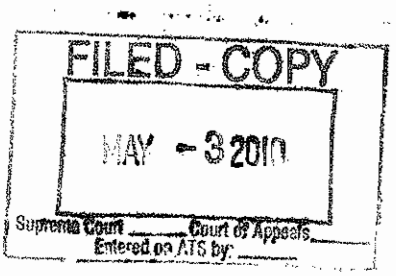
5-3-2010

Fuller v. Dave Callister Appellant's Brief 1 Dckt. 37035

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID and SHIRLEY FULLER, a married couple, Appellants/Cross-Respondents, vs. DAVE CALLISTER, an individual, CONFLUENCE MANAGEMENT, LLC, an Idaho Limited Liability Company, and LIBERTY PARTNERS, INC., an Idaho corporation, Respondents/Cross-Appellants.	Supreme Court Docket No. 37035 APPELLANTS' BRIEF



APPELLANT'S BRIEF

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

Honorable Ronald J. Wilper
District Judge, Presiding

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I. STATEMENT OF FACTS

Nature Of The Case

Land developer, Dave Callister and his companies bought a family farm owned by David and Shirley Fuller located in Ada County, Idaho. At the outset of negotiations, Dave Callister was fully aware and had actual knowledge of the Ada County Highway District's interest in acquiring a portion of the property to widen Ten Mile Road in Ada County and the Fullers ongoing negotiations with the highway district.

At the time of entering into the real estate contract, David Callister and his company Confluence Management, LLC contracted that the Fullers would receive the proceeds paid by ACHD for the taking of the property. This agreement was specifically included in the contract.

Two days after the contract was executed and at the closing, Dave Callister assigned the rights under the contract to his other company Liberty Partners, Inc. The Fullers consented to the assignment.

Approximately eleven months later, Liberty Partners was paid $83,921.00 by the ACHD for the property taken. Dave Callister and Liberty Partners then refused to pay the proceeds to the Fullers. This action was brought by the Fullers to recover the $83,921.00 the Respondents refused to pay.

The issue before this Court is whether the contractual term reserving the proceeds paid by ACHD to the Fullers was collateral and independent of the deed excepted by the doctrine of merger or did the agreement to pay money merge with the transfer of the deed. This is the crux of the case and dispositive if the doctrine of merger applies rendering the other outstanding issues and defenses on appeal academic and moot.

However, should the Court decide that the doctrine of merger did not apply to the reservation of ACHD's proceeds incorporated into the real estate contract, the assignment of error concerning the district court's ruling on Respondents' affirmative defense of novation is relevant to determine who may still remain liable for the breach of the provision under the contract and if the district court's *sua sponte* dismissal of the Fullers' claim was correct.

Course of Proceedings

On October 21, 2008, Appellants, David and Shirley Fuller (hereinafter "Fullers") filed a Complaint and Demand for Jury Trial against Respondents Dave Callister, Confluence Management, LLC and Liberty Partners, Inc. (hereinafter "Callister," "Confluence Management" and "Liberty Partners," respectively or collectively referred to as "Respondents") for breach of contract stemming from a real estate purchase and sale agreement and addendum for the sale of Fullers' property to Callister and Confluence entered on September 20, 2005. *See* R. pp. 6 - 26.

On December 1, 2008, Fullers filed an Amended Complaint against Callister, Confluence Management and Liberty Partners. See R. pp 27 - 48. On December 22, 2008, Callister, Confluence Management and Liberty Partners filed their Answer to Fullers' Amended Complaint asserting twelve (12) affirmative defenses to the allegations raised by the Fullers. *See* R. pp. 49 - 57.

On June 23, 2009, the Fullers filed a Motion for Partial Summary Judgment on three issues:

1) the doctrine of merger did not apply to the reservation of the condemnation proceeds warranting dismissal of their ninth affirmative defense;

2) the assignment between Confluence Management and Liberty Partners was not a

novation relieving Confluence Management of its obligations and liabilities under the real estate purchase and sale agreement warranting dismissal of their eighth affirmative defense and

3) Confluence Management breached its obligations under the agreement. *See* R. pp. 58 - 60. Accompanied with the Motion, Fullers submitted the Affidavits of Ed Guerricabeitia and David Fuller, along with a Memorandum in Support of the Motion for Partial Summary Judgment. *See* Tr. Vol. I, p. 5, Ll. 11-12. The hearing date was scheduled for July 20, 2009. *See* Tr. Vol I.

July 6, 2009, Respondents filed their Memorandum in Opposition to the Motion for Partial Summary Judgment, accompanied with the Affidavit of Michael R. Jones. *See* Tr. Vol. I, p. 5, Ll. 11-12.

July 10, 2009, the Fullers filed their Reply Brief to the Memorandum in Opposition to the Motion for Partial Summary Judgment. *See id.*

Oral argument on the Motion for Partial Summary Judgment was held on July 20, 2009 and the District Court took the matter under advisement.

On August 24, 2009, the District Court filed its Memorandum Decision and Order on Plaintiffs' Motion for Partial Summary Judgment. *See* R. pp. 61 – 67.

The District Court made the following rulings:

> 1) The Respondents' affirmative defense on the doctrine of merger was applicable to the reservation of the condemnation proceeds provided in the real estate agreement and addendum which the warranty deed did not preserve, thus entitling Respondents to summary judgment and precluding recovery under the agreement; *See* R. pp. 64 – 65.
>
> 2) Confluence Management assigned all rights and responsibilities as the purchaser under the real estate agreement over to Liberty Partners with the Fullers consent, therefore the Fullers motion for partial summary judgment dismissing Respondents' eighth affirmative defense of novation is denied; *See* R. p. 65.

