County

User: CCTHIEBJ

ROA Report

Case: CV-OC-2008-20018 Current Judge: Ronald J. Wilper

David Fuller, etal. vs. Dave Callister, etal.

David Fuller, Shirley Fuller vs. Dave Callister, Confluence Management LLC, Liberty Partners Inc

Date	Code	User		Judge
12/4/2009	ORDR	DCJOHNSI	Order of Costs and Fees	Ronald J. Wilper
12/8/2009	NOTC	CCTHIEBJ	Notice Of Transcript Lodged - Supreme Court Docket No. 37035	Ronald J. Wilper
1/13/2010	NOTA	CCTHIEBJ	Notice Of Cross Appeal	Ronald J. Wilper

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Fuller, Ex. A. That same day, the parties executed an Addendum where Plaintiffs were to receive the funds paid by ACHD. *See id.*, Ex. B.

On September 22, 2005, Plaintiffs and Defendants Confluence Management and Liberty Partners executed another Addendum where Plaintiffs consented to the property vesting with Liberty Partners. *See id.*, Ex. C.

On August 10, 2006, Defendant Liberty Partners executed a Sale and Purchase Agreement with ACHD and warranty deed conveying a portion of the property. *See Aff. of EJG*, Exs. A & B.

On or about August 25, 2006, ACHD issued a check to Transnation Title & Escrow in the amount of \$83,921.00 for the property ACHD acquired. *See id.*, Ex. C. The property closed on October 20, 2006 at LandAmerica Transnation and a payment of \$83,921.00 was issued to Liberty Partners, Inc. *See id.*, Ex. D.

Neither Defendants Confluence Management or Liberty Partners turn over the condemnation proceeds received from ACHD to Plaintiffs. *See Aff. of Fuller.*

II. LEGAL ARGUMENT

A. Standard of Review

A motion for summary judgment is properly granted if no genuine issue of material fact exists. *Orthman v. Idaho Power Co.*, 130 Idaho 597, 600, 944 P.2d 1360, 1363 (1997).

Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from evidence. *Id.* A "material fact" for summary judgment purposes is one upon which the outcome of the case may be different. *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998). In determining whether or not to grant summary judgment, the court is to liberally construe the facts and draw all reasonable inferences in favor

of the nonmoving party. *Garzee v. Barkley*, 121 Idaho 771, 774, 828 P.2d 334, 337 (Ct. App. 1992). Nevertheless, raising doubts as to a material fact is not sufficient because the nonmoving party must produce substantial evidence that demonstrates a material fact is in dispute, a mere scintilla of evidence is not sufficient. *Ambrose v. Buhl Joint School District #412*, 126 Idaho 581, 583, 887 P.2d 1088, 1091 (Ct. App. 1994).

B. The Commercial/Investment Real Estate Purchase and Sale Agreement did not Merge with the Recorded Warranty Deed.

In their Answer, Defendants alleged as their ninth affirmative defense that “Plaintiffs claim for relief is barred against all Defendants because all contractual obligations contained in the Commercial/Investment Real Estate Purchase and Sale Agreement merged with the recorded Warranty Deed.” *See* Defendants’ Answer.

As part of the Commercial/Investment Real Estate Purchase and Sale Agreement executed by the Plaintiffs and Defendant Confluence Management on September 20, 2005, the parties executed an Addendum that same day where Defendant Confluence Management and Plaintiffs agreed to reserve the proceeds from the acquisition of a portion of the subject property by ACHD under the threat of condemnation to Plaintiffs. The Agreement was assigned to Defendant Liberty Partners, Inc. on September 22, 2005 and Plaintiffs executed a Warranty Deed for the benefit of Defendant Liberty Partners, Inc. Defendant Liberty Partners, Inc. negotiated with ACHD for the sale of a portion of the property and kept the proceeds paid by ACHD in breach of the Agreement.

In *Sells v. Robinson*, 141 Idaho 767, 118 P.3d 99 (2005), the Idaho Supreme Court explained the application of the doctrine of merger of a real estate agreement and the deed.

Here, Sells sold 20 acres of their property to Robinson. Under their agreement, Sells granted an easement on their remaining portion of property and the timber rights on that

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT - 3

easement were included. After the execution of the agreement, the Sells executed a warranty deed which described the Robinson easement over the Sells' property and timber rights located on the easement. Robinson interpreted that both the agreement and warranty deed granted him timber rights to all of Sells' remaining property and proceeded to log his twenty acres, as well as the Sells remaining acres.

Sells sued Robinson for trespass and conversion and the case was tried to the court without a jury. The court found in Sells favor and applied the doctrine of merger holding the agreement merged into the deed so only the terms of deed would be considered. Robinson appealed the court's ruling.

Relying on its past decision in *Jolley v. Idaho Sec., Inc.*, 90 Idaho 373, 414 P.2d 879 (1966), the Court defined the doctrine of merger as follows:

[T]he acceptance of a deed to premises generally is considered as a merger of the agreements of an antecedent contract into the terms of the deed, and any claim for relief must be based on the covenants of agreements contained in the deed, not the covenants or agreements contained in the prior agreement. (Citation omitted).

The Court recognized that an exception to merger exists, "where under the contract the rights are conferred collaterally and independent of the deed; there being no presumption that the party in accepting the deed intends to give up the covenants of which the deed is not performance or satisfaction." However, the Court noted that, "[w]here the right claimed under the contract would vary, change, or alter the agreement in the deed itself, *or inheres in the very subject-matter with which the deed deals, a prior contract covering the same subject-matter cannot be shown against the provisions of the deed.*" (Emphasis included).

Id., 141 Idaho at 771-72.

The Court affirmed the district court's application of the doctrine of merger holding that the terms of the agreement sought to be enforced by Robinson inhered to the vary subject-matter dealt with by the deed, i.e. the timber on the Sells' property. The Court found that the timber language in the agreement did not constitute a collateral agreement independent of the deed.

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT - 4

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In *Jolley, infra.*, the Idaho Supreme Court further elaborated on the doctrine of merger, explaining:

“In the absence of fraud, mistake, etc., the following stipulations in contracts for the sale of real estate are conclusively presumed to be merged in a subsequently delivered and accepted deed made in pursuance of such contract, to wit: (1) Those that inhere in the very subject-matter of the deed, such as title, possession, emblements, etc; (2) those carried into the deed and of the same effect; (3) those of which the subject-matter in the deed. In such cases the deed alone must be looked at in determining the rights of the parties.

“But where there are stipulations in such preliminary contract of which the delivery and acceptance of the deed is not a performance, the question to be determined is whether the parties have intentionally surrendered or waived such stipulations. If such intention appears in the deed, it is decisive; if not, then resort may be had to other evidence.

“The authorities may perhaps be reconciled by a determination of what are ‘collateral stipulations.’ If the stipulation has reference to title, possession, quantity, or emblements of the land, it is generally, but not always, held to inhere in the very subject-matter with which the deed deals, and is merged therein.”

Id., 90 Idaho at 383.

In the instant case, the contract reserving the condemnation proceeds with Plaintiffs do not inhere in the very subject-matter of the deed nor makes reference to the title, possession, quantity or emblements of the land. Instead it deals with money.

Based upon the foregoing case law, Plaintiffs respectfully request this Court enter its Order dismissing Defendants ninth affirmative defense.

C. The Assignment of the Property Does Not Relieve Defendant Confluence Management of Liability under the Agreement.

Defendants alleged as their eighth affirmative defense that “Plaintiffs claim for relief should be barred against Confluence because Confluence assigned all right to the Commercial/Investment Real Estate Purchase and Sale Agreement that is subject of this suit to Defendant Liberty. The assignment was agreed to and accepted by Plaintiffs thereby releasing

Confluence from all obligations to Plaintiffs pursuant to said Commercial/Investment Real Estate Purchase and Sale Agreement.” Defendants claim that the novation relieves Defendant Confluence of any liability under the contract.

Specifically, the assignment/novation states :

The undersigned sellers and buyers agree to the following:

1. The buyers of said property will be assigned to vest as Liberty Partners, Inc. All other terms and conditions shall remain the same. *See* Aff. of Fuller, Ex. B.

Plaintiffs executed the document along with Defendants Confluence Management and Liberty Partners.

In *George W. Watkins Family v. Messenger*, 115 Idaho 386, 766 P.2d 1267 (App.1988), the Idaho Court of Appeals addressed whether a lessee’s assignment to a third party relieved him of liability from the landlord who consented to the assignment.

On appeal, the lessee argued that the landlord’s consent to the assignment relieved him of liability. The Court of appeals reviewed the lease agreement and held as follows:

In our view the quoted language clearly holds the lessee primarily obligated in the event of an assignment and subsequent default by the assignee. Absent an express novation, a lessee remains in privity of contract with the lessors and is a guarantor for performance of the covenants in the agreement. (Citation omitted). There is no express novation here. We hold that the lessors’ consent to an assignment did not relieve the lessee of his obligation under the lease agreement.

Id., 115 Idaho at 390.

A mere assignment does not release the assignor from his or her obligations to the other party under the assigned contract, absent an agreement that can be applied from the facts other than the other contracting party’s consent to the assignment. *See Seagull Energy E&P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342 (Tex.2006).

Even if the assignee assumes the obligations of the contract, the assignor remains

secondarily liable as a surety or guarantor. *See Roget v. Grand Pontiac, Inc.*, 5 P.3d 341 (Colo.Ct.App.1999).

In the instant case, Plaintiffs only consented to the property vesting to Liberty Partners. The assignment does not expressly state or relieve Confluence Management of its obligations under the Commercial/Investment Real Estate Purchase and Sale Agreement dated September 20, 2005 wherein the ACHD condemnation proceeds were reserved to the Plaintiffs.

Since Liberty Partners took the ACHD proceeds and failed to turn it over to Plaintiffs, Confluence Management is still obligated under the contract to pay said funds to Plaintiffs.

Based upon the foregoing case law, Plaintiffs respectfully request this Court enter its Order dismissing Defendants eighth affirmative defense.

D. Defendants Confluence Management and Liberty Partners Breached the Agreement by Failing to Return the ACHD proceeds to Plaintiffs.

As noted above, Defendant Confluence Management is still obligated to pay the proceeds received from ACHD to Plaintiffs pursuant to the terms of their contract.

It is undisputed that Liberty Partners received the proceeds paid by ACHD for the acquisition of a portion of the property which was reserved to Plaintiffs under their agreement with Confluence Management. *See Aff. of EJG, Exs. A, B & C.*

The reservation of the condemnation proceeds was a material part of the agreement which Defendants Confluence Management and Liberty Partners breached. Whether Defendant Liberty Partners assumed Confluence Management's obligations under the contract is irrelevant as Plaintiffs never expressly released Confluence Management of its obligations under the agreement.

ACHD issued a check in the amount of \$83,921.00 to the escrow agent who in turn issued payment in that amount to Liberty Partners who failed to turn over the proceeds to

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT - 7

Plaintiffs. *See* Aff. of EJG, Exs. A, B & C.

Based upon the undisputed facts, Plaintiffs respectfully request the Court enter its Order for partial summary judgment against Defendants Confluence Management, LLC and Liberty Partners, Inc. in the amount of \$83,921.00, plus prejudgment interest accruing from the date of the settlement, October 10, 2006.

III. CONCLUSION

Based upon the foregoing undisputed facts and case authority provided herein, Plaintiffs respectfully request this Court enter partial summary judgment in favor of Plaintiffs and dismiss Defendants' eighth and ninth affirmative defenses, as well as, enter partial summary judgment against Defendant Confluence Management, LLC in the amount of \$83,921.00, plus accrued pre-judgment.

DATED this 23rd day of June, 2009.

