12-20-2013

ABC Agra v. Critical Access Group Appellant's Brief Dckt. 40573

IN THE SUPREME COURT OF THE STATE OF IDAHO

ABC AGRA, LLC, an Idaho limited liability company, Plaintiff/Appellant, v. CRITICAL ACCESS GROUP, INC., a Minnesota non-profit corporation, Defendant/Respondent.	**Supreme Court Docket No. 40573-2012** Jerome County Case No. CV-2012-513

APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for Jerome County

Honorable Robert J. Elgee, District Judge, Presiding

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A. Nature of the Case

This case presents an appeal of a district court decision to dismiss a declaratory judgment action on the basis of ripeness pursuant to I.R.C.P. Rule 12(b)(6). Additionally, the appeal also seeks a reversal of the district court's award of costs and attorney fees in favor of the Respondent.

B. The Course of the Proceedings.

ABC Agra, LLC ("ABC") sought a declaratory judgment against Critical Access Group, Inc. ("CAG") relative to the interpretation of a restrictive covenant that affected real property which ABC had sold to CAG's predecessor. The restrictive covenant provided that CAG's property could be used solely for the construction of healthcare facilities, as had been defined by CAG's predecessor. After ABC learned of the property's conveyance to CAG, ABC sent CAG a letter advising CAG of the restrictive covenant. After being advised of the existence of the covenant, CAG's attorney informed ABC that although CAG was aware of ABC's position concerning the enforceability of the restrictive covenant, that awareness was not to be interpreted as a statement that CAG agreed with ABC's position. Because of the uncertainty created by CAG in that regard, and because of the potential impact that could be visited on the remainder of ABC's commercial property development, ABC filed its Complaint.

CAG responded with a Motion to Dismiss pursuant to I.R.C.P. Rule 12(b)(6). ABC defended the motion, but after multiple briefings and two oral arguments, the district court granted CAG's Motion to Dismiss, and subsequently granted CAG an award of costs and

attorney fees.

ABC timely filed this appeal.

C. Statement of the Facts.

For purposes of a motion to dismiss pursuant to I.R.C.P. Rule 12(b)(6), and as expressly acknowledged by CAG, CAG accepted all of the facts set forth in the verified Complaint as true. The Complaint for Declaratory Relief is contained in the record at R., pp. 3-60, inclusive, and sets forth the following facts:

1. Plaintiff ABC Agra, LLC ("ABC"), is an Idaho limited liability company with its principal place of business in Jerome County, Idaho. ABC is the developer of certain real property known as Crossroads Point Business Center PUD, as shown on the recorded plat ("Plat") thereof, and which is recorded as Instrument No. 2063855 in the records of Jerome County, Idaho. ABC owns real property located therein, and is a party interested under a written contract as set forth herein.

2. CAG is a Minnesota non-profit corporation owned by or affiliated with Essentia Health ("Essentia"), which is also a Minnesota non-profit corporation. Both corporations are active and in good standing in the state of Minnesota, and both corporations have registered office addresses at 502 East Second Street in Duluth, Minnesota. See **Exhibits "A"** (R., pp. 10-11) **and "B"** attached hereto (R., pp. 12-13).

3. Defendant Critical Access Group, Inc. ("CAG") is a Minnesota non-profit corporation that currently owns Lots 6, 7, 8 in Block 8 of Crossroads Point Business Center PUD Phase 1, Jerome County, Idaho ("Subject Property"), as shown on the Plat thereof. CAG acquired its

property from St. Benedict's Family Medical Center, Inc. ("St. Benedict's") pursuant to a General Warranty Deed recorded on October 3, 2011, as Instrument No. 2114629, in the records of Jerome County, Idaho. A copy of said General Warranty Deed is attached hereto as **Exhibit "C"** (R., pp. 14-17).

4. On or about March 14, 2007, St. Benedict's and St. Alphonsus Regional Medical Center, Inc. ("St. Alphonsus") executed the Option Agreement (the "Option Agreement"), a true copy of which is attached hereto as **Exhibit "D"** (R., pp. 18-33), and by this reference incorporated herein. Pursuant to Recital "B" thereof, St. Alphonsus assigned all of its right in and to that Option Agreement and the Subject Property to St. Benedict's. St. Alphonsus has no interest in the Subject Property.

5. St. Benedict's at all times prior to the execution of the Option Agreement represented to ABC that it would build a new hospital on the Subject Property. See documents attached hereto as **Exhibit "E"** (R., p. 34).

6. In order to facilitate St. Benedict's plan to build a new hospital on the Subject Property, the Option Agreement contemplated that ABC would gift Lots 7 and 8 of the Subject Property to St. Benedict's if St. Benedict's exercised its option to purchase the 8.89 acres of property within Lot 6 of the Subject Property. Lot 7 contained 10.09 acres, and Lot 8 contained 11.55 acres.

7. A restrictive covenant in the Option Agreement contemplated that in the event the Option was exercised, the Subject Property could only be used by St. Benedict's, or its successors and assigns, for healthcare facilities. See paragraphs 4 and 14 of the Option Agreement. Notice of

the Option Agreement relative to the Subject Property was recorded as hereinafter set forth.