3) Because the Sales and Purchase Agreement and Addendum merged with the warranty deed and Confluence Management assigned all its rights and responsibilities to Liberty Partners, the Fullers motion for partial judgment on the issue of Confluence Management breaching the agreement is denied; *See* R. pp. 65 – 66.

4) After reviewing the pleadings, memorandum and affidavits in support of summary judgment, the District Court found that there were no facts or allegations before it that Callister was acting in any capacity other than his corporate capacity and therefore Respondents' motion for summary judgment dismissing Callister, individually, is granted; *See* R. p. 66; and

5) The Fullers did not raise dismissal of other affirmative defenses in their initial motion, therefore the Fullers motion to dismiss those other affirmative defenses is denied without prejudice. *See* R. p. 66.

Statement of Facts

In February of 2005, the Ada County Highway District ("ACHD") approached the Fullers about purchasing a portion of Appellants' property for the widening of Ten Mile Road. *See* Affidavit of David Fuller, attached to the Record as Exhibit 2, p. 2. The parties were negotiating and attempting to reach a fair amount of just compensation for the property. *See id.*

On September 20, 2005, Fullers entered into a Commercial/Investment Real Estate Purchase and Sale Agreement with Confluence Management. *See* Commercial/Investment Real Estate Purchase and Sale Agreement which is attached as Exhibit A to the Affidavit of David Fuller, attached to the record as Exhibit 2. *See* R. p. 76. All at times prior to entering the real estate agreement, Confluence Management and Callister had actual knowledge and were aware of ACHD's attempts to purchase a portion of the property from Fullers and Fullers unwillingness to agree to the amount of just compensation ACHD extended. *See* Tr. Vol I, p. 6, Ll. 15-18. Callister is both a member of Confluence Management and President of Liberty Partners. *See* R., 62, Ll. 2-3. The same day the Commercial/Investment Real Estate Purchase and Sale Agreement was executed, the parties executed an Addendum where Fullers were to

receive the funds paid by ACHD. *See* Exhibit B to the Affidavit of David Fuller which is attached to the record as Exhibit 2. *See* R. p. 76. Specifically, paragraph 3 of the Addendum reads:

> 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 of said funds paid by ACHD. Said amount has not been yet determined and Dave and Shirley Fuller retain the right to negotiate the amount with ACHD.

At the closing, on September 22, 2005, the Fullers, Confluence Management and Liberty Partners executed another Addendum where Fullers consented to the property vesting with Liberty Partners. *See* Exhibit C to the Affidavit of Fuller which is attached to the Record as Exhibit 2. *See* R. p. 76. The Addendum stated:

> 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.

Sometime after closing, the Fullers contacted ACHD attempting to continue negotiations for the acquisition of the right-of-way referenced in the Addendum to Commercial/Investment Real Estate Purchase and Sale Agreement. *See* Exhibit C to the Affidavit of Michael R. Jones which is attached to the record as Exhibit 2, p. 9. ACHD issued a letter to the Fullers on October 28, 2005, advising them that ACHD could not negotiate with them and could only negotiate with the new owner, Liberty Partners. *See id.*

After months had passed, the Fullers discovered that Liberty Partners sold a portion of the property to ACHD and was paid $83,921.00. *See* Affidavit of David Fuller which is attached to the Record as Exhibit 2, p. 2. On August 10, 2006, Liberty Partners executed a Sale

and Purchase Agreement with ACHD and warranty deed conveying a portion of the property. *See* Exhibits A and B attached to the Affidavit of Ed J. Guerricabeitia, which is attached to the record as Exhibit 1. *See* R. p 76.

On 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* Exhibit D attached to the Affidavit of Ed J. Guerricabeitia, which is attached to the record as Exhibit 1. *See* R. p 76.

Neither Confluence nor Liberty Partners paid the condemnation proceeds received from ACHD to the Fullers. *See* page 2-3 of the Affidavit of David Fuller, which is attached to the record as Exhibit 2. *See* R. p 76.

II. ISSUES PRESENTED ON APPEAL

a. Did the District Court err in finding as a matter of law that the doctrine of merger applied to the agreement between the parties that the Fullers were to receive the ACHD proceeds;

b. Did the District Court err in finding as a matter of law that the document assigning all it rights under the real estate contract from Confluence Management, LLC to Liberty Partners, Inc. to which the Fullers merely consented to, constituted a valid novation relieving Confluence Management, LLC of any obligations or liability under the real estate contract;

c. Did the District Court err in finding as a matter of law *sua sponte* that Respondent Dave Callister, individually, be dismissed from the lawsuit without the issue being raised and any facts presented in the record to support the ruling; and

d. Are the Fullers entitled to attorneys fees on appeal?

III. ARGUMENT

A. Standard of Review

In *Doe v. City of Elk River,* 144 Idaho 337, 338, 160 P.3d 1272, 1273 (2007), the Idaho Supreme Court expressed the following standard of review:

> "In an appeal from a grant of summary judgment, this Court's standard of review is the same as the district court's standard in ruling upon the motion. (Citation omitted). Summary judgment is proper if 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' I.R.C.P. 56(c). The moving party is entitled to a judgment when the non-moving party 'fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial.' (Citation omitted). For purposes of summary judgment, the evidence is construed liberally and all reasonable inferences are drawn in favor of the nonmoving party. (Citation omitted). This Court exercises free review in determining whether a genuine issue of material fact exists and whether the prevailing party was entitled to judgment as a matter of law. (Citation omitted).

