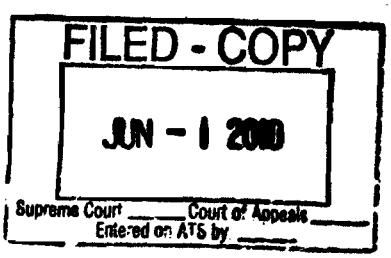
6-1-2010

Fuller v. Dave Callister Respondent's Brief Dckt. 37035

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT NO. 37035

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.	)



RESPONDENTS'/CROSS APPELLANTS' BRIEF

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

Honorable Ronald J. Wilper, District Judge, Presiding

E. DON COPPLE
ED GUERRICABEITIA
Attorneys at Law
Davison, Copple, Copple & Copple
199 N. Capitol Boulevard, Suite 600
P.O. Box 1583
Boise, Idaho 83701
Telephone: (208) 342-3658
Facsimile: (208) 386-9428

ATTORNEY FOR APPELLANTS/
CROSS RESPONDENTS
David and Shirley Fuller

MICHAEL R. JONES
Attorney at Law
Michael R. Jones PLLC
508 North 13th Street
Boise, Idaho 83702

Telephone: (208) 385-7400
Facsimile: (208) 389-9103

ATTORNEY FOR RESPONDENTS/
CROSS APPELLANTS
Dave Callister, Liberty Partners, Inc.,
and Confluence Management, LLC

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Attorney at Law
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508 North 13th Street
Boise, Idaho 83702

Telephone: (208) 385-7400
Facsimile: (208) 389-9103

ATTORNEY FOR RESPONDENTS/
CROSS APPELLANTS

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I.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a contract case arising out of a commercial real estate purchase and sale agreement between the Appellant Fullers and the Respondent Confluence Management, which involves the right to receive post-sale proceeds arising from a subsequent transfer of a portion of the property to the Ada County Highway District ("the ACHD") by the then-owner, Liberty Partners, Inc.

B. COURSE OF PROCEEDINGS BELOW

The Plaintiff/Appellant Fullers stated two causes of action in their amended complaint. (R.Vol. I, pp. 27-33). The Fullers' first, and primary claim, was for breach of contract, as only alleged against the Defendant Confluence Management LLC, and as against the Defendant Dave Callister, individually. The Fullers' second, and alternative claim, was for unjust enrichment, as only alleged against the Defendant Liberty Partners, Inc.

All three named defendants in this action – Dave Callister as an individual, Confluence Management, LLC, and Liberty Partners, Inc. – responded to the Fuller's amended complaint in a single answer, denying the Fuller's claims generally, and asserting twelve affirmative defenses. (R.Vol. I, pp. 49-57). The defendants made no claim for separate affirmative relief by way of a counterclaim.

In a rather curious twist under summary judgment practice, the Fullers did not request entry

of partial summary judgment on their own two claims for breach of contract and unjust enrichment, but instead requested summary judgment on the application of two affirmative defenses to those claims raised by the defendants which, if successful, would be a complete defense to all claims for relief that had been raised by the Fullers in their amended complaint. (R.Vol. I, pp. 58-60).

The first question presented on the Fuller's motion for partial summary judgment was whether their breach of contract claim, as only alleged against the Defendants Callister and Confluence Management, and as based upon the commercial real estate purchase and sale agreement, was barred under the merger doctrine after that contract had been merged into the warranty deed?

The second question presented on the Fuller's motion for partial summary judgment was whether there were any surviving rights under the commercial real estate purchase and sale agreement, which if not barred by the operation of the merger doctrine, would nonetheless be barred as asserted against the Defendants Confluence Management and Callister as a result of the Fuller's consent to the assignment of that underlying contract to Liberty Partners?

The district court held that the merger doctrine and Confluence Management's assignment of the contract to Liberty Partners barred all of the Fullers' claims. (R.Vol. I, pp. 63-65). Although the Fullers motion had been for partial summary judgment, the district court's determination of the issues that had been raised on that motion disposed of the entire action, leaving no issues to be determined at trial. Therefore, a final judgment was entered for the defendants dismissing all of the Fullers' claims against them. (R.Vol. I, pp. 68-69).

The district court also specifically held that the existence of an enforceable express contract precluded any recovery for unjust enrichment, and therefore dismissed the Fullers' Count II unjust enrichment claim that had only been alleged against Liberty Partners in the Fullers' amended complaint. (R.Vol. I, pg. 69). The Fullers have raised no issue on this appeal challenging the district court's dismissal of their Count II unjust enrichment claim.

Consequently, the only issues that have been presented by the Fullers on this appeal concern whether the merger doctrine bars any recovery by them under the contract, and whether any contract claim that was alleged by them against Confluence Management and Callister, which might still survive under the merger doctrine, was nonetheless barred as result of Callister's assignment of Confluence Management's rights under the contract to Liberty Partners?