DAVISON, COPPLE, COPPLE & COPPLE




Ed Guericabeitia, of the firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of June, 2009 a true and correct original of the foregoing was served upon the following by the method indicated below:

Michael R. Jones
Michael R. Jones PLLC
508 North 13th Street
Boise, Idaho 83702

U.S. MAIL
 Hand Delivery
 Facsimile Transmission:


Ed Guerricabeitia

JUL 06 2009

J. DAVID NAVAHO, Clerk
By L. AMES
DEPUTY

Michael R. Jones
MICHAEL R. JONES, PLLC
P.O. Box 7743
508 North 13th Street
Boise, Idaho 83707
Telephone: (208) 385-7400
Facsimile: (208) 389-9103
ISB No. 2221

Attorney for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID and SHIRLEY FULLER, a)
married couple,)
)
Plaintiffs,)
)
vs.)
)
DAVE CALLISTER, an individual,)
CONFLUENCE MANAGEMENT, LLC,)
an Idaho limited liability company, and)
LIBERTY PARTNERS, INC., an Idaho)
corporation,)
)
Defendants.)
_____)

CASE NO. CV OC 0820018

**DEFENDANTS' MEMORANDUM
IN OPPOSITION TO PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

COMES NOW the Defendants, DAVID CALLISTER ("Callister"), CONFLUENCE MANAGEMENT, LLC ("Confluence Management"), and LIBERTY PARTNERS, INC. ("Liberty Partners"), by and through their counsel of record, Michael R. Jones, and submit the following Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment. This memorandum is further supported by the accompanying affidavit of Michael R. Jones.

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT - PAGE 1**

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I.

**THE QUESTION PLACED AT ISSUE IN PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT**

On or about September 20, 2005 , the Fuller Plaintiffs sold 12.73 acres of property located at the common address, 890 N. Ten Mile Road, in or near the city of Meridian, Ada County, Idaho to the Defendant Liberty Partners for slightly more than 1.25 million dollars (\$1,273,000.00). Liberty Partners was the contract assignee of the Defendant Confluence Management, the entity that had originally entered into the purchase/sale agreement with the Fullers.

Almost one year later, on or about August 10, 2006, the Ada County Highway District ("ACHD") paid Liberty Partners \$83,921.00 for the purchase of slightly less than one acre (.99 acre) out of the 12.73 acres that had been previously sold by the Fullers to Confluence Management almost one year earlier (hereinafter referred to as the "ACHD proceeds").

In this action the Plaintiff Fullers claim that they had reserved a right in the purchase/sale agreement to receive the ACHD proceeds for the .99 acres that were subsequently paid to Liberty Partners. As the defendants in this action, both Liberty and Confluence assert that the purchase/sale agreement unambiguously limited the Fullers' right to the ACHD proceeds to any sale or condemnation that occurred prior to the Fullers' September 2005 closing on the sale of the 12.73 acres. And that in any event, the doctrine of merger now precludes the Fullers from attempting to enforce a contract provision that was not reserved in the deed that has now superseded the underlying contract.

Therefore, the following question is presented to this Court upon the Fullers' motion for partial summary judgment:

***DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT - PAGE 2***

Are the Plaintiff Fullers entitled to the \$83,921.00 in proceeds that were paid by the ACHD to the Defendant Liberty Partners on or about August 10, 2006 for the purchase of approximately one acre of land out of the 12.73 acres of land that Fullers had previously sold to Liberty's assignor, Confluence Management, on or about September 20, 2005 for more than 1.25 million dollars?

II.

THE FACTUAL DISPUTE

Exhibit A to the Amended Complaint is a copy of the September 20, 2005 real estate sales contract between the Fullers and Confluence Management, and its assignee Liberty Partners. The dispute that is before this Court arises out of the language found in paragraph 10 of that contract, and an "addendum" to that paragraph,¹ also dated September 20, 2005, which in relevant part declares as follows:

10. OTHER TERMS AND/OR CONDITIONS: This Agreement is made subject to the following special terms, considerations and/or contingencies **which must be satisfied prior to closing . . .**

. . .

3. Seller to receive any and all funds paid for road right of way including land, landscaping, fencing, sprinklers and temporary easements.

Escrow instructions by the title company will cover the receipt and disbursement of the right of way funds. It is understood that buyer will be deeding the right of way to ACHD and that the seller, Dave and Shirley Fuller will receive all said funds paid by ACHD. Said

¹ The last sentence of paragraph 10 declares, "continues on addendum # 2." There is no "addendum # 2," but there is an "addendum # 1" (Exhibit B to the Amended Complaint), that declares, "continuation of the Earnest Money Agreement paragraph # 10." There is no dispute between the parties that this addendum # 1 does provide the additional language appended to paragraph 10, and that the reference in paragraph 10 to "addendum # 2," is simply a scrivener's error.

amount has not been yet determined and Dave and Shirley Fuller retain the right to negotiate the amount with ACHD.

(Emphasis added).

III.

LEGAL STANDARDS APPLICABLE TO THE ISSUES RAISED

The Fuller Plaintiffs argue that they are entitled to partial summary judgment awarding them the ACHD proceeds because the Defendants cannot defeat that claim based upon their ninth affirmative defense encompassing the merger doctrine, which if applicable, would entirely defeat the Fullers' claim - or upon the defendants' eight affirmative defense encompassing the doctrine of contract novation, which would exonerate the Defendant Confluence Management from an liability because its rights and liabilities were entirely and completely assigned to the Defendant Liberty Partners.

The Idaho Supreme Court in *Sirius LC v. Erickson*, 144 Idaho 38, 156 P.3d 539 (2007) directly addressed the question of granting summary judgment based upon the existence of any genuine issue of material fact involving an affirmative defense:

Erickson asserts that the district court improperly granted summary judgment with respect to his remaining twelve affirmative defenses because neither party raised those defenses at summary judgment. When the district court granted summary judgment for Sirius on the issue of consideration, it also *sua sponte* granted summary judgment with respect to Erickson's remaining defenses. Erickson challenged the district court's dismissal of his remaining affirmative defenses in his motion for reconsideration and the district court responded by stating that Erickson had failed to submit any evidence- affidavit, testimony, or otherwise - that would raise disputed issues of material fact with respect to his remaining defenses.

Erickson was not required to come forth with evidence creating a genuine issue of material fact with regard to his remaining affirmative defenses at the summary judgment stage because neither party put those defenses at issue. While a court may grant summary judgment in favor of either a moving or non-moving party upon a motion for summary judgment, its

authority is limited to the issues placed before it pursuant to the movant's motion. *Harwood*, 136 Idaho at 677, 39 P.3d at 617. The record indicates that the only ground asserted by Erickson in his motion for summary judgment was the defense of lack of consideration. Sirius did not file its own motion for summary judgment and thus did not raise any additional issues. Accordingly, when the district court determined that summary judgment was proper with respect to Erickson's remaining affirmative defenses, it improperly "seized upon" matters not before it pursuant to the movant's motion. *See Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994) (holding that district court improperly seized upon the issue of proximate cause on summary judgment in negligence action where no argument was offered regarding this element by the moving party). We vacate the district court's dismissal of Erickson's remaining affirmative defenses because they were not at issue in the summary judgment proceedings.

144 Idaho at 43, 156 P.3d at 544 (emphasis added).

Here, the defendants in their answer to the Fullers' Amended Complaint alleged twelve affirmative defenses, only two of which - the eighth and ninth - have been raised and put at issue by the Fullers on their motion for partial summary judgment.

A court can grant summary judgment to the non-moving party when there are no genuine issues of material fact and the non-moving party is entitled to judgment as a matter of law. *Harwood v. Talbert*, 136 Idaho 672, 677-78, 39 P.3d 612, 617-18 (2001).

IV.

ARGUMENT

A. The Fullers' Alleged Contract Rights Have Been Superseded By The Warranty Deed

The essential elements that must be present to have an enforceable land sale contract include: (1) identification of the parties involved, (2) identification of the subject matter of the contract, (3) the price or consideration, (4) a legal description of the property, and (5) all the essential terms necessary in any particular situation that are required to form an enforceable

agreement. *P.O. Ventures v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 238, 159 P.3d 870, 875 (2007).

In this case the parties included the Fullers and Confluence Management, who subsequently assigned all its rights as buyer under the contract to Liberty Partners. The subject matter of the contract was 12.73 acres of property located at 890 N. Ten Mile Road, Meridian, Idaho. The price for this entire property was identified as \$1,273,000.00. A legal description was appended to both the purchase/sale agreement and the warranty deed. The purchase/sale agreement provided the remaining essential terms concerning the date of closing, the payment of the consideration, and the assignment of Confluence Management's rights to Liberty Partners.

Under the doctrine of merger these essential terms of an enforceable land sale contract constitute the very terms that are merged into a subsequent deed. The Defendants in this action concur with the Plaintiff Fullers' statement of the merger doctrine as recently set out in *Sells v. Robinson*, 141 Idaho 767, 771-72, 118 P.3d 99, 103-04 (2005), which incorporated the declaration of that doctrine made in *Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 414 P.2d 879 (1966), to the effect that,

[T]he acceptance of a deed to premises generally is considered a merger of the agreements of an antecedent contract into the terms of the deed, **and any claim for relief must be based on the covenant or agreements contained in the deed, not the covenants or agreements as contained in the prior agreement.**

90 Idaho at 382, 414 P.2d at 884 (emphasis added). As stated in *Sells*, the following test is applied:

"[w]here the right claimed under the contract would vary, change, or alter the agreement in the deed itself, *or inheres in the very subject-matter with which the deed deals, a prior contract covering the same subject-matter cannot be shown against the provisions of the deed.*"

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT - PAGE 6**

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141 Idaho at 771-72, 118 P.3d at 103-04 (italicized emphasis in original).

The Fullers do not dispute the fact that the warranty deed in this case does not incorporate and preserve any right in them to receive the ACHD proceeds that are at issue, and consequently they predicate their claim entirely upon the underlying real estate purchase/sale agreement. The Fullers have argued in support of their motion for partial summary judgment that the contract provision that they are attempting to enforce does not address matters that are inherent in the subject matter of the deed, such as title, possession, quantity or emblements of the land, but rather that the contract provision at issue it only deals with "money." *See*, Fullers' Summary Judgment Memorandum at pg. 5.

The consideration paid, the amount of land sold, and the legal description of that land, are all essential elements necessary to form an enforceable land sale agreement, as declared in the *P.O. Ventures* decision that was cited above. In order for this Court to decide the Fullers' claim to the ACHD proceeds that has been made in this case, evidence will be required that delves into questions of how much land was sold by the Fullers to Confluence Management (was it 12.73 acres? or 12.73 acres minus the .99 acres that ACHD purchased?); the consideration that was paid (was it \$1,273,000? or was it \$1,273,000 minus the \$83,921 in ACHD proceeds?); and the legally enforceable description of the property that was sold, as incorporated into the warranty deed. *See, Ray v. Frasure*, 146 Idaho 625, 629, 200 P.3d 1174, 1178 (2009) ("A description contained in a deed will be sufficient so long as quantity, identity or boundaries of property can be determined from the face of the instrument, or by reference to extrinsic evidence to which it refers.").

This application of the merger doctrine, so as to preclude evidence arising out of an

***DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT - PAGE 7***

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underlying contract that would necessarily alter the terms of the deed itself, is consistent with the long-standing application of the parol evidence rule to preclude the introduction of evidence that would alter the terms embodied within the terms of the deed itself. *See e.g., Barmore v. Perrone*, 145 Idaho 340, 345, 179 P.3d 303, 308 (2008), citing to *Bliss v. Bliss*, 127 Idaho 170, 898 P.2d 1081 (1995). It is significant to the decision of this question that the ACHD itself declared in an October 28, 2005 letter to the Fullers that it was compelled by controlling Idaho law to negotiate only with the owner of record - which at that date was Liberty Partners, not the Fullers. *See*, Exhibit C to the Affidavit of Michael R. Jones.

