11-14-2013

Brown v. Greenheart Appellant's Brief Dckt. 41189

IN THE SUPREME COURT FOR THE STATE OF IDAHO

JAY BROWN and CHRISTINE HOPSON-BROWN, Husband and Wife,

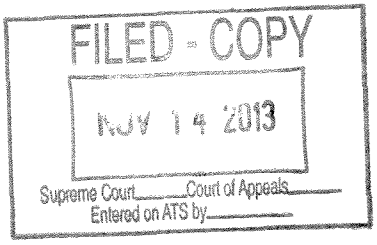
Plaintiffs - Respondents,

v.

AUGUSTA SAYOKO MIMOTO GREENHEART, an individual,

Defendant - Appellant.

SUPREME COURT NO. 41189



APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT AND FOR THE COUNTY OF ELMORE

HONORABLE LYNN G. NORTON, DISTRICT JUDGE, PRESIDING

ATTORNEY FOR PLAINTIFFS-RESPONDENTS

Michael C. Creamer (ISB #4030)
Thomas E. Dvorak (ISB #5043)
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, ID 83701-2720

ATTORNEY FOR DEFENDANT-APPELLANT

Joseph W. Borton (ISB #5552)
Victor S. Villegas (ISB #5860)
BORTON LAKEY LAW OFFICES
141 E. Carlton Ave.
Meridian, ID 83642

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STATEMENT OF THE CASE

(i) Nature of the Case:

This case arises out of a dispute of whether a deed for conveyance of land also transferred a portion of an appurtenant ground water right. Respondents Jay and Christine Brown (the "Browns") brought a declaratory and quiet title action against Appellant Augusta Greenheart ("Greenheart") arguing that a portion of an adjudicated ground water right was not sold nor transferred with the sale of 60 acres of land that Greenheart had purchased from the Browns.

(ii) Facts:

On or about February 5, 1988 the Jay Brown acquired approximately 320 acres of land situated in the East ½ of Section 24, T4S, R5E, B.M., in Elmore County ("Original Brown Property") by way of a Quitclaim Deed. [R. Vol. III, p. 538]. The Snake River Basin Adjudication ("SRBA") Court in Twin Falls, Idaho, decreed Water Rights Nos. 61-2188 and 61-7151 (*See.* Plaintiff's Exhibit Nos. 2 and 3 in Exhibits to Clerk's Record; also found in [R. Vol. I, pp. 25-28]) to Brown on October 26, 2000, authorizing the use of groundwater to the 320 acres comprising the Original Brown Property. *Id.* Water Right No. 61-2188 was decreed authorizing the irrigation of up to 164 acres of land within a permissible place of use that encompassed the 320 acres comprising the Original Brown Property. [R. Vol. III, p. 538]. Water Right No. 61-7151 was decreed authorizing the irrigation of up to 123 acres of land within a permissible place of use that encompassed the 320 acres comprising the Original Brown Property. [R. Vol. III, p. 539].

In December of 2006, the Browns listed for sale 60 acres of their Original Brown Property with an asking price of $80,000, the property was listed with real estate agent Daryl Rhead. [R. Vol. III, p. 539]. In 2006, Greenheart spoke with agent Daryl Rhead about her interest

to purchase property in the Mountain Home, and that she wanted vacant land with low taxes and low maintenance. [R. Vol. III, p. 540]. All communications between the Browns as the seller and Ms. Greenheart as the buyer were conducted through the agent Darryl Rhead. *Id.* Mr. Rhead was both the listing and selling agent for the 60 acres that contained the adjudicated ground water rights at issue in this case, however Mr. Rhead did not testify at trial. [R. Vol. III, p. 540-41].

On January 29, 2007, Defendant Greenheart and Jay Brown entered into a written contract to purchase approximately sixty (60) acres of the Original Brown Property (the "Greenheart Property") from the Browns, leaving the Browns with approximately 260 acres (the "Current Brown Property"). [R. Vol. III, p. 545-546]. The two written documents comprising the contract between the parties include a RE-24 Vacant Land Real Estate Purchase and Sale Agreement and an RE-13 Counteroffer (collectively "Purchase and Sale Agreement"). *See.* Plaintiff's Exhibit No. 6 in Exhibits to Clerk's Record; also found in [R. Vol. I, pp. 114-120].