8. On May 14, 2007, St. Benedict's exercised its option. See **Exhibit "F"** attached hereto (R., p. 35), and made a part hereof by this reference. St. Benedict's purchased Lot 6 of the Subject Property, and contemporaneously therewith, ABC honored its contract and executed a Gift Deed conveying Lots 7 and 8 of the Subject Property to St. Benedict's. See **Exhibit "G"** attached hereto (R., pp. 36-39), and made a part hereof by this reference.

9. In the event that St. Benedict's exercised its option, paragraph 4 of the Option Agreement required ABC to execute a restrictive covenant applicable to all property within the Crossroads Point Business Center PUD prohibiting the provision of healthcare services in healthcare facilities on any other property in the Plat without the prior written permission of St. Benedict's.

10. ABC and St. Benedict's undertook to draft the restrictive covenant contemplated by paragraph 4 of the Option Agreement. At all times during the negotiations, St. Benedict's was represented by the law firm of Givens Pursley LLP ("Givens").

11. Counsel for ABC completed an initial draft of a Supplemental Declaration of Covenants, Conditions and Restrictions of Crossroads Point Business Center PUD ("Supplemental Declaration"), and provided it for review to Judson Montgomery, an attorney with Givens who was representing St. Benedict's.

12. The Supplemental Declaration drafted by ABC contemplated a list of medical uses in order to define the term "healthcare services" that could be placed within healthcare facilities on the Subject Property.

13. In response to the proposal submitted by ABC, Judson Montgomery of Givens sent a facsimile letter to ABC which is attached hereto as **Exhibit "H"** (R., pp. 40-48), and by this reference incorporated herein. For purposes of defining what could be constructed as a healthcare facility, Mr. Montgomery eliminated all of ABC's proposed restrictions, and instead, substituted the language of "private practice of medicine for the care and treatment of human beings" for the definition of healthcare uses in a healthcare facility.

14. ABC agreed to St. Benedict's revisions as proposed, and on June 13, 2007, the Supplemental Declaration was recorded in Jerome County, as Instrument No. 2073551, a true copy of which is attached hereto as **Exhibit "I"** (R., pp. 49-53), and incorporated herein by this reference.

15. As referenced in paragraph 3 above, on October 3, 2011, St. Benedict's conveyed all three lots of the Subject Property to Critical Access Group, Inc. ("CAG") pursuant to the General Warranty Deed attached hereto as Exhibit "A". Notice of the Option Agreement had previously been recorded in Jerome County by ABC in a Memorandum of Option Agreement recorded on June 29, 2011, as Instrument No. 2113149, a true copy of which is attached hereto as **Exhibit "J"** (R., pp. 54-57), and incorporated herein by this reference. Such notice was identified as a permitted exception to the deed of the Subject Property to CAG from St. Benedict's.

16. St. Benedict's was previously owned by Benedictine Health Systems ("BHS"), which is also a Minnesota non-profit corporation, with a registered office address in Duluth, Minnesota. Subsequently, BHS transferred its interest in St. Benedict's to Essentia, which also owns or is affiliated with CAG. On October 4, 2011, one day after the Subject Property was recorded in

favor of CAG, the St. Benedict's name was changed to St. Luke's Jerome, Ltd.

17. CAG is either an affiliate or subsidiary of Essentia, and was at all times aware and had actual notice of the restrictive covenant contained in the Option Agreement which provided that the Subject Property could only be used for healthcare facilities.

18. ABC is a "person" interested under a written contract whose rights or status would be affected if a use other than healthcare facilities was constructed on the Subject Property.

19. Pursuant to the clear and unambiguous language of the Option Agreement, only healthcare facilities are allowed to be constructed on the Subject Property, unless and until the parties, or their successors, agree to a written amendment thereof.

20. On January 30, 2012, counsel for ABC sent a letter to CAG in Duluth, Minnesota, advising its president, Daniel McGinty, of the restrictions as to healthcare facilities on the Subject Property consistent with the definition that had been provided by CAG's attorneys at the Givens firm. See **Exhibit "K"** attached hereto (R., p. 58), and made a part hereof by reference.

21. Daniel McGinty of CAG is the same individual to whom Arlen Crouch of ABC corresponded with concerning a transfer of the Option Agreement to BHS on January 23, 2007. See **Exhibit "L"** attached hereto (R., p. 59), and made a part hereof by reference.

22. On February 9, 2012, the Givens firm responded to the letter sent to CAG and stated:

> I was also asked to confirm that CAG is aware of the March 14, 2007 Option Agreement and does understand your client has taken certain positions with respect to [the restrictive covenant in] that document. **The fact that CAG is aware of your client's previous position should not be interpreted as a statement that CAG agrees with such positions.**

(Emphasis added). See **Exhibit "M"** attached hereto (R., p. 60), and made a part hereof by

reference.