In sum, the merger doctrine precludes the Fullers in this case from attempting to enforce alleged contract rights that would necessarily change three essential elements of an enforceable land sale contract that are embodied within the terms of the deed itself - (1) the identification of the property being sold (12.73 acres, or something less), (2) the amount of consideration to be paid for that property (\$1,273,000, or something less), and (3) the precise legal description of that property. Consequently, because the Fullers cannot prevail upon their claim to the ACHD proceeds because of the operation of the merger doctrine, not only should their motion for partial summary judgment be denied, but summary judgment on that claim should be entered for the Defendants in this action.

B. Even If The Fullers' Contract Rights Survived Merger Into The Warranty Deed, Those Rights Lapsed At Closing

As included in the statement of disputed facts set out above, the terms of the contract upon which the Fullers rely, as stated in paragraph 10 of the purchase/sale agreement were clearly and unambiguously stated as lapsing, if not exercised and satisfied prior to closing:

This Agreement is made subject to the following special terms, considerations

***DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT - PAGE 8***

and/or contingencies **which must be satisfied prior to closing** . . .

(Emphasis added).

When the terms of a contract are unambiguous, interpretation of the contract and its legal effect are questions of law. *Opportunity, L.L.C. v. Ossewarde*, 136 Idaho 602, 605, 38 P.3d 1258, 1261 (2002). An unambiguous contract will be given its plain meaning, which is based on the words of the contract. *Id.* A contract must be interpreted in its entirety, without nullifying or ignoring any provision of that contract. *Madrid v. Roth*, 134 Idaho 802, 806, 10 P.3d 751, 755 (Ct.App.2000).

Paragraph 26 of the purchase/sale agreement declared in bold letters that, "TIME IS OF THE ESSENCE IN THIS AGREEMENT." Generally, when time is made of the essence in a real estate sales contract, performance must occur within the prescribed time constraints contained in that contract. *Kessler v. Tortoise Development, Inc.*, 134 Idaho 264, 269, 1 P.3d 292, 297 (2000); *Ujdur v. Thompson*, 126 Idaho 6, 9, 878 P.2d 180, 183 (Ct.App.1994) ("[W]here the parties make time of the essence in setting a deadline for payment, strict compliance with such deadline is required.").

In this case the Fullers were given an opportunity to negotiate a sale with ACHD prior to closing with Confluence Management. Had the Fullers been successful in their negotiations with ACHD then necessary adjustments could have been made in the identification of the property being sold, its legal description, and the consideration to be paid to be paid at closing. The facts are undisputed that the Fullers neither successfully completed negotiations with ACHD prior to closing, nor did they thereafter specifically further reserve any continuing right to conduct such negotiations, or to receive any further compensation from either ACHD, or Confluence

Management or its assigns (Liberty Partners) as the buyer, as the result of any subsequent sale to, or condemnation by, ACHD.

Therefore, even if the Fullers' contract right, as embodied within paragraph 10 of the purchase/sale agreement, had survived merger into the deed, that contract right by its own unambiguous and express terms lapsed at the time of the Fullers' closing with Confluence Management and its assignee Liberty Partners. The Fullers no longer had any enforceable contract right after the date of that closing to either negotiate or receive proceeds from ACHD arising from any subsequent sale or condemnation of that property by ACHD. Consequently, the Fullers are not entitled to summary judgment on their claim to the ACHD proceeds, and because there are no genuine issues of material fact on this question, summary judgment should be entered for the Defendants in this action, as a matter of law.

C. Confluence Management Has No Liability To The Fullers Because It Assigned All Of Its Rights Arising Out Of The Contract And Subsequent Deed to Liberty Partners

The Fullers have argued in support of their motion for partial summary judgment that the Defendant Confluence Management is not released from any liability to them as a result of its assignment of its right as "buyer" under the purchase/sale agreement to Liberty Partners. In support of their argument the Fullers rely upon the Idaho Court of Appeals decision in *George W. Watkins Family v. Messenger*, 115 Idaho 386, 766 P.2d 1267 (Ct.App.1988), and decisions from Texas and Colorado.

The lease agreement that was at issue in the *Watkins* case contained a provision that specifically declared that in the event of an assignment or sublease that, "the Lessee shall nevertheless not be relieved form his obligation to fully perform hereunder in the event of the

default of the assignee. [Underlining original.]" 115 Idaho at 390, 766 P.2d at 1271 (emphasis in original). Consequently, the decision rendered in the *Watkins* case was constrained by contractual language in which the lessee retained liability notwithstanding any assignment or sublease. Furthermore, the Fullers have made no argument to this Court that the supporting authority that they have cited from Texas and Colorado is consistent with existing Idaho law, or that this out-of-state authority has any persuasive authority as applied to controlling Idaho law.

As applied under Idaho law, an "assignment" and a "sublease", are not synonymous terms that evoke an equivalent legal meaning. As the Court in *Haag v. Pollack*, 122 Idaho 605, 836 P.2d 551 (Ct.App.1992) observed:

An assignment, unlike a sublease, disposes of a lessee's entire interest in the leasehold, and does not reserve to the lessee any reversionary interest. *Fahrenwald v. LaBonte*, 103 Idaho 751, 753 n. 1, 653 P.2d 806, 808 n. 1 (Ct.App.1982). In other words, an assignment is a transfer of all of one's interest in property. See 6 AM.JUR.2D *Assignments* 1, at 185 (1963).

122 Idaho at 610, 836 P.2d at 556.

As applied to the facts of this case, the controlling general rule of Idaho law provides that when a contract is assignable, the assignee acquires all the rights and responsibilities of the assignor, and is thereafter substituted for the assignor. *Van Berkem v. Mountain Home Development Co.*, 132 Idaho 639, 641, 977 P.2d 901, 903 (Ct.App.1999), citing *Anderson v. Carrigan*, 50 Idaho 550, 555, 298 P. 673, 674 (1931). This applicable legal rule was recently more fully stated as follows in *Foley v. Grigg*, 144 Idaho 530, 164 P.3d 810 (2007):

An assignment is a transfer of rights or property from one person to another. *Purco Fleet Servs., Inc. v. Idaho State Dep't of Fin.*, 140 Idaho 121, 125, 90 P.3d 346, 350 (2004) (quoting Black's Law Dictionary 115 (7th ed.1999); 6 Am.Jur.2d *Assignment* 1 (1999)). An assignment "confers a complete and present right in the subject matter to the assignee." *Id.* (quoting 6 Am.Jur.2d *Assignment* 1 (1999)). "[A]n assignee takes the subject of the assignment with

all the rights and remedies possessed by and available to the assignor." 6 Am.Jur.2d Assignment 144 (1999) (emphasis added). Once an assignor makes an assignment, he no longer retains control of the subject of the assignment. See *First State Bank of Eldorado v. Rowe*, 142 Idaho 608, 612, 130 P.3d 1146, 1150 (2006).

144 Idaho at 533, 164 P.3d at 813 (italicized emphasis in original).


Even if this Court should find that the Fullers retain a contractual right to pursue the relief they seek in respect to the ACHD proceeds, or that they have not lost this contractual right due to the doctrine of merger, no factual or legal basis exists in this case upon which they are entitled to pursue either the Defendant Confluence Management, or the Defendant David Callister, individually, inasmuch as neither of these named defendants has any enforceable legal obligation to the Fullers. Defendant, Callister, was not at any time pertinent to these claims acting as an individual and, therefore, should not be a named party in this claim. Therefore, this Court should deny the Fullers' motion for summary judgment in respect to the Defendants' eighth affirmative defense, and instead grant summary judgment for both Confluence and Callister individually, as to any claim made against them in this action by the Fullers.

V.

CONCLUSION

The Fullers' motion for partial summary judgment should be denied. This Court should enter summary judgment for the defendants' as a matter of law - on the basis that the Fullers have no enforceable claim to the ACHD proceeds. In the event that this Court does not dismiss the Fullers claims in their entirety, then the Defendants Confluence, and Callister individually, should be dismissed due to the absence of any liability in them to the Fullers.

Respectfully submitted this 6~~th~~ day of July, 2009.



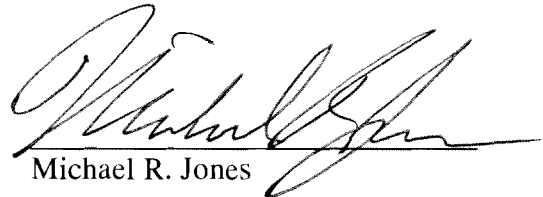
Michael R. Jones
Attorney for the Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 6th day of July, 2009, I caused to be served a true and correct copy of the **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** upon the plaintiffs by the method indicated and addressed as follows:

E. DON COPPLE
ED GUERRICABEITIA
DAVISON, COPPLE, COPPLE & COPPLE
Attorneys at Law
Washington Mutual Capitol Plaza, Suite 600
199 North Capitol Boulevard
Post Office Box 1583
Boise, Idaho 83701-1583
Telephone: (208) 342-3658
Facsimile: (208) 386-9428
Email: guerricabetitia@davisoncopples.com

U.S. Mail, postage prepaid
 Hand Delivered
 Overnight Mail
 Facsimile Transmission
 Other _____


Michael R. Jones

OCT 09 2009

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Michael R. Jones
MICHAEL R. JONES, PLLC
508 N. 13th Street
Boise, Idaho 83702
P. O. Box 7743
Boise, ID 83707
Telephone: (208) 385-7400
Facsimile: (208) 389-9103
ISB No. 2221
mrjones@mcleodusa.net

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID and SHIRLEY FULLER, a married couple,)
)
 Plaintiffs,)
)
 vs.)
)
 DAVE CALLISTER, an individual,)
 CONFLUENCE MANAGEMENT, LLC, an Idaho)
 Limited Liability Company, and LIBERTY)
 PARTNERS, INC., an Idaho Corporation,)
)
 Defendants.)
)
 _____)

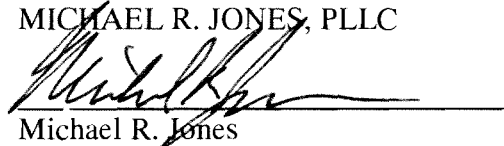
CASE NO. CV OC 0820018
Memorandum of Costs
and Attorney Fees

COMES NOW, Defendants, Dave Callister ("Callister"), Confluence Management, LLC ("Confluence", and Liberty Partners, Inc. ("Liberty") by and through its attorney of record, Michael R. Jones, PLLC and pursuant to Rule 54(d)(1), 54(d)(5), and 54(e)(1), seeks an award of attorneys' fees and costs as prevailing party in the litigation. Defendants seek an award of attorneys' fees pursuant to Idaho Code §12-120(1), §12-120(3) and §12-121. Defendants are the prevailing party. All claims raised by Plaintiffs' Complaint were

dismissed. The Complaint arose from a commercial transaction and is transaction covered by the attorney fee provisions of §12-120(1), §12-120(3). This Memorandum of Costs and Attorneys' Fees is supported by the Affidavit of Michael R. Jones in Support of Memorandum of Costs and Attorneys' Fees filed concurrently herewith. By way of this Memorandum of Costs, Defendants Callister, Confluence and Liberty seek an award of costs as a matter of right in the amount of \$244.61, discretionary costs in the amount of \$4.95 and an award of attorneys' fees in the amount of \$9,010.25.

DATED this 8 day of October 2009.

