UIdaho Law
Digital Commons @ UIdaho Law

Idaho Supreme Court Records & Briefs

11-8-2011

Buku Properties v. Clark Appellant's Brief Dckt. 38561

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation
"Buku Properties v. Clark Appellant's Brief Dckt. 38561" (2011). *Idaho Supreme Court Records & Briefs*. 3218.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/3218

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

BUKU PROPERTIES, LLC,

Plaintiff/Respondent,

vs.

RAOEL H CLARK and JANET C. CLARK; ANGUS JERRY PETERSON and BETTY JEAN PETERSON,

Defendants/Appellants.

Docket No. 38561-2011

Jefferson County Case: CV-2008-941

APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District for Jefferson County
Honorable Dane H. Watkins, District Judge, Presiding

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB No. 2903
P.O. Box 277
477 Pleasant Country Lane
Rigby, Idaho 83442
(208) 745-9202 (t)
(208) 745-8160

rdunn@dunnlawoffices.com

Attorneys for Appellant

HOLDEN, KIDWELL, HAHN & CRAPO, PLLC
DeAnne Casperson, Esq., ISB No. 6698
P.O. Box 50130
Idaho Falls, Idaho 83405
(208) 523-0620 (t)
(208) 523-9518 (f)

Attorney for Respondent

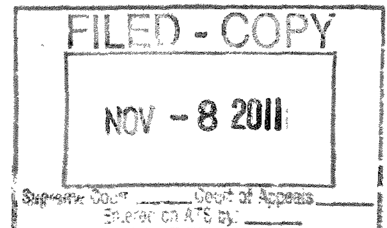


TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

1. FACTUAL EVENTS *1*

2. LEGAL EVENTS *3*

ADDITIONAL ISSUES ON APPEAL 5

1. The Appellants request their costs and fees for the lower court proceedings. *5*

2. The Appellants request their costs and fees on appeal. *5*

ARGUMENT 5

1. SUMMARY *5*

2. INTRODUCTION. *7*

3. THE RESPONDENT BREACHED THE CONTRACTS WITH APPELLANTS AND THE INTENT OF SUCH CONTRACTS. THE LOWER COURT COULD NOT SUPPLEMENT UNAMBIGUOUS CONTRACTS. *8*

A. The first summary judgment motion ruled upon by Judge Gregory Moeller. 8

B. The second summary judgment motion ruled upon by Judge Watkins. 15

4. THE LOWER COURT IMPROPERLY DISMISSED THE COUNTERCLAIMS OF THE APPELLANTS. *18*

5. THE LOWER COURT IMPROPERLY RELIED UPON IDAHO CODE 9-503; AND, EQUITABLE REMEDIES WHICH WERE DISMISSED SHOULD NOT HAVE BEEN INCLUDED IN ANY SUMMARY JUDGMENT DECISION. *21*

6. THE LOWER COURT COMMITTED ERROR IN ITS AWARD OF FEES, COSTS AND PREJUDGMENT INTEREST. *25*

ADDITIONAL ISSUES ON APPEAL 30

1. THE APPELLANTS REQUEST THEIR COSTS AND FEES AT HEARINGS IN THE LOWER COURT *30*

2. THE APPELLANTS REQUEST THEIR COSTS AND FEES ON APPEAL. *32*

CONCLUSION 33

CERTIFICATE OF SERVICE 34

TABLE OF AUTHORITIES

Cases

Allen v. Moyle, 84 Idaho 18, 367 P.2d 579 (1961) 23
Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust, 147 Idaho 117, 206 P.3d 481 (2009) 32
Bates v. Seldon, 146 Idaho 772, 203 P.3d 702 (2009) 19
Bondy v. Levy, 121 Idaho 993, 996-97, 829 P.2d 1342, 1345-46 (1992) 9
Chemetics, 130 Idaho at 258, 939 P.2d at 577 33
Clark v. St. Paul Property and Liability Ins. Companies, 639 P.2d 454, 102 Idaho 756, (Idaho 1981) 10, 15, 32
Edwards v. Edwards, 842 P.2d 307, 122 Idaho 971, (Idaho App. 1992) 28
Farnworth v Ratliff, 134 Idaho 337, 999 P.2d 892 (2000 32
Frantz v. Parke, 729 P.2d 1068, 111 Idaho 1005, (Idaho App. 1986) 25
Hummer v. Evans, 979 P.2d 1188, 132 Idaho 830, (Idaho 1999) 33
Iron Eagle Development, LLC v. Quality Design Systems, Inc., 65 P.3d 509, 138 Idaho 487, (Idaho 2003) 7, 11
Katseanes v. Yamagata, 653 P.2d 1185, 103 Idaho 773, (Idaho App. 1982) 9
Lettunich, 141 Idaho at 367, 109 P.3d at 1109 25
Management Catalysts v. Turbo West Corpac, Inc., 809 P.2d 487, 119 Idaho 626, (Idaho 1991) 28
Mohr v. Shultz, 388 P.2d 1002, 86 Idaho 531, (Idaho 1964) 21
Property Management West, Inc. v. Hunt, 894 P.2d 130, 126 Idaho 897, (Idaho 1995) 29
Sammis v. Magnetek, Inc., 130 Idaho 342, 353, 941 P.2d 314, 325 (1997) 33
Sewell v. Neilson, Monroe, Inc., 109 Idaho 192, 706 P.2d 81 (Ct. App. 1985) 32
Smith v. Idaho State Credit Union, 103 Idaho 245, 646 P.2d 1016 (Ct. App. 1982) 32
Spokane Structures, Inc. v. Equitable Inv., LLC, 226 P.3d 1263, 148 Idaho 616, (Idaho 2010) 27
Swanson v. Beco Const. Co., Inc., 175 P.3d 748, 145 Idaho 59, (Idaho 2007) 10, 16
Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 22, 644 P.2d 341, 344 (1982) 21
USA Fertilizer, Inc. v. Idaho First Nat. Bank, 815 P.2d 469, 120 Idaho 271, (Idaho App. 1991) 8

Statutes

I.C. § 12-120(3) 32
I.C. § 9-503 22
I.C. § 9-504 22
I.C. § 9-505 22
Idaho Code §§ 12-120; 12-121 .... 27, 28, 32
Idaho Code 9-503 21

Other Authorities

A Primer For Awarding Attorney Fees in Idaho, Idaho Law Review, Volume 38, 2001, Number 1 30

Rules

I.A.R. 40 32
I.A.R. 41 32
Rule 54, I.R.C.P 30, 33

STATEMENT OF THE CASE

1. FACTUAL EVENTS

Respondent, hereinafter "Buku", entered into two separate contracts[1] [2] with elderly couples[3], hereinafter "Clark" and "Peterson". The contracts entered into by Buku with the appellants were nearly identical and both contracts depended on the complete sale of the real property of both Clark and Peterson to Buku. The contracts were intertwined to allow for the complete purchase of the adjoining property of both Clark and Peterson[4]. The Clark property consisted of 80.17 acres and a home; and, the Peterson property consisted of approximately 73 acres and a home. The elderly couples were using the sale of the real property for their retirement years. Each property was to be purchased for the following sum: Clark-$1,044,075.18; Peterson-$980,000.00.[5]

The two contracts were almost identical in nature. The major difference was the earnest money payment. The Clarks received $25,000.00 of earnest money; the Petersons received $327,000.00 of earnest money. The difference was the need, which was expressed to respondent (Buku), of the Petersons' desire to purchase a retirement townhouse in Idaho Falls, Idaho. The Peterson townhouse was purchased with the earnest money and was a known fact to all parties to the action. The Petersons <u>relied</u> upon the representations of plaintiff in accepting the down payment.