C. STATEMENT OF FACTS

In September 2005 Confluence Management LLC reached an agreement to purchase 12.73 acres from the Fullers at a cost of $100,000 per acre for a total payment of $1,273,000.00. (R.Vol. I, pg. 35). Prior to the closing of that sale Confluence Management assigned its interest under the contract in this 12.73 acres to Liberty Partners, Inc. The Fullers consented to this assignment. *See*, Exhibit B to the Affidavit of Michael R. Jones, submitted as an exhibit to the record on appeal.

Prior to the sale of this 12.73 acres by the Fullers to Confluence Management in September 2005, the Fullers had been negotiating with the ACHD for a sale of a portion of this same property for use in the planned expansion of Ten Mile Road in western Ada County. When the Fullers sold

this 12.73 acres to Confluence Management in September 2005 they received full compensation for all 12.73 acres. There was no reduction in price for any reserved parcel that was to be subsequently conveyed to, or condemned by, the ACHD. Nor did the deed contain any description of any reserved parcel, in size or location, that was to be conveyed to, or condemned by, the ACHD. *See*, Exhibit A to the Affidavit of Michael Jones, submitted as an exhibit to the record on appeal. The entire matter was left to future negotiations.

In September 2006, nearly one year after the sale of this property by the Fullers to Confluence Management, the then-owner, Liberty Partners, Inc., accepted a payment of $83,921.00 (R.Vol.1, pg. 42), in lieu of a condemnation, for the conveyance to the ACHD of 1.43 acres out of the 12.73 acres that Confluence Management had purchased from the Fullers. (R.Vol. I, pp. 46-47). Although the Fullers only asserted their contract claims against Confluence Management and Callister in this action, these funds that are claimed by the Fullers (hereinafter referred to as "the ACHD proceeds") were paid to Liberty Partners by the ACHD for the 1.43 acres.

This $83,921.00 payment, as made by the ACHD for the 1.43 acres, equals a valuation of $58,686.00 per acre. Consequently, this subsequent sale of this 1.43 acres to the ACHD by Liberty Partners represented an $84,314.00 loss in value, when compared to the apportioned cost of $143,000 that Confluence Management had paid to the Fullers for this same land the previous year.

In the action below the Fullers contended that they had reserved a right to the $83,921.00 in proceeds for the 1.43 acres that was sold by Liberty Partners to the ACHD in an addendum to the

purchase and sale agreement (R.Vol. I, pg. 40), which had been executed before their sale of the property to Confluence Management. (R.Vol. II, pp. 6-14). The Fullers were claiming a right to the $83,921.00 in ACHD proceeds in addition to the apportioned $143,000.00 that they had received for that same acreage when they sold the property to Confluence a year earlier. In sum, the Fullers claimed that they were entitled to a total payment of $226,921.00 for this 1.43 acres ($143,000 + $83,921) for a total compensation of $153,686.00 per acre for that particular parcel of land that was conveyed to the ACHD.

Correspondingly, when viewed from the perspective of the current owner, Liberty Partners, when the 12.73 acre parcel was reduced by the 1.43 acres that was conveyed to the ACHD, the remaining 11.3 acres that was retained by Liberty Partners would now have an acquisition cost of $112,654.86 per acre, as based upon the $1,273,000.00 purchase price for 11.3 acres, or $105,228.23 per acre, if Liberty Partners was allowed to retain the $83,921 in the ACHD proceeds, which on an apportioned basis was $84,314 less than the $143,000 per acre that Confluence Management had paid for that parcel a year earlier.

D. STANDARD OF REVIEW

The application of the doctrine of merger presents a mixed question of law and fact. *Sells v. Robinson* 141 Idaho 767, 771, 118 P.3d. 99 (2005).

In the absence of any ambiguity, questions in respect to the interpretation of contracts present an issue of law for the court to decide. *Harris v. Kempthorne*, 147 Idaho 401, 405, 210 P.3d 86, 90

(2009). 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).

II.

ISSUES PRESENTED ON APPEAL BY CROSS-APPELLANTS

1. Whether the District Court erred in determining that the Cross-Appellants were not entitled to attorney fees under I.C. § 12-120(3) because gravamen of this action was not a commercial transaction?

2. Whether the Respondents/Cross-Appellants are entitled to an award of attorney fees on appeal under I.C. § 12-120(3) as the prevailing party?

III.

ARGUMENT

The respondents'/cross appellants' concur with the concession that has been made by the Appellant Fullers to the effect that if this Court determines that the Fullers' alleged contract right to the ACHD proceeds was merged into the warranty deed, which deed itself is silent on that question, then that determination by this Court to affirm the decision of the district court will be dispositive of all other issues that have been raised by the Fullers on this appeal. *See*, Appellant's Brief, last sentence on pg. 4; and last sentence on pg. 29.

Therefore, if this Court upon appeal decides to affirm the district court's decision that the merger doctrine barred any action by the Fullers to enforce the underlying contract against Confluence Management in respect to the ACHD proceeds, then the remaining issues that have been raised by the Fullers on this appeal become moot, and do not have to be addressed.