23. An actual justiciable controversy exists between the parties within the meaning of Idaho Code § 10-1201, et seq., in order to determine the rights, status and legal relations between the parties relative to the question of construction or validity arising under the restrictive covenant in the Option Agreement.

24. The court's declaratory judgment that the Subject Property can only be developed with healthcare facilities, as expressly defined by the Givens law firm, unless otherwise amended in writing between the parties thereto, or their successors, will finally resolve this controversy.

25. None of the parties have previously sought any adjudication or declaration of their rights concerning the issues raised herein.

II. ISSUES ON APPEAL

1. Did the district court err in dismissing ABC's Complaint pursuant to I.R.C.P. Rule 12(b)(6) on the basis of a lack of ripeness?

2. Should the award of costs and attorney fees in favor of CAG be vacated?

3. Should ABC be awarded costs and attorney fees on appeal pursuant to I.A.R. Rules 40 and 41, and paragraph 11 of the Option Agreement as contained in the record at R., p. 23?

III. ARGUMENT

ABC is the developer of Crossroads Point Business Center PUD (the "PUD"), a large-scale commercial planned unit development located at the intersection of Interstate 84 and Highway 93 in Jerome County, Idaho. In 2007, St. Benedict's ("St. Benedict's") the local hospital in Jerome, concluded that its aging hospital facility required a replacement facility. Consequently, St. Benedict's and St. Alphonsus Regional Medical Center, Inc. ("St. Alphonsus") jointly executed the Option Agreement with ABC. The Option Agreement provided that St. Benedict's and St. Alphonsus had an option to purchase Lot 6 in the PUD which lot contained 8.89 acres. If they elected to purchase that property, ABC would gift them Lots 7 and 8 which contained 21.64 acres of additional land to facilitate the construction of the new hospital campus, with the hospital to serve as the primary anchor for the development. The parties included a restrictive covenant in paragraph 4 of the Option Agreement that restricted the three lots to use solely for the construction of healthcare facilities. (See Option Agreement at ¶ 4). By its terms, the Option Agreement was binding upon the successors and assigns of St. Benedict's and St. Alphonsus. (See ¶ 14 of Option Agreement). St. Benedict's exercised its option, and thereafter, ABC executed a Gift Deed conveying Lots 7 and 8 of the PUD to St. Benedict's. Subsequent to its exercise, St. Benedict's required ABC's execution of a restrictive covenant as against all other property in the PUD which prohibited the provision of healthcare services on any such property. ABC proposed a form of restrictive covenant, but St. Benedict's attorney (now CAG's attorney) countered ABC's proposal with a redline proposal containing revisions acceptable to St. Benedict's, which defined the term "healthcare" in terms of both

services and facilities. The language required by St. Benedict's is contained in Exhibit "H" to the Complaint, and is contained in the record at R., p. 40-48. ABC acquiesced to St. Benedict's restrictive covenant language, and subsequently recorded the supplemental declaration which is attached as Exhibit "I" to the Complaint and contained in the record at R., pp. 49-53.

A newspaper article published in the Twin Falls *Times News* evidenced the collaborative relationship between St. Benedict's and its owner, Benedictine Health Systems ("BHS"), designed to provide high quality healthcare facilities at the anticipated new medical center. On June 29, 2011, ABC recorded a Memorandum of Option Agreement ("MOA") identifying ABC, St. Benedict's and St. Alphonsus as the parties, and which specifically acknowledged that the Option Agreement was binding on the parties with regard to all three lots. (See Exhibit "J" to the Complaint at R., p. 54). Unbeknownst to ABC, St. Benedict's conveyed the lots, including the two lots gifted by ABC, to CAG on October 3, 2011. BHS transferred its ownership interest in St. Benedict's to Essentia ("Essentia"), a Minnesota non-profit corporation which either owns or is affiliated with CAG, also a Minnesota non-profit corporation. Both of them have registered office addresses at the same office building located at 502 East 2nd Street in Duluth, Minnesota. (See Exhibits "A" and "B" to the Complaint at R., pp. 10-13.) As an affiliate or subsidiary of Essentia, CAG was aware and had actual notice of the restrictive covenant contained in the Option Agreement. (See ¶ 19 of Amended Complaint at R., p. 6.) The MOA was identified as a permitted exception to the deed given by St. Benedict's to CAG. (See last paragraph of Permitted Exceptions at R., p. 17.)

Upon serendipitously learning that all three lots had been conveyed to CAG, counsel for

ABC sent CAG a courtesy letter dated January 30, 2012, informing CAG of the healthcare restriction contained in the Option Agreement. (See Exhibit "K" to Complaint at R., p. 58.) The letter was addressed to Mr. Dan McGinty, the president and registered agent of CAG. Five (5) years earlier, a letter had coincidentally been sent to Mr. McGinty by ABC on January 23, 2007, regarding the community's excitement about the planned new hospital. (See Exhibit "L" to Complaint at R., p. 59.) However, that letter was in Mr. McGinty's capacity as an officer of BHS, and not CAG, because CAG had absolutely no involvement with the proposed new hospital in 2007. Instead of acknowledging the restrictive covenant, CAG had the law firm which drafted the restrictive covenant language for St. Benedict's send a letter to ABC dated February 9, 2012, which stated, in pertinent part, as follows:

> I was also asked to confirm that CAG is aware of the March 14, 2007 Option Agreement and does understand your client has taken certain positions with respect to [the restrictive covenant in] that document. **The fact that CAG is aware of your client's previous position should not be interpreted as a statement that CAG agrees with such positions.**

(Emphasis added). (See Exhibit "M" attached to Complaint at R., p. 60.) In light of the uncertainty created by CAG through its correspondence, and because an inconsistent position could dramatically disrupt ABC's ability to market its property, ABC reluctantly concluded that it had little choice but to pursue the declaratory judgment action. Because ABC was in the business of developing and selling its property, and because ABC was required to provide warranties of exclusivity such as that required by St. Benedict's and St. Alphonsus, ABC was placed in a position of uncertainty relative to the potential future uses on the thirty acres that was located in the heart of ABC's PUD. Another purchaser of property in the PUD who required a similar

exclusivity provision such as that which had been demanded by St. Benedict's and St. Alphonsus, could not be provided such warranties and representations of that exclusivity by ABC in light of CAG's response to ABC's letter. In order to resolve the uncertainty, and the apparent lack of any agreement between the parties as to the meaning or validity of the contractual covenant language, and in order to bring certainty and finality to the restrictive covenant, ABC was compelled to resolve the matter through a declaratory judgment action. There was absolutely nothing to be gained by waiting. ABC's alternative was to await CAG taking action regarding the use of the property in a manner inconsistent with the covenant, and then ABC would have to seek an emergency temporary restraining order and/or injunction in accordance with paragraph 4 of the Option Agreement. R., p. 20. ABC contends that a declaration of the rights of the parties will afford a relief from uncertainty and controversy in the future.

A. Standard of Review.

In *Selkirk Seed Co. v. State Insurance Fund*, 135 Idaho 649, 22 P.3d 1028 (2000), this Court stated the following with regard to the standard of review brought on an appeal from an order of the district court dismissing a case pursuant to I.R.C.P. Rule 12(b)(6). The Court stated:

> When this Court reviews an order of the district court dismissing a case pursuant to I.R.C.P. 12(b)(6), the non-moving party is entitled to have all inferences from the record reviewed in its favor. *See Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 997 P.2d 591 (2000); *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). After drawing all inferences in the non-moving party's favor, this Court then asks whether a claim for relief has been stated. *See id.* We do not consider whether the non-moving party will ultimately succeed in its claim, but whether it is "entitled to offer evidence to support the claims." *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90, 96

> (1974)). [As an aside, *Scheuer* was overruled on other grounds in *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984)].

22 P.3d at 1029.

B. Ripeness and the Need for a Declaratory Judgment.

CAG asserted that this case was not ripe, despite its attorneys having been the architects of the restrictive covenant for BHS, and despite having been the authors of the letter which gives rise to the uncertainty and controversy in this proceeding. The instant case calls to mind one of the seminal cases in Idaho jurisprudence regarding ripeness. In *Miles v. Idaho Power Company*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989), the Idaho Supreme Court considered a lack of ripeness assertion, and stated as follows:

> Deferring adjudication would add nothing material to the resolution of the legal issues presented, and it would, in fact, delay implementation of the agreement. "Generally, in determining whether to grant a declaratory judgment, the criteria is whether it will clarify and settle the legal relations at issue, and whether such declaration will afford a leave from uncertainty and controversy giving rise to the proceeding." *Sweeney v. Am. Nat'l Bk.*, 62 Idaho 544, 115 P.2d 109 (1941). Here, nothing can be gained by delaying adjudication of the issue. It is clear that this issue will be before us either now or in the future, and a declaration now of the various rights of the parties will certainly afford a relief from uncertainty and controversy in the future. "Since we are persuaded that 'we will be in no better position than we are now' to decide this question, we hold that it is presently ripe for adjudication." (Citation omitted).

778 P.2d at 765.

In 1996, the case of *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 913 P.2d 1141 (1996) was decided by the Idaho Supreme Court. In determining that a matter was ripe for judicial review, the Court stated:

> The county and the board members assert that this case is not ripe for judicial review. We disagree.
>
> In Miles, the Court pointed out that "a declaratory judgment action must raise issues that are definite and concrete, and must involve a real and substantial controversy as opposed to an advisory opinion based upon hypothetical facts. Ripeness asks whether there is any need for court action at the present time." 116 Idaho at 642, 778 P.2d at 764. All of these conditions are met in this case. The ordinance is in place. It contains several edicts concerning the compliance of federal and state agencies with the plan and announces that "[n]o wilderness areas shall be designated in Boundary County." The ordinance proclaims: "Boundary County shall enforce compliance with [the plan] ...." The affidavit of the board members who enacted the ordinance stating that they "deemed that it would not be proper to seek enforcement of the ordinance by fines or penalties" does not override the terms of the ordinance requiring enforcement. We will not speculate whether the board members will choose another form of enforcement or whether a new board will choose to enforce the ordinance by fines or penalties. The ordinance requires the plan to be enforced.
>
> In *Harris v. Cassia County*, 106 Idaho 513, 681 P.2d 988 (1984), the Court noted that the right sought to be protected by a declaratory judgment "may invoke either remedial or preventive relief; it may relate to a right that has either been breached or is only yet in dispute or a status undisturbed but threatened or endangered; but, in either or any event, it must involve actual and existing facts." (Citations omitted). In the present case, the ordinance threatens to disturb the status and management of federal and state public lands in Boundary County. The issues are definite and concrete and there is a real and substantial controversy.