---

[1] The Clark contract is contained at pages 89-94 of the record.
[2] The Peterson contract is contained at pages 95-100 of the record.
[3] Janet C. Clark is now deceased; Betty Jean Peterson has cancer which may be terminal.
[4] See paragraph 25 of each contract. (R. pp 93, 99).
[5] R. pp. 89, 100.

The Clarks received a modest down payment to sell their real property to the defendant and moved to Texas to begin their retirement plans. Neither set of defendants believed any contingencies existed and that the contract was to be completed by a date certain for them to begin retirement activities.

The parties entered into preliminary negotiations and, ultimately, signed the contracts prepared by the respondent on August 30, 2007.[6] The closing date was established at December 21, 2007. The reason for the delay in closing was to allow the respondent to do its "due diligence". Both contracts contained paragraph 3 of the "due diligence" language.[7] Due diligence or the conditions thereof are not explained in said paragraph.

The real estate purchase agreements state the terms and conditions. Defendants/appellants relied upon multiple promises of payment by the respondent/plaintiffs to the appellants/defendants—even subsequent to the closing date of the transactions. The appellants did not participate with Buku's bank process nor were the appellants involved in any actions of respondent concerning financing.

No conditions were placed upon the sale of the real property as it related in any way, shape or form as to the County of Jefferson and any zoning or building requirements. The

---

[6] R. pp. 93, 100.

[7] Paragraph 3 of both contracts contains the following language: 3. Buyer's Obligations. Buyer is obligated to pay the earnest money as set forth in this agreement and pay the remaining purchase price at the tim0e of closing. Prior to closing, it is Buyer's obligation to make sure that they are fully satisfied with the condition of the property, also any requirements, environmental requirements, and all of the requirements that the Buyer needs to make for its due diligence purposes. Buyer will have four months to perform the due diligence inspections to satisfy Buyer's interests and concerns regarding the purchase. Thus, closing will be on or before December 21, 2007.

intent of usage by plaintiff for the subject real properties was irrelevant to the appellants. No mutual agreement or understanding was made by the appellants as to the ultimate usage of the real property being purchased by the respondent. In fact, the only understanding was that the down payment to Petersons was critical to their purchase of a retirement home in Idaho Falls. Respondent was well aware of the zoned property as it met with Jefferson County prior to the closing date on December 10, 2007.[8] Both set of appellants continued to be ready, able and willing to perform on the sale and were ready, willing and able to close at the closing date and subsequent to the closing date.

Buku failed to close on December 21, 2007. The legal disputes revolve around paragraph 3 of the two contracts with the appellants; and, the use of the earnest money by Peterson. Buku alleged that there were zoning issues on the real properties. Appellants contend no such issues existed as the zoning never changed during the entire process.[9] The contracts are silent on such language.

2. LEGAL EVENTS

Ten months after the expiration of the closing date for the sale of the two real properties, Buku signed it complaint for return of earnest money on October 15, 2008 and filed the same with the Jefferson County court system.[10] The complaint alleged refund of earnest money; conversion; unjust enrichment; a pre-judgment interest request; along with a

---

[8] R. pp. 148. Affidavit of Foster: Pre-application meeting shows December 10, 2007 and lots are zoned 1-acre,
[9] R. pp. 144-146.
[10] R. p. 12.

request for fees and costs.[11] Appellants filed an answer and counter-claim on December 10, 2008.[12] The counter-claim contained requests for specific performance of the contract; breach of contract; unjust enrichment; estoppel; promissory estoppel/detrimental reliance; consumer protection violations, along with a request for fees and costs.

Approximately one year after the complaint was filed, respondent, Buku, filed a request for summary judgment.[13] Clark and Peterson filed a denial of the request for summary judgment and objection to respondent's request along with the appellants' motion for summary judgment.[14] Additionally, a motion to strike portions of the respondent's affidavits was filed by appellants.[15]

District Judge Gregory Moeller was the sitting judge at the time and made a ruling denying summary judgment to respondents; and, did not consider the motion for summary judgment of appellants.[16] He did opine, however, that the contracts with Clark and Peterson were unambiguous.[17]

District Judge Dane Watkins was appointed to the bench and was presented this first case from Jefferson County. The respondents, thereafter, filed a second motion for summary judgment.[18] Appellants contested the motion with memorandum and various

---

[11] R. pp. 12-22.
[12] R. pp. 33-45.
[13] R. pp. 64-65.
[14] R. pp. 114-118.
[15] R. pp. 119-121.
[16] R. pp. 197-210.
[17] R. pp. 203-205.
[18] R. pp. 290-292.

affidavits.[19] Judge Watkins granted summary judgment [20]to the respondent, Buku, on all issues and denied any of the counter-claim responses of the appellants, Clark and Peterson. Appellants timely appealed to this court.[21] This court suspended the document entitled "judgment" and remanded to the district court for a "final judgment in proper form".[22] The respondent then filed a motion for fees, costs and pre-judgment interest. The request for fees, costs and interest would have been untimely but for the remand. Appellant objected.[23]

The district judge then awarded fees, costs and pre- judgment interest to the summary judgment decision award in favor of Buku.[24] The appellants then filed an amended appeal to this court.[25]

ADDITIONAL ISSUES ON APPEAL

1. The Appellants request their costs and fees for the lower court proceedings.
2. The Appellants request their costs and fees on appeal.

ARGUMENT

1. SUMMARY

Two rulings on summary judgment were submitted to the district court. Judge Gregory Moeller heard the first motion for summary judgment and denied the request. Judge Dane Watkins heard the second motion for summary judgment and granted the

---

[19] R. pp. 310-347.
[20] R. pp. 395-408.
[21] R. pp. 409-412.
[22] R. pp.434.
[23] R. pp 435-440.
[24] R. pp. 473-476.
[25] R. pp. 505-508.

request for the plaintiff/respondent.

The two major arguments of the appellants are straight-forward and clear in nature and described hereafter.

Both judges indicated the contracts in question were unambiguous. If so, then parol or evidence outside of the four corners of the contracts could not be considered. Both judges accepted information outside of the four corners of the contracts to render a decision. Thus, the contracts could not have been unambiguous.

Judge Watkins accepted affidavit testimony of the respondents and did not accept affidavit testimony of the appellants. Summary judgment could not have been granted and the factual disputes would have to be determined by the fact-finder, to-wit: the jury.

