6-29-2010

Fuller v. Dave Callister Appellant's Brief 2 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'/CROSS-RESPONDENTS' REPLY 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

E Don Copple
Ed Guerricabeitia
Davison, Copple, Copple & Copple
199 N. Capitol Boulevard, Suite 600
P.O. Box 1583
Boise, Idaho, 83701

Attorneys for Appellants/
Cross-Respondents

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

Attorneys for Respondent/
Cross-Appellants

TABLE OF CONTENTS

I. TABLE OF CASES & AUTHORITIES

Cases

Statutes

Other Sources

II. REPLY ARGUMENT

A. The Reservation of the ACHD Proceeds Provision in the Addendum Did Not Restrain Respondents' Right of Alienation of the Property.

Respondents contend that the district court correctly applied the doctrine of merger concerning the ACHD proceeds provision expressed in the Addendum because the amount of land to be acquired by ACHD and the amount of compensation to be paid were essential elements to "the right of alienation of real property" which "inheres to the very subject matter with which a warranty deed deals" and to which the merger doctrine applies. *See* Respondents'/Cross Appellants' Brief, p. 13, ¶ 2. Because the warranty deed executed in this matter was silent to those issues, the real estate land contract merged with the deed.

To be clear for the record, prior to the execution of the Commercial/Investment Real Estate Purchase and Sale Agreement executed by Confluence Management and Callister, ACHD extended the Fullers the same offer amount ($83,921.00) that Liberty Partners converted for itself. The Fullers disagreed with this amount presented in the appraisal report obtained by ACHD. Tr., p. 39, Ll. 2-22.

In defining what constitutes a restraint on the alienation of property, this Court has approvingly cited to the definition provided in the Restatement of Property, specifically:

> Restatement of Property § 404 (1944), defines a restraint on alienation as follows:
>
> '(1) A restraint on alienation, as that phrase is used in this Restatement, is an attempt by an otherwise effective conveyance or contract to cause a later conveyance
>
> (a) to be void; or
> (b) to impose contractual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey; or
> (c) to terminate or subject to termination all or a part of the property interest conveyed.'

Lake v. Equitable Sav. & Loan Ass'n, 105 Idaho 923, 925, 674 P.2d 419, 421 (1983).

In *Lake,* this Court addressed whether a due-on-sale clause contained in a Deed of Trust which allowed a lender to declare the entire balance owed on a loan immediately due and payable if the property securing the loan was sold or otherwise transferred constituted a direct or indirect restraint on the alienation of real property.

After accepting the definition provided in the Restatement and comments made by courts from other jurisdictions on the issue, this Court held that the due-on-sale was not a direct or indirect restraint on the alienation of real property. "Therefore, we decline to follow the *Wellenkamp* decision and, instead hold that even though the due-on-sale clause may affect the ease with which one may dispose of one's property as a matter of law, the due-on-sale clause is neither direct nor indirect restraint on alienation and therefore, is not void as such." 105 Idaho at 926-927, 674 P.2d at 422-23.

Additionally, the Lakes argued that the clause was unconscionable and against public policy. The *Lake* Court responded to this argument as follows:

> This Court has stated that '**[a]n agreement voluntarily made between competent persons is not likely to be set aside on public policy grounds.**' (Citation omitted). It has also been stated that public policy should not be allowed to curtail the liberty to contract unless the preservation of the general public welfare demands it. (Citation omitted). 105 Idaho at 927, 674 P.2d at 423. (Emphasis added).

The district court's determination that the uncertainty regarding the amount of land to be acquired and paid for by ACHD (a third party government entity with the power of eminent domain) restrained the Respondents ability to alienate or convey the real property to another fails under the definition expressed under the Restatement of Property and relied on by the *Lake* Court.

First, the reservation of the ACHD proceeds provided in the real estate contract and addendum would not render the conveyance to Respondents void if there was a later conveyance.

Secondly, the real estate contract did not provide a condition not to convey which would have imposed liability on Respondents if they later conveyed the property.

And finally, a later conveyance by Respondents would not have terminated the property interest conveyed under the contract with Fullers.