MICHAEL R. JONES, PLLC



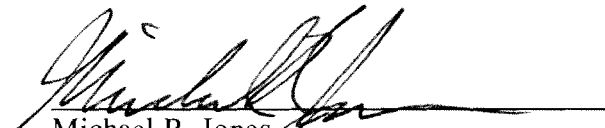
Michael R. Jones
Attorney for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 9th day of October, 2009, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Idaho Rules of Civil Procedure, to the following person(s):

E. Don Copple
Ed Guerricabeitia
DAVISON, COPPLE, COPPLE &
COPPLE
Washington Mutual Capitol Plaza, Suite
600
199 North Capitol Boulevard
Post Office Box 1583
Boise Idaho 83701

- U.S. Mail
- Certified Mail–Return Receipt requested
- Fax – 208-386-9428
- By Hand
- Overnight


Michael R. Jones
Attorney for Defendants

OCT 09 2009

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

Michael R. Jones
MICHAEL R. JONES, PLLC
508 N. 13th Street
Boise, Idaho 83702
P. O. Box 7743
Boise, ID 83707
Telephone: (208) 385-7400
Facsimile: (208) 389-9103
ISB No. 2221
mrjones@mcleodusa.net

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID and SHIRLEY FULLER, a married couple,)
)
 Plaintiffs,)
)
 vs.)
)
 DAVE CALLISTER, an individual,)
 CONFLUENCE MANAGEMENT, LLC, an Idaho)
 Limited Liability Company, and LIBERTY)
 PARTNERS, INC., an Idaho Corporation,)
)
 Defendants.)
 _____)

CASE NO. CV OC 0820018
Affidavit in Support of
Memorandum of Costs
and Attorney Fees

COMES NOW the Defendants, appearing by its attorney of record, Michael R. Jones of the firm of Michael R. Jones, PLLC, and respectfully submits to the Court this itemized list of costs and disbursements incurred herein pursuant to Rules 54(d), 54(e)(1), and 54(e)(5) of the Idaho Rules of Civil Procedure.

Affidavit of Michael R. Jones
Support of Memorandum of Costs
and Attorney Fees

2

STATE OF IDAHO)
)
 COUNTY OF ADA) ss.

I, Michael R. Jones, being duly sworn, depose and say:

1. I am attorney of record for Dave Callister ("Callister"), Confluence Management, LLC ("Confluence"), and Liberty Partners, Inc. ("Liberty") the Defendants in the above-entitled matter, and I make this affidavit based upon my own personal knowledge.

2. I have over thirty years of legal experience. I am familiar with the hourly rates charged by attorneys in this area and certify that the following attorney time and hourly rates charged in this matter were reasonable and necessary for this case, as were the costs incurred herein, and further certify that the costs claimed are reasonable and necessary, and that any discretionary costs claimed were necessary and exceptional.

3. The following are the reasonable attorneys' fees incurred by Defendants attributable to their defense of the claims brought by Plaintiffs against Defendants. In preparing this Affidavit, I have combined the time incurred in defense of all the Defendants. Only a few hours of time my research time for the summary judgment opposition was allocated solely to Defendant Callister in defense of his individual liability and again for the novation issues related to Confluence.

4. The attorneys' fees incurred are as follows:

<u>Attorney</u>	<u>Hours</u>	<u>Rate</u>	<u>Fee</u>
Michael R. Jones	10.90	\$185.00	\$2016.50
Michael R. Jones	27.95	\$200.00	\$5590.00
Gary Quigley	6.10	\$150.0	\$915.00
Doug Fleenor	<u>5.75</u>	<u>\$85.00</u>	<u>\$488.75</u>
	TOTAL		\$9010.25

The amount claimed is based upon an evaluation of all the time spent on this case. The attorney fees charged to Defendants are set forth on Exhibit A and incorporated herein by reference.

5. The following are the costs which are recoverable as a matter of right pursuant to Rule 54(d)(1)(c):

Court Filing Fees:	\$58.00
Deposition Transcript Fees	\$186.61
Deposition of Dave Callister	\$186.61
	TOTAL
	\$244.61

Affidavit of Michael R. Jones
 Support of Memorandum of Costs
 and Attorney Fees

6. The following are the costs Defendants incurred in obtaining copies of documents from the Ada County Highway District that were used in defense of the lawsuit and in opposition to Plaintiffs' Motion For Partial Summary Judgment. The photocopy costs are recoverable in the Court's discretion under Rule 54(d)(1)(d) of the Idaho Rules of Civil Procedure. The amount of claimed discretionary costs is the amount of \$4.95.

7. In total, Defendants claim costs as a matter of right and attorneys fees in the amount of \$244.61, discretionary fees in the amount of \$4.95 and attorney fees in the amount of \$9,010.25. The total amount claimed for all costs and attorney fees is the sum of \$9,259.81.

MICHAEL R. JONES, PLLC

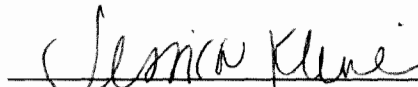
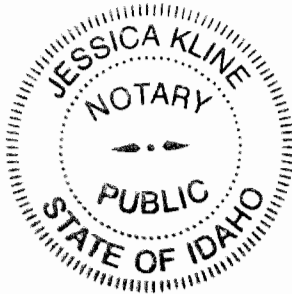


Michael R. Jones

Attorney for Defendants

SUBSCRIBED AND SWORN to before me this 8 of October 2009.

DATED this 8 day of October 2009.



Notary Public, State of Idaho

Residing at Boise, Idaho

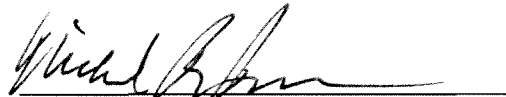
My Commission Expires: June 29, 2011

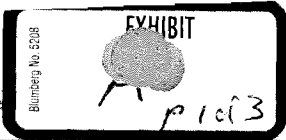
CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 9th day of October, 2009, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Idaho Rules of Civil Procedure, to the following person(s):

E. Don Copple
Ed Guerricabeitia
DAVISON, COPPLE, COPPLE &
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Washington Mutual Capitol Plaza, Suite
600
199 North Capitol Boulevard
Post Office Box 1583
Boise Idaho 83701

- U.S. Mail
- Certified Mail–Return Receipt requested
- Fax – 208-386-9428
- By Hand
- Overnight


Michael R. Jones



Date	Paid To/Fee/Time	Che/Inv	Retainer	Disbursement	Fee/Time	Current A/R Bal	Current Trust Bal
Entry#	Explanation						
Client: 229	Liberty Partners, Inc.					0.00	
Matter: 990752	Defend suit filed by David and Shirley Fuller					0.00	
Oct 28/2008	Lawyer: mrj 0.20 Hrs X 185.00				37.00		
17609	Telephone call with client regarding suit filed by Fullers.						
Nov 4/2008	Lawyer: mrj 0.50 Hrs X 185.00				92.50		
17610	Telephone call with client and receipt and review of documents.						
Nov 6/2008	Lawyer: mrj 0.05 Hrs X 185.00				9.25		
17576	Telephone call with client left message to call.						
Nov 7/2008	Lawyer: mrj 0.10 Hrs X 185.00				18.50		
17577	Telephone call with client regarding strategy and fees.						
Nov 12/2008	Lawyer: mrj 0.75 Hrs X 185.00				138.75		
17578	Telephone call and message to plaintiffs' counsel EG regarding appearance and prepare notice of appearance and draft letter and email to plaintiffs' counsel.						
Nov 13/2008	Lawyer: mrj 0.50 Hrs X 185.00				92.50		
17579	Telephone call with plaintiffs' counsel regarding case and settlement potential; Telephone call with client regarding conversation with counsel and email regarding clarifications to status of development and property for sale.						
Nov 18/2008	Lawyer: mrj 0.50 Hrs X 185.00				92.50		
17580	Telephone call with plaintiffs' counsel regarding case and rejection of settlement; Telephone call with client regarding conversation with counsel.						
Dec 15/2008	Lawyer: mrj 0.60 Hrs X 185.00				111.00		
17611	Preparation of offer of compromise/settlement.						
Dec 18/2008	Lawyer: mrj 3.50 Hrs X 185.00				647.50		
17582	Preparation of draft answer to complaint.						
Dec 19/2008	Lawyer: mrj 2.00 Hrs X 185.00				370.00		
17612	Review of various sales agreements and drafting answer and Telephone call with client regarding answer and settlement offer.						
Dec 20/2008	Lawyer: mrj 1.20 Hrs X 185.00				222.00		
17584	Drafting affirmative defenses; authority of president in individual capacity.						
Dec 22/2008	Clerk of District Court	2932		58.00			
17608	Answer and Counterclaim						
Dec 22/2008	Lawyer: mrj 1.00 Hrs X 185.00				185.00		
17613	Review final answer with client.						
Jan 6/2009	Lawyer: mrj 0.50 Hrs X 200.00				100.00		
17586	Telephone call with R. Thurber regarding purchase and sale matters.						
Jan 8/2009	Lawyer: mrj 0.50 Hrs X 200.00				100.00		
17587	Telephone call with ACHD representatives regarding record review and request to see records.						
Jan 9/2009	Lawyer: mrj 0.10 Hrs X 200.00				20.00		
17588	Telephone call with ACHD representative regarding time to come and review records.						
Jan 13/2009	Ada County Highway District	2948		4.95			
16653							
Jan 13/2009	Lawyer: mrj 3.75 Hrs X 200.00				750.00		
17614	Review of records at ACHD travel to ACHD.						
Feb 2/2009	Lawyer: mrj 1.20 Hrs X 200.00				240.00		
17590	Preparation of scheduling stipulation and Telephone call with plaintiff's counsel EG. Make corrections to stipulation forward to plaintiffs' counsel. Fax stipulation to Court and Telephone call with Judge Wilper's Clerk and emails to plaintiffs' counsel						

Date	Paid To/Fee/Time	Che/Inv	Retainer	Disbursement	Fee/Time	Current A/R Bal.	Current Trust Bal.
Entry#	Explanation						
Feb 6/2009	EG regarding hearing vacated. Lawyer: mrj 0.20 Hrs X 200.00				40.00		
17591	Telephone call with client regarding status and plan of defense.						
Feb 9/2009	Lawyer: DF 3.50 Hrs X 85.00				297.50		
17615	Legal Research Idaho and case law of merger officers and directors personal liability.						
Feb 10/2009	Lawyer: DF 2.25 Hrs X 85.00				191.25		
17448	Legal Research elements of novation and waiver.						
Feb 12/2009	Lawyer: mrj 0.30 Hrs X 200.00				60.00		
17592	Telephone call with client regarding discovery responses.						
Feb 13/2009	Lawyer: mrj 0.60 Hrs X 200.00				120.00		
17616	Telephone call with First American Title and counsel; Telephone call with client's realtor. Review of discovery responses.						
Feb 16/2009	Lawyer: mrj 0.30 Hrs X 200.00				60.00		
17594	Correspondence to plaintiffs' counsel EG regarding deposition of Dave Callister.						
Feb 17/2009	Lawyer: mrj 2.75 Hrs X 200.00				550.00		
17617	Drafting Defendants First set of discovery of plaintiffs.						
Feb 23/2009	Lawyer: mrj 0.05 Hrs X 200.00				10.00		
17596	Email to plaintiffs' counsel regarding Callister deposition						
Feb 23/2009	Lawyer: mrj 0.20 Hrs X 200.00				40.00		
17597	emails regarding depositions and Telephone call with client regarding deposition schedules.						
Jun 6/2009	Lawyer: mrj 3.25 Hrs X 200.00				650.00		
17598	Attendance at deposition of David Callister.						
Jun 15/2009	M & M Court Reporting	3008		186.61			
17194	Deposition David Callister						
Jun 27/2009	Lawyer: mrj 1.20 Hrs X 200.00				240.00		
17599	Review of pleadings and deposition and discovery.						
Jun 29/2009	Lawyer: gary 2.80 Hrs X 150.00				420.00		
17471	Legal Research and review of cases cited by plaintiff in motion for summary judgement memo.						
Jul 2/2009	Lawyer: gary 3.30 Hrs X 150.00				495.00		
17472	Drafting response memorandum to summary judgement motion.						
Jul 3/2009	Lawyer: mrj 3.80 Hrs X 200.00				760.00		
17600	Drafting memorandum and affidavit of counsel and research issue of novation.						
Jul 6/2009	Lawyer: mrj 1.50 Hrs X 200.00				300.00		
17601	Drafting and final review of memorandum.						
Jul 13/2009	Lawyer: mrj 1.00 Hrs X 200.00				200.00		
17602	Review of plaintiffs' reply brief.						
Jul 20/2009	Lawyer: mrj 4.00 Hrs X 200.00				800.00		
17603	Preparation for hearing and attend hearing on motion for summary judgement; email to client regarding hearing.						
Jul 27/2009	Lawyer: mrj 0.50 Hrs X 200.00				100.00		
17604	Conference with appraiser regarding being expert witness for defense.						
Aug 25/2009	Lawyer: mrj 0.75 Hrs X 200.00				150.00		
17605	Review of court memorandum decision and email to client.						
Aug 27/2009	Lawyer: mrj 1.50 Hrs X 200.00				300.00		
17606	Prepare proposed final judgement and memorandum of costs and affidavit of						