Appellants allege that the respondent breached the contracts; and, that summary judgment should have been granted in their favor. Worst case scenario, the appellants believe they should have had the opportunity to present their facts to the jury.

Judge Watkins then granted a monetary judgment; added prejudgment interest along with costs and fees.

The two major issues surround the "unambiguous" contract; and, the earnest money used by Peterson for their retirement townhome.

> Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c) (2002). In a motion for summary judgment, this Court should liberally construe all facts in favor of the nonmoving party and draw all reasonable inferences in favor of the nonmoving party. *Northwest Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 838-39, 41 P.3d 263, 266-67 (2002). Summary judgment must be denied if

reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented.

Iron Eagle Development, LLC v. Quality Design Systems, Inc., 65 P.3d 509, 138 Idaho 487, (Idaho 2003)
------------ Excerpt from page 65 P.3d 513.

2. INTRODUCTION.

The first major issue surrounding this case is the interpretation and application of a due "diligence clause" contained in both of the contracts before this court. That language is as follows:

> 3. Buyer's Obligations. Buyer is obligated to pay the earnest money as set forth in this agreement and pay the remaining purchase price at the time of closing. Prior to closing, it is Buyer's obligation to make sure that they are fully satisfied with the condition of the property, also any requirements, environmental requirements, and all of the requirements that the Buyer needs to make for its due diligence purposes. Buyer will have four months to perform the due diligence inspections to satisfy Buyer's interests and concerns regarding the purchase. Thus, closing will be on or before December 21, 2007.

This non-artfully drafted language is so vague that it would be impossible for any court to know what "buyer needs for its due diligence." Paragraph 24 of the contracts is very clear that the buyer drafted this agreement.[26] As the court is well aware, the court must construe the language against the drafter.

> (See, e.g., RESTATEMENT, supra, at § 201 (agreement interpreted in accordance with the meaning assigned by the more "innocent" of the parties); *Luzar v. Western Surety Co.*, 107 Idaho 693, 692 P.2d 337 (1984) (where trier of fact is unable to determine the intent of the parties, preference is given to the meaning which operates against the party drafting the agreement); RESTATEMENT, supra, at § 207 (preferring an interpretation

[26] R. pp. 93, 99.

favoring the public interest).

USA Fertilizer, Inc. v. Idaho First Nat. Bank, 815 P.2d 469, 120 Idaho 271, (Idaho App. 1991)

------------ Excerpt from page 815 P.2d 474.

The second major issue before this court concerns the earnest money agreement and the Petersons' purchase of the retirement townhome from the earnest money. No question exists that this purchase of townhome was a major factor in the sale contracts. It is evident this event was major and can determined from the earnest money to Clarks of $25,000.00 and the comparing earnest money to Petersons of $327,000.00.

3. THE RESPONDENT BREACHED THE CONTRACTS WITH APPELLANTS AND THE INTENT OF SUCH CONTRACTS. THE LOWER COURT COULD NOT SUPPLEMENT UNAMBIGUOUS CONTRACTS.

Case law in Idaho is well defined on the interpretation of contracts and is illustrated with the following:

> The primary objective in construing a contract is to discover the intent of the parties, and in order to effectuate this objective, the contract must be viewed as a whole and considered in its entirety. The primary consideration in interpreting an ambiguous contract is to determine the intent of the parties. The determination of a contract's meaning and legal effect are questions of law to be decided by the court where the contract is clear and unambiguous. However, where a contract is determined to be ambiguous, the interpretation of the document presents a question of fact which focuses upon the intent of the parties. The determination of whether a contract is ambiguous or not is a question of law over which we may exercise free review, and in determining whether a contract is ambiguous, our task is to ascertain whether the contract is reasonably subject to conflicting interpretation.

Bondy v. Levy, 121 Idaho 993, 996-97, 829 P.2d 1342, 1345-46 (1992).

A. The first summary judgment motion ruled upon by Judge Gregory Moeller.

The first motion for summary judgment between the parties resulted in a decision from Judge Gregory Moeller denying summary judgment to either party. He opined that the contracts in question were not ambiguous. Thus, the court could not accept any information outside of the four corners of the contract to interpret the meaning of the contracts. The court did not do that as can be determined by his references to the information contained in affidavits of both parties.[27] If the contracts are unambiguous, outside information and/or parol evidence is irrelevant. Furthermore, the district court, in this first decision, focused on the earnest money provision and not the due diligence clause which are the two major issues before this court.

> Under Idaho's parol evidence rule, where preliminary negotiations are consummated by written agreement, the writing supercedes all previous understandings and the intent of the parties must be ascertained from the writing. Nuquist v. Bauscher, 71 Idaho 89, 94, 227 P.2d 83, 86 (1951). This rule, however, applies only when the integrated character of the writing is established. Whether a particular subject of negotiation is embodied in the writing depends on the intent of the parties, revealed by their conduct and language, and by the surrounding circumstances. *Nysingh v. Warren*, 94 Idaho 384, 385, 488 P.2d 355, 356 (1971). The mere existence of a document does not establish integration. Id. A "merger" clause in a written agreement is one means of proving the integrated character of a writing. *Tapper Chevrolet Co. v. Hansen*, 95 Idaho 436, 510 P.2d 1091 (1973).
>
> Katseanes v. Yamagata, 653 P.2d 1185, 103 Idaho 773, (Idaho App. 1982)
> ------------ Excerpt from page 653 P.2d 1187.
>
> The trial court's finding that the contract was ambiguous is a question of law. *Watson Construction Co. v. Reppel Steel & Supply*, 123 Ariz. 138, 598 P.2d 116 (Ariz.App.1979). When presented with an issue that raises only a question of law, this Court is not bound by the findings of the trial court, but is free to draw its own conclusions from the evidence presented. *Sharp v.*

[27] E.g. See footnotes 1-7 of the court's decision. R. pp.198-199, 203, 206.

Hoerner Waldorf Corp., 584 P.2d 1298 (Mont.1978). See *Harding v. Home Investment & Savings Co.*, 49 Idaho 64, 286 P. 920 (1930).

The respondent cites *Werry v. Phillips Petroleum Co.*, 97 Idaho 130, 540 P.2d 792 (1975), for the proposition that the trial court's finding of ambiguity must be respected on appeal. However, as shown by the analysis in *Werry*, the question of an ambiguity in a contract is separate from the question concerning the interpretation of an ambiguous contract. In *Werry*, we only held that, "where the terms of a contract are ambiguous its interpretation and meaning is a fact question to be determined by the jury." Id. at 135, 540 P.2d at 797, citing *National Produce Distributors v. Miles & Meyer*, 75 Idaho 460, 274 P.2d 831 (1954).

Clark v. St. Paul Property and Liability Ins. Companies, 639 P.2d 454, 102 Idaho 756, (Idaho 1981)
------------ Excerpt from page 639 P.2d 455.