Paragraph 16 of the Purchase and Sale Agreement reads:

> 16. WATER RIGHTS: Description of water rights, water systems, wells springs, water, ditches, ditch rights, etc. if any, that are appurtenant thereto that are now on or used in connection with the premises and shall be included in the sale unless otherwise provided herein: [blank]

[R. Vol. III, p. 543]. Jay and Christine Brown reviewed the Purchase and Sale Agreement before entering into the agreement. [R. Vol. III, p. 543]. Greenheart believed that when she signed the Purchase and Sale Agreement that she expected to receive everything that came with the land. [March 5-6, 2013 Trial Transcript; Tr. p. 242, ll. 5-9].

Jay and Christine Brown executed a Warranty Deed (*See.* Plaintiff's Exhibit 8 in Clerk's Exhibits on Appeal; also found in [R. Vol. I, p. 29 and p. 121]) dated January 29, 2007 transferring the Greenheart Property to Ms. Greenheart. [R. Vol. III, p. 546]. The Warranty

Deed was recorded in the real property records of Elmore County on January 30, 2007 as Instrument # 384017. *Id.* The language in the Warranty Deed makes no mention of reserving the adjudicated ground water rights and recites that the premises are conveyed "with their appurtenances unto said Grantee and to the Grantee's heirs and assigns forever." *Id.*

The Warranty Deed was prepared by the title company, First American Title. [R. Vol. III, p. 546]. Jay and Christine Brown had a full opportunity to read the language of the Warranty Deed and in fact reviewed the Warranty Deed before signing it. [R. Vol. III, p. 546].

(iii) Course of Proceedings:

On April 5, 2012, Plaintiffs Jay and Christine Brown filed their Complaint to quiet title on adjudicated groundwater rights. [R. Vol. I, p. 11]. The Complaint only asked for a declaration that the terms of the Purchase and Sale Agreement and the Warranty Deed did not transfer water with the sale of the Greenheart Property and that Greenheart should be estopped from asserting that a portion of the groundwater rights were transferred to the Greenheart Property. [R. Vol. I, pp. 17-18]. On May 9, 2012, Greenheart filed her Answer. [R. Vol. I, p. 63].

On November 15, 2012, Greenheart filed her *Motion for Summary Judgment*, with supporting affidavits and memorandum, arguing that the statute of limitations on the Browns' claim had run and the Browns could not rely on equitable principles as a defense to Greenheart's statute of limitations claims. [R. Vol. I, pp. 97-121]. The Browns filed a *Cross-Motion for Summary Judgment* on December 10, 2012, arguing that the adjudicated ground water rights were never appurtenant to the Greenheart property both parties knew that that the groundwater rights not part of the sale. [R. Vol. I, pp. 122-140].[1] On December 21, 2012, Greenheart filed her *Motion to Strike Portions of Jay Brown's and Terri LaRae Manduca's Affidavits*, to preclude

[1] The affidavits of Jay Brown and Terri LaRae Manduca attached to *Plaintiff's Memorandum in Support of Summary Judgment,* all pointed to extrinsic evidence in an attempt to show that the adjudicated ground water rights were not conveyed with the sale of the Greenheart property. [R. Vol. I, pp. 142-166].

extrinsic evidence from being introduced in order to interpret the unambiguous Warranty Deed because fraud or mistake was never pled, let alone pled with particularity as the Idaho Rules of Civil Procedure require. [R. Vol. II, pp. 322-329]. On that same day Greenheart filed a *Response to Plaintiffs' Motion for Summary Judgment*, which argued once again that the court should not consider extrinsic evidence to explain the unambiguous Warranty Deed because the Browns' Complaint did not allege fraud or mistake and was not pled with particularity pursuant to I.R.C.P. 9(b). [R. Vol. II, pp. 286-296].