Michael R. Jones PLLC
Work-in-Progress
To Oct 8/2009

Date	Entry#	Paid To/Fee/Time Explanation	Che/Inv	Retainer	Disbursement	Fee/Time	Current A/R Bal	Current Trust Bal	
Total:				0.00	450.00	1100.00	2401.61	5308.20	9259.81
*** Work In Progress - Summary by Working Lawyer ***									
		Unbilled	Current	31-60 Days	61-90 Days	91-120 Days	>120 Days	Total	Percent
mrj	-	Michael R. Jones							
		Number of Matters 1							
		Hours	0.00	2.25	5.50	6.50	24.60	38.85	76.61
		+ Fees	0.00	450.00	1100.00	1300.00	4756.50	7606.50	84.42
		+ Disbs	0.00	0.00	0.00	186.61	62.95	249.56	100.00
		- Retainers	0.00	0.00	0.00	0.00	0.00	0.00	
		Total:	0.00	450.00	1100.00	1486.61	4819.45	7856.06	84.84

gary	-	Gary Quigley							
		Number of Matters 1							
		Hours	0.00	0.00	0.00	6.10	0.00	6.10	12.03
		+ Fees	0.00	0.00	0.00	915.00	0.00	915.00	10.16
		+ Disbs	0.00	0.00	0.00	0.00	0.00	0.00	0.00
		- Retainers	0.00	0.00	0.00	0.00	0.00	0.00	
		Total:	0.00	0.00	0.00	915.00	0.00	915.00	9.88

DF	-	Doug Fleenor							
		Number of Matters 1							
		Hours	0.00	0.00	0.00	0.00	5.75	5.75	11.34
		+ Fees	0.00	0.00	0.00	0.00	488.75	488.75	5.42
		+ Disbs	0.00	0.00	0.00	0.00	0.00	0.00	0.00
		- Retainers	0.00	0.00	0.00	0.00	0.00	0.00	
		Total:	0.00	0.00	0.00	0.00	488.75	488.75	5.28

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34/2
 OCT 21 2009
 J. DAVID HOWARD, CLERK
 DISTRICT COURT

Attorneys for Plaintiffs
 David and Shirley Fuller

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID and SHIRLEY FULLER, a married couple,))
)
 Plaintiffs,))
))
 vs.))
))
 DAVE CALLISTER, an individual,))
 CONFLUENCE MANAGEMENT, LLC, an Idaho))
 Limited Liability Company, and LIBERTY))
 PARTNERS, INC., an Idaho corporation,))
))
 Defendants.))
))

CASE NO.: CV OC 0820018
 PLAINTIFFS' MEMORANDUM
 IN SUPPORT OF THEIR MOTION
 TO DISALLOW COSTS AND
 ATTORNEY FEES

COME NOW the Plaintiffs, David and Shirley Fuller, by and through their attorneys of record, Davison, Copple, Copple & Copple, and hereby submits this memorandum with the foregoing case authority and legal arguments in support of their Motion.

I. LEGAL ARGUMENT

A. Plaintiffs Did Not Defend This Lawsuit Frivolously, Unreasonably or Without Foundation.

Idaho Code § 12-121 grants the court discretion to award reasonable attorney's fees to the prevailing party. Attorney fees are awarded under this section only if the position advocated by the nonprevailing party was brought, pursued or defended frivolously, unreasonably or without foundation. *Dominguez v. Evergreen Res., Inc.*, 142 Idaho 7, 121 P.3d 938 (2005); *see also, Associates N.W. v. Beets*, 112 Idaho 603, 733 P.2d 824 (Ct.App.1987) and *Jerry J. Joseph C.L.U. Ins. Assocs. V. Vaught*, 117 Idaho 555, 789 P.2d 1146 (Ct.App.1990) .

Rule 54(e)(1) and (e)(2) of the Idaho Rules of Civil Procedure have supplemented Idaho Code § 12-121 and requires the court to make a written finding, either in the award or a separate document as to the basis and reasons for award such fees. *Need v. Idaho State Dep't of Cor.*, 115 Idaho 399, 766 P.2d 1280 (Ct.App.1988).

Rule 54(e)(1) entitled attorney fees of the Idaho Rules of Civil Procedure states:

In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

Plaintiffs moved for summary judgment against Defendants on their affirmative defenses of the doctrine of merger and novation and that Defendant Confluence Management breached its contractual agreement with Plaintiffs for failing and refusing to turn over the condemnation proceeds pursuant to their agreement providing for a reservation of the ACHD condemnation

proceeds that all parties had actual knowledge that ACHD sought to condemn a portion of the land prior to execution of the agreement. The primary fact was that the reservation of the condemnation proceeds which was clear and unambiguous in the agreement.

Plaintiffs provided legal support of their position from other jurisdictions that held a reservation of the condemnation proceeds provided under a valid agreement was enforceable. Those same jurisdictions also adhered to principles set forth in the doctrine of merger. Defendants provided no case authority to the contrary.

This Court held as a matter of law that a reservation of condemnation proceeds in the agreement was a “term is the right of alienation of the property” and therefore the doctrine of merger applies.¹

Plaintiffs also cited authority from Idaho and other jurisdictions defining and distinguishing the distinct legal theories of novation and assignment. In the instant case, Plaintiffs merely consented to Defendants Confluence and Liberty Partners assignment, but did not execute any document releasing Confluence of its obligations and liability under the agreement. Defendants provided the Court the law on an assignment which Plaintiffs did not dispute governed that theory under Idaho law. The Court held that the assignment transferred Confluence’s rights over to Liberty Partners and denied Plaintiffs’ motion to dismiss the novation defense.

Although the Court disagreed with the case authority cited by Plaintiffs in support of their motion for partial summary judgment to dismiss two of Defendants’ affirmative defenses, it is evident from the record that Plaintiffs did not bring, pursue or defend this case frivolously,

¹ Memorandum Decision and Order on Plaintiffs’ Motion for Partial Summary Judgment, p. 4.
PLAINTIFFS’ MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISALLOW COSTS AND
ATTORNEY FEES - 3

unreasonably and without foundation in law of fact.

Simply because a Court disagrees with the application and interpretation of cited case authority to the facts of a case does not render the pursuit or defense of such proposition frivolous, unreasonable or without foundation. Otherwise, in all cases the party who is on the other side of the Court's decision either brought, pursued or defended the case frivolously, unreasonably or without foundation and an award of attorney fees would be mandatory, contrary to I.R.C.P. 54(e)(1) and Idaho Code § 12-121 provides.

Plaintiffs respectfully requests that this Court find that they did not bring, pursue or defend this lawsuit frivolously, unreasonably or without foundation. There was no dispute of fact that Liberty Partners was aware of the reservation of the condemnation proceeds, accepted the condemnation proceeds and converted the proceeds for its benefit.²

B. Defendants' are not entitled to an Award of Attorney Fees under Idaho Code § 12-120(1) or (3).

Defendants seek an award of attorney fees pursuant to Idaho Code §§ 12-120(1), (3) and 12-121 and Rule 54(e)(1) of the Idaho Rules of Civil Procedure. The latter premises are addressed above and will not be reiterated.

Idaho Code § 12-120(1) applies to civil actions plead for \$25,000 or less. In the instant case, Plaintiffs pled for damages over \$83,000 that was taken by Defendants, therefore rendering this section inapplicable for an award of attorney fees.

Idaho Code § 12-120(3) reads in pertinent part:

In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of

² The record reflected that Dave Callister was a member and sole shareholder of both Confluence Management, LLC and Liberty Partners, Inc.
PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISALLOW COSTS AND ATTORNEY FEES - 4

goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs. The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. . .

Defendants allege that they incurred attorneys' fees in the amount of \$9,010.25 in this case. It is alleged that the firm of Michael R. Jones, PLLC expended a total of 50.70 hours for both its clients in defending this action. *See* Affidavit of Michael R. Jones, p. 2.

Under Idaho Code § 12-120(3), the Court must determine that the gravamen of the case involves a "commercial transaction" and which party was the "prevailing party."

"A two-prong test exists for awarding attorney fees under I.C. § 12-120(3). First, an alleged commercial transaction must be integral to the claim. Second, the commercial transaction must be the basis upon which a party is attempting to recover." *Andrea v. City of Coeur D'Alene*, 132 Idaho 188, 190, 968 P.2d 1097 (App.1998).

In *Bastian v. Albertson's, Inc.*, 102 Idaho 909, 643 P.2d 1079 (App.1982), the Idaho Court of Appeals affirmed the district court's denial of attorney fees under Idaho Code § 12-120(2) which is now Idaho Code § 12-120(3) contending that said provision, on its face, was not applicable to the dispute between the tenant and landlord under the lease agreement. *See also, Treasure Valley Concrete, Inc., v. State*, 132 Idaho 673, 978 P.2d 233 (1999).

In the instant case, the issue related to whether the Plaintiffs were entitled to ACHD condemnation proceeds incorporated and reserved in the addendum of the agreement. The Plaintiffs sold their personal residence and land to Defendants Callister and Confluence Management, LLC. The reservation of the condemnation proceeds was not an integral commercial transaction contemplated by Idaho Code § 12-120(3). Rather, the reservation of the

condemnation proceeds went to the purchase price of the real property sold to Defendants.

Because the claim asserted by Plaintiffs did not involve a commercial transaction as contemplated by the provision, Defendants are not entitled to an award of attorney fees under Idaho Code § 12-120(3) and therefore Defendants request for attorney fees must be denied.

C. Defendants' Request For \$9,010.25 As Attorney Fees Is Excessive And Unreasonable.

If the Court finds that the issue involved was a commercial transaction, then in determining the prevailing party, the Court's examination involves a three part inquiry: 1) the result obtained in relation to the relief sought; 2) whether there were multiple issues or claims; and 3) the extent to which either party prevailed on each issue and claim. *Joseph C.L.U. Ins. Assoc. v. Vaught*, 117 Idaho 555, 557 (App. 1990).

What constitutes a reasonable attorney fee is a discretionary determination for the trial court, to be guided by the criteria of I.R.C.P. 54(e)(3). *Sanders v. Lankford*, 134 Idaho 322, 326, 1 P.3d 823 (App.2000). "This amount may be more or less than the sum which the prevailing party is obligated to pay its attorney under their agreement." *See id.*

"A court is permitted to examine the reasonableness of the time and labor expended by the attorney under I.R.C.P. 54(e)(3)(A) and need not blindly accept the figures advanced by the attorney. . . An attorney cannot 'spend' his time extravagantly and expect to be compensated by the party who loses at trial." *Daisy Mfg. Co., Inc. v. Paintball Sports*, 134 Idaho 259, 263, 999 P.2d 914 (App.2000) (quoting *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct.App.1985)). "Hence, a court may disallow fees that were unnecessarily and unreasonably incurred or that were the product of attorney 'churning.'" *Id.*

I.R.C.P. 54(e)(3) sets forth criteria for which the Court must consider in determining

what is a reasonable fee to be awarded. The factors include time and labor required; novelty and difficulty of the issues; skill and experience of counsel; prevailing charges for like work; whether fee is fixed or contingent; amount involved and results obtained; undesirability of case; awards in similar cases and several others.