In *Harwood v. Talbert,* 136 Idaho 672, 677-78, 39 P.3d 612, 617-18 (2001), the Idaho Supreme Court explained the standard of review from an order granting summary judgment against the moving party.

> In instances where summary judgment is granted to the non-moving party, this Court liberally construes the record in favor of the party against whom summary judgment was entered. (Citations omitted). 'The party against whom the judgment will be entered must be given adequate advance notice and an opportunity to demonstrate why summary judgment should not be entered.' (Citations omitted). It is also true that a district court may not decide an issue not raised in the moving party's motion for summary judgment. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530, 887 P.2d 1034, 1037 (1994) (holding non-moving party is not required to respond to issues not raised by the moving party even if the non-moving party ultimately has the burden of proof at trial).

B. The Doctrine of Merger Did Not Apply to the Reservation of Condemnation Proceeds Incorporated in The Commercial/Investment Real Estate Purchase and Sale Agreement.

Generally speaking, the doctrine of merger is defined as stipulations and terms in a contract are merged in the deed upon the acceptance of deed unless the stipulations under the contract are conferred collaterally and independent of the deed. However, where the right conferred in the contract would vary, change or alter the agreement in the deed itself or inheres to the very subject-matter with which the deed deals, the right in the contract is deemed merged and the language in the deed controls.

In *Sells v. Robinson,* 141 Idaho 767, 118 P.3d 99 (2005), the Idaho Supreme Court explained the application of the doctrine of merger between a real estate agreement and the deed. In this case, Sells owned a 50 acre parcel in Bonner County, Idaho. The Sells sold a portion of their property to a neighbor and 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 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 claimed 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 10 acres.

Sells sued Robinson for trespass and conversion and the case was tried to the court without a jury. The trial 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 trial court's ruling.

Relying on its past decision in *Jolley v. Idaho Sec., Inc.*, 90 Idaho 373, 414 P.2d 879 (1966), the *Sells* 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, 118 P.3d at 103-04.

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.

In *Jolley v. Idaho Securities, Inc., supra.*, the Idaho Supreme Court discussed the doctrine of merger. Here, the Jolleys and Idaho Securities, Inc. entered into a contract whereby the Jolleys agreed to trade their Lemhi ranch property and machinery in exchange for Idaho Securities' hotel property in Caldwell, Idaho. Among the various terms and condition in the agreement, the parties agreed to deliver an abstract of title to the real properties being transferred within a reasonable time after execution of the agreement. The parties signed the agreement and deeds, which were delivered to the respective parties and recorded. Each party

took possession of the respective properties. The Jolleys then sought the abstract of title to the hotel property which was not delivered. The Jolleys did not make the mortgage payments on the hotel and the property was foreclosed upon.

The Jolleys instituted an action against Idaho Securities and others and the matter was tried to the court. The trial court rendered a memorandum decision, entering findings of fact, conclusions of law and judgment and decree. The Jolleys appealed the judgment and decree.

Among the issues on appeal was whether the furnishing of an abstract of title provided in the agreement merged by the Jolleys acceptance of the deed. The Idaho Supreme Court articulated the general rule that acceptance of a deed to property generally was considered as a merger of the agreement into the terms of the deed. However, the Court acknowledged that an exception existed to the general rule which related to collateral stipulations of the contract which were not incorporated in the deed. The Court quoted from *Continental Life Ins. Co. v. Smith,* 41 N.M. 82, 64 P.2d 377 (1946) to explain the general rule and exception. As to the exception to the general rule, the Court quoted the following:

> "An exception to this general rule is likewise stated in the Norment Case in the following language: 'There is an exception to the rule stated, which is that the contract of conveyance is not merged upon execution of a deed 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 covenants of which the deed is not a performance or satisfaction. Where 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 as against the provisions of the deed.'* (Citation omitted) (emphasis included).
>
> "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 383-84, 414 P.2d at 844-85.

The *Jolley* Court held that the condition to deliver the abstract of title in the agreement did not merge with the acceptance of the deed. *See id.*, 90 Idaho at 385.

In its Memorandum Decision and Order, the district court noted that Fullers sought partial summary judgment to dismiss Respondents' Ninth Affirmative Defense asserted in their Answer that the doctrine of merger precluded Fullers' recovery.

In their Answer, Respondents alleged 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* R., p. 51.

In its Memorandum Decision and Order, the District Court held the following in support of its ruling:

> In the instant case, Plaintiffs argue that the doctrine of merger does not apply because the reservation of the condemnation proceeds deals only with money and not the very subject matter of the deed. Plaintiffs cite no case in which an Idaho appellate court has held reservation of condemnation proceeds in a contract survives the doctrine of merger. Instead, Plaintiffs would have the Court adopt the view of two foreign condemnation cases which do not address the issue of merger. In the case at hand, Plaintiffs assert that the term of the purchase agreement dealt only with money, the ACHD proceeds. However, the Court finds that the term is the right of alienation of the property, the proceeds from the sale of a portion of the greater tract of real property to ACHD. Had Defendants sold the property at issue to a third party, Plaintiffs would have no right to a portion of the proceeds. Had ACHD instituted a condemnation

> proceeding and taken eleven-twelfths of the property, Plaintiffs would be unreasonable in seeking those proceeds in addition to the sale price already paid to them. The Court finds that the right of alienation of real property inheres to the very subject matter with which the warranty deed deals. The Purchase and Sale agreement and Addendum merged with the warranty deed. The warranty deed did not preserve a right to the proceeds of the ACHD sale. Defendants' motion for summary judgment that the doctrine of merger applies and precludes recovery under the purchase and sale agreement is GRANTED.