913 P.2d at 1146.

That case was followed by the opinion in *Schneider v. Howe*, 142 Idaho 767, 133 P.3d 1232 (2006), where the Court stated:

> The Howes assert that Schneider's claim is not ripe for review because his land is currently zoned as agricultural land and he has not submitted the proper applications to have the zoning changed

or submitted a subdivision plat to the County. Schneider concedes that he has not applied to change the zoning or submitted a subdivision plat. However, he contends that his claim is ripe because the Declaratory Judgment Act allows parties with an interest in a potential legal determination to seek redress regardless of whether they can seek further relief and because he suffered harm the moment the Howes refused to let him use the easement.

Ripeness asks whether court action is necessary at the present time. *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 376, 913 P.2d 1141, 1146 (1996).

> Declaratory judgments by their very nature ride a fine line between purely hypothetical or academic questions and actually justiciable cases. Many courts have noted that the test of justiciability is not susceptible of any mechanistic formulation, but must be grappled with according to the specific facts of each case.

(Citation omitted). "Generally, in determining whether to grant a declaratory judgment, the criteria is whether it will clarify and settle the legal relations at issue, and whether such declaration will afford a leave from uncertainty and controversy giving rise to the proceeding." (Citations omitted). If deferring the adjudication "would add nothing material to the legal issues presented" so that a court will be in no better position in the future and if a declaration of the rights of parties will "certainly afford a relief from uncertainty and controversy in the future" the case may be presently ripe for adjudication.

Here, Schneider has asked the district court to determine the existence of an easement as it appears in a plat. Delaying the adjudication would add nothing material to the litigation and a court would be in no better position to decide the existence of the easement. A declaration regarding the existence of an easement will afford both Schneider and the Howes relief from uncertainty and controversy in the future. Additionally, local governmental entities often do not want to become involved in pending lawsuits. The County may be reluctant to approve any subdivision requested by Schneider that would use the road easement in question as long as there is a controversy about the existence of the easement. Therefore, the issue is ripe.

Id.

CAG argued to the district court that the decision in *Davidson v. Wright*, 143 Idaho 616, 151 P.3d 812 (2006) was critical in the district court's analysis of the instant case. (Supp. R., pp. 8-9). Given that Judge Robert Elgee was reversed by the Idaho Supreme Court in *Davidson, supra,* it was easy to understand his sensitivity to this Court's decision, and that apparently led to the comments he made at the hearing of this matter. (See TR., p. 30-32).

> Davidson was my case. Davidson was a gentleman who came in and said we need to have an election in Sun Valley to determine – we want the voters of Sun Valley – we've got enough votes for a – or enough signers of a petition, we want to have a vote by the citizens of Sun Valley to legalize marijuana.
>
> And the City of Sun Valley came in and said, judge, that's ridiculous. That's like asking us to set the speed limits in Twin Falls. Everybody knows that's not going to work. That's a matter of state law. Sun Valley can have referendums until hell freezes on whether – what Sun Valley residents think of smoking marijuana, but Sun Valley says we can't affect state law. That's a matter of state law. That's way over our heads. And, besides, these elections cost us $10,000 to put on. This isn't a moot question. This is a justiciable controversy. Why make the City of Sun Valley spend $10,000 to have an election and then we can't do anything about the constitutionality or the use of marijuana in the state.
>
> And I looked at that and I said why have the City of Sun Valley spend $10,000 to have an election when they can't do anything about it, they're powerless. And May vs. Cenarrusa, some of those cases told me, they clearly define the law, that that's not a moot exercise, the Court can enjoin an election that's worthless and stupid. And that's pretty much what I thought, it was worthless and stupid, and so I said so.
>
> So Mr. Davidson, pro se, went to the Idaho Supreme Court who decided in the meantime the Ten Commandments case, and the

> Supreme Court came out with the result that you're reading now in Davidson and they said, well, you know, an election might not have – an election might not have – might not have passed, so why don't we wait and see.
>
> Isn't that the trend in the federal system and in the Idaho courts?

(TR., p. 30, LL. 13-25; p. 31, LL. 1-24). However, ABC contends that in this case, reliance on *Davidson, supra*, would be misplaced. In *Davidson, supra,* Davidson attempted to compel the Sun Valley City Clerk to accept or reject a proposed initiative based on the municipality's view of its constitutional merits. In ruling on the declaratory judgment action, the Court stated:

> The substance of Davidson's proposed initiative will not be ripe for judicial review unless or until passage by the voters brings up the problem of enforcing a potentially invalid law. ...Until then, any judgment on the merits of this case would be an academic discussion on a hypothetical set of facts.