"Whether a contract is ambiguous is a question of law over which we exercise free review." *Howard v. Perry*, 141 Idaho 139, 142, 106 P.3d 465, 468 (2005). Ambiguities can be either patent or latent. "Idaho courts look solely to the face of a written agreement to determine whether it is [patently] ambiguous." *Ward v. Puregro Co.*, 128 Idaho 366, 369, 913 P.2d 582, 585 (1996). Accord, *Valley Bank v. Christensen*, 119 Idaho 496, 808 P.2d 415 (1991). "A latent ambiguity is not evident on the face of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist." *In re Estate of Kirk*, 127 Idaho 817, 824, 907 P.2d 794, 801 (1995).

Swanson v. Beco Const. Co., Inc., 175 P.3d 748, 145 Idaho 59, (Idaho 2007)
------------ Excerpt from page 175 P.3d 751.

Thus, the court determines if language in a contract is ambiguous. If a contract or clause is not ambiguous, the court must stay within the four corners of the contract and may not consider evidence not contained in such contract. If the contract is ambiguous, the fact-finder determines the facts to consider the ambiguous language and application thereof.

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) (citing *Idaho v. Hosey*, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000)). An unambiguous

> contract will be given its plain meaning, which is based on the words of the contract. Id. The purpose of interpreting a contract is to determine the mutual intent of the contracting [138 Idaho 492] parties at the time the contract was entered. Id. at 607, 38 P.3d at 1263. If a contract is determined ambiguous, its interpretation is a question of fact. *Elec. Wholesale Supply Co., Inc. v. Nielson*, 136 Idaho 814, 823, 41 P.3d 242, 251 (citing *State v. Barnett*, 133 Idaho 231, 234, 985 P.2d 111, 114 (1999)).

Iron Eagle Development, LLC v. Quality Design Systems, Inc., 65 P.3d 509, 138 Idaho 487, (Idaho 2003)
------------ Excerpt from pages 65 P.3d 513-65 P.3d 514.

The due diligence clause [paragraph 3 of the contracts] is overly broad by both the appellants' opinion and the first court decision.[28] The contract, paragraph 3 clause: "they [Buku] are fully satisfied with the condition of the property, also any requirements, environmental requirements, and all of the requirements that the Buyer needs to make for its due diligence purposes" is unquestionably overly broad. Also, it is capable of various meanings and "all requirements" could include almost anything in the realm of possibility.

No questions exist that the condition of the property was not an issue. No questions exist as to environmental concerns as being a non-issue. Thus, the first portion of the due diligence language is not before the court.

What do "all of the requirements of the Buyer" mean? Nothing in the contract discusses land uses, zoning, financing, water rights, title issues, disasters, eminent domain or many of the "normal" concerns when purchasing real property. The contract appears to have an overly broad catch-all contained in "all of the requirements" phrase.

The respondents have made no claim, whatsoever, that any problem existed with the

[28] See, Judge Moeller's statement in the decision at R. p. 205, first paragraph.

real property of both Clark and Peterson. The ONLY claim asserted by Buku is that the property could potentially be re-zoned. Rhetorically asked: How could the district court even come up with this knowledge unless outside information was considered? If the contracts are unambiguous, the court had to rely purely on the contracts and not consider any outside information by way of affidavit or otherwise. It would be impossible to know of Buku's claim of zoning issues by viewing the information within the four corners of the contracts. Further, the purpose of Buku's purchase is never disclosed in the contracts. How could the court even know if zoning was a concern on the use of the property by respondents if zoning was never mentioned or contained in the "unambiguous" contracts?

Thus, the reasoning on the first decision of Judge Moeller had to be in error. The result denying summary judgment was acceptable to the appellants. The reasoning on the first decision, however, may have affected the result on the second ruling by Judge Watkins. That court needed additional information to interpret Paragraph 3; and, it would need to be supplemented to determine its meaning and application. Therefore, a portion of paragraph 3 of the contracts had to be ambiguous.

Likewise the agreement with Peterson on the earnest money of $327,000.000, for the purchase of the townhome for retirement, would require supplementation from affidavit, parol evidence or other supplemental evidence to determine the intent of the parties. Thus, Judge Moeller was correct that summary judgment could not be granted. Summary judgment could not be granted. The appellants agree with the result of Judge Moeller; but disagree with the reasoning to reach the result. Therefore, the district court's reasoning to

determine summary judgment was not appropriate but the denial of summary judgment was in accord with appellants' belief. The reasoning to reach the end result is disputed by appellants.

Every party to this transaction knew the property was zoned R-1 (residential-one acre) at the time the contracts were contemplated, signed and completed. Every party to this transaction knew the property was also zoned R-1 at the scheduled closing date. Also, Buku was reassured that the subjects properties would be grandfathered and continued to be zoned R-1,[29] at all times before the contract, during the contract to closing; and, after the transaction was completed.

The contracts are silent on the use of the property that was to be purchased by the respondents. Although, the appellants knew that the respondent were real estate speculators and developers, nothing was contained in the contracts about the proposed usage by respondents. Once again, the court would need to go outside of the contracts to determine such additional facts.

Since the two contracts did not close on December 21, 2007, appellants believe that the contracts were breached by the respondents. No reasonable explanation can be given for not closing the transactions. The potential for re-zone was not contained in the contracts and, more important, was a non-issue because the property was not re-zoned or contemplated to be re-zoned. This non-issue is a red herring developed by the respondent.

If, in fact, the respondents were known developers, Buku had extensive knowledge

---

[29] See affidavit of Foster with attachments. R. pp. 144-153. See also Affidavit of Peterson. R. pp. 139-140, par. 11, 14, 21.

that the land would be "grandfathered" by their applications to Jefferson County, Idaho for development. Buku had actual knowledge that the property would remain R-1 by its December 10, 2007 meeting with the Jefferson County official, Naysha Foster.[30] The respondents were re-assured of this position although Buku already possessed such knowledge. [31] No legitimate explanation can be given for the breach by Buku.

The court, in this first ruling, never addressed the summary judgment motion filed by appellants.[32] The court in its decision states: "This decision addresses Buku's motion."[33] Thus, the court never considered the appellants' motion for summary judgment although it was presented, briefed and argued to the court. The breach by Buku should have entitled Clark and Peterson to summary judgment. Appellants gained no guidance on their motion or the potential factual issues to be presented to a jury.