As expressed above, the criteria set forth under the Restatement defining a "restraint on alienation" of real property would not have been triggered under the Commercial/Investment Real Estate Purchase and Sale Agreement and Addendum executed between Confluence Management, Callister and Fullers. The district court's conclusion that the doctrine of merger applied to the ACHD proceeds provision because the provision impacted the right of alienation of real property is erroneous based upon the definition adopted by the *Lake* Court.

Respondents argue that in order to have an enforceable land sale contract, essential elements that must be present 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). (Emphasis added). The Fullers do not dispute that the foregoing elements are essential to create an enforceable land sale contract which is not at issue in this case. The district court's Memorandum Decision and Order held that purchase and sale agreement and addendum was a valid and enforceable contract.

Notwithstanding, it appears from the Respondents' argument that the reservation of the ACHD proceeds provision provided in the Addendum was an essential element for an

enforceable contract which automatically merges into the deed. The Respondents simply fail to acknowledge that the provision in the Addendum reserving the ACHD proceeds was part of the consideration the parties agreed to in order to consummate the deal. The reservation of the ACHD proceeds for the benefit of the Fullers plus the payment of $1,273,000.00 was the consideration of the agreement. The Respondents ignore the recognized exception to the merger doctrine under Idaho law.

In *Milu, Inc. v. Duke,* 204 So.2d 31 (1967), the Florida Court of Appeals for the Third District held that consideration to be paid in a contract did not merge with the deed. The Florida Court stated:

> It is a general rule that preliminary agreements and understandings relative to the sale of property usually merge in the deed executed pursuant thereto. (Citation omitted). However, there are exceptions to the merger rule. The rule that acceptance of a deed tendered in performance of a contract to convey land merges or extinguishes the covenants and stipulations contained in the contract does not apply to provisions of the antecedent contract which the parties do not intend to be incorporated in the deed, or which are not necessarily performed or satisfied by the execution and delivery of the stipulated conveyance. **Contractual provisions as to considerations to be paid by the purchaser are ordinarily not merged in the deed and, accordingly, evidence of such contractual provisions is admissible to show what consideration is to be paid by the purchaser although the deed has been accepted.** 55 Am.Jur., Vendor and Purchaser, Sec. 328; American Law of Property (1952 ed.), Vol. III, Sec. 11.65; Thompson on Real Property, Vol. 8A, Sec. 4458. 204 So.2d at 33. (Emphasis added).

In *Purbaugh v. Jugensmeier,* 483 N.W.2d 757 (1992), the Nebraska Supreme Court explained the following as it related to the doctrine of merger:

> **'Merger' does not serve to make the contract and the deed one document; it is merely a rule for resolution of title disputes**. ' " ' "[U]pon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein . . ." ' " ' (Citation omitted). '[T]herafter the deed regulates the rights and liabilities of the parties, and evidence of contemporaneous or antecedent agreements between the parties is inadmissible *to vary or contract the terms of the deed."* (Emphasis supplied. (Citation omitted). **The doctrine of merger 'does not apply to those**

> **provisions of the antecedent contract which the parties do not intend to be incorporated in the deed, or which are not necessarily performed or satisfied by the execution and delivery of the stipulated conveyance.**' (Citation omitted). For example, '[a] stipulation in a preliminary contract for the sale of real estate, to deliver a deed at a specified time upon a contingency fully performed, does not necessarily merge in a subsequently delivered and accepted deed.' (Citation omitted).
>
> The doctrine of merger does not serve to make the contract and the deed one. Absent fraud or mistake, the deed controls as to the identity of the estate. (Citations omitted). **Terms such as purchase price, interest, payments, and date of closing included within the contract of sale are normally not repeated in the deed and therefore are not merged with the deed instrument.** 483 N.W.2d at 761-62. (Emphasis added). *See also, McGovern Builders, Inc. v. Davis,* 468 N.E.2d 90 (1983).