See R., pp. 64-65.

As support for its ruling, the District Court cited *Jolley v. Idaho Sec., Inc., infra.* and *Sells v. Robinson, infra.*

While there is no authority on the issue in Idaho, Illinois and the Tenth Circuit Court of Appeals have addressed this factual pattern. *In re Dept. of Transportation,* 527 N.E.2d 958 (1988), the Illinois Department of Transportation brought a condemnation action and the issue involved who was entitled to the condemnation proceeds, the seller or buyer.

On August 18, 1985, the seller (Andrews) entered into a contract with the buyer (Chung) to purchase a parcel of real estate. The parties knew that a certain portion of the property was going to be condemned by the state.

On December 2, 1985, the parties executed an addendum to the August 18 contract where the seller's counsel included a reservation that the seller would be entitled to the proceeds from the sale of the property from the state. The next day, the seller executed a deed to the buyer conveying all of his property.

On September 10, 1986, the state filed its condemnation action and deposited $10,000 with the Court.

Both the seller and buyer filed cross motions before the trial court contending that each was entitled to the money. The trial court entered an order finding the seller was entitled to the money which the buyer appealed.

On appeal the buyer argued that he should have received the proceeds because he was the owner of the property and also that the addendum was ambiguous and should be strictly construed against the seller as the drafter of the clause.

The Illinois Appellate Court affirmed the trial court's decision and explained as follows:

> Generally, the person who is the owner of the property when possession is taken is entitled to the condemnation award. (*In re Application of County Collector* (1978), 63 Ill.App.3d 506, 18 Ill.Dec. 594, 377 N.E.2d 1230, citing II Nichols, *The Law of Eminent Domain* § 5.21 (1976).) **This general rule may be avoided however, where it is evident that the parties agreed that the seller will receive condemnation proceeds notwithstanding the sale of the property.** See *Application of County* citing Nichols § 5.21[2] (stating that if a sale takes place while condemnation proceedings are pending, but before title has vested in the condemnor, the award is payable to the purchaser *unless the parties involved have otherwise agreed.)* (Emphasis included).

527 N.E.2d at 960. (Emphasis added).

Illinois law also follows and applies the doctrine of merger. *See Brownell v. Quinn,* 197 N.E.2d 721 (1964) (While the general rule is that a deed in full execution of a contract for sale of land merges the provisions of the contract therein, the rule is subject to exception namely, that where there are provisions in the contract which delivery of the deed does not fulfill, the contract is not merged in the deed as to such provisions and remains open for performance of such terms); *Daniels v. Anderson,* 642 N.E.2d 128, 135 (1994) ("Unless the deed contains a reservation, the deed supercedes all contract provisions and becomes the only binding instrument between the parties. However, where there are contract provisions which delivery of the deed does not fulfill, the contract remains in force until it has been fully performed."). *See also, Czarobski v. Lata,* 862 N.E.2d 1039 (2007) and *Gerald Elbin, Inc. v. Seegren,* 378 N.E. 2d 626 (Ill.App.1978).

In *United States v. 397.51 Acres of Land,* 692 F.2d 688 (1982), the Tenth Circuit Court of Appeals addressed the same issue and held that the seller was entitled to the condemnation proceeds due to the provision in the real estate contract.

Here, two sisters sold their interest in a parcel to their brother in 1956. The contract provided that the sisters would receive one-third of the award above $25,000 in the event of a condemnation.

On July 16, 1975, the United States brought its condemnation action and deposited $143,000. The sisters cross-claimed against their brother asserting their rights under the 1956 contract to a portion of the condemnation award.

Ultimately in 1980, a value was fixed for the land at $238,175 which the parties did not dispute. The district court granted summary judgment in favor of the sisters according to their contract. The brother appealed the decision.

On appeal, the brother argued that the term violated the rules against perpetuities. The Court addressed the issue as follows:

> We are concerned with a personal contract agreement to pay upon the happening of a contingency, federal condemnation. Upon delivery and acceptance of the deed from the sisters, the brother and his wife were vested with absolute, fee simple title encumbered by no restraint on alienation. The promise by the brother and his wife was to pay a portion of the award proceeds "that may be paid to us." They could have sold the land at any time and the buyer would not have been obligated to pay anything to the sisters. The land was condemned, not sold, and they received an award, part of which they promised to pay to the sisters. *Melcher v. Camp* says, 435 P.2d at 112 that: "The rule against perpetuities is a rule of property and merely personal contracts are not subject to the rule." To hold otherwise would cast doubt on all promises to pay upon the happening of a contingency. The brother and his wife are bound by their promise to pay. The rule against perpetuities has no application.

692 F.2d at 691.

Similarly, the doctrine of merger is a rule followed under Oklahoma law. *See, Watson v. Johnson,* 411 P.2d 498 (Okl.1965) and *Anchor Stone & Material Co. v. Pollok,* 344 P.2d 559 (1959).

Although not in the context of reserving condemnation proceeds, the Colorado Court of Appeals decided which terms merged and survived with the deed. In *Skidmore v. First Bank of Minneapolis,* 773 P.2d 587 (Colo.App.1988), Skidmore bought a mountain property that did not have adequate access. As a result of an action, Skidmore and adjoining lot owners entered into an agreement which provided a roadway easement over the lot owners' land to Skidmore, his heirs, successors, assigns, invitees and permittees. In addition, the agreement expressed the Skidmore was responsible for construction and maintenance of the roadway easement at his sole expense. The lot owners delivered a quitclaim to Skidmore for the roadway easement, but did not reserve the terms in the agreement.