This first decision included the court's opinion that more facts need to be ascertained on the conduct of the parties subsequent to the closing date. Admittedly, no written contracts or written amendments were entered into by the parties after the failed closing date. However, verbal assurance were given on multiple occasions that the contract would be fulfilled and that the Petersons did not need to worry about their earnest money used to purchase the townhome.[34]

Moreover, the parties had relied on the original contracts and both had begun partial

---

[30] R. p. 148.
[31] R. p. 148. the pre-application meeting with Jefferson County occurred on December 10, 2007 and Buku KNEW (Emphasis Supplied) that the property was grandfathered at R-1.
[32] R. pp. 116-117.
[33] R. p. 199.
[34] Peterson affidavit, R. pp. 137-143.

performance based upon such contracts. Subsequent to the failed closing, the respondent continued to exercise dominion and control over the Peterson property.[35]

B. The second summary judgment motion ruled upon by Judge Watkins.

The second ruling on summary judgment was conducted by Judge Watkins. The lower court also ruled the contracts were unambiguous. The same reasoning applies as above. How could the judge know of zoning if it was not contained in the four corners of the contracts? How could the judge know of the intended use if it was not contained in the four corners of the contracts? The court could not. Paragraph 3 had to be interpreted with parol evidence from the affidavits by the lower court. This procedure would violate existing case law as set forth above. *Clark v. St. Paul Property and Liability Ins. Companies,* 639 P.2d 454, 102 Idaho 756, (Idaho 1981); *Swanson v. Beco Const. Co., Inc.,* 175 P.3d 748, 145 Idaho 59, (Idaho 2007).

The district court did not consider the affidavits of the appellants on the earnest money arrangement. If so, the court would have determined that a factual dispute existed as to the use of the $327,000.00 for the Peterson purchase of the townhouse in Idaho Falls, Idaho. Summary judgment could not have been granted. A fact-finder would need to determine the surrounding conduct and intent of the parties. In the first decision, Judge Moeller recognized this reality. The second ruling by Judge Watkins ignored this fact.

The lower court supplemented the contracts with evidence from the affidavits on the

[35] R. pp. 137-143; 329-347; [both Peterson affidavits from 1st and 2nd decisions].

zoning issue but failed to supplement the contracts with evidence from the affidavits on the issue of the earnest money. The lower court should have been obligated to consider evidence both ways—not just to the advantage of the respondents.

Examples of the lower court accepting additional testimony on the zoning and use issues include, but are not limited, as follows:

> . . .both the Clark Property and the Peterson Property (hereinafter collectively Properties) were zoned Residential-1 ("R-1"), which would allow a minimum density of one acre lots. (R. p. 396).
>
> During the four month diligence period, Buku learned of a proposed zoning change, which might have affected the Properties. (R. p. 396).
>
> Between August 30, 2007 and December 18, 2007, issues arose regarding the Jefferson County Planning and Zoning Commission's plans to possibly change the zoning categorization of the Properties to R-5. The change which would allow a minimum density of five acre lots could have potentially decreased the value of the Properties. (R. p. 396).

See also, first two paragraphs, R. p. 397.

In its decision, the court improperly states: "Neither party asserts the Agreements are ambiguous."[36] This statement is incorrect. Judge Moeller stated the agreements were unambiguous.

Appellants stated that a portion of paragraph 3 of the agreements was not ambiguous, to-wit: 1. condition of the property, and 2. environmental concerns. However, the phrase "and all of the requirement that the Buyer needs . . ." certainly is overly broad, ambiguous and capable of multiple meanings.

The court also accepted the "red herring" when it stated: "Thus, the Agreements

---

[36] R. p. 401.

permitted Buku to look into potential (emphasis supplied) zone changes that would affect its 'interests and concerns' ".[37] If there were no possibility of zone changes, there could be no effect on Buku. Buku knew that the real property was grandfathered. Once again, however, how could the court even know that a zone change was an issue without accepting evidence outside of the four-corners of the contracts.[38] If the lower court were to accept outside evidence, shouldn't it also have accepted outside evidence on the issue of the earnest money provided to Peterson for the townhome? The court needs to treat both parties on an equal basis. The court's reasoning is inconsistent with an unambiguous contract.

In footnote 4, R. p. 403, the lower court commits major error by stating: "while the court acknowledges the above facts, the record reflects that the 'grandfathering' issue was not addressed by Jefferson County until March 2008, three months after the December 21, 2007 closing date." That statement is totally untrue. The pre-application subdivision meeting with Buku occurred on December 10, 2007 and specifically stated: "Lot Size: 1 acre building lots." See, R. p. 148 [half way down the page the date and lot size are listed]. (Emphasis Supplied). Buku absolutely knew beyond any doubt that the real property in question was 1 acre lots (R-1). This knowledge was eleven (11) days before the scheduled closing and within the four month time period for due diligence.

In footnote 6, R. p. 405, the lower court commits additional error when it draws an inference in favor of respondent that was a jury mission by stating: "Based upon the

[37] R. p. 403.
[38] See footnote 4, R. p. 403.

affidavits and exhibits attached with Buku's submissions, the Court questions whether the "dominion and control" arguments asserted by the Clarks and Petersons would be established." The court continually accepts supplemental evidence to support the "unambiguous" contracts and ignores any presentations of evidence by the appellants on the issue of paragraph 3 or on the issue of the earnest money usage. The appellants requested a jury trial.[39] The jury is the fact-finder not the court.

Judge Moeller noted that "Buku may not be entitled to recover under the unambiguous contracts".[40] Judge Watkins referred to such language and then went on to form an opinion that the subsequent dealings had to be in writing. Once again, if the contracts were unambiguous, how would the evidence presented by affidavit affect the validity of the "unambiguous contracts". [41]

The subsequent dealings reiterate that the contract was still valid and that appellant was going to honor its terms.[42] Respondent continually reiterated that the contract would be fulfilled after the closing date. The jury needs to interpret these dealings and determine whether the original contracts had been re-ratified. In any event, summary judgment in favor of Buku was incorrect.

4. <u>THE LOWER COURT IMPROPERLY DISMISSED THE COUNTER-CLAIMS OF THE APPELLANTS.</u>

---

[39] R. p. 44.
[40] First Memorandum Decision, R. pp. 205-206; Judge Watkins recognized such fact. R. p. 404.
[41] R. pp. 404-405.
[42] R. pp. 137-143; 329-347; [both Peterson affidavits from 1st and 2nd decisions]

Appellants various counter-claims were summarily dismissed by the lower court in the second decision by Judge Watkins.[43] The lower court cited *Bates v. Seldon,* 146 Idaho 772, 203 P.3d 702 (2009); *Iron Eagle Development, LLC v. Quality Design Systems, Inc.,* 138 Idaho 487, 65 P.3d 509 (2003) incorrectly.

First, if summary judgment is non-applicable because of the errors advance above, the counter-claims remain. Second, and just as important, in *Bates and Iron Eagle,* the lower court indicated that equity claims were not applicable because an adequate remedy at law existed.

In the instant case, if the contract were held to be void or illusory, the appellants have no remedy at law for the use of their property by Buku, for the declarations made concerning the earnest money, for the dominion and control exercised by Buku over the property of appellants and for the damages and lost revenue caused by Buku.

The counter-claims of appellants included specific performance, breach of contract, unjust enrichment, estoppel and detrimental reliance. [Consumer Protection Violations were properly dismissed by Judge Moeller in the first decision.][44]

The equitable doctrines of unjust enrichment, estoppel and detrimental reliance apply if no contract is in force. In quoting *Bates at 776,* the lower court clearly should have recognized that "The existence of an express agreement does not prevent the application of the doctrine of unjust enrichment." If this court adheres to the lower court's decision that the express contract between the parties is not enforceable (which the court found), then the

---

[43] R. pp. 406-407.
[44] R. pp. 207-208.

equitable remedies apply.