A. The Fullers' Alleged Contract Right To The ACHD Proceeds Was Merged Into, And Superseded By, The Warranty Deed That They Issued To Liberty Partners

Under the merger doctrine the essential terms that are required to create an enforceable land sale contract constitute the very same terms that are merged into a subsequent deed. The respondents on this appeal concur with the Plaintiff Fullers' statement of the merger doctrine as set out in *Sells v. Robinson*, 141 Idaho 767, 771-72, 118 P.3d 99, 103-04 (2005), which incorporated the earlier 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 covenants 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*, in quoting *Jolley*, the following test is applied to determine those matters foreclosed by the merger doctrine:

> "[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.*

141 Idaho at 772, 118 P.3d at 104 (italicized emphasis in original).

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).

The district court held that both the amount of land that the ACHD would require for its Ten Mile Road project, as taken from the 12.73 acres that the Fullers sold to Confluence Management, and the amount of the compensation that was to be paid by the ACHD for that transfer, were essential elements of "the right of alienation of real property," and that this right of alienation, "inheres to the very subject matter with which a warranty deed deals," and to which the merger doctrine applies. (R, pg. 64).

Therefore, under the merger doctrine, because any alleged right of the Fullers to the ACHD proceeds that are at issue on this appeal was not expressly reserved within in the terms stated on the face of the deed itself, the Fullers cannot enforce their claim to those ACHD proceeds in reliance upon terms stated in the underlying commercial real estate purchase and sale agreement that was merged into that warranty deed. The district court held: "Because the Court has held that the Sale and Purchase Agreement and Addendum merged with the warranty deed and the Court has held that the Defendant Confluence assigned the Sale and Purchase Agreement and Addendum to Defendant Liberty Partners, Plaintiffs [sic] motion for summary judgment on the issue of breach of the sales

purchase agreement is DENIED." (R.Vol. I, pg. 66).

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. On this appeal the Fullers continue to argue to this Court that the district court erred in its determination that the right to the ACHD proceeds was an inherent part of those matters addressed in the contract that are merged into the warranty deed. But the Fullers have failed to acknowledge in their argument that the district court's decision was squarely based upon "the right of alienation," as encompassing both the issue of the amount of land that was to be taken, and as to the amount that was to be paid for the land that was to be taken. The Fullers have summarized their arguments to this Court in the following two statements:

> 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.

Appellants' Brief at pg. 19 (emphasis added).

> 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 land. Instead it dealt with money predicated upon a future event by ACHD which could have or could not have occurred.

Appellants' Brief at pg. 21 (emphasis added).

In respect to the issue that has been raised on this appeal, it needs to be emphasized that the

ACHD proceeds at issue were not paid to Liberty Partners as the result of a condemnation, as indicated in the just-cited quotations from the Fullers' argument to this Court. Instead, the amount of those proceeds were determinated through a voluntary agreement that the ACHD reached with the property owner, Liberty Partners. Contrary to the argument that the Fullers have made on this appeal, the question that was presented to, and decided by the district court was not simply a determination of the proper recipient of transaction proceeds, but instead the question also involved a determination of the amount of land that the ACHD wanted to obtain. This point was clearly stated by the district court in the following colloquy with the Fullers' legal counsel at the summary judgment hearing:

> THE COURT: And - - but what if through negotiations the Fullers had told ACHD, you know, we'll give you more property than that. We'll give you, you know, one-sixth of the property. Could that have been on the table?
>
> MR. GUERRICABEITIA: That was not on the table.
>
> THE COURT: But how do we know? I mean - - I guess that's what I'm struggling with, is that that amount of land - - you know, they talk in - - you know, they just say the road right-of-way. Assuming that you go someplace else and find out what we're talking about when we are talking about road right-of-way and it ended up being a twelfth and that might have very well been all of the land that ACHD wanted to condemn.
>
> But what if during these negotiations some clever engineer came up with a way to - - you know, to do something else with the right-of-way that ACHD wanted to acquire and the Fullers could stand back and say, well, gee, I'm sorry, Mr. Callister, but we sold eleven/twelfths of your - - you know, of the property and we intend to keep it. Do you see what I mean?
>
> MR. GUERRICABEITIA: I do.

Tr., pg. 13, L. 23 to pg. 14, L. 22. Although the Fullers' legal counsel had stated in this colloquy with the district court that the amount of land at issue "was not on the table," just a few moments before making that statement to the district court he had declared that, in the absence of a voluntary agreement between the ACHD and the property owner (Liberty Partners), that the ACHD would be free to take any portion of the land that it determined to be necessary:

> MR. GUERRICABEITIA: . . . ACHD can acquire whatever property they want to.
>
> THE COURT: They have condemnation authority.
>
> MR. GUERRICABEITIA: Exactly. The fact that the [sic] negotiated a strip, they can always extend that strip or widen that strip. So, therefore, there is no clear way of knowing exactly what ACHD desired at that time.
>
> . . .