The roadway easement was damaged and Skidmore filed suit to enjoin the lot owners from using the roadway. The trial court ultimately entered judgment in favor of the lot owners which Skidmore appealed.

On appeal, Skidmore contended that the trial court erred in finding that Skidmore did not have an exclusive easement based on the doctrine of merger. However, he argued if the doctrine of merger did apply then it also applied to the provision in the agreement that he was solely responsible for the maintenance of the roadway easement.

The Court of Appeals first discussed the easement conveyed in the quitclaim deed. Based on the quitclaim deed, Skidmore did not contain an exclusive easement to exclude the burdened estates.

Next, the Court of Appeals had to decide whether the language in the contract varied the terms in the quitclaim deed. The Court noted, "[B]y the law of merger, the provision of the agreement relating to exclusivity is merged in the quitclaim deed which does not include such language." 773 P.2d at 589.

Next, the Court addressed whether the maintenance provision in the agreement also merged with the quitclaim deed. The Court explained as follows:

> The doctrine of merger does not affect covenants in an antecedent contract which are not intended to be incorporated in the deed or which relate to aspects of the transaction outside the conveyance itself. (Citation omitted). Thus, while we have held that the portion of the agreement relating to exclusivity of use is subsumed or merged within the deed, a contrary result must obtain as to the maintenance provision in the written agreement. **The latter provision was collateral to the conveyance and was the type of obligation – maintenance— as to which parties would intend to govern their actions after delivery of the deed.** Thus, we hold that the provision stating "costs of construction and maintenance of the roadway easement shall be borne by James E. Skidmore" survives the subsequent deed and remains in full force and effect even though not restated in the deed. (Emphasis added).

Id. at 589-90.

In the instant appeal, the district court held that the reservation of the condemnation proceeds affected the right of alienation of the property which right inhered to the very subject matter with which a warranty deed dealt with. The district court's holding is not supported under the law. Like *397.51 Acres of Land,* the reservation of ACHD's condemnation proceeds was a personal agreement between the Fullers and Confluence Management and Callister who executed the Addendum. Contrary to the district court's holding, the Respondents could have sold the property to any third party before ACHD instituted condemnation proceedings in which the Fullers would not have had a claim against the third party and possibly Respondents. The reservation in the Addendum did not in any way restrict or restrain the right of alienation of the property.

Secondly, the right of alienation is subject to the government's power eminent domain. ACHD has the power of eminent domain and has the authority to condemn land, involuntarily, from a property owner. In order to initiate the power of eminent domain, it must be shown that the condemning authority has the right of eminent domain, the use to which the property is to be applied is authorized by law, the taking is necessary for such use, the appropriation is for a public use, and payment of just compensation. Art. I, § 14, Idaho Constitution, Idaho Code § 7-704.

Third, the reservation of the condemnation proceeds was a condition subsequent or in other words a future event. In order for there to be performance of the condition, ACHD had to either reach a voluntary agreement of the amount of just compensation with the Fullers or initiate condemnation proceedings. At anytime, ACHD could have elected not to acquire a portion of the subject property at which time the condition and obligation would not have been triggered.

It is undisputed the parties understood and intended the reservation of the condemnation proceeds to be performed after the delivery of the deed. Specifically, paragraph 3 of the Addendum stated in relevant part:

> 3. . . .
> **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 of said funds paid by ACHD.** Said amount has not been yet determined and Dave and Shirley Fuller retain the right to negotiate the amount with ACHD. (Emphasis added).

In order for the BUYER to deed the right of way to ACHD, the BUYER had to have the deed of the property delivered to him. Otherwise, there would have been no need for this provision if the parties intended the Fullers to reach an agreement with ACHD before the property was transferred. Here, it is undisputed that Liberty Partners was assigned all of

Confluence Management's rights, interest and obligations under the agreement and directly negotiated, received and converted the ACHD proceeds obligated to the Fullers under the agreement.

Fourth, the reservation of the condemnation proceeds was collateral and independent of the conveyance of the deed. ACHD has the power of eminent domain which neither the Fullers nor Respondents have any control of when such power may be used.

The contract reserving the condemnation proceeds with the Fullers does not inhere in the very subject-matter of the deed nor make reference to the title, possession, quantity or emblements of the land. Instead it dealt with money predicated upon a future event by ACHD which could have or could not have occurred.

In *McGovern Builders, Inc. v. Davis,* 468 N.E.2d 90 (1983), the Second District Court of Appeals of Ohio addressed the issue of whether a buyer's obligation to pay for the real estate arising from a written real estate sales contract merged into the deed upon its delivery.

Considering prior precedent, the *McGovern* Court quoted the following statement of law:

> 'It is definitely settled in Ohio that a written agreement between the grantor and the grantee for the conveyance of real estate is not executed by and merged in the deed as to stipulations to be performed by the grantee; that, while the agreement to convey is performed by the execution and delivery of the deed conveying whatever was, by the terms of the contract, to be conveyed, it does not execute any of the stipulations of the grantee as to the consideration to be paid for the property; and that the agreement as to matters other than mere conveyance is not thus performed or satisfied. The deed is to be considered as a part of the transaction, in connection with, and not to the exclusion of, the contract between them; that is, both the deed and the contract are parts of one transaction, and the rights of the parties must be determined by the terms of the whole contract.'