151 P.3d at 817. In the instant case, there is no hypothetical set of facts. Either the covenant contained in the Option Agreement is valid or it isn't. ABC had advised CAG of its applicability, but CAG then advised ABC that its awareness of ABC's position was not to be interpreted as agreeing that the healthcare limitation was binding on its property. The controversy is definite and concrete, and touches upon the legal relations of the parties. The controversy admits of specific relief through a decree of a conclusive character. Deferring the adjudication of this matter to a later date will add nothing material to the resolution of the legal issue presented. Consistent with *Miles, supra*, the adjudication in this case will clarify and settle the legal relations at issue, and will provide the parties relief from any uncertainty or lack of agreement as specifically asserted by CAG's attorney.

C. ABC's Option to Purchase.

In paragraph 7 of the Option Agreement (R., p. 20), the parties provided for an option in favor of ABC to repurchase the three lots if St. Benedict's had not commenced construction of a healthcare facility within three years of its exercise of its option to purchase. From a reading of CAG's original Brief and Reply Brief at the district court level, it was apparent that CAG wanted to force ABC to exercise its Option and purchase the property from CAG. ABC understands CAG's desires in that respect. It is no secret that commercial property values declined precipitously between 2007 and 2012, a fact which rendered economically unviable a decision by ABC to exercise its option to repurchase the property. CAG's alternative approach was for ABC to try to market the remainder of its property in the PUD despite having knowledge of the uncertainty imparted to it by CAG relative to the validity of the restrictive healthcare covenant on CAG's property. The dilemma regarding that second alternative was raised in oral argument at the district court when ABC employed the example of the Chevron gas station that demanded an assurance from ABC that it would be the exclusive provider of fuel sales in the entire PUD. (TR., p. 25, LL. 7-25.) When Chevron demanded such a covenant from ABC, ABC would be left with the uncertainty as to what CAG might assert it could develop on its thirty acres. However, this is the exact same type of covenant that had been demanded by St. Benedict's and St. Alphonsus in paragraph 4 of the Option Agreement wherein they required that they would be the exclusive provider of healthcare services within the entirety of the PUD. CAG somewhat cavalierly argued at the hearing that Chevron could simply conduct a title report, and satisfy itself with due diligence about what could and could not be done within the Crossroads Ranch project. The

problem with that approach, however, is the hidden uncertainty pertaining to CAG's property that has been created as a result of the letter from CAG through its attorney. [If CAG attempted to allow another gas station to come into the PUD after Chevron had purchased its property with a restrictive covenant exclusive to Chevron, there would obviously be a lawsuit brought by Chevron against ABC.] Title reports and due diligence by Chevron would never disclose those matters. It is worthwhile for the court to note the scope and extent of the representations and warranties that were demanded of ABC by CAG's predecessor in the Option Agreement at Paragraph 9(f). ABC was required to include the following language:

> Optionor has no knowledge of any claims, actions, suits, arbitrations, proceedings, or investigations by or before any court or arbitration body, any governmental, administrative or regulatory agency, or any other body, pending or threatened against, effecting [sic-affecting] or relating to the Real Property or Gift Property, or the transactions contemplated by this Option Agreement, **nor is Optionor aware of any basis for such claim, action, suit, arbitration, proceeding or investigation.**

(Emphasis added). *Id.* at p. 5. ABC is left with the abiding uncertainty relative to the position advanced by CAG's attorney in his letter. As indicated above, BHS, St. Benedict's, Essentia, and CAG are all related entities, and they have at all times since the beginning been represented by the same law firm. It was that same law firm who painstakingly redlined ABC's draft of the restrictive covenant, and substituted one with language that it demanded on behalf of St. Benedict's, the predecessor in interest to CAG. It seems facially inconsistent for the drafters of the "healthcare facilities" language to take the position as was stated in the letter dated February 9, 2012. (R., p. 60). This is hardly "a potential academic debate" as suggested by CAG in its Memorandum. (Supp. R., p. 11). For ABC, the uncertainty created by the letter is palpable. As if the letter were

not enough, CAG also raised the legal issue of merger in its briefing to the district court, and provided a rather protracted legal analysis of the merger doctrine regarding the deed and covenant in this case. (R., p. 75-77). CAG also raised the issue of its ability to enforce restrictive covenants within 200 feet of the three lots, and the right to seek to enforce other rights under the Option Agreement. (R., p. 78). If anything, CAG has only compounded the uncertainty that is requisite to allow this declaratory judgment action to proceed. If, as CAG suggests, it needs to assert a counterclaim as to the merger doctrine or other legal issues, that is CAG's right and prerogative. Such argument only supports ABC's position that resolving these issues now will aid the parties in avoiding uncertainty and controversy in the future.

D. Federal Law.

CAG asserted in its briefing and oral arguments that the district court should look to federal court decisions for guidance. As a consequence, ABC undertook research of federal declaratory judgment action decisions to bolster its position.