Likewise, the lower court cited *Iron Eagle at 492*, for the same proposition. What the lower court failed to recognize is that those cases had remedies at law. If the court, in the instant case, determines that the contract is cancelled and the earnest money should be returned, where is the remedy for the damages for lost use of real property, for dominion and control over the appellant's property for nearly one year, for the expenses associated with the property which Buku controlled and other items? Where is the remedy for the expenses of moving to the townhome, the taxes, utilities, upkeep, and cost of such purchase? This purchase (of the townhome) was authorized by the respondent.

The respondent should be estopped from asserting rights contrary to the representations made to the appellants. Estoppel ties into the detrimental reliance theory. Estoppel is defined as follows:

> Equitable estoppel requires
>
> (1) a false representation or concealment of a material fact made with actual or constructive knowledge of the truth;
>
> (2) that the party asserting estoppel did not and could not have discovered the truth;
>
> (3) an intent that the misrepresentation or concealment be relied upon; and
>
> (4) that the party asserting estoppel relied on the misrepresentation or concealment to his or her prejudice.
>
> *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 103 Idaho 19, 22, 644 P.2d 341, 344 (1982).

E. Detrimental Reliance

Allowing promissory estoppel as a substitute for consideration is

> permitted in those situations where injustice would otherwise result. The reason for the doctrine also defines its limits. In order to allege the defense of promissory estoppel, it must be shown: (1) the detriment suffered in reliance was substantial in an economic sense; (2) the substantial loss to the promisee acting in reliance was or should have been foreseeable by the promisor; and (3) the promisee must have acted reasonably in justifiable reliance on the promise as made. Simpson, Contracts § 42 (1954).
>
> See also, Restatement of Contracts, § 90.

Mohr v. Shultz, 388 P.2d 1002, 86 Idaho 531, (Idaho 1964)
------------ Excerpt from pages 388 P.2d 1008-388 P.2d 1009.

The appellants, unquestionably, relied upon the assurances of the respondents. These items of damage, mentioned above, are not controlled by an express contract. Therefore, there was no adequate remedy at law. Judge Moeller, in the first ruling on summary judgment recognized these facts. The lower court, on the second ruling, failed to consider the reasoning of Judge Moeller in the first summary judgment memorandum decision.

5. <u>THE LOWER COURT IMPROPERLY RELIED UPON IDAHO CODE 9-503; AND, EQUITABLE REMEDIES WHICH WERE DISMISSED SHOULD NOT HAVE BEEN INCLUDED IN ANY SUMMARY JUDGMENT DECISION.</u>

The appellants have never alleged that a new written agreement existed after the closing date did not conclude this matter. The appellants do not dispute the clear written language of paragraph 21 of the contracts in question. Nor do Clark and Peterson dispute the statute of frauds language as contained in Idaho Code 9-503. The law is clear on those points and it is believed that the respondent has "missed the point" of the court's earlier ruling [Judge Moeller's first ruling].

That court was stating that various facts exist to determine whether there is justification for return of earnest money. If there are not sufficient facts to enable Buku return of the earnest money, then the fact-finder needs to make such a determination. Both pre- and post- contracts, Buku has led the appellants to believe the sale would occur and the balance of money would be paid to Clark and Peterson.

It is very clear that *part-performance creates various remedies* under the Statute of Frauds. The respondent began to perform on the promise to purchase. This case was not about zoning. The case has never been about the inability of zoning, despite the assertions of Buku, or any deficiency on the real properties; or, for that matter, the good faith and fair dealings of Clark and Peterson.

Quite clearly, part performance is explained in more technical terms concerning the Statute of Frauds as follows:

> We turn to "part" performance. When we use this term, we mean performance by either or both parties of less than all their respective obligations under the contract. There is no literal foundation in I.C. § 9-505 for the oft-made assertion that part performance takes a contract outside the statute. Plainly it does not. The contract is still within the statute. At least a portion of the contract remains "to be performed" on both sides. Compare I.C. § 9-504 (explicitly referring to part performance of land sale contracts under I.C. § 9-503). *Rather, it is more accurate to say that in some circumstances, part performance may establish an equitable ground to avoid the strictures of the statute of frauds.*

In *Allen v. Moyle*, 84 Idaho 18, 367 P.2d 579 (1961), discussing contracts for personal services, our Supreme Court implicitly recognized this point:

> [T]he equitable doctrine of part performance is not applicable to a contract ... within the statute of frauds.... The mere part performance of such a contract does not take it out of the operation of the statute or permit a recovery under the contract for any part of the contract remaining executory.... [T]o hold that

part performance is performance would be a nullification of the statute.

Id. at 23, 367 P.2d at 582 (quoting 49 AM.JUR. § 497, at 798). Similarly, in *International Business Machines Corp. v. Lawhorn*, 106 Idaho 194, 198, 677 P.2d 507, 511 (Ct.App.1984), we referred to part performance as a doctrine "grounded in equity." The doctrine of part performance is best understood as a specific form of the more general principle of equitable estoppel. Accordingly, we will return to it in the next section of this opinion.

Hovering uneasily between full performance by both parties and part performance by either or both parties is a troublesome hybrid known as "full" performance by one party. American courts and commentators have long disagreed--with varying degrees of awareness and perception--as to whether such performance is akin to full performance by both sides (taking a contract outside the statute of frauds) or more closely resembles part performance (possibly allowing equitable relief from the statute). A majority of courts appear to hold the former view. CALAMARI & PERILLO § 19-23; CORBIN § 457; L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS § 89 (2d ed. 1965) (hereinafter SIMPSON); 73 AM.JUR.2D Statute of Frauds § 533 (1974) (hereinafter Statute of Frauds). However, "no ... general principle can be derived from the decisions on this point." WILLISTON § 528. *Thus, some courts have held that the statute of frauds does not apply to a contract fully executed on one side, where nothing remains to be done on the other side except to pay money.* See SIMPSON § 89. Courts adopting this view may order the contract to be enforced in damages. Other courts, taking an approach analogous to part performance, may consider an equitable or quasi-contractual remedy, such as quantum merit. Id.

Although the Idaho courts have not explicitly addressed this issue, our cases strongly point to the equity approach. The Idaho Supreme Court repeatedly has held that when one party has fully performed an oral contract within the statute of frauds, he is not entitled to collect damages for a breach. Rather, he is entitled to the equitable remedy of specific performance. E.g., *Tew v. Manwaring*, 94 Idaho 50, 480 P.2d 896 (1971); *Quayle v. Mackert*, 92 Idaho 563, 447 P.2d 679 (1968).