The doctrine of merger is an evidentiary rule akin to the parole evidence rule. In the absence of fraud or relievable mistake, express or implied provisions in a contract with respect to title of land are merged in the accepted deed, and evidence of such contractual provisions is inadmissible to vary or contradict the deed with respect to title.[1] 77 Am.Jur.2d, Vendor and Purchaser, Sec. 243 (2006). The Nebraska Supreme Court's comments regarding the merger doctrine as a rule for resolving title disputes is consistent with the holding in *Jolley v. Idaho Sec., Inc.,* 90 Idaho 373, 414 P.2d 879 (1966). The *Jolley* Court acknowledged the Court previously considered the general rule and its recognized exceptions to the merger doctrine in its previous decision in *Christiansen v. Intermountain Assn.,* 46 Idaho 394, 267 P. 1074 (1928). Relying on the *Christiansen* decision, the *Jolley* Court quoted the following statements regarding the merger doctrine and its exceptions:

> 'To the general rule that there is a merger of prior covenants and agreements in the deed, there is a well recognized exception. **Where the covenants in the contract do not relate to the conveyance, but are collateral to and independent of the conveyance, they are not merged in the deed, in so far as the deed is only a part performance of the contract.** (citations)

[1] The foregoing proposition expressed in American Jurisprudence cites *Jolley v. Idaho Sec., Inc.,* 90 Idaho 373, 414 P.2d 879 (1966) in support thereof.

> 'A grantee may accept a deed as full performance of a prior contract, even where it is not such; but whether a deed has been so accepted is, in the final analysis, a matter of intention. **It would seem that where the covenants are of this nature – that is, collateral to the covenants of conveyance – there is no presumption that either party intended to give up the benefit of the covenants of which the conveyance is not a performance.** (citations). **In such a case the contract is kept alive, and an action on it may be brought in case of its breach, independent of any possible recovery on the warranties of the deed.**

Id., 90 Idaho at 384, 414 P.2d at 885. (Emphasis added).

The reservation of the ACHD proceeds provided in the addendum that was agreed on by Confluence Management, Callister and Fullers 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.

See Exhibit B to the Affidavit of David Fuller which is attached to the record as Exhibit 2. *See* R. p. 76. (Emphasis added).

The parties clearly understood and intended that the buyer (Confluence Management & Callister) would deed the land to ACHD for its right-of-way and that the Fullers would receive the funds paid by ACHD for said land for road right of way. The reservation of the ACHD proceeds did not, in any way, relate to the conveyance of the real estate between the Fullers and the Respondents. The Fullers conveyed and Liberty Partners received, through its assignment with Confluence Management, fee simple title to all 12.73 acres owned by the Fullers.

Furthermore, the reservation of the ACHD proceeds in the addendum did not relate to the title of the real property conveyed by Fullers to Respondents. Liberty Partners, through its assignment with Confluence Management, received full fee simple title to all 12.73 acres previously owned by the Fullers.

Neither *Jolley* nor *Sells v. Robinson,* 141 Idaho 767, 118 P.3d 99 (2005) which the district court relied on reference or mention the "right of alienation" as a presumption for the application of the doctrine of merger.

"Alienation" is defined as:

> In real property law, the transfer of the property and possession of lands, tenements, or other things, from one person to another. The term is particularly applied to absolute conveyances of real property. The voluntary and complete transfer from one person to another. Disposition by will. Every mode of passing realty by the act of the party, as distinguished from passing it by the operation of law. Black's Law Dictionary, 6th Ed., p. 72 (1990).

What the Respondents simply fail to acknowledge and the district court neglected is that all real property is subject to the government's power of eminent domain. *See, Portneuf Irrigating Co. v. Budge,* 16 Idaho 116, 126, 100 P. 1046, 1049 (1909) ("The power of eminent domain is an inalienable right of sovereignty (*Hollister v. State,* 9 Ida. 8, 71 Pac. 541 (1903); Lewis on Eminent Domain, secs. 1-3), and may be exercised over all the property within the state.). A landowner cannot prohibit the exercise of the power, unless the use to which the property is to be applied is not authorized by law, the taking is not necessary for such use, the appropriation is not for a public use, and payment of just compensation is not made. Idaho Code § 7-704.

The real estate contract between Fullers and Respondents in no way hindered or restrained Respondents and/or Liberty Partners' ability to transfer the property to another party.

The event which would trigger the reservation provision in the agreement was dependent upon ACHD (a third party government agency) to acquire road right of way from the Respondents during their ownership of the property. The reservation language expressed in the addendum clearly acknowledged that this event was independent and collateral to the conveyance between the parties and a condition subsequent to the agreement:

> 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. (Emphasis added).