In *Reliance Life Insurance Company v. Burgess*, 112 F.2d 234 (8th Cir. 1940), the 8th Circuit Court of Appeals stated:

> The Declaratory Judgment Act, 28 U.S.C.A. 400, 'did not create any new substantive right. It is procedural in nature, designed to expedite and simplify the ascertainment of uncertain rights; **and it should be literally construed to attain that objective.**'

(Emphasis added). 112 F. 2d at 238. The Idaho Supreme Court fully embraced the 8th Circuit's statements in *Sweeney v. American National Bank, et al.*, 62 Idaho 544, 115 P.2d 109 (1941) (*overruled on other grounds*), when the Court stated the following:

> It was held in *Reliance Life Ins. Co. v. Burgess*, 112 F.2d 234, as follows: "The Declaratory Judgment Act must be liberally construed to attain its objective, which is to expedite and simplify the ascertainment of uncertain rights."
>
> Anderson on Declaratory Judgments, page 29, in stating the general rule uses this language:
>
> "The very purpose of the declaratory judgment statutes, as expressed within the uniform act, is to settle and to afford relief for uncertainty and insecurity with respect to rights, status, and other legal relations, and to place a restricted construction upon this language would be to delete from the statute a beneficent provision, inserted therein by virtue of legislative authority. It should be kept constantly in view, lest we lose the benefit of this instrumentality of justice, that it is to be liberally construed and freely applied in cases coming within its terms."

In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), the U.S. Supreme Court stated:

> In *Abbott Laboratories,* which remains our leading discussion of the doctrine [of ripeness] we indicated that the question of ripeness turns on "the fitness of the issues for judicial decisions" and "the hardship to the parties withholding court consideration."

461 U.S. at 201. In the instant case, the district court repeatedly acknowledged that this case was a "close call" in its view. If liberality is to be the watchword in terms of entertaining a declaratory judgment action, then the facts of this case compel a reversal of the district court's decision to grant CAG's Motion to Dismiss. If hardship to one of the parties results due to the withholding of judicial consideration, such a hardship is a further basis for a reversal of the district court's decision. The uncertainty placed upon ABC in the conduct of its business due to CAG's posture in both the letter and in its Reply Brief is such that it would be patently unfair to deny ABC the

ability to proceed with this action. As acknowledged by CAG, the issues appear to be legal in nature, a fact which supported a ripeness finding by the United States Supreme Court in *Abbott Laboratories v. Gardener,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). CAG's attempts to color the situation as being "contingent" because CAG has not yet sought to develop its land for anything other than "healthcare facilities," falls wide of the mark. It was CAG itself that has created the present uncertainty regarding the contractual provisions between the parties, a condition which warrants the invocation of the declaratory judgment statutes. In *Schugg v. Gila River Indian Community*, No. 2-05-AP-003-84 (U.S.D.C., D. AZ, May 25, 2012), the Court stated:

> "Under the strictest interpretation of the ripeness doctrine, all declaratory judgment claims would be suspect, because declaratory relief involves plaintiffs seeking to clarify their rights or obligations before an affirmative remedy is needed. The Supreme Court has rejected that strict conception [rather] Article III requires that there be a substantial controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Aydin Corp. v. Union of India*, 940 F.2d 527, 528 (9th Cir. 1991).

The *Schugg* case involved the plaintiffs' plan to pave certain easements, but they were told by the defendant that they did not have a legal right to pave the easements, or to use them for their planned development. The Court held that the ripeness doctrine did not require a party to infringe on another's rights before an actual case or controversy existed, and that as such, there was a substantial controversy of sufficient immediacy, even though paving of the easements was not about to commence. In that case, there was apparently no writing whatsoever upon which the Court relied in determining that declaratory relief was appropriate. The plaintiffs asserted that the

defendant had simply advised them it would not allow the easements to be paved, and that was sufficient to allow the claim for declaratory relief to proceed in the face of a ripeness challenge.

With regard to the district court's questions inquiring as to the sufficiency of the letter and Reply Brief leading to a ripeness determination, the Court's attention is directed to *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009). That case was an employment case in which a pharmacist raised religious objections to the dispensation of a contraceptive. Her employer apparently told her that "it would not work for [her] to remain employed there." 586 F.3d at 1124. The Court observed that although the employee had not yet suffered the consequences of the imposition of the new rules regarding distribution of such contraceptives, the Court found that her case was ripe because she was at serious risk of losing her job because of those new rules. *Id.* The Court noted while that she had not yet suffered the consequences of the new rules, her risk of losing her job was sufficiently real and immediate based upon a verbal statement made by her employer. If a simple oral statement made in that case can give rise to a determination of ripeness, it is clear that CAG's letter, coupled with the legal assertions contained in its Reply Brief, should lead this Court to a conclusion that this case was ripe for review. Additionally, if the verbal representation that was made in *Schugg*, *supra*, was sufficient to precipitate uncertainty that led to ripeness for a declaratory judgment action, then certainly the Court must determine in this case that both the letter from CAG's attorney and the issues raised in the Reply Brief are sufficient to allow this case to proceed.