Id., 468 N.E.2d at 92 (quoting, *Berry v. Cleveland Trust Co.* (1953), 53 Ohio App. 425, 431, 5 NE.2d 702 [7 O.O.278].

The *McGovern* Court then explained:

> **We further note that an acknowledgement in a deed of the payment of the consideration is not essential to the conveyance. It is immaterial, so far as the deed itself is concerned, whether the price of the land was paid or not; the admission of its payment in the deed is generally merely formal. Its omission is not conclusive proof that no consideration passed and, on the other hand, as between the parties, the recital of payment in a deed is open to explanation and contradiction in an action to recover the consideration money, by parol proof showing that in fact no payment or only partial payment has been made.** (Citation omitted) (Emphasis added).

Id.

The *McGovern* Court reversed the trial court's holding that the buyer's obligation to pay for the real estate arising from the written contract merged with the deed, thus barring the seller's action to recover the money. *See id.,* 468 N.E.2d at 93.

Based upon the foregoing case law, arguments and undisputed facts, the Fullers respectfully request this Court enter its order reversing the district court's ruling that the doctrine of merger applied to the reservation of condemnation proceeds in the agreement.

C. The Assignment of the Purchase and Sale Agreement to Respondent Liberty Partners, Inc. Did Not Relieve Defendant Confluence Management of Liability under the Agreement.

Fullers next assignment of error to the district court's Memorandum Decision and Order pertains to the district court's denial of Fuller's motion for partial judgment to dismiss the Respondents Eighth Affirmative Defense asserted in their Answer on the issue of novation.

ln *First National Bank in Evanston v. Sims,* 78 ldaho 286, 301 P.2d 1103 (1956), the Idaho Supreme Court expressed the following regarding a novation:

> Novation requires assent of all parties. The original debtor must be fully discharged and the debt as to him extinguished. Mere knowledge and consent of the creditor that a third party assume the debt will not release the original debtor. It must appear that the creditor agreed to release the original debtor. (Citations omitted). The taking of collateral or **the promise of a third party does not effect a novation, since a creditor may accept money or performance of a**

> **contract from a third party without releasing the original debtor.** (Citations omitted).

Id., 78 Idaho at 290, 301 P.2d at 1105. (Emphasis added).

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, 766 P.2d at 1271.

In *Exchange Lumber & Mfg. Co. v. Thomas,* 71 Idaho 391, 233 P.2d 406 (1951), the Idaho Supreme Court articulated the elements necessary to establish a novation as an affirmative defense:

> It is claimed that the settlement agreement constituted a novation by which Lucy Thomas was substituted as plaintiff's debtor, in place of these defendants, and that the note and account were thereby discharged. A novation requires the assent of all the parties. (Citations omitted). The original debtor must be fully discharged and the debt, as to him, extinguished. (Citations omitted). These necessary elements are not alleged. Mere knowledge and consent by the creditor that a third party assumed the debt will not release the original debtor. It must appear that the creditor agrees to release the original debtor. (Citations omitted). Moreover, it appears from the affirmative defense that there was no consideration for the alleged novation.

Id., 71 Idaho at 396, 233 P.2d at 408-09.

Other jurisdictions hold 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 their Answer, Respondents 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." *See* R., p. 50-51. The affirmative defense is based upon an alleged novation executed between Confluence Management and Liberty Partners which Fullers consented to.

Specifically, the assignment 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.

The document was signed by the Fullers and Callister on behalf of Confluence Management and Liberty Partners.

The district court properly recited the general rule on assignability of a contract, however, failed to address whether such document constituted a novation which relieved Confluence Management of liability under the agreement. Instead, the district court held "[T]he Court finds that all rights and responsibilities to Confluence as the purchaser under the purchase and sale agreement were transferred to Defendant Liberty Partners with Plaintiffs agreement.

Plaintiffs' motion for summary judgment dismissing Defendants' Eighth Affirmative Defense is DENIED." *See* R., p. 65.

The district court ignored the distinction between an assignment and a novation. Under an assignment, the assignee acquires all the rights the assignor had under the contract. However, a novation, on the other hand, is an express declaration of a contracting party releasing the original contracting party from all obligations and liability under the agreement that is assigned to a third party. In other words, the alleged affirmative defense of novation asserted by Respondents must expressly release Confluence Management of all obligations and liabilities under its agreement with the Fullers.

In this case, the alleged novation identified as exhibit B to Mr. Fuller's affidavit does not expressly release Confluence Management of its obligations under the agreement to the Fullers. Instead, the Fullers merely provided their consent to Confluence Management assigning its rights under the agreement to Liberty Partners.

In Idaho, the mere consent to an assignment does not relieve the assignor of its contractual obligations with the original contracting party. The Fullers merely 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 Fullers.

There is no dispute of fact that Liberty Partners took and converted the ACHD proceeds. Notwithstanding Liberty Partners failure to adhere to the terms of the contract, Confluence Management continues to be liable under the contract to pay said funds to the Fullers.

Based upon the foregoing case law, arguments and undisputed facts, the Fullers respectfully request this Court enter its order reversing the district court's ruling denying dismissal of Respondents' eighth affirmative defense of novation.

D. The District Court Erred in Dismissing Respondent Callister, individually, as the Issue was Not before the Court to Decide.

The Fullers moved for partial summary judgment for the dismissal of only two (2) out of the twelve (12) affirmative defenses raised by Respondents in their Answer. Specifically, their ninth affirmative defense on the doctrine of merger and eighth affirmative defense on the issue of novation. Respondents did not file a cross motion for summary judgment.