Tr, pg. 11, L. 23 to pg. 12, L. 6.

It was this very fact, concerning the uncertainty about the amount of the land that might be either purchased or condemned by the ACHD, and the price that was to be paid for that land, upon which the district court based its decision that any reservation of such right to the ACHD proceeds in the Fullers was merged into the deed, and therefore had to be expressed in the deed in order for the Fullers to exercise that right. The district court reasoned as follows:

> 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 a warranty deed deals. . . .

(R.Vol. I, pg. 64). The Fullers have simply failed to acknowledge the fact that the district court's decision on the merger doctrine was based upon issues concerning the conveyance of property, the amount of property, and the price to be paid for that property, as constituting essential components of the "right of alienation," which is inherent in a warranty deed, and therefore is controlled by the merger doctrine.

The primary support that the Fullers provide for their argument to this Court that a "right to proceeds" is not an inherent part of a transaction that is merged into the deed, is based upon decisions from Illinois, Oklahoma, and Colorado. In each instance the Fullers argue that, because each of those states also recognize the merger doctrine, the result reached in those cases upon which they rely should be considered persuasive authority in the application of Idaho's merger doctrine to the facts of this case.

Neither the 1988 decision of the Illinois Court of Appeals in, *In re Dept. of Transportation*, 527 N.E.2d 958 (Ill.App.1988), nor the Tenth Circuit's decision in *United States v. 397.51 Acres of Land*, 692 F.2d 688 (10th Cir. 1982), which relied upon Oklahoma law, raised, involved, or decided any issue concerning the application of the merger doctrine. Under Idaho law even when a case reaches a favorable result involving a similar factual question, the result in that case does not create a binding or controlling precedent on an issue of law that was not raised or decided by the court in

respect to the determination of that particular factual question. *Callies v. O'Neal*, 147 Idaho 841, 850, 216 P.3d 130, 139 (2009). Here, neither the Illinois nor the Tenth Circuit decisions cited and relied upon the Fullers present any persuasive authority on the merger doctrine question that is at issue on this appeal. Even though the Fullers can point to a favorable outcome involving similar facts in those cases, they are simply not persuasive in respect to the merger doctrine issue that is presented on this appeal.

As to the Colorado Court of Appeals decision in *Skidmore v. First Bank of Minneapolis*, 773 P.2d 587 (Colo.App.1988), the Colorado Court determined that a maintenance provision concerning an easement was collateral to the conveyance itself, as encompassed within the deed, and therefore the enforcement of that easement maintenance agreement was not barred by the merger doctrine. The respondents on this appeal have no quarrel with that reasoning, or with that result, and would concede that a similar result might occur if those same facts were presented to an Idaho court. But the fact that a separate maintenance agreement in respect to an easement survives under the merger doctrine does not in any way alter the result in this case that alienation rights in respect to either a subsequent conveyance or condemnation of an undetermined quantity of land, at an undetermined price, are inherent in the rights represented by the deed and are therefore merged into that deed.

In sum, the merger doctrine precluded 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. Therefore, the district court's decision holding that the Fuller's contract claim was barred under the merger doctrine should be affirmed.

B. Even If The Fuller's Contract Rights Survived Merger Into The Warranty Deed, Confluence Management Has No Liability On Those Claims As A Result Of The Assignment Of Its Entire Obligation Under The Contract To Liberty Partners

Because the Fullers' breach of contract claim was only brought against Confluence Management any determination by this Court on appeal that the merger doctrine bars any contract claim against Confluence Management, must necessarily also preclude the assertion of any claim by the Fullers against Confluence Management that is based upon the alleged continuing liability of Confluence Management under the commercial real estate purchase and sale agreement after the Fullers had consented to the assignment of that contract by Confluence Management to Liberty Partners. *See*, Appellant's Brief, last sentence on pg. 4; and last sentence on pg. 29.

The operation of the merger doctrine is a complete defense to all claims of the Fullers to the ACHD proceeds that are based upon the underlying commercial real estate purchase and sale agreement. It again bears reiterating that the Fullers made no claims based upon contract against the Defendant Liberty Partners.

Notwithstanding the fact that the merger doctrine issue is potentially dispositive of this entire appeal, the Fullers have nonetheless advanced an additional argument that, in the absence of a

"novation" that arose from the assignment between Confluence Management and Liberty Partners, Confluence Management remained independently liable to the Fullers under the contract for the payment of the ACHD proceeds.

The district court rejected the Fullers' argument, finding that Confluence Management had no remaining obligations under the purchase and sale agreement after its assignment to Liberty Partners, and it specifically held that, "all rights and responsibilities of Confluence as the purchaser under the purchase and sale agreement were transferred to Defendant Liberty Partners with Plaintiffs agreement." (R.Vol. I, pg. 65). The district court did not expressly reach the question of novation, but simply ruled that 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 rule was more fully stated 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).