E. Idaho Statutory Authority.

In arguing to the district court that this case was not ripe, CAG stated:

> There is no allegation in the Complaint that CAG has breached any provision of the Option Agreement. Specifically, there is no allegation that CAG has used the Property for any purpose other than the construction of a healthcare facility. Indeed, there is no allegation in the Complaint that CAG has commenced any construction on the Property.

(Supp. R., p. 10). CAG now apparently wants to distance itself from the fact that its related predecessor-in-interest, acting through the same law firm, authored the healthcare language of the restrictive covenant, and authored the letter that created the very uncertainty which has led to the filing of the action. In this case, the requisite uncertainty was initially created by the letter from CAG's attorney, and has been subsequently compounded by the various legal issues raised in CAG's Reply Brief to the district court. There is clearly a distinct and immediate uncertainty that has befallen ABC as a consequence, given its inability to make the specific warranties and representations to future buyers as had been expressly demanded by CAG's predecessor when it acquired its property. ABC agrees that there has been no allegation that CAG has breached the Option Agreement. However, Idaho Code § 10-1203 states:

> A contract may be construed either before or after there has been a breach thereof.

Specifically, ABC is proceeding in this action in accordance with Idaho Code § 10-1202, which states, in pertinent part, as follows:

> Any person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder.

F. Attorney Fees.

If this Court agrees with ABC, and reverses the district court's decision, it is apparent that

the district court's award of costs and attorney fees to CAG below must also be reversed. In that event, and consistent with paragraph 11 of the Option Agreement, as well as I.A.R. Rules 40 and 41, costs and attorney fees on appeal should be awarded to ABC as the prevailing party.

IV. CONCLUSION

The district court's internal struggle in this case was apparent as a result of statements made in open court regarding this situation being a "close call". Additionally, it was apparent that the Idaho Supreme Court's decision in *Davidson v. Wright*, *supra*, had created a bad memory for the district court. However, the hypothetical nature of the *Davidson* case differs markedly from the existing facts of the instant case. The uncertainty that was created by CAG's letter and its Reply Brief is anything but hypothetical, unlike the facts in *Davidson*. What CAG wanted all along was to force ABC to exercise an option for more than $1,600,000 at a time when property values in the Jerome area have declined, and liquidity is difficult to come by in an era of sharply reduced credit. ABC contends that CAG's response letter was calculated to lead to the current uncertainty in order to force ABC's hand to either purchase the property, or face the prospect of having the inability to make the same warranties and representations to prospective purchasers that CAG's predecessors had demanded. Having raised the legal issues of merger and other matters relative to various contract terms in the Option Agreement in its Reply Brief to the district court, it is clear that the declaratory judgment action would afford relief to both parties in a single action. It would serve to clarify and settle all the legal relations now at issue in order to afford relief from uncertainty and controversy in the future.

The instant case brings the Court squarely to the provision of an answer to the two-part test for determining ripeness i.e., the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. It would be patently unfair to require ABC to dangle in the uncertainty created by CAG relative to the development of the remainder of ABC's property. Given that the Idaho Supreme Court has embraced the federal court's notion of liberality in deciding to grant declaratory relief, this Court should reverse the decision to grant CAG's Motion to Dismiss. Defenses to the enforcement of the covenant were raised by virtue of the letter from CAG's attorney, and it is clear that CAG's Reply Brief to the district court created more than demonstrable legal issues which deserve to be heard and decided in a single proceeding. In each instance, the requisite need for a declaratory judgment action was created. The Idaho legislature was quite purposeful in providing that a declaratory judgment action could be maintained either before or after a contractual breach had occurred. The sole purpose of having a contract issue determined prior to the time of such a breach was to afford the parties the requisite certainty of their contract. If the documents are clear on their face, the issues presented are solely legal issues for resolution as previously suggested by CAG. Delaying the litigation will change nothing, and will only serve to leave ABC hanging in a state of limbo. When the Option Agreement was drafted, the language contained in Paragraph 9(f) relative to warranties and representations was purposefully chosen by CAG's related predecessor-in-interest. The district court's decision to dismiss this action should b reversed on appeal. The award of costs and fees to CAG should likewise be reversed, with an award of costs and attorney fees to ABC pursuant to the terms of the Option Agreement and I.A.R. Rules 40 and 41.

RESPECTFULLY SUBMITTED this 20th day of December, 2013.

ROBERTSON &, SLETTE, PLLC

BY: _____
GARY D. SLETTE

CERTIFICATE OF SERVICE

The undersigned certifies that on the 20th day of December, 2013, he caused two (2) true and correct copies of the foregoing instrument to be served upon the following persons in the following manner:

Patrick J. Miller	[ ]	Hand Deliver
Givens Pursley	[✓]	U.S. Mail
601 W. Bannock St.	[ ]	Overnight Courier
Boise, ID 83701-2720	[ ]	Facsimile Transmission - 208-388-1300
	[ ]	Email pjm@givenpursley.com

_____
Gary D. Slette