These cases put Idaho among a minority of states, *but we think the equity approach is sound.* It offers greater consistency with the literal language of Idaho's [111 Idaho 1010] statute of frauds. For even if one side has fully performed a contract, the contract as a whole remains "to be performed." Moreover, it is the nonperforming party who seeks protection under the statute. [In the instant case, the plaintiff, Buku]. Conceptually, it

> makes little sense to allow the extent of the opposing party's performance to determine whether the contract is within or without the statute. *It makes greater sense, in our view, to examine the conduct of both parties, and the circumstances surrounding the alleged contract, to determine whether the party invoking the statute of frauds is equitably entitled to do so.* Accordingly, we hold that the doctrine of full performance by one party, like the doctrine of part performance, does not take the contract out of the statute of frauds. Rather, it should be treated as a form of *equitable estoppel.* (Emphasis supplied).
>
> *Frantz v. Parke,* 729 P.2d 1068, 111 Idaho 1005, (Idaho App. 1986)
> ------------ Excerpt from pages 729 P.2d 1072-729 P.2d 1073.
>
> The doctrine of part performance works in conjunction with the doctrine of equitable estoppel. "Under Idaho law, part performance per se does not remove a contract from the operation of the statute of frauds. Rather, the doctrine of part performance is best understood as a specific form of the more general principle of equitable estoppel." *Lettunich,* 141 Idaho at 367, 109 P.3d at 1109. (citing *Sword v. Sweet,* 140 Idaho 242, 249, 92 P.3d 492, 499 (2004)). *Equitable estoppel generally, and the doctrine of part performance specifically, assume the existence of a complete agreement.* See *Lettunich,* 141 Idaho at 367, 109 P.3d at 1109.

The language quoted above from cases in Idaho is precisely what the district court in its first ruling [Judge Moeller] was referring to when it stated: "the behavior of the parties" and similar language as stated therein. This language is identical to the issues propounded by the court cases as highlighted above.

Respondent cannot rely upon mere allegations of zoning issues to defeat the contract. It has already been proven, through the Planning and Zoning Department, via Naysha Foster, that the real property would not be re-zoned.[45] The contractual enforcement rights exist for the benefit of the appellants. The equitable remedies exist due to the aforementioned part performance theory. Those theories are contained in the counter-

[45] R. pp. 144-153.

claims of appellants.

Respondent misses the point of these facts when arguing for its second summary judgment motion. These controverted facts show the surrounding nature of the circumstances of how Buku dealt; and, that such dealings were not in good faith. The controverted facts still do not solve the unresolved question of whether Buku could unilaterally terminate a contract, partially performed, by the assumption of zoning issues which were non-existent. The clear testimony contained in the record is that the zoning issue was a non-issue. Such fact has not been rebutted by Buku.

Summary judgment on the second motion was clearly inappropriate.

6. THE LOWER COURT COMMITTED ERROR IN ITS AWARD OF FEES, COSTS AND PREJUDGMENT INTEREST.

The lower court issued a document entitled "JUDGMENT RE: MOTIONS FOR SUMMARY JUDGMENT" dated February 3, 2011.[46] Rule 54 of the Idaho Rules of Civil Procedure require that a request for fees, costs and/or other requests must be submitted within 14 days of a final judgment.[47] The respondent filed its Memorandum on February 22, 2011. Fourteen (14) days had expired prior to the filing.

However, this Supreme Court suspended the appeal for "D.C. FINAL

---

[46] R. pp. 392-394.

[47] At any time after the verdict of a jury or a decision of the court, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense, but such memorandum of costs may not be filed later than fourteen (14) days after entry of judgment.
IRCP Rule 54, Judgments.
------------ Excerpt from page 169.

JUDGMENT". [48] The appellant appealed from the "Judgment" entered by the district court. The respondent failed to timely respond. This court then suspended the appeal and may have caused to become "moot" the timing of the 14 day response.

This court held as follows:

> Rule 58(a) requires that "[e]very judgment shall be set forth on a separate document." That requirement was added to the Rules of Civil Procedure in 1992. *Hunting v. Clark County School Dist.* No. 161, 129 Idaho 634, 637, 931 P.2d 628, 631 (1997). "The purpose of this rule is to eliminate confusion about when the clock for an appeal begins to run. The separate document requirement was also designed to eliminate uncertainty over what actions of the district court are intended to be its judgment." 46 Am.Jur.2d Judgments § 70 (2006) (footnotes omitted).

Spokane Structures, Inc. v. Equitable Inv., LLC, 226 P.3d 1263, 148 Idaho 616, (Idaho 2010)
------------ Excerpt from page 226 P.3d 1266.

The judgment entered by the court and contained in the record is clearly set forth in a separate document and sets forth the time and date for the clock to begin running. As such, appellants believed the same was a final judgment. Respondent missed the time period to request fees and costs. (See footnote 44).

However, other reasons exist for the denial of fees, costs and pre-judgment interest. Most notable, the appellants believe they are correct upon this appeal and the matter will be reversed. Absent that argument, the appellants still believe they are correct as stated hereafter.

Buku requested a rescission of the contracts with Clark and Peterson which were for the sale of the real property. The lower court believed that Buku could rescind the

[48] R. pp. 432-433.

contract based upon a due diligence period contained in the contract notwithstanding the lack of evidence associated with any zoning issues on the real property. In any event, the court granted summary judgment and the contract became a nullity. As such, there was no contract. Thus, no contractual basis exists for the award of fees since there was "no contract" according to the grant of summary judgment.

> having dismissed the contract claims, the action could not have been one "to recover on a contract." We affirmed the action of the trial court in Day, stating that "to recover attorney fees under the statute, the action must be one to recover on the contract, not merely an action arising from a transaction relating to the purchase or sale of goods." 115 Idaho at 1018, 772 P.2d at 225. Based upon the interpretation of the statute in Day, the trial court's grant of attorney fees against appellants must be reversed; there being no contract between appellants

Management Catalysts v. Turbo West Corpac, Inc., 809 P.2d 487, 119 Idaho 626, (Idaho 1991)
------------ Excerpt from page 809 P.2d 491.

The same logic holds true for the claim of a commercial transaction under Idaho Code Section 12-120. If there is "no transaction" between the parties because the parties are returned to the status quo, then there is no basis for the award of fees. If the "Agreement" is rescinded, then no transaction occurred. Thus, no basis exists statutorily for the award of fees.

> "there is a clear distinction between litigation arising from a commercial transaction and litigation on noncommercial issues that might have future commercial ramifications." 117 Idaho at 424, 788 P.2d at 239. For reasons different from those given by the district judge, we conclude that an award of attorney fees in this case was not authorized under I.C. § 12-120(3).

Edwards v. Edwards, 842 P.2d 307, 122 Idaho 971, (Idaho App. 1992)

------------ Excerpt from page 842 P.2d 309.

This action before the court involved the future purchase of the real property. Although the appellants' disagree with the court's ruling on summary judgment, the case as it stands rescinded the contract and made the future purchase of the real property problematic. Future commercial ramifications do not come under the definition of commercial transactions to be able to award fees and costs.