Idaho law recognizes that contract rights that are collateral and independent of the deed which are to be performed subsequent to the conveyance are not presumed merged. *See Jolley, supra.* (the merger doctrine did not apply to obtaining an abstract of title after the conveyance). For additional guidance, the Fullers refer this Court to the Minnesota Supreme Court's decision in *Bruggeman v. Jerry's Enterprise, Inc.,* 591 N.W.2d 705 (1999).

In *Bruggeman,* the Minnesota Supreme Court reviewed its Court of Appeals decision reversing the district court's granting of summary judgment to the purchaser on the grounds that the doctrine of merger applied to the repurchase option agreement.

The relevant facts on the issue was that the seller reserved an option in the real estate agreement to repurchase the subject property within two (2) years if the Buyer had not commenced construction of improvements on the property. *See id.,* 591 N.W.2d at 706.

On review, the Court reviewed the history of the merger doctrine as it applied in Minnesota. The Court noted that it opinions relating to the doctrine were generally limited to recitations of the general rule that all prior agreements were deemed to have merged into the deed. However, the Court acknowledged that its prior decisions did not address the pending issue on appeal. "Because of the nature of the issues before us on those occasions, it has not been necessary to discuss the possibility that agreements pertaining to conditions subsequent might not merge with the deed at closing." *Id.,* 591 N.W.2d at 709.

On review concerning the issue pending, the Court explained as follows:

> We therefore look for guidance from jurisdictions that have answered the question. When considered as a whole, the foreign case law on the merger doctrine indicates that the rule 'is not as broad or absolute as some abbreviated statements of the doctrine might indicate.' 77 Am.Jur.2d, *Vendor and Purchaser*

§ 289 (1997). Many states have carved out exceptions to the general presumption of merger for those situations in which the parties to a real estate transaction would be unlikely to have intended that their contractual agreements be extinguished by a subsequent deed of conveyance. In 1988, the Mississippi Supreme Court surveyed the state of merger doctrine law as it has developed in the states, and conclude that 'thirty-seven (37) jurisdictions hold collateral or independent agreements, which are to be performed subsequent to the conveyance, are not merged into the deed of conveyance.' Knight v. McCain, 531 So.2d 590, 595 (Miss.1988). Minnesota was one of eleven states that had not addressed the issue.[2] (Citation omitted).

The courts that have carved out an exception from the merger doctrine for conditions subsequent use the exception as a means of giving meaning to the parties' presumed intentions that the agreement survive conveyance of deed. As one commentator explained:

> The idea behind the distinction is this: If the promise is contemplated by the contract to be performed at closing and it is not so performed, then there is some reason to infer that the parties intended that the agreed-upon performance not be required and that the promise has thereby accepted a substitute performance. On the other hand, if the promise is by its nature not performable until some time after closing, then there is no particular reason to infer that the promise has agreed to abandon the right of performance, from the mere fact that the undertaking has not been repeated in the deed or other closing papers. (Citation omitted).

We agree that there is no reason to presume that a party has waived its right to performance of a contractual obligation that cannot be performed until sometime after the closing simply by accepting a deed that does not contain a reference to that prior agreement. Because there is no reason that waiver should be automatically presumed in these circumstances, we do not feel it would be equitable to apply a rule that inflexibly assumes that the parties intended waiver, thereby denying parties any chance to pursue their claim in court. We therefore hold that the presumption of merger does not apply to this repurchase option agreement which could not, by its very nature, be performed prior to closing. *Id.*, 591 N.W.2d at 709-10.

In *Peterson v. Peterson,* 431 So.2d 672 (1983), the Florida Court of Appeal of the Third District addressed whether reserving a life estate in a real estate agreement survived the merger doctrine. The Florida Court recited:

---

[2] *Jolley, supra.,* was one of the cases identified by the Mississippi Supreme Court of the 37 states that held that collateral or independent agreements which were to performed subsequent to the conveyance were not merged into the deed. 531 So.2d at 595.

> An agreement, as her, made contemporaneously with a deed so as to show consideration for a promise to reconvey the property upon a certain stated condition, is valid. (Citation omitted). Where an agreement is collateral to, or independent of, the provisions of the deed, there is no merger. (Citations omitted). Here the agreement by its very terms reflect the intent of the parties that it be independent of the deed. (Citation omitted). Moreover, the agreement, again by its very terms, could not become effective until after the delivery of the deed, since prior to that time Jack would have no life estate to forfeit by ceasing to occupy the property. (Citation omitted). *Id.,* 431 So.2d at 673.