In the instant case and assuming a commercial transaction was involved, Plaintiffs do not dispute that Defendants prevailed in light of the fact this Court entered summary judgment in favor of Defendants in its entirety.

However, Plaintiffs do dispute and challenge the reasonableness of the attorney fees allegedly incurred by Defendants and contend that the fees incurred by Defendants are excessive in light of the time and work performed in this case by counsel of all the parties involved in this matter.

In reviewing the time records submitted by affidavit, a careful examination of said records show that counsels' time was excessive, duplicate and unreasonable for work performed for certain items.

The principal issue involved in this case was whether the reservation of the condemnation proceeds in the addendum was breached by Defendants for failing to turn-over the proceeds. It was undisputed that Defendants accepted the condemnation proceeds and failed to forward the proceeds to Plaintiffs per the terms of the agreement. The issue was identical for all Defendants and work performed by its counsel was same for all Defendants. Defendants, jointly, propounded only one set of discovery requests, no depositions were taken by Defendants and the matter was resolved in summary judgment by the Court. All in all, Defendants contend that its counsel incurred a total of 50.70 hours of time spent in defending this case on their behalf.

Counsel for Plaintiffs has broken down the fees and time spent that they contend was excessive, unreasonable and/or duplicate work performed.

According to the time entries, Defendants' counsel, Michael Jones, expended 7.70 hours at \$185 per hour preparing, drafting, discussing and finalizing Defendants' Answer to the lawsuit.³

The facts were fairly simple and mostly undisputed and the doctrine of merger was the only affirmative defense that had any legal merit. The remaining defenses were boilerplate defenses with only a scintilla of evidence in support thereof.

The preparation of the answer for two causes of actions being asserted should have taken less than half of the time Defendants allege was incurred. Although some time should have been incurred to respond to the Complaint, three (3) hours would have been reasonable to prepare the Answer Defendants' filed.

On January 13, 2009, Defendants counsel alleges he incurred 3.75 hours at \$200 per hour for traveling and reviewing records at ACHD. Plaintiffs' claim that this entry is excessive and unreasonable on the grounds that Defendants could have obtained the same information under a Freedom of Information request at substantially less expense than counsel incurred and the same information was provided by Plaintiffs' in response to Defendants first and only set of discovery.

A letter should have been prepared that at most should have taken twenty (20) minutes or .33 hours, if that, to prepare the request for the information.

On February 6 and 7, 2009, Doug Fleenor expended 5.75 hours at \$85 per hour performing legal research on the doctrine of merger, officer's personal liability, elements of

³ See Aff. of Jones, Exhibit A, entries dated December 18, 19, 20, and 23, 2008.

novation and waiver.

On June 29 and July 2, 2009, Gary Quigley expended 6.10 hours at \$150 per hour reviewing cases cited by Plaintiffs in their memorandum and preparing a response memorandum to the Plaintiffs' motion.

On July 3 and 6, 2009, Michael Jones expended 5.3 hours drafting and finalizing the memorandum, preparing a 2 page affidavit attaching 3 exhibits and researching the issue of novation (which Defendants cited no case authority on the issue).

Defendants did not file a counter motion for summary judgment nor raised or presented any evidence in the record on Defendant Callister's personal liability which this Court granted.

In all, the submission of one brief, including legal research performed, and a 2 page affidavit in response to the motion for partial summary judgment allegedly entailed 13.65 hours between the counsel.

Interestingly, Defendants agreed on Plaintiffs' representation on the law of merger in Idaho and cited no other authority to the contrary on the specific issue. Furthermore, Defendants cited no case authority on the issue of novation, but provided the Court authority on an assignment.

Plaintiffs respectfully request the Court reduce the alleged time expended by the counsel in preparing Defendants' response to the motion for partial summary judgment to a reasonable amount of time of 9 hours.

For the reasons and arguments set forth above, Plaintiffs respectfully request that the Court reduce the total hours expended by Michael Jones as follows:

- 1) 10.90 hours @ \$185/hr. to 6.20 hours @ \$185/hr. for a total of \$1,147.00; and

2) 27.95 hours @ \$200/hr. to 19.88 hours @ \$200/hr. for a total of \$3,976.00.

In total, Plaintiffs respectfully request that the total amount of the fees allegedly incurred be reduced from \$9,010.25 to \$6,526.75 based upon the reasons and arguments set forth above.

D. Costs

The only cost that Plaintiffs' dispute is the discretionary costs of \$4.95 for photocopies of ACHD documents as those costs were not exceptional costs reasonably incurred and in the interest of justice should not be assessed against Plaintiffs.

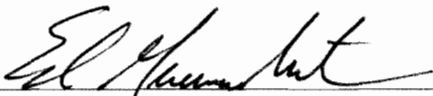
II. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court deny Defendants request for attorney fees for failing to state a provision authorizing the Court to award attorney fees and award only those costs as a matter of right.

In the alternative, Plaintiffs request the Court enter its order reducing the Defendants Memorandum of Costs and Attorney Fees to a total amount of \$6,771.36.

DATED this 21st day of October, 2009.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

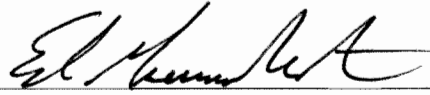
By: 
ED GUERRICABEITIA, of the firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of October, 2009 a true and correct original of the foregoing was served upon the following by the method indicated below:

Michael R. Jones
Michael R. Jones PLLC
508 North 13th Street
Boise, Idaho 83702

U.S. MAIL
 Hand Delivery
 Facsimile Transmission:



Ed Guerricabeitia

Michael R. Jones
 MICHAEL R. JONES, PLLC
 P.O. Box 7743
 508 North 13th Street
 Boise, Idaho 83707
 Telephone: (208) 385-7400
 Facsimile: (208) 389-9103
 ISB No. 2221

FILED 110
 NOV 06 2009
 J. DAVIN LAWRENCE, Clerk
 By: L. AMES
 deputy

Attorney for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID and SHIRLEY FULLER, a)
 married couple,)
)
 Plaintiffs,)
)
 vs.)
)
 DAVE CALLISTER, an individual,)
 CONFLUENCE MANAGEMENT, LLC,)
 an Idaho limited liability company, and)
 LIBERTY PARTNERS, INC., an Idaho)
 corporation,)
)
 Defendants.)
 _____)

CASE NO. CV OC 0820018

**DEFENDANTS= REPLY TO
 PLAINTIFFS= MEMORANDUM TO
 DISALLOW COSTS AND ATTORNEY
 FEES**

COMES NOW the Defendants in the above-captioned action, by and through their counsel of record, Michael R. Jones, and submits the following Reply to the Plaintiffs' Memorandum to Disallow Costs and Attorney fees.

1. **Entitlement.** Although alternative statutory grounds were stated for an award of attorney fees to the prevailing party defendants in this action, that statute which most clearly

**DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM
 TO DISALLOW COSTS AND ATTORNEY FEES -- PAGE 1**

applies is I.C. §12-120(3) providing an award in a claim arising out of a commercial transaction. In *Heritage Excavation, Inc. v. Briscoe*, 141 Idaho 40, 105 P.3d 700 (Ct.App.2005) the Court followed the relatively long-standing precedent to grant attorney fees to the prevailing party under I.C. §12-120(3) in litigation involving contracts to purchase real estate. The Court held as follows:

The Idaho Supreme Court has previously concluded that the test for application of this statute is whether a commercial transaction comprises the gravamen of the lawsuit; that is, whether the commercial transaction is integral to the claim and constitutes the basis upon which the party is attempting to recover. *Spence v. Howell*, 126 Idaho 763, 776, 890 P.2d 714, 727 (1995). In *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 274-75, 869 P.2d 1365, 1369-70 (1994) the Idaho Supreme Court held that a transaction to finance the purchase of real property which was intended to be used for commercial farming operations was a commercial transaction under I.C. §12-120(3). **We conclude that litigation regarding the existence of a contract to purchase real property for the purpose of a housing development likewise falls under I.C. §12-120(3).** Accordingly, Briscoe as the prevailing party is awarded his attorney fees.

141 Idaho at 40, 105 P.3d at 705 (emphasis added). The Defendants in this action were purchasing the Fuller property for use in their commercial real estate development activities, which falls squarely within the scope of activities constituting “commercial transactions,” in the just-cited *Briscoe* decision.

The opinion in *Bastian v. Albertson's, Inc.*, 102 Idaho 909, 643 P.2d 1079 (Ct.App.1982), upon which the Plaintiffs Fuller rely in opposing an award of attorney fees to the defendants under I.C. §12-120(3), was decided before the “commercial transaction” language was added to that statute in 1986, and thus it no longer stands for the proposition cited under existing law. This fact was noted by the Court of the Appeals in *Herrick v. Leuzinger*, 127 Idaho 293, 900 P.2d 201 (Ct.App. 1995):

In resisting this request for attorney fees, the Herricks rely upon *Bastian v.*

**DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM
TO DISALLOW COSTS AND ATTORNEY FEES -- PAGE 2**

00051

Albertson's, Inc., 102 Idaho 909, 915, 643 P.2d 1079, 1085 (Ct.App.1982), where we said that Section 12-120 was inapplicable to a lease of real property. This reliance is misplaced, for the *Bastian* decision was rendered before a 1986 amendment to Section 12-120 which added the provision mandating attorney fees in actions arising out of commercial transactions. 1986 Idaho Sess.Laws, ch. 205 at 511-12. A transaction for commercial farming operations was found to be a "commercial transaction" under I.C. §12-120(3) in *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 275, 869 P.2d 1365, 1370 (1994).

127 Idaho at 306, 900 P.2d at 214.

The Defendants, as the prevailing parties in this action, are entitled to an award of attorney fees under I.C. §12-120(3), in accordance with the authority cited above in the *Briscoe* decision. On that basis the Defendants will not further pursue the justification for an award of attorney fees under either I.C. §12-120(1), or I.C. §12-121.

2. Right to Discretionary Costs

The Plaintiffs object to the Defendants request for \$4.95 in discretionary costs. This amount, on its face, appears so insignificant that it should not merit further argument. But in this case, because this claim also relates to the general allegation made by the Fullers that the amount of attorney fees requested by the defendants is unreasonable, it does merit some further discussion.

The Defendants made discovery requests to the Fullers for the documents in their possession concerning the ACHD condemnation of the property that the Fullers had sold to Liberty Partners, the proceeds of which sale was the primary issue in this action. The requested ACHD documents included correspondence, appraisals, memoranda, and the like. The Fullers responded by refusing to disclose the documents in their possession and instead simply stating that these documents were equally accessible to the defendants directly from ACHD.

A party in this circumstance is confronted with the option of either going to the effort and cost of filing a motion to compel, and going to hearing on that motion, or simply going to ACHD

and obtaining the requested documents. The defendants in this instance opted for the latter course of action.

ACHD had informed counsel that it had about 15 bankers boxes of documents concerning the entire 10-mile road condemnations, of which the Fullers' property was only a very small part. In total, it took nearly four hours to review the documents related to the Fullers' property after they were located by ACHD Counsel for Defendants had to identify those relevant to this case, ask that they be copied, and then retrieve those copies. The total copying cost was \$4.95 which is the discretionary cost claim that is at issue here.

Among the documents located in the ACHD records was the October 28, 2005 letter to the Fullers from ACHD in which ACHD declared that it was compelled by controlling Idaho law to negotiate only with the owner of record -- which at that date was Liberty Partners, not the Fullers. This letter was attached as Exhibit C to the Affidavit of Michael R. Jones, submitted in opposition to the Fullers' motion for summary judgment, and was one of the critical pieces of evidence that led to this Court's decision in this case denying the Fullers' claim to the ACHD condemnation proceeds.

Under these circumstances, the imposition of this \$4.95 copying cost, as a direct result of the Fullers refusal to comply with a reasonable and limited discovery request, was exceptional, necessary, and reasonable, and this \$4.95 should be awarded to the Defendants as a discretionary cost.