On this appeal the Fullers argue that under Idaho law Confluence Management could not be relieved of all its obligations under the commercial real estate purchase and sale agreement – including its obligation to pay the ACHD proceeds to the Fullers – unless the Fullers had given an express release as a part of their consent to that assignment. *See*, Appellants' Brief pp. 22-25. The Fullers argue that they did not give such an express release, and therefore Confluence Management remains independently liable for the performance of the commercial real estate purchase and sale agreement.

The commercial real estate purchase and sale agreement identified the "buyer," as "Confluence Management and/or assigns." (R.Vol. I, pg. 35). The merger doctrine would be entirely toothless if it could be so easily circumvented by the mere expedient of alleging an independent surviving right under the contract. Simply stated, if Confluence Management's potential liability upon the underlying contract is merged into the deed, then no different outcome should arise as a result of its assignment of the contract, followed by the subsequent merger of that contract into the deed issued to that assignee, than if there had been no assignment.

The Eighth Affirmative defense, upon which this question turns, declared as follows in the response that the defendants filed and served in answer to the Fullers' amended complaint:

> 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.

(R.Vol. I, pp. 50-51).

Admittedly, both parties at the July 20, 2009 hearing on the Fullers' summary judgment motion spoke in terms of the Eighth Affirmative Defense raising a "novation" defense. *See*, Counsel for the Fullers: Tr., pg. 15, LL. 10-10; Counsel for Defendants: Tr., pg. 23, L. 4 to pg. 24, L. 6. The requirements for a novation under Idaho law were expressly declared in *Harris v. Wildcat Corp.*, 97 Idaho 884, 556 P.2d 67 (1976), and most recently cited with approval in, *University Place/Idaho Water Center Project v. Civic Partners, Inc. et al.*, 146 Idaho 527, 547, 199 P.3d 102, 122 (2008) (J. Jones, J. specially concurring). The Court in *Harris* explained the essence of a novation as follows:

> A novation results when an accord and satisfaction is reached by substitution of a new agreement or performance in place of the performance or compromise of the original obligation. Thus, novation is a species of accord and satisfaction. 1 C.J.S. Accord and Satisfaction § 5, pg. 465; *Wheeler v. Wardell*, 173 Va. 168, 3 S.E.2d 377 (1939). It is stated in *Wheeler v. Wardell, supra*, that novation is a contract consisting of two stipulations; first to extinguish an existing obligation and, secondly, to substitute a new one in place of the original. The court stated:
>
> > "'Every novation embraces, necessarily, an accord and satisfaction; the principle distinguishing feature between them being that a novation implies the extinguishment of an existing debt by the parties thereof and its transition into a new existence between the same or different parties, whereas an 'accord and satisfaction' relates solely to the extinguishment of the debt or obligation.'"
>
> To establish an accord and satisfaction the parties accepting a new or different obligation must do so knowingly and intentionally. [citations omitted]

97 Idaho at 886, 556 P.2d at 69 (bracketed reference to, "citations omitted," added).

As is aptly demonstrated by the decisions from Idaho, and other jurisdictions, that the Fullers have cited in support of their argument that they did not consent to a novation in this case, that principle has its most extensive application in the area of debtor/creditor relationships and in leases, involving personal performance in respect to a debt obligation. Idaho law also draws a clear distinction between an "assignment" and a "sublease," such that these 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.

In this case the principal obligation, which was the payment of $1,273,000.00 to the Fullers in exchange for 12.73 acres of property that they owned, had been fully performed before this action was commenced. Consequently, there was no debt obligation in respect to the primary performance under that contract for which any accord and satisfaction was required, or that was necessary in this case in respect to a novation.

Assuming, for the sake of argument, that even if neither merger nor novation extinguished the Fullers' claimed contractual right to the ACHD proceeds in this case, there remained at least four

conditions precedent to any required performance by Confluence Management under the terms of paragraph 3 in the addendum to the underlying commercial real estate purchase and sale agreement, that did not occur. (R.Vol. I, pg. 40). *See e.g.*, *Wade Baker & Sons Farms v. Corporation of the Presiding Bishop*, 136 Idaho 922, 925, 42 P.3d 715, 718 (Ct.App.2002) ("A condition precedent is an event that is not certain to occur, but which must occur, unless it nonoccurrence is excused, before performance under a contract will become due.").

First, the Fullers only seek performance by Confluence Management of a contractual obligation allegedly owed to the Fullers in respect to the ACHD proceeds. Confluence Management had no right to, or control over, any funds paid by the ACHD for the property that is at issue after the assignment it made to Liberty Partners, the owner of record at the time the ACHD proceeds were paid. *See*, Exhibit C to the Affidavit of Michael Jones, submitted as an exhibit to the record on appeal.

Second, the ACHD proceeds were to be paid to the Fullers according to escrow instructions, whose absence from the record on this appeal is an indication that those instructions do not, and never did, exist.