Although this Court is not faced with the per se issue concerning the reservation of a repurchase agreement or life estate in a contract surviving the merger doctrine, the reasoning, rational and proposition adopted by these jurisdictions, as well as, the cases cited in Fullers original brief are consistent with Idaho law. Although not binding, on an issue of first impression, this Court will look at decisions from other jurisdictions to provide guidance on the issue. *Sliman v. Aluminum Co. of America,* 112 Idaho 277, 281, 731 P.2d 1267, 1270 (1986).

Clearly, the intent of the parties reflected in the reservation was independent to the conveyance of the property. The parties agreed and understood that the reservation for the ACHD proceeds in the addendum would take place after closing, otherwise how could have Respondents legally deed the right of way to ACHD prior to closing since they would had no legal interest or title to the property. Furthermore, if the parties intended Fullers to complete a deal with ACHD prior to closing, there would have been no need to include the provision in the first place that required Respondents to convey the right of way to ACHD.

In this matter, the reservation of the ACHD proceeds was part of the consideration for the agreement which is collateral or independent of the conveyance of the deed and the obligation could not be performed until after the conveyance was completed.

Based upon the district court's erroneous conclusion that the reservation of the ACHD proceeds restrained the right of alienation to which the merger doctrine applied, the case authority provided herein and previously, *Jolley's* acknowledgment that a contract right which is both a condition subsequent and collateral to the conveyance of a deed does not merge with the deed, and the unequivocal facts reflecting the parties' intent that the obligation arising under the reservation of the ACHD proceeds would not be performed until after closing, the Fullers' respectfully request this Court enter its order reversing the district court's ruling that the doctrine of merger applied to the reservation at issue.

B. The Assignment of the Purchase and Sale Agreement to Liberty Partners Did Not Relieve Confluence Management of Liability under the Agreement.

Respondents argue that the assignment between Confluence Management and Liberty Partners, with the Fullers consent, relieved Confluence Management of any further obligations and liabilities imposed under the contract because all its rights and responsibilities were transferred to Liberty Partners. Because the assignment was valid, it was not necessary for the district court to reach the question of novation.

Although Confluence Management assigned its rights to Liberty Partners creating privity between them, the assignment did not extinguish the rights, obligations and privity between Confluence Management, Callister and the Fullers created under the original and underlying real estate contract.

The real estate agreement identified the buyer as "Confluence Management and/or assigns" which was signed by Callister, not as a member of Confluence Management or in an official capacity of the unknown "assigns" at the time, but rather, personally. R., Vol. I, p. 76, Aff. of David Fuller, Exhibits A & B.

The real estate purchase and sale agreement and addendum were executed on September 20, 2005 and two (2) days later, the parties closed on the sale. At no time prior to the execution of the underlying agreement were the Fullers informed or advised that Callister was intending to transfer the property to another entity he owned. A significant fact in this case is that Callister, Confluence Management and Liberty Partners are in essence one and the same. Certainly, Liberty Partners cannot assert that it was a bona fide purchaser of the property and unaware of the reservation of the ACHD proceeds under the agreement it was assigned. Respondents appear to suggest that the identification of the buyer under the agreement which included "and/or assigns" created some form of privity between the unknown assigns, at the time, and the Fullers. This is not so.

The Restatement (Second) of Contracts § 323 (1981) entitled "Obligor's Assent to Assignment or Delegation" states under the comments, in relevant parts, the following:

> *b. Promises to or by "assigns."* Contracts often refer to the "assigns" of one or both parties. A purported promise by a promisor "and his assigns" does not mean that the promisor can terminate his duty by making an assignment, nor does it of itself show an assumption of duties by any assignee. . .
>
> *c. Assent subsequent to contract.* . . . Assent to assignment and delegation, even though irrevocable, does not of itself establish a novation discharging duties of the assignor.
>
> The assignment, at issue and presented on the day of closing, expressed:
>
> 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.

R., Vol. I, p. 76, Aff. of David Fuller, Exhibit C.