Instead, Respondents in their Memorandum in Opposition to the motion for partial summary judgment, made the following argument in response to the Fullers request for dismissal of their eighth affirmative defense (novation):

> 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, no factual or legal basis exists in this case upon which they are entitled to pursue to either the Defendant Confluence Management, ot 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 action. Therefore, this Court should deny the Fuller's motion for summary judgment in respect to 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.

In *Harwood v. Talbert,* 136 Idaho 672, 39 P.3d 612 (2001), the Idaho Supreme Court explained the standard of review from an order granting summary judgment against the moving party.

In *Hardwood,* Talbert filed for summary judgment against Harwood on "all Plaintiff's claims for relief set forth in Plaintiff's Complaint. 136 Idaho at 678, 39 P.3d at 618. The trial court granted Hardwood partial summary judgment on a valid road easement and its existence.

On appeal, Talbert argued that the district court committed legal error by *sua sponte* granting summary judgment to Harwood on the grounds that Talbert did not put the issue of the existence of the road in her motion and Harwood did not file his own motion on the issue.

The Court explained and held as follows:

> In this case, partial summary judgment was granted to Harwood, the non-moving party. This Court has determined'[s]ummary judgment may be rendered for any party, not just the moving party, on any or all the causes of action involved, under the rule of civil procedure.' Thus allowing trial courts flexibility in determining the form of relief granted in summary judgment orders. (Citations omitted).
>
> The district court may grant summary judgment to a non-moving party even if the party has not filed its own motion with the court. A motion for summary judgment allows the court to rule on the issues placed before it as a matter of law; the moving party runs the risk that the court will find against it, as in this case.
>
> In instances where summary judgment is granted to the non-moving party, this Court liberally construes the record in favor of the party against whom summary judgment was entered. (Citations omitted). 'The party against whom the judgment will be entered must be given adequate advance notice and an opportunity to demonstrate why summary judgment should not be entered.' (Citations omitted). **It is also true that a district court may not decide an issue not raised in the moving party's motion for summary judgment.** *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530, 887 P.2d 1034, 1037 (1994) (holding non-moving party is not required to respond to issues not raised by the moving party even if the non-moving party ultimately has the burden of proof at trial). (Emphasis added).

Id., 136 Idaho at 677-78, 39 P.3d at 617-18.

The same standard applies to a summary judgment granted *sua sponte* by the district court on issues not raised by the moving party.

In *Sirius LC v. Erickson,* 144 Idaho 38, 156 P.3d 539 (2007), summary judgment was granted to Sirius dismissing Erickson's remaining twelve affirmative defenses that neither party raised at summary judgment. The Idaho Supreme Court explained:

> 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 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 the 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.** (Citation omitted). 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. (Citation omitted). We vacate the district court's dismissal of Erickson's remaining affirmative defenses because they were not at issue in the summary judgment proceedings.

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

Based upon the quoted argument raised in Respondents' memorandum in opposition, the district court concluded that there were no facts or allegations before it that Callister was acting in any capacity other than his corporate capacity and therefore summary judgment dismissing Callister, individually, was granted.

The District Court made the following ruling pertaining to this issue:

> Defendants seek summary judgment dismissing Callister as a party because Plaintiffs have not alleged that he was acting in his individual capacity at any time during the transaction. After reviewing the pleadings and memoranda and affidavits filed in support of summary judgment, the Court finds that there are no facts or allegations before the Court that Callister was acting in any capacity other than his corporate capacity. Defendants' motion for summary judgment dismissing Callister as an individual defendant is GRANTED.

See R., p. 66.

Notwithstanding the district court's ruling, the issue of dismissing Callister as an individual was not before the Court. The Fullers' motion for partial summary judgment raised

the issues concerning two of the Respondents' twelve affirmative defenses asserted in their Answer and a conclusory issue on Confluence Management's liability in the agreement which the Fullers do not appeal the district court's general ruling, except for the basis for reaching such ruling. No motion to dismiss Callister, individually was brought by him.

Both *Harwood* and *Sirius* hold that the district court's authority to render summary judgment is limited to the issues placed by the moving party's motion.

Here, the Fullers were the moving party and put forth the following issues in their motion to be decided by the district court:

1) The doctrine of merger does not apply concerning the reservation of the condemnation proceeds paid by ACHD resulting in the dismissal of Defendants' ninth affirmative defense;

2) That the assignment vesting the property in Liberty Partners did not relieve Defendant Confluence Management of its obligation and liability under the Commercial/Investment Real Estate Purchase and Sale Agreement dated September 20, 2005 resulting in the dismissal of Defendants' eighth affirmative defense; and

3) Defendants Confluence Management, LLC breached its obligations under the agreement in the amount of $83,921.00, plus accrued pre-judgment interest from October 20, 2006.

See R., pp. 58-59.

Even though Respondents did not file their own motion for summary judgment as to Callister, individually, the Fullers did not raise or assert any issue with regards to Callister, individually in their motion.

The first issue placed before the Court was the application of the doctrine of merger to the reservation of condemnation proceeds in the Purchase and Sale Agreement raised by Respondents as an affirmative defense. The application of the doctrine of merger is a question of law and if applicable, is dispositive of the entire case.

The second issue concerned whether a valid novation existed which would relieve ONLY Confluence Management of liability under the Commercial/Investment Real Estate Purchase and Sale Agreement. This affirmative defense, if applicable, would only relieve Confluence Management from liability, if any, under the agreement.