Third, the Fullers specifically reserved the right to negotiate the amount of the ACHD proceeds, yet when the ACHD balked at the Fullers attempt to exercise that right the Fullers did not assert their alleged contractual reservation of that right, but instead acquiesced in the ACHD's declaration that it only negotiated with the owner of record. *See*, Exhibit C to the Affidavit of

Michael Jones submitted as an exhibit to the record on appeal.

Fourth, the terms of the contract upon which the Fullers rely in support of their claim to the ACHD proceeds, as stated in the prefatory printed language in paragraph 10 of the commercial real estate purchase/sale agreement, clearly and unambiguously stated that those particular terms would lapse if not exercised and satisfied prior to closing:

> This Agreement is made subject to the following special terms, considerations and/or contingencies **which must be satisfied prior to closing** . . .

(R.Vol. I, pg. 36, emphasis added; R.Vol. I, pg. 40). 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 sum, the Fullers' novation argument, as only alleged against the Defendant Confluence Management, fails because: (1) the district court was correct that this case is covered by the broader rule that a general assignment includes all the rights and remedies possessed by and available to the assignor; (2) even if the more specific doctrine of novation applies to the facts of this case, and that novation failed due to the failure of consent by the Fullers, that question had become moot because the principal obligation under the contract had been fully performed; (3) The Fullers themselves

failed to perform necessary conditions precedent to any performance under the contract by Confluence Management; and (4) even if the merger doctrine would not preclude any further action against Confluence Management under the contract, the fact that Liberty Partners held the property deed eliminated any further possibility that Confluence Management would be required to perform under the contract because it would not receive the ACHD proceeds.

Therefore, because the Fullers' arguments for recovery upon an independent contractual obligation owed to them by Confluence Management, which is not barred by the merger doctrine, appears to be wholly without merit, the decision of the district court dismissing the Fullers' contract claim against Confluence Management should be affirmed.

C. The Dismissal Of Callister Was A Part Of The District Court's Determination That The Contract Had Been Merged Into The Deed, And A Complete Assignment Had Been Made To Liberty Partners

The district court denied the Fullers' motion for partial summary judgment on the defendants' Eighth Affirmative Defense (the assignment of the contract to Liberty Partners), and Ninth Affirmative Defense (the merger of the contract with the deed), and instead granted summary judgment to the defendants. The district court held that the parties' commercial real estate purchase and sale agreement was enforceable, but that its merger into the deed prevented its independent enforcement apart from the express terms of the deed. This holding necessarily precluded any recovery by the Fullers' on their second cause of action for unjust enrichment. In addition, the district court held that the assignment of the contract to Liberty Partners by Confluence Management

extinguished all the rights and obligations that Confluence Management had owed to the Fullers under that contract. The effect of these rulings, as set out in the following excerpt from the district court's judgment, was to completely adjudicate the case, leaving no claims to be determined at trial:

> The Court denied the Plaintiffs' motion for partial summary judgment on the Defendants' Eighth and Ninth Affirmative defenses, and instead entered summary judgment for the Defendants on each of those affirmative defenses. Consequently, summary judgment is granted to the Defendants dismissing COUNT I of the Plaintiffs' complaint.
>
> Because the Court's decision upholds the existence of an express contract that governs the rights of the parties in this action, COUNT II of the Plaintiffs' complaint, which states an alternative basis for relief in unjust enrichment, is rendered entirely moot by the existence of an enforceable express contract. Consequently, summary judgment is granted to Defendants dismissing COUNT II of the Plaintiffs' complaint.
>
> THEREFORE, this Court grants summary judgment to the Defendant on all claims made by the Plaintiffs in their complaint. This ORDER shall constitute a final appealable judgment in this action.

(R.Vol. I, pg. 69).

Although the denial of a motion for summary judgment typically means that the question that was placed at issue on the motion remains pending before the trial court, and is left for determination at a trial of the case, *Johannsen v. Utterbeck*, 146 Idaho 423, 428, 196 P.3d 341, 346 (2008), in this instance the direct consequence of the denial of the Fullers' motion for partial summary judgment and the corresponding grant of summary judgment to the defendants was to fully adjudicate the case, leaving no issues to be determined at trial.

The Defendant Dave Callister had been only named by the Fullers as a co-defendant with

Confluence in the breach of contract action. (R.Vol. I, pg. 30). Only Liberty Partners was named by the Fullers as a defendant in the Fuller's second cause of action for unjust enrichment. (R.Vol. I, pg. 31). The district court specifically found that no facts had been alleged that placed any individual liability upon Dave Callister. (R.Vol. I, pg. 66). Just as the district court held that the Fullers' unjust enrichment claim was extinguished by the existence of an enforceable express contract – even though that unjust enrichment claim had not been directly placed at issue on the summary judgment motion – any question of Dave Callister's potential personal liability for the Fullers' claims, as derivative of the contract claim brought against Confluence Management, was fully extinguished as a result of the exoneration of Confluence Management for any contract liability to the Fullers because of its assignment of the contract to Liberty Partners.