The assignment simply assumes that the title of the property will be under Liberty Partners. Even assuming that the assignment is a complete transfer of rights under the contract

between Confluence Management and Liberty Partners, it unquestionably does not express an extinguishment of the right and obligations under the contract between Confluence Management, Callister and the Fullers.

The Respondents argue that the payment of $1,273,000.00 to the Fullers for the property was the principal obligation and fully performed, therefore there is no other debt obligation. *See* Respondents'/Cross-Appellants' Brief, p. 23. Contrary to Respondents' assertion, the debt obligation and consideration in the contract was $1,273,000 **and** the proceeds from ACHD.

The Respondents imply that consent, alone, is sufficient to create a novation in a real estate sale transaction, and that the Idaho authority and other jurisdictions cited by the Fullers in their previous brief on the subject is applicable only to areas of law on leases and debtor/creditor relationships where consent, alone, is not sufficient to create a novation. *See id.* No such distinction exists under Idaho law or any other jurisdiction. There is a clear distinction between an "assignment" and a "novation" under Idaho law, in that, an assignment transfers rights and obligations between parties while a novation extinguishes rights and obligations between parties.

In order to create a novation arising by an assignment, the parties' intent must be clearly established and expressed, consent alone to the assignment is not enough. *Warm Springs Dev. Assoc. v. Burrows,* 120 Idaho 280, 284, 815 P.2d 478, 482 (App.1991). Without an express novation, the original contracting party remains in privity of contract and is a guarantor for the performance of the covenants in the agreement. *See id.; see also, George W. Watkins Family v. Messenger,* 115 Idaho 386, 766 P.2d 1267 (App.1988)

The Fullers do not challenge the district court's finding that Confluence Management assigned its rights to Liberty Partners. However, the district court's holding thereafter that no contractual obligations continue to exist between Confluence Management and the Fullers

resulting from the assignment is contrary to the law in Idaho. There is nothing in the record, but for the assignment, alone, that supports an express novation was created between Confluence Management and the Fullers. The assignment, alone, speaks for itself to the issue.

Furthermore, there is nothing in the record that shows Liberty Partners assumed Confluence Management's debt obligation owed to the Fullers.

Finally, Respondents argue that certain conditions precedent under the contract were supposedly not performed and thus this somehow extinguishes Confluence Managements' obligation for tendering the ACHD proceeds provided in the contract. This argument has no merit.

First, the reservation of the ACHD proceeds was not a condition precedent, but by its very terms was a condition subsequent, thus the boilerplate provision of paragraph 10 in the agreement is not applicable, and if so, the parties were excused for nonperformance according to the language.

Second, Respondents argument that "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" does not relieve Confluence Management under the agreement because, if liable, Confluence Management would have a direct claim against Liberty Partners for indemnification. *See* Respondents'/Cross-Appellants' Brief, p. 26.

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.

C. The District Court's Dismissal Respondent Callister, individually, Should be Reversed.

Although the Fullers did not raise any issue concerning Callister's individual liability in their motion for partial summary judgment, the district court *sua sponte* concluded that dismissal was warranted because of its findings that the doctrine of merger applied and the contract was assigned to Liberty Partners extinguishing any liability arising under the contract to confluence Management.

Fullers again reiterate that if this Court finds that the doctrine of merger was applicable to the reservation of the ACHD proceeds and affirms the district court's ruling, then this issue of error is moot.

Notwithstanding, and should this Court reverse the district court's decision, there is evidence in the record creating a material issue of disputed fact which precludes a summary judgment dismissing Callister, individually.

As noted above, the real estate contract identified the buyer as "Confluence Management and/or assigns" and it was signed by Callister who did not designate under whose capacity he was executing the contract for. *See* R., Vol. I, p. 76, Aff. of David Fuller, Exhibits A & B.

A reasonable inference in favor of the Fullers can be drawn that Callister knew at all times that he was intending to transfer the property to his corporation, Liberty Partners, and he failed to disclose his relationship of the principal he was truly acting for.

In *Western Seeds, Inc. v. Bartu,* 109 Idaho 70, 704 P.2d 974 (App.1985), the Idaho Court of Appeals held that an agent who contracts with someone and fails or partially discloses the agency relationship and identity of the principal for whom he is representing is personally liable as a party to the contract.