3. Reasonableness of the Fees Claimed

The Fullers request an overall reduction of almost a third (27%) in the attorney fees claimed from \$9,010.25 to \$6,526.75, or a reduction of \$2,483.50.

As already noted above in respect to the discretionary costs, the Fullers have objected to

the Defendants' claims for 3.75 hours to search for, and obtain documents from ACHD. They argue that instead these documents could have been obtained by simply writing a letter and requesting the documents under the Public Records Act, I.C. §9-338, for which only a charge of .33 hours would be appropriate. To begin with, the availability of records by an alternative means is not reason to allow a party to avoid or shirk its responsibilities under the discovery rules. As already noted above, the easiest avenue to obtain these records would have been for the Fullers to simply comply with the Defendants' discovery request, which they did not. Second, the Idaho Public Records Act only creates a right to inspect and copy, not a right to compel any agency to devote its staff time to answering such a request. Agencies are allowed to charge for time expended in locating and copying records. I.C. §9-338(8). Under these circumstances the costs incurred were reasonable and necessary.

The Fullers also contest the amount of time expended in answering the complaint, and researching and writing the response to their summary judgment complaint. Specifically they object to the 7.70 hours spent by Michael Jones in "preparing, drafting, discussing, and finalizing" the answer. There is more involved than the mere drafting of an answer to a complaint. This time includes consultation with the client, analysis of the claims made, review of client documents and the determination of relevant affirmative defenses. While the Fullers desire that the Defendants had only expended three hours on these tasks is understandable, the fact that additional time was spent did result in the pleading of the affirmative defenses that led to a successful determination of this case for the defendants. In the context of the real estate transaction itself, the related ACHD condemnation, the challenge to the assignment between Confluence and Liberty, and the other related legal issues, the expenditure of 7.70 hours appears to be rather

economical and should be awarded in its entirety.

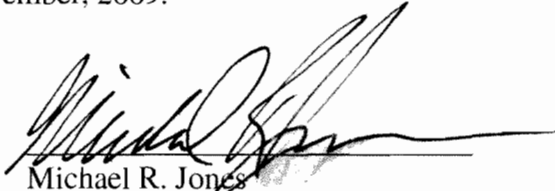
The Fullers also object to a total of 5.75 hours spent conducting research at a rate of \$85 per hour on the defense theories of merger, officer liability, novation, and waiver. This activity was detailed to a lower-billing individual and required the examination of the case law cited by the Plaintiff Fullers and the identification, review, and development of the legal argument in opposition to the Fullers' claims. In opposing the assignment between Confluence and Liberty, the Fullers attempted to adapt the specialized law that applies between lessors, lessees, and sub-lessees to the factual situation in this case that involved no lessors or lessees. Such allegations by the Fullers required the defendants to expend additional time to examine the Fullers' unconventional theories, and to determine their inapplicability, and to identify the appropriate rules that should otherwise be applied to the facts of this case. In this context 5.75 hours does not appear to be at all excessive.

In total, counsel that worked on the summary judgment briefing expended 13.65 hours in reviewing the Fullers' motion, memorandum, and supporting authority; and in researching and reviewing opposing authority, drafting the memorandum, and applying the law to the facts. Significant legal issues involving merger, novation, and assignment were involved in this case. The expenditure of that amount of time is not at all extraordinary or unreasonable in the context of the factual questions that were at issue, in developing the record, in identifying the law, in applying the law to the facts, and drafting and revising the memorandum. Consequently, the Defendants should be awarded the full amount of time claimed.

In total, it is not at all apparent, based upon the factual and legal issues raised and addressed, and the result obtained, that the Fullers have identified any area where the time

expended by the defendants was at all extravagant, unnecessary, redundant, or unrelated to this case. In the context of the prevailing charges for similar work, and in obtaining a similar result, the charges for costs and attorney's fees as claimed by the defendants are entirely reasonable and justified and should be awarded in their entirety, as claimed.

Respectfully submitted this 6th day of November, 2009.

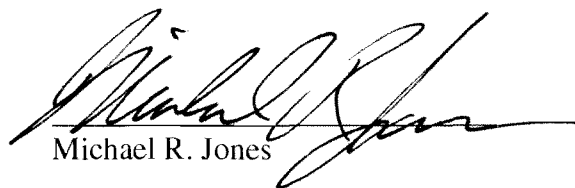


Michael R. Jones
Attorney for the Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 6th day of November, 2009, I caused to be served a true and correct copy of the **DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM TO DISALLOW COSTS AND ATTORNEY FEES** upon the plaintiffs by the method indicated and addressed as follows:

E. DON COPPLE	[]	U.S. Mail, postage prepaid
ED GUERRICABEITIA	[]	Hand Delivered
DAVISON, COPPLE, COPPLE & COPPLE	[]	Overnight Mail
Attorneys at Law	[X]	Facsimile Transmission
Washington Mutual Capitol Plaza, Suite 600	[]	Other _____
199 North Capitol Boulevard		
Post Office Box 1583		
Boise, Idaho 83701-1583		
Telephone: (208) 342-3658		
Facsimile: (208) 386-9428		
Email: <u>guerricabetitia@davisoncopples.com</u>		


Michael R. Jones

DEC 04 2009

J. DAVID NAVARRO, Clerk
By _____ INGA JOHNSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID and SHIRLEY FULLER, a
married couple,

Plaintiffs,

vs.

DAVE CALLISTER, an individual,
CONFLUENCE MANAGEMENT, LLC, an
Idaho Limited Liability Company, and
LIBERTY PARTNERS, INC., an Idaho
corporation,

Defendants.

Case No. CV OC 0820018

ORDER ON COSTS AND FEES

This matter came before the Court on the Plaintiffs' Motion to Disallow Defendants' Costs and Attorney Fees and Plaintiffs' Motion to Stay Decision on Attorney Fees and Costs Pending Appeal. The Court heard oral arguments on the motions on November 9, 2009. Ed Guerricabeitia appeared for the Plaintiffs and Michael R. Jones appeared for the Defendants. The Court took the matters fully under advisement at that time.

BACKGROUND

Plaintiffs owned a parcel of real property in Ada County. Plaintiffs were in the process of negotiating with the Ada County Highway District (ACHD) on reasonable compensation for certain easement rights or a fee of a portion of the property via eminent domain. On September 20, 2005, Plaintiffs and Defendant Confluence Management LLC (Confluence) entered into a Commercial/Investment Real Estate Purchase and Sale Agreement. That same day, Plaintiffs and Defendant Confluence signed an Addendum to the Purchase and Sale Agreement. Plaintiffs did not

1 complete negotiations with ACHD prior to transferring the property under the purchase and sale
2 agreement. On September 22, 2005, Plaintiffs and Defendants signed another addendum which
3 assigned certain rights to Defendant Liberty Partners. Defendant Callister is both a member of
4 Confluence and the President of Liberty Partners. Also on September 22, 2005, Plaintiffs executed a
5 warranty deed transferring the property to Liberty Partners. It is undisputed that the warranty deed
6 does not contain the language of the first addendum. On August 10, 2006, Liberty Partners executed
7 a Sale and Purchase Agreement and warranty deed which transferred approximately one twelfth of
8 the property to ACHD. On August 25, 2006, ACHD paid Liberty Partners \$83,921.00 for the
9 smaller segment of the property. Plaintiffs seek the ACHD proceeds under the language of the
10 Addendum.
11

12 On August 24, 2009, the Court entered its Memorandum Decision and Order granting
13 Defendants' motion for summary judgment holding that the contract had merged with the warranty
14 deed.¹ On September 28, 2009, the Court entered Judgment against the Plaintiffs dismissing Count
15 One and Count Two of the Complaint. On October 9, 2009, Plaintiffs filed a notice of appeal and
16 Defendants filed a memorandum and an affidavit for costs and fees.
17

18 **MOTION TO STAY DECISION ON ATTORNEY FEES**

19 **AND COSTS PENDING APPEAL**

20 Idaho Appellate Rule 13(b)(9) provides the District Court the express authority to "make any
21 order regarding the taxing of costs or determination of attorneys fees incurred in the trial of an
22 action" during the pendency of an appeal. Idaho Rule of Civil Procedure 1(a) sets the standard for
23

24 _____
25 ¹ The August 24, 2009 Order also denied Plaintiffs' motion for summary judgment seeking dismissal of Defendants'
26 ninth affirmative defense based on merger of the contract with the warranty deed.

1 resolution of suits in Idaho, "These rules shall be liberally construed to secure the just, speedy and
2 inexpensive determination of every action and proceeding."

3 Plaintiffs ask this Court to enter an order staying a decision on an award of costs or attorney
4 fees due to the "novelty of the issues presented in this case" and seeking to prevent this court from
5 "wast[ing] time and effort for naught on the tedious and detailed task of reviewing the claimed costs
6 and attorney fees." Plaintiffs have not alleged good cause or hardship as a basis to stay a decision on
7 attorney fees and costs. The Court finds that judicial economy and the just, speedy, and inexpensive
8 resolution of this action require the Court to undertake the cost and fee analysis at this time.
9 Plaintiffs' motion to stay is DENIED.
10

11 COSTS AS A MATTER OF RIGHT

12 Idaho Rule of Civil Procedure 54(d)(1)(A) states that a prevailing party shall be awarded
13 costs, unless otherwise provided by the Court or limited by the Rules. "The determination of which
14 party is the prevailing party for purpose of awarding costs is within the discretion of the trial court."
15 *J.R. Simplot Co. W. Heritage Ins. Co.*, 132 Idaho 582, 584, 977 P.2d 196, 198 (1999). Rule
16 54(d)(1)(B) lists the factors that this Court must consider in ruling on which party is the prevailing
17 party as follows:
18

19 In determining which party to an action is a prevailing party and entitled to costs, the
20 trial court shall in its sound discretion consider the final judgment or result of the
21 action in relation to the relief sought by the respective parties, whether there were
22 multiple claims, multiple issues, counterclaims, third party claims, cross-claims, or
23 other multiple or cross issues between the parties, and the extent to which each party
24 prevailed upon each of such issue or claims. The trial court in its sound discretion
25 may determine that a party to an action prevailed in part and did not prevail in part,
26 and upon so finding may apportion the costs between and among the parties in a fair
and equitable manner after considering all of the issues and claims involved in the
action and the resultant judgment or judgments obtained.

1 As Defendants sought the dismissal of both of Plaintiffs' claims and the Court dismissed
2 both claims, Defendants are the prevailing party. Plaintiffs have not objected to the costs as a matter
3 of right claimed by Defendants. Defendants seek costs of \$186.61, for a deposition transcript, and
4 \$58.00, for the filing fee. These fall squarely within Rule 54(d)(1)(C). The Court awards \$244.61 to
5 Defendants as costs as a matter of right.

6 **DISCRETIONARY COSTS**

7 Idaho Rule of Civil Procedure 54(d)(1)(D) commits the decision whether to award certain
8 costs to the discretion of the trial court. *Van Brunt v. Stoddard*, 136 Idaho 681, 689, 39 P.3d 621,
9 629 (2001). When an objection to discretionary costs is presented, the trial court "shall make
10 express findings as to why such specific item of discretionary cost should or should not be
11 allowed." I.R.C.P. 54(d)(1)(D). Thus, the Court must make specific findings that each discretionary
12 cost was 1) necessary, 2) exceptional, 3) reasonably incurred, and 4) should be assessed against the
13 adverse party in the interest of justice. *Evans v. State*, 135 Idaho 422, 432, 18 P.3d 227, 237 (Ct.
14 App. 2001); *Swallow v. Emergency Med. of Idaho, PA*, 138 Idaho 539, 67 P.3d 68 (2003).

15
16 Defendants seek \$4.95 for costs incurred in obtaining documents from ACHD. At oral
17 argument Defendants asserted that they are entitled to this cost as Plaintiffs were in possession of
18 the information but declined to provide it and thereby forced Defendants to incur the expense of
19 obtaining it. Plaintiffs argue that such an expense is not exceptional.