In addition, it also bears reiterating that the only contractually bound "buyer," as defined by the commercial real estate purchase and sale agreement, was Confluence Management, LLC. (R.Vol. I, pg. 35). Therefore, based upon the pleadings, and upon the evidence submitted on the motion for summary judgment, there was no basis for the imposition of any liability under the contract upon Dave Callister, and consequently the district court did not err in specifically dismissing him from the action.

D. The Fullers Are Not Entitled To An Award Of Attorney Fees On Appeal

The Fullers request an award of attorney fees on this appeal under paragraph 17 of the underlying commercial real estate purchase and sale agreement. The Fullers' contract claim in this action was only brought against Confluence Management and Dave Callister, individually. Dave Callister signed the contract as "buyer," which was identified as, "Confluence Management and/or assigns." (R.Vol. I, pg. 35). In addition, in their opening brief on this appeal the Fullers did not raise any substantive issue that the district court erred in failing to find either of the Co-Defendants Liberty Partners, Inc., or Dave Callister, individually, liable for its claims to the ACHD proceeds. Therefore, even if the Fullers should prevail on this appeal, they would not be entitled to an award of attorney fees against either Dave Callister, individually, or Liberty Partners, Inc. *See e.g.*, *Nguyen v. Bui*, 146 Idaho 187, 195, 191 P.3d 1107, 1115 (Ct.App.2008) (Distinctions between co-parties may be required when attorney fees are awarded).

The Fullers must first be determined to be the prevailing party on the issues that they have raised on this appeal, as brought against Confluence Management, before they can claim attorney fees under paragraph 17 of the contract. But even if neither the merger doctrine, nor novation, bars the Fullers' claims in this action, they still are not entitled to an award of attorney fees. The Fullers' claim against Confluence Management is for payment of the ACHD proceeds. Because Confluence Management, itself, has no right, or claim, to those proceeds, it can have no enforceable contractual obligation to pay those proceeds to the Fullers. Consequently, even under the best possible outcome

that the Fullers could obtain on this appeal, they cannot prevail on their contractual claim against Confluence Management for the payment of the ACHD proceeds, and therefore they could not be considered to be a prevailing party on this appeal entitled to an award of attorney fees under paragraph 17 of the contract. Therefore, the Fullers' request for an award of attorney fees should be denied even if they should prevail on this appeal.

E. The Gravamen Of This Action Arose Out Of A Commercial Transaction For Which The Cross-Appellants Were Entitled To An Award Of Attorney Fees Below Under I.C. § 12-120(3)

The district court denied the defendants' request for attorney fees declaring as follows:

> In the instant case, the transaction giving rise to the litigation was the purchase by Defendants of Plaintiffs' home. Plaintiffs sought to recover **condemnation proceeds**. That Defendants may have purchased the property for commercial purposes is not integral to the claim or constitute the basis on which Plaintiffs were attempting to recover. The Court finds that this was not a commercial transaction. Plaintiffs' motion to disallow attorney fees is GRANTED.

(R.Vol. II, pg. 63, emphasis added).

The district court might well be correct in its assessment that in a dispute over "condemnation proceeds," the prevailing party is not entitled to an award of attorney fees under I.C. § 12-120(3). But this is not an action involving "condemnation proceeds." The transaction between Liberty Partners and the ACHD was a "willing-buyer willing-seller" transaction. No condemnation was involved.

In the instance of a condemnation any award of attorney fees might well be limited, as provided by I.C. § 7-718, or by one of the other recognized exceptions to an award of attorney fees

under I.C. § 12-120(3) that might apply, such as in those cases involving property disputes, or in those cases that arise under a statutory claim. *See* e.g., *Anderson v. Rex Hayes Family Trust*, 145 Idaho 741, 745, 185 P.3d 253, 257 (2008) ("[C]ommercial transactions generally do not include real estate transactions or issues involving the ownership of property, such as an action to quiet title."); *Baxter v. Craney*, 135 Idaho 166, 174-75, 16 P.3d 263, 271-72 (2000) (boundary dispute); *Durrant v. Christensen*, 117 Idaho 70, 73, 785 P.2d 634, 637 (1990) (water right adjudication); and *Treasure Valley Concrete, Inc. v. State of Idaho*, 132 Idaho 673, 677, 978 P.2d 233, 237 (1999) (outcome depends upon the interpretation of a statute).

On the other hand, as a general category, commercial real estate development disputes have been deemed to be commercial transactions for which an award of attorney fees under I.C. § 12-120(3) is appropriate. *Lexington Heights Development, LLC v. Crandlemire*, 140 Idaho 276, 287, 92 P.3d 526, 537 (2004) ("The purpose of the alleged Agreement was for Lexington Heights to acquire the ninety acres to develop it into a subdivision. Therefore, the alleged Agreement was a commercial transaction."). In particular, a case that involved facts quite similar to those that are before the Court on this appeal was deemed to involve a commercial transaction. *P.O. Ventures, Inc. v. Louks Family Irrevocable Trust*, 144 Idaho 233, 159 P.3d 870 (2007) (Purchase of a 14.66 acre tract of land to include in a subdivision development constituted a commercial transaction).