In vacating the dismissal of the agent, individually, the Idaho Court of Appeals articulated the following:

> We believe the trial court erred by dismissing Western Seeds' complaint against Bartu. **An agent contracting with someone else is liable as a party to the contract unless he discloses, at or before the time entering into the contract, the agency relationship and the identity of the principal.** (Citations omitted). **Similarly, a person contracting with another for a *partially* disclosed principal is liable to the contract.** (Citations omitted). The evidence indicated, as noted by the district court in its memorandum opinion, that Western Seeds did not learn until after it stopped delivering seed that Farmers Feed and Seed was owned by Pocatello Cold Storage. The trial court erroneously assumed that partial disclosure of a principal – here, the fact that Bartu was contracting on behalf of a corporation, although the corporate name was not disclosed – would be sufficient to relieve the agent from liability on the contract. The factual question – whether Western Seeds knew of the relationship between Farmers Feed and Seed and Pocatello Cold Storage, Inc. before part or all of the open account debt was incurred – was not resolved by the trial court, because of the court's erroneous assumption. Nor is the answer to that factual question obvious from the record. (Citation omitted). We therefore remand this case to the district court to make a finding regarding disclosure of the identity of the principal, before determining whether the agent should be relieved from liability for the account. *Id.,* 109 Idaho at 71-72, 704 P.2d at 975-76. (Emphasis added).

Here, the district court's Memorandum Decision and Order found Callister was both a member of Confluence and the President of Liberty Partners. R., Vol. I, p. 62. The real estate agreement identified the buyer as "Confluence Management and/or assigns." *See* R., Vol. I, p. 76, Aff. of David Fuller, Exhibits A & B. Two (2) days after the contract was executed, Callister assigns the contract to Liberty Partners. *See id.,* Exhibit C.

The first time the Fullers could have reasonably discovered Callister's relationship to and the actual principal who would be receiving the party was the day of closing, **after** the real estate agreement was accepted. In this case, Callister was representing and acting for two distinct legal entities in which he has a personal interest in both, but failed to disclose Liberty Partners who ultimately received title to the property.

Based upon the foregoing case law and the Clerk's Record, if this Court reverses the district court's ruling on the issues referenced above, specifically, the merger doctrine, then the district court's *sua sponte* ruling dismissing Callister, individually, should be reversed.

D. Respondents/Cross-Appellants are not Entitled to Attorney Fees Under I.C. § 12-120(3).

Respondents/Cross-Appellants argue the district court erred in not awarding their attorney fees under Idaho Code § 12-120(3) on the grounds that the real estate contract in the matter was intended for development purposes by Respondents and therefore the gravaman of the lawsuit was a "commercial transaction." *See* Respondents'/Cross-Appellants' Brief, p. 33. Respondents cite several cases issued by this Court which have held that commercial real estate development disputes have been deemed commercial transactions for purposes of an award of attorney fees under Idaho Code § 12-120(3). The Fullers does not dispute nor challenge the proposition that under certain circumstances commercial real estate development disputes can constitute a "commercial transaction" for purposes of Idaho Code § 12-120(3). However, the gravaman of this case giving rise to this litigation did not concern a dispute of the sale of the property, but instead it concerned the enforcement of the provision which provided the Fullers the right to receive the ACHD proceeds which were converted by Liberty Partners for itself, a fact which is undisputed in this case.

As noted by Respondents, the district court held:

> 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 the 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, p. 63.

In support of its holding, the district court cited to this Court's decision in *Sun Valley Hot Springs Ranch, Inc. v. Kelsey,* 131 Idaho 657, 962 P.2d 1041 (1998) where this Court affirmed the district court's denial of attorney fees to the prevailing party under Idaho Code § 12-120(3) involving a dispute arising from a failed residential subdivision development.

In *Kelsey,* the litigation was about whether a lot owner in an uncompleted residential subdivision development could enforce the CC&Rs against the new owners of the subdivision that acquired their interest after a foreclosure proceeding. Among the claims, the lot owner alleged that the new owners had an obligation pursuant to the subdivision's recorded plat and CC&Rs to complete construction of the subdivision and that they breached this obligation. The merits were decided by summary judgment for the new owners and the district court's ruling was affirmed by this Court, including the district court's denial for an award of attorneys fees under Idaho Code § 12-120(3) requested by the prevailing party.