Finally, the third issue concerned a finding by the district court that Confluence Management breached the Agreement by failing to turn over the condemnation proceeds. This issue was dependent upon the district court finding the document at issue did not constitute a valid novation therefore not relieving Confluence Management of its obligations under Agreement. However, the Fulelrs recognize that no such decision could be made in light of the other remaining affirmative defenses asserted that were not raised by the Fullers' motion. Notwithstanding, whether or not a breach occurred is a question of fact. The district court's ultimate decision to deny the issue was correct, however, the district court's reasoning for the denial was not.

Accordingly, the Fullers never raised any issue pertaining to Callister as an individual, and thus the district court's *sua sponte* decision to dismiss Callister as an individual was an error because the issue was not before it to decide at that time.

Despite the foregoing, the district court based its ruling on the pleadings, memoranda and affidavits filed in support of summary judgment. Other than the Fullers' Motion for Partial Summary Judgment setting forth the issues to be decided, affidavits submitted by David Fuller, Fullers' counsel and Respondents' counsel and the Fullers' initial memorandum in support of their motion, Respondents' memorandum in opposition to the motion and Fullers' reply brief to Respondents' memorandum in opposition, no other affidavits or pleadings were submitted. Callister never submitted an affidavit attesting to any facts based upon his personal knowledge

in accordance with Rule 56(e) of the Idaho Rules of Civil Procedure either as an individual or acting in his corporate capacity of Confluence Management and/or Liberty Partners.

Based upon the foregoing case law and the Clerk's Record, the district court acted outside its authority in granting summary judgment in favor of Callister and the Fullers respectfully request this Court enter its Order reversing said ruling.

IV. ATTORNEY FEES ON APPEAL

The Fullers are claiming their reasonable attorney's fees and costs on appeal pursuant to I.A.R. 40 and I.A.R. 41 and pursuant to the Commercial/Investment Real Estate Purchase and Sale Agreement dated September 20, 2005.

Attorney fees are awardable only where they are authorized by statute or contract. *Heller v. Cenarussa,* 106 Idaho 571, 682 P.2d 524 (1984). If a party bases its claim for an award of attorney fees by contract, the party must identify the provision of the contract which authorizes such an award for attorney fees. *Bream v. Benscoter,* 139 Idaho 364, 79 P.3d 723 (2003).

Specifically, the Real Estate Purchase and Sale Agreement sets forth a provision which mandates that the prevailing party is entitled to an award of attorney's fees on an appeal. Paragraph 17 of the Real Estate Purchase and Sale Agreement reads:

> **17. ATTORNEY'S FEES:** If either party initiates or defends any arbitration or legal action or proceedings which are in any way connected with this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and fees on appeal.

Although the issue on appeal arises under Addendum #1 dated September 20, 2005, said addendum is part of the underlying Commercial/Investment Real Estate Purchase and Sale Agreement dated September 20, 2005. The Addendum provides the following language:

To the extent the terms of this ADDENDUM modify or conflict with any

> provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. **All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same.** Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement. (Emphasis included).

Based upon the contractual language, the case law and arguments presented herein, the Fullers respectfully requests an award of their reasonable attorney fees and costs on appeal with instructions to the district court allowing the Fullers' reasonable attorney fees and costs incurred prior to this appeal.

V. CONCLUSION

The reservation of the ACHD's proceeds in the contract was a personal agreement between the Fullers and Confluence Management and Callister which was later assigned to Liberty Partners. Notwithstanding the assignment, the Fullers never expressly released Callister and Confluence Management of their obligation under the contract. The record is undisputed that Liberty Partners converted the ACHD's proceeds. The reservation of ACHD proceeds was collateral and independent to the conveyance of the deed and clearly was intended to be performed after the deed was delivered.

The reservation of ACHD's proceeds did not restrict the right of alienation of the property, nor did the reservation reference or affect the title, possession, quantity or emblements of the land, therefore varying, changing or altering the agreement in the deed itself, or inhering in the very subject-matter with which the deed dealt. The reservation of the ACHD's proceeds only dealt with money which was part of the overall consideration for the whole transaction. The payment of the ACHD's proceeds was not relevant to the conveyance of the property and immaterial to the deed itself.

Based upon the foregoing case law and authority, the arguments presented herein and the clerk's record provided herein, the Fullers' respectfully request this Court to reverse the district court's Memorandum Decision and Order in toto and with instructions to the district court upon remand as following:

1) That doctrine of merger does not apply and the reservation of the ACHD's proceeds survived the conveyance of the deed, therefore warranting dismissal of Respondents' Ninth affirmative defense asserted in their Answer;

2) That the assignment between Confluence Management and Liberty Partners did not constitute a valid novation relieving Confluence Management of its obligations in the contract, therefore warranting dismissal of Respondents' Eighth affirmative defense;

3) The district court's decision denying partial summary judgment on the Fullers' third issue raised in their motion for partial summary judgment is affirmed, only to the extent that other affirmative defenses exist that were not raised creating disputed genuine issues of material fact of Confluence Management's breach under the contract;

4) The district court's *sua sponte* ruling dismissing Callister as an individual is reversed because the issue was not properly before the district court; and

5) The Fullers are the prevailing party on appeal and entitled to their reasonable costs and attorney's fees incurred on appeal.

DATED this 5rd day of May, 2010.

DAVISON, COPPLE, COPPLE & COPPLE

By _____
Ed Guerricabeitia, of the firm
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of May, 2010 a true and correct copy 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
__X__ Hand Delivery
_____ Facsimile Transmission:

Ed Guerricabeitia