

7-20-2010

Fuller v. Dave Callister Cross Appellant's Reply Brief Dckt. 37035

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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.)
)

CROSS APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District
for the County of Ada
Honorable Ronald J. Wilper, District Judge, Presiding

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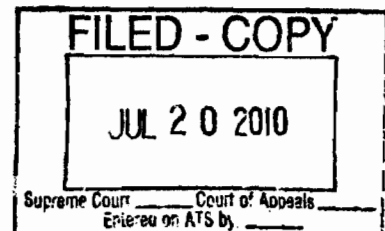


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I.

REPLY ARGUMENT

The cross-appellants raised a single issue on their cross appeal, which was that the district court erred in denying them an award of attorney fees under I.C. § 12-120(3) as the prevailing party in the action below. The core issue upon which the cross-appellants prevailed in the underlying action was that the Fullers' contract claim was merged into the deed that consummated the sale of the Fullers' property to Confluence Development for the purposes of commercial development. It is this commercial development sale, which was the gravamen of the action upon which the cross-appellants prevailed in the action below, that should have controlled the determination of their right to attorney fees before the district court, not the failed claim that was asserted by the Fullers.

On their cross appeal the cross-appellants have argued that the district court erred in denying them an award of attorney fees under I.C. § 12-120(3) because the parties' dispute involved a determination of the actual amount of the compensation that the Fullers were entitled to from their sale of the 12.73 acres to Confluence Development for the purposes of commercial development. In support of their argument made on this cross appeal the cross-appellants primarily relied upon the authority stated in *Lexington Heights Development, LLC v. Crandlemire*, 140 Idaho 276, 287, 92 P.3d 526, 537 (2004), *P.O. Ventures, Inc. v. Louks Family Irrevocable Trust*, 144 Idaho 233, 159 P.3d 870 (2007); and *Troupis v. Summer*, 148 Idaho 77, 218 P.3d 1138 (2009), each of which involved at its core a dispute involving a commercial transaction. In contrast, the case upon which

the Fullers rely in opposing the cross-appellants claim to attorney fees, *Sun Valley Hot Springs Ranch, Inc. v. Kelsey*, 131 Idaho 657, 962 P.2d 1041 (1998), involved a matter concerning the right to enforce subdivision CC&Rs, which is not a matter that is inherent in the rights that are conveyed by a deed itself, as was declared in *Sells v. Robinson*, 141 Idaho 767, 772, 118 P.3d 99, 104 (2005).

In response to the cross appellants' arguments made on this appeal the cross respondent Fullers have argued that, "the gravaman [sic] 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." Appellants'/Cross-Respondents' Reply Brief at pg. 20. The Fullers have further argued that their "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." Appellants'/Cross-Respondents' Reply Brief at pg. 22. This characterization of the claim that the Fullers presented to the district court is at odds with the core decision that was made by that court, which was that the merger doctrine operated to preclude any claim of the Fullers that directly related to those matters which were concluded within the deed itself, by which the Fullers had agreed to convey their property to Confluence Development for commercial development. (R., pp. 64-65).

Furthermore, the Fullers' own characterization of the claim that they presented to the district

court in the arguments that they have made to this Court on appeal is in direct conflict with, and in fact is at war with, the arguments that they have made in opposition to the cross-appellants' claim to attorney fees under I.C. § 12-120(3). At page 22 of their reply argument the Fullers declare in support of their argument in opposition to the cross-appellants' claim for attorney fees that,

The Fullers [sic] claim is not about the sale and conveyance of 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.

Appellants'/Cross-Respondents' Reply Brief at pg. 22 (bracketed reference added). But in opposing the cross-appellants' argument made in support of the merger doctrine, the Fullers had earlier argued as follows:

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.

Appellants'/Cross-Respondents' Reply Brief at pg.7 (underlined emphasis in original).

The Fullers simply cannot argue in opposition to the cross-appellants' claim for attorney fees that their claim was "not about the sale and conveyance of land," when they have already argued in opposition to the application of the merger doctrine that their claim to "the ACHD proceeds was part of the consideration the parties agreed to in order to consummate the deal." Likewise, in the same fashion the Fullers cannot argue that both Confluence Development and Dave Callister should bear liability for their claims to the ACHD proceeds (Appellants'/Cross-Respondents' Reply Brief at pp.

14-20), notwithstanding the fact that neither Confluence Development nor Dave Callister was the ultimate recipient of those “ACHD proceeds,” and then turn around and argue in opposition to the cross-appellants’ claim to attorney fees that, “it is about the money paid by ACHD which Respondents agreed that it would belong to the Fullers.” Appellants’/Cross-Respondents’ Reply Brief at pg. 22.

Moreover, the foundation for the Fullers’ suit arose from the Fullers’ claim of a breach of the commercial real estate purchase and sales contract arising from funds that the Fullers’ claim were due under that commercial contract. The contract used by the parties was a form document that was titled RE-23 Commercial/Investment Real Estate Purchase and Sale Agreement. This Court has long recognized that where an action is one to recover in a commercial transaction, that claim triggers the application of I.C. § 12-120(3) and the prevailing party may recover fees “regardless of the proof that the commercial transaction alleged did in fact, occur.” *Magic Lantern Prod., Inc. v. Dolsot*, 126 Idaho 805, 808, 892 P. 2d 480 483 (1995). Here it does not matter that the contract merged with the deed because the Fullers’ claims arose from a commercial transaction. The Fullers’ suit to recover funds they claimed were due them was based upon an alleged breach of contract arising from a commercial transaction. The affirmative defenses that the defendants prevailed on were made in response to the breach of contract claim and the other claims that all arose from this commercial transaction.

Because this reply brief is limited to the arguments the Fullers have made in opposition to

the cross-appellants' argument to an entitlement to an award of attorney fee under I.C. § 12-120(3) in the action below, those broader issues can only be more fully addressed at oral argument. But it is sufficient to conclude this argument by observing that the Fullers' opposition argument is internally inconsistent, and that it fails to cite any Idaho authority rebutting the proposition that the district court's ruling was based upon an application of the merger doctrine as arising out of the deed that consummated the underlying commercial transaction between the parties.

In addition, the Fullers have made no argument in opposition to the Cross-Appellants request for an award of attorney fees under I.C. § 12-120(3) if they should prevail on their cross appeal.

II.

CONCLUSION

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 20th day of July 2010.

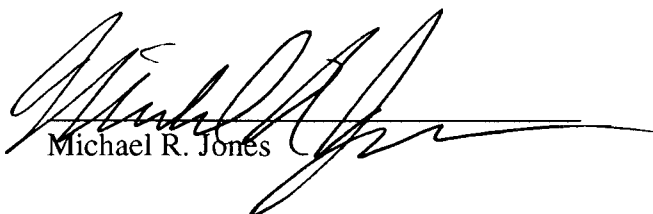


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 20th day of July 2010, two true and correct copies of the foregoing CROSS APPELLANTS' REPLY BRIEF was served upon the following:

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