The district court here relied upon its conclusion that the fact, "That Defendants may have purchased the property for commercial purposes is not integral to the claim or constitute the basis

on which Plaintiffs were attempting to recover." The basis upon which the Plaintiff Fullers were attempting to recover in this action was the alleged right to the $83,921.00 in proceeds that were received by Liberty Partners from the ACHD in a subsequent sale of a portion of the land that Confluence Management had previously purchased from the Plaintiff Fullers for $1,273,000.00. The fact that the dispute directly involves a right to "proceeds" from a land sale does not mean that the matter is not a commercial transaction.

In another recent decision, the Idaho Supreme Court has held that a dispute over the right to the proceeds derived from a real estate partition action did involve a commercial transaction for which an award of attorney fees under I.C. § 12-120(3) is appropriate. In *Troupis v. Summer*, 148 Idaho 77, 218 P.3d 1138 (2009) the Court reasoned as follows:

> Idaho Code section 12-120(3) compels an award of attorney fees to the prevailing party in an action to recover on a commercial transaction. I.C. § 12-120(3); *BECO Constr. Co., Inc. v. J-U-B Eng'rs, Inc.*, 145 Idaho 719, 726, 184 P.3d 844, 851 (2008). A court *must* award attorney fees to the prevailing party in an action to recover on a "commercial transaction." I.C. § 12-120(3); *BECO,* 145 Idaho at 726, 184 P.3d at 851. A "commercial transaction" is defined as "all transactions except transactions for personal or household purposes." I.C. § 12-120(3). The test to determine whether this section applies is whether the commercial transaction comprises the gravamen of the lawsuit; it must be integral to the claim and constitute the basis upon which the party is attempting to recover. *Johannsen v. Utterbeck,* 146 Idaho 423, 432, 196 P.3d 341, 350 (2008). The Summers and Troupises owned the real property in question to conduct their business together. Therefore, the lawsuit was to recover on a commercial transaction and the Troupises are entitled to an award of attorney fees.

148 Idaho at 81, 218 P.3d at 1142 (italicized emphasis in original).

The property that was purchased from the Fullers by Confluence Management and subsequently assigned to Liberty Partners, Inc. was for development purposes to the same extent that the property being purchased in the *Lexington Heights* and *P.O. Ventures* cases was also being developed for commercial purposes. The dispute over the final compensation that the Fullers were entitled to for the purchase of that property is not different in substance than the dispute over the partition proceeds that were at issue in the *Troupis v. Summer*. Therefore, this Court should reverse the district court's denial of an award of attorney fees to the defendants in this action, and instead direct the entry of an award of attorney fees to the defendants as the prevailing parties in the summary judgment proceeding that resulted in the entry of a final judgment in their favor.

F. The Respondents/Cross-Appellants Are Entitled To An Award Of Attorney Fees On Appeal Under I.C. § 12-120(3)

Should the respondents/cross appellants' be determined to be the prevailing parties on this appeal, then they request an award of attorney fees pursuant to I.A.R. 41 and I.C. § 12-120(3). They rely upon the same authority cited in support of an award of attorney fees on appeal as they have already argued in support of their argument made in the immediately preceding section that the district court erred in denying them an award of attorney fees in the action below under I.C. § 12-120(3). The argument from that previous section is fully incorporated by reference herein.

IV.

CONCLUSION

This Court should affirm the decision of the district court denying the Fullers' claim to the ACHD proceeds.

This Court should reversed the decision of the district court denying the respondents/cross appellants an award of attorney fees below under I.C. § 12-120(3).

This Court should grant the respondents/cross-appellants an award of attorney fees on appeal under I.C. § 12-120(3), as provided by I.A.R. 41.

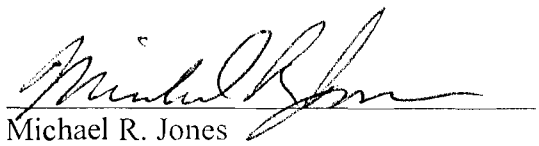
Respectfully Submitted this first day of June 2010.

Michael R. Jones
Attorney for the Respondents/Cross Appellants, Dave Callister, Liberty Partners, Inc., and Confluence Management, LLC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this first day of June 2010, two true and correct copies of the foregoing RESPONDENTS'/CROSS APPELLANTS' BRIEF was served upon the following:

E. DON COPPLE ED GUERRICABEITIA Attorneys at Law Davison, Copple, Copple & Copple 199 N. Capitol Boulevard, Suite 600 P.O. Box 1583 Boise, Idaho 83701 Telephone: (208) 342-3658 Facsimile: (208) 386-9428 Email: edcopple@davisioncopple.com guerricabeitia@davisioncopple.com	___ ___ ___ X ___	U.S. Mail Facsimile Overnight Mail Hand Delivery _____



Michael R. Jones