In affirming the denial on an award of attorney fees under said section, this Court explained:

> Idaho Code § 12-120(3) provides for an award of attorney fees to the prevailing party in a civil action to recover on any commercial transaction. "Commercial transactions," as defined in I.C. § 12-120(3), include all transactions except transactions for personal or household purposes. "Attorney's fees are not appropriate under I.C. § 12-120(3) unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover." *Brower v. E.I. Dupont De Nemours & Co.,* 117 Idaho 780, 784, 792 P.2d 345, 349 (1990).
>
> Kelsey and SLVM argue that the loan-mortgage transaction between First Federal and Clarendon and the sale of Lot 44 to the Davises are "commercial transactions" which are integral to SVHS' claims and constitute the basis upon which SVHS is attempting to recover. Accordingly, they claim the district court should have awarded them attorney fees under I.C. § 12-120(3) as the prevailing parties.
>
> This Court has previously recognized, however, that an "award of attorney's fees is not warranted [under I.C. § 12-120(3)] every time a commercial transaction is

> remotely connected with the case." (Citation omitted). The commercial transaction must be integral to the plaintiff's claims and constitute the basis upon which the plaintiff is attempting to recover. (Citation omitted). While the loan-mortgage transaction and the sale of Lot 44 are commercial transactions as defined in I.C. § 12-120(3), they are incidental to SVHS' claims. This action brought by SVHS is essentially an action whereby a landowner is attempting to enforce covenants against the owner of adjacent property. This case is analogous to holdings by this Court and the Court of Appeals involving determination of property rights. *See Durrant v. Christensen*, 117 Idaho 70, 785 P.2d 634 (1990) (action in which landowners sought adjudication of water rights and a permanent restraining order prohibiting defendant from interfering with their diversion and use of water determined not to be an action based on a commercial transaction as defined in I.C. § 12-120(3)); *Chen v. Conway*, 121 Idaho 1006, 829 P.2d 1355 (Ct.App.1991) (quiet title action involving dispute over the existence of a prescriptive easement determined not be a commercial transaction under I.C. § 12-120(3)); *Jerry J. Joseph C.L.U. Ins. Assoc. v. Vaught*, 117 Idaho 555, 789 P.2d 1146 (Ct.App.1990) (attorney fees denied under I.C. § 12-120(3) in action where property owner sought judgment compelling adjoining property owners to reimburse it for irrigation assessments, to record an instrument establishing an access easement, and to remove a fence hindering its use of the easement and where after settlement, adjoining property owners breached the settlement agreement). The present action is primarily a property dispute to determine ownership and easement rights and does not fall within the meaning of a commercial transaction in I.C. § 12-120(3). Therefore, the district court properly denied Kelsey and SVLM's claim for attorney fees under this provision. *Id.*, 131 Idaho at 663, 962 P.2d at 1047.

Similar to the foregoing case, the Fullers' claim is seeking to enforce a covenant in their contract with Respondents to recover the proceeds ACHD paid to Liberty Partners who intentionally refused to turn over the money to the Fullers. The Fullers claim is not about the sale and conveyance of the land to Respondents which they assume Respondents have since completed the construction of their development, it is about the money paid by ACHD which Respondents agreed that it would belong to the Fullers. Although the underlying sale of land may have been a "commercial transaction" as defined under I.C. § 12-120(3), the Fullers' claim is about a condition subsequent which could only be triggered **if** ACHD acquired land during their ownership, a fact that is not in dispute.

Accordingly, the Fullers respectfully request this Court to affirm the district court's denial of an award of attorney fees under I.C. § 12-120(3) to the Respondents.

III. CONCLUSION

Based upon the case authority provided herein and previously and the arguments presented, the Fuller's respectfully request this Court to reverse the district court's Memorandum Decision and Order with instructions that the Fullers are granted partial summary judgment for the dismissal of Respondents' eighth and ninth affirmative defenses as a matter of law and entitled to their attorney fees and costs on appeal as the prevailing party.

Respectfully submitted this 29th day of June, 2010.

DAVISON, COPPLE, COPPLE & COPPLE

By _____
Ed Guerricabeitia, of the firm
Attorneys for Appellants/Cross-Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of June, 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