20
21 The Court finds that neither Defendants' memorandum of costs and fees nor Defendants'
22 affidavit of costs and fees asserts that this cost was necessary, exceptional, or reasonably incurred.
23 Further, the Court finds that the cost was not necessary and exceptional as Defendants had the
24

1 option of moving to compel discovery of the document or information. Plaintiffs' motion to
2 disallow Defendants' claimed discretionary cost is GRANTED.

3 **ATTORNEY FEES**

4 Defendants seek an award of \$9010.25 in attorney fees pursuant to Idaho Code §§ 12-
5 120(1), 12-120(3), and 12-121. Plaintiffs argue that Defendants are not entitled to an award of
6 attorney fees under Idaho law and that the claimed attorney fees are excessive and unreasonable.
7 Idaho Code § 12-120(1) provides for attorney's fees in civil actions where the amount pled is
8 twenty-five thousand dollars or less. In the case at hand Plaintiffs sought \$83,921.00, the amount
9 paid by ACHD to Defendants. Defendants are not entitled to recover attorney fees under § 12-
10 120(1).
11

12 Attorney fees may be awarded under § 12-121 only when the Court finds, from the facts
13 presented, "that the case was brought, pursued or defended frivolously, unreasonably or without
14 foundation." I.R.C.P. 54(e)(1). That Plaintiffs may have intended to reserve the ACHD
15 condemnation proceeds could be inferred from their execution of multiple documents. Although the
16 Court ruled for Defendants, holding that the purchase and sale agreement merged with the warranty
17 deed, the Court does not find the case was pursued frivolously, unreasonably, or without foundation.
18 Defendants are not entitled to recover attorney fees under § 12-121.
19

20 Idaho Code § 12-120(3) provides in pertinent part:

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

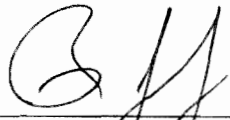
26 The term "commercial transaction" is defined to mean all transactions except
transactions for personal or household purposes.

1 "Attorney's fees are not appropriate under I.C. § 12-120(3) unless the commercial
2 transaction is integral to the claim, and constitutes the basis upon which the party is attempting to
3 recover." *Brower v. E.I. DuPont De Nemours & Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990).
4 "[A]n 'award of attorney's fees is not warranted [under I.C. § 12-120(3)] every time a commercial
5 transaction is remotely connected with the case.'" *Sun Valley Hot Springs Ranch, Inc. v. Kelsey*, 131
6 Idaho 657, 663, 962 P.2d 1041, 1047 (1998)(quoting *Brower*, 117 Idaho at 784, 792 P.2d at 349). In
7 the instant case, the transaction giving rise to the litigation was the purchase by Defendants of
8 Plaintiffs' home. Plaintiffs sought to recover condemnation proceeds. That Defendants may have
9 purchased the property for commercial purposes is not integral to the claim or constitute the basis
10 on which Plaintiffs were attempting to recover. The Court finds that this was not a commercial
11 transaction. Plaintiffs' motion to disallow attorney fees is GRANTED.
12

13
14 Because the Court finds that Idaho law does not provide for an award of attorney fees in this
15 instance, the Court does not reach the issue of the reasonability of the claimed attorney fees.
16

17 IT IS SO ORDERED.

18 Dated this 3rd day of December 2009.
19

20
21
22 
23 _____
24 Ronald J. Wilper
25 DISTRICT JUDGE
26

CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 4 day of December 2009, I caused a true and correct copy of the foregoing ORDER ON COSTS AND FEES to be served by the method indicated below, and addressed to the following:

Ed Guerricabeitia
Davison, Copple, Copple & Copple
199 N. Capitol Blvd., Ste. 600
P.O. Box 1583
Boise, Idaho 83701

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile

Michael R. Jones
Michael R. Jones, PLLC
508 N. 13th Street
P.O. Box 7743
Boise, Idaho 83707

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

By INGA JOHNSON
Deputy Clerk

JAN 13 2010

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

Michael R. Jones
MICHAEL R. JONES, PLLC
P.O. Box 7743
508 North 13th Street
Boise, Idaho 83707
Telephone: (208) 385-7400
Facsimile: (208) 389-9103
ISB No. 2221

Attorney for Defendants/Respondents/Cross-Appellants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID and SHIRLEY FULLER, a)
married couple,)
)
Plaintiffs/Appellants/)
Cross-Respondents)

CASE NO. CV OC 0820018

NOTICE OF CROSS APPEAL

vs.)

Class: L.4.

Fee: \$101.00

DAVE CALLISTER, an individual,)
CONFLUENCE MANAGEMENT, LLC,)
an Idaho limited liability company, and)
LIBERTY PARTNERS, INC., an Idaho)
corporation,)
)
Defendants/Respondents/)
Cross-Appellants)

TO: THE ABOVE NAMED CROSS-RESPONDENTS, DAVID AND SHIRLEY FULLER, AND THEIR ATTORNEYS, ED GUERRICABEITIA, ATTORNEY AT LAW, DAVISON, COPPLE, COPPLE & COPPLE, WASHINGTON MUTUAL CAPITOL PLAZA, SUITE 600, 199 NORTH CAPITOL BOULEVARD, POST OFFICE BOX 1583, BOISE, IDAHO 83701-1583, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named cross-appellants, DAVE CALLISTER, an individual, CONFLUENCE MANAGEMENT, LLC, an Idaho limited liability company, and LIBERTY PARTNERS, INC., an Idaho corporation, appeal against the above-named cross-respondents to the Idaho Supreme Court from the order denying costs and fees to the cross-appellants entered in the above-entitled action on the 4th day of December, 2009, Honorable Judge Ronald J. Wilper presiding.

2. That the party has a right to cross-appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(7) I.A.R.

3. A preliminary statement on appeal which the cross-appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the cross-appellant from asserting other issues on appeal.

Did the district court err in denying the cross-appellants, as prevailing parties, an award of attorney fees?

4. (a) Is additional reporter's transcript requested? Yes

(b) The cross-appellant requests the preparation of the following portions of the reporter's transcript: The November 9, 2009 hearing on Defendants' Motion for Costs and Fees.

5. The cross-appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R. and those designated by the appellant in the initial notice of appeal:

a. Order on Costs and Fees (December 4, 2009).

- b. Defendants Reply to Plaintiffs Memorandum to Disallow Costs and Attorney Fees (11/06/09).
- c. Plaintiff's Memorandum in Support of their Motion to Disallow Costs and Attorney Fees (10/21/09).
- d. Affidavit in Support of Memorandum and Attorney Fees (10/09/09).
- e. Memorandum of Costs and Attorney Fees (10/09/09).
- f. Defendants Memorandum in Opposition to Plaintiffs Motion for Partial Summary Judgment (07/06/09).
- g. Memorandum in Support of Motion for Summary Judgment (06/23/09).

6. I certify:

(a) That a copy of this notice of cross-appeal and any request for additional transcript has been served on each reporter of whom an additional transcript has been requested as named below at the address set out below:

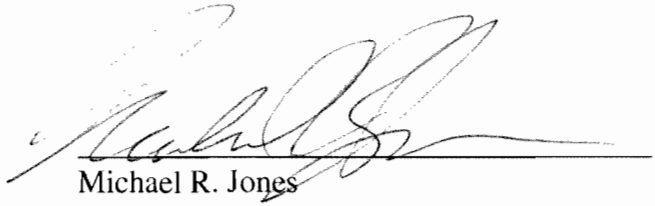
Name and address: Dianne Cromwell, 200 W. Front Street, Boise, Idaho 83702-7300.

(b) (1) That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript and any additional documents requested in the cross-appeal.

(c) That service has been made upon all parties required to be served pursuant to I.A.R.

20.

Dated this 13~~4~~ day of January, 2010.



Michael R. Jones
Attorney for the Defendants/Respondents/
Cross-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 13~~4~~ day of January, 2010, I caused to be served a true and correct copy of the **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** upon the plaintiffs by the method indicated and addressed as follows:

E. DON COPPLE
ED GUERRICABEITIA
DAVISON, COPPLE, COPPLE & COPPLE
Attorneys at Law
Washington Mutual Capitol Plaza, Suite 600
199 North Capitol Boulevard
Post Office Box 1583
Boise, Idaho 83701-1583
Telephone: (208) 342-3658
Facsimile: (208) 386-9428
Email: guerricabetitia@davisoncopples.com

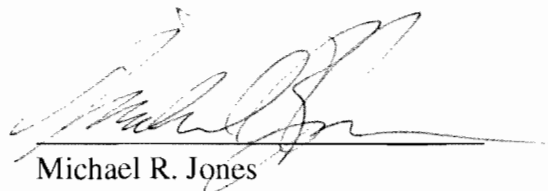
- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Mail
- Facsimile Transmission
- Other _____

Attorneys for the Plaintiffs/Appellants/Cross-Respondents

Dianne Cromwell
Ada County Courthouse
200 W. Front Street
Boise, Idaho 83702-7300
Telephone: (208) 287-7587

- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Mail
- Facsimile Transmission
- Other _____

Court Reporter



Michael R. Jones

NO. _____ FILED
A.M. 8:00 P.M. _____

FEB 25 2010

J. DAVID NAVARRO, Clerk
By BRADLEY J. THIBB
DEPUTY

Stephen W. Kenyon
Clerk of Supreme Court
451 W State Street
Boise, Idaho 83720

In re: Fuller v. Callister, Docket No. 37035

Notice is hereby given that on Thursday, January 28, 2010, I lodged a transcript of 11 pages in length for the above-referenced appeal with the district court clerk of Ada County in the Fourth Judicial District.

The following files were lodged:

Proceeding 11/09/09

David Cromwell
Tucker & Associates

cc: kloertscher@idcourts.net
PDF format of completed files emailed to Supreme Court
ASCII format of completed files emailed to counsel

00069

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID and SHIRLEY FULLER, a married couple,

Plaintiffs-Appellants-Cross Respondnets,
vs.

DAVE CALLISTER, an individual, CONFLUENCE
MANAGEMENT, LLC, an Idaho limited liability
company, and LIBERTY PARTNERS, INC., an Idaho
corporation,

Defendants-Respondents-Cross Appellants.

Supreme Court Case No. 37035

CERTIFICATE OF EXHIBITS

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the
State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the
course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said
Court this 24th day of February, 2010.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk



CERTIFICATE OF EXHIBITS

00070

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID and SHIRLEY FULLER, a married couple,

Plaintiffs-Appellants-Cross Respondents,

vs.

DAVE CALLISTER, an individual, CONFLUENCE
MANAGEMENT, LLC, an Idaho limited liability
company, and LIBERTY PARTNERS, INC., an Idaho
corporation,

Defendants-Respondents-Cross Appellants.

Supreme Court Case No. 37035

CERTIFICATE OF SERVICE

I, J. DAVID NAVARRO, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

SUPPLEMENTAL CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

ED GUERRICABEITIA

ATTORNEY FOR APPELLANTS

CROSS RESPONDENTS

BOISE, IDAHO

MICHAEL R. JONES

ATTORNEY FOR RESPONDENTS

CROSS APPELLANTS

BOISE, IDAHO

J. DAVID NAVARRO
Clerk of the District Court

Date of Service: FEB 25 2010

By BRADLEY J. THIES
Deputy Clerk



CERTIFICATE OF SERVICE

00071

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID and SHIRLEY FULLER, a married couple,

Plaintiffs-Appellants-Cross Respondents,

vs.

DAVE CALLISTER, an individual, CONFLUENCE
MANAGEMENT, LLC, an Idaho limited liability
company, and LIBERTY PARTNERS, INC., an Idaho
corporation,

Defendants-Respondents-Cross Appellants.

Supreme Court Case No. 37035

CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 9th day of October, 2009.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk



CERTIFICATE TO RECORD

000'72