The lack of a contract or a statutory basis prohibits the award of fees and costs.

> With respect to the provision allowing attorney fees in a commercial transaction, the statute defines a commercial transaction as all transactions except transactions for personal and household purposes. This Court has held that the test is whether the commercial transaction comprises the gravamen of the lawsuit. *Spence v. Howell*, 126 Idaho 763, 890 P.2d 714 (1995); *Brower v.* [126 Idaho 900] *E.I. DuPont De Nemours and Co.*, 117 Idaho 780, 792 P.2d 345 (1990). The gravamen of the lawsuit refers to whether the commercial transaction is integral to the claim and constitutes the basis upon which the party is attempting to recover. *Brower*, 117 Idaho at 784, 792 P.2d at 349.
>
> *Property Management West, Inc. v. Hunt,* 894 P.2d 130, 126 Idaho 897, (Idaho 1995) ------------ Excerpt from pages 894 P.2d 132-894 P.2d 133.

The claim for reimbursement by Buku was by rescinding the contract. By rescinding the contract to recover the earnest money, no contract existed and could not be, by the court's ruling, the gravamen of the lawsuit since a contract no longer existed and a commercial transaction no longer existed. Thus, fees cannot be awarded.

No argument, of a reasonable nature, is made for fees pursuant to any other statute including Idaho Code 12-121. If so, the court should be convinced that nothing done by the appellants was unreasonable, frivolous or without foundation.

Assuming arguendo that the court determines fees should be awarded,

reasonableness of fees is governed by Rule 54 of the Idaho Rules of Civil Procedure. The plaintiff should not be entitled to fees leading up to the ruling on summary judgment by this court.

The appellants successfully defended the first summary judgment motion and all allegations until the second sitting judge made a ruling. Thus, all fees prior to the briefing on the latest summary judgment motion (second motion for summary judgment) should be denied.

The appellants prevailed on the first motion and the events leading up to that decision. Thus, the respondents could not argue, in reasonable fashion, that it was entitled to fees until the date of July 8, 2010. (The date commencing the preparation for the second summary judgment motion.) Furthermore, the court did not accept the motions to strike, etc. and those matters should not be awarded for the unsuccessful attempt by Buku. Buku would only be entitled to 68.9 hours according to the affidavit of its attorney commencing July 8, 2010 until February 15, 2011.

Fees and costs should not be awarded. However, if the contract is reinstated and the matter set for trial, all parties would then be subject to the contractual terms and the jury determination.

ADDITIONAL ISSUES ON APPEAL

1. THE APPELLANTS REQUESTS THEIR COSTS AND FEES AT HEARINGS IN THE LOWER COURT

Justice Jesse R. Walters, Jr. in his updated primer of the former Lon Davis manual on the award of attorney fees, A Primer For Awarding Attorney Fees in Idaho, Idaho Law Review, Volume 38, 2001, Number 1, indicates that the following steps are necessary for an award of fees and costs:

A. A prevailing party;

B. A statutory or contract basis for award of fees; and,

C. Compliance with Rule 54 of the Idaho Rules of Civil Procedure.

The respondents were not entitled to summary judgment and could not be a prevailing party. Second, the appellants were entitled to a ruling on their summary judgment motion that respondent breached the contracts. The appellants would have prevailed.

Both judges accepted and considered evidence outside the four corners of the contracts despite a ruling such contracts and clauses contained in the contracts were unambiguous. The law does not allow such action. *Clark v. St. Paul Property and Liability Ins. Companies,* 639 P.2d 454, 102 Idaho 756, (Idaho 1981).

Moreover, the documents were drafted by respondents and should have been construed against Buku. Additionally, the court must view the evidence in a light most favorable to Clark and Peterson. *Smith v. Idaho State Credit Union,* 103 Idaho 245, 646 P.2d

1016 (Ct. App. 1982); *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust,* 147 Idaho 117, 206 P.3d 481 (2009). The court also was precluded from drawing inferences in favor of the respondents since the court was not the fact-finder as this matter was scheduled for a jury trial. *Sewell v. Neilson, Monroe, Inc.,* 109 Idaho 192, 706 P.2d 81 (Ct. App. 1985); *Farnworth v Ratliff,* 134 Idaho 337, 999 P.2d 892 (2000).

2. THE APPELLANTS REQUEST THEIR COSTS AND FEES ON APPEAL.

An award of attorney fees on appeal requires a statutory or contractual basis. A contract exists in the case at bar with an attorney fee provision if this court reinstates the contract and remands the matter for trial. Appellants rely upon the contract and upon Idaho Code §§ 12-120; 12-121 and I.A.R., Rules 40 and 41 in their request for fees on appeal.

Fees are awarded on appeal as follows:

> Section 12-120(3) of the Idaho Code requires that the court hearing any action arising out of a contract for services award reasonable attorney fees to the prevailing party. This Court has interpreted I.C. § 12-120(3) to mandate the award of attorney fees on appeal as well as at trial. Chemetics, 130 Idaho at 258, 939 P.2d at 577.
>
> . . . also asserts a right to attorney fees and costs on appeal based on I.A.R. 40, I.A.R. 41, I.C. § 12-120 and I.C. § 12-121. As stated above, this Court has held that I.C. § 12-120(3) mandates the award of attorney fees on appeal to the prevailing party. Additionally, costs are properly awarded to the prevailing party on appeal pursuant to I.A.R. 40. Sammis v. Magnetek, Inc., 130 Idaho 342, 353, 941 P.2d 314, 325 (1997).

Hummer v. Evans, 979 P.2d 1188, 132 Idaho 830, (Idaho 1999)
------------ Excerpt from page 979 P.2d 1191.

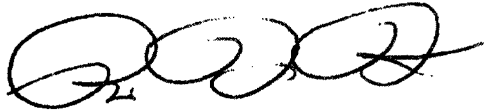
Fees should be awarded to appellant as a prevailing party pursuant to the contract, statutes cited, and Rule 54, I.R.C.P. The lower court could not have made the findings and conclusions to support summary judgment.

CONCLUSION

The lower court could not supplement an "unambiguous" clause or contract with additional evidence not contained in the contracts. The intent of the parties is a factual question to be determined by the fact-finder. Respondent breached the contracts with the appellants. Fees and costs were not proper or properly considered. Pre-judgment interest was inappropriate.

Fees and costs should be awarded to the appellants at trial and upon appeal.

DATED this 7th day of November, 2011.



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC
ATTORNEY FOR APPELLANTS

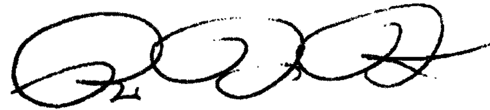
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of November, 2011 true and correct copies of the foregoing were delivered to the following persons(s) by:

Hand Delivery

xx Postage-prepaid mail

Facsimile Transmission



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC
ATTORNEY FOR APPELLANTS

DeAnne Casperson, Esq.
Attorney for Respondents
P.O. Box 50130
Idaho Falls, ID 83405