On December 24, 2012, the Browns filed their *Memorandum in Opposition to Defendant's Motion for Summary Judgment* which only included the arguments that both parties were aware that the adjudicated ground water rights were not included in the sale of the Greenheart property, the statute of limitations had not run, and equitable estoppel was applicable to this case. [R. Vol. II, pp. 330-342].[2]

On December 28, 2012, Greenheart filed her *Reply in Support of Defendant's Motion for Summary Judgment* which articulated that the adjudicated groundwater rights were transferred through the appurtenance clause contained in Warranty Deed, the Plaintiffs applied the wrong adverse possession statute of limitations, and that the four-year statute of limitation began to accrue on the date the Warranty Deed was signed. [R. Vol. II, pp. 343-348].

On December 31, 2012, Browns filed their *Reply in Support of Plaintiffs' Motion for Summary Judgment* and *Response in Opposition to Defendant's Motion to Strike Portions of Affidavits of Jay B. Brown and Terri LaRea Manduca*. [R. Vol. II, p. 349]. The *Reply* and *Motion* argued that the adjudicated water rights were not appurtenant to the Greenheart Property and the

[2] The Plaintiffs in their *Memorandum in Opposition to Defendant's Motion for Summary Judgment* never mentioned any type of mistake had occurred, mutual or unilateral.

Purchase and Sale Agreement's terms confirm that no water rights would be included in the sale. [R. Vol. II, pp. 349-362].

A hearing on the cross-motions for summary judgment was held on January 7, 2013. The district court entered its *Order on Cross Motions for Summary Judgment* on January 31, 2013. [R. Vol. II, p. 366]. In that order the district court denied Greenheart's motion to strike and denied both parties' cross motions for summary judgment finding that material issues of fact existed as to whether "there was a mutual mistake in the deed and whether the court may consider extrinsic evidence for that purpose." *See Order On Cross Motions For Summary Judgment* p. 10; [R. Vol. II, 375]. As such, the matter proceeded to trial set for March 5, 2013.

Greenheart filed a *Motion for Reconsideration* and supporting memorandum on February 15, 2013. [R. Vol. II, p. 385 and p. 386]. Additionally, on February 15, 2013, Greenheart filed a *Motion in Limine to Preclude Allegations of Mistake.* [R. Vol. II, p. 398]. Both motions filed by Greenheart raised the issues that the Browns' Complaint did not plead mistake, in the alternative did not plead mistake with particularity and that the Browns should be precluded from asserting a claim of 'mistake' and or precluded from introducing extrinsic evidence to vary the language of the Warranty Deed.

On February 21, 2013, Browns filed a *Response in Opposition to Defendant's Motion in Limine* and *Motion for Reconsideration* [R. Vol. II, 425] and a *Motion to Amend* [R. Vol. II, p. 408] seeking to amend their Complaint to add a claim for mutual mistake under Count I. *See.* [R. Vol. III, p. 417]. In response to Greenheart's arguments on reconsideration the Browns argued that the parties presented evidence[3] on the cross motions for summary judgment that allowed the court to delve into the issue of mistake because, according to the Browns, the parties had tried that issue by implication. [R. Vol. III, pp. 429-435].

[3] The very extrinsic evidence that the Browns submitted via the affidavits that Greenheart objected to.

The district court took up the parties' motion on February 22, 2013 during the court's regularly scheduled pre-trial conference. After oral argument of the parties the district court denied Greenheart's motion for reconsideration and concluded that the Browns' Complaint pled mistake. The district court held:

> As to whether it relates to whether mistake was plead, while I did not use that heading, this is a notice pleading state. To that extent, I think the party certainly was on notice of what they were claiming in their claims, so I do find that it has been plead with enough particularity in this particular case in the declaratory judgment state to put the parties on notice that mistake is an issue.

See. [Transcript of February 22, 2013; Tr. p. 55, ll. 15-22]. On the Browns' motion to amend their Complaint, the district court held:

> As it relates to the motion to amend answer--or excuse me motion to amend the complaint, the only reason for the motion to amend at this point--and quite frankly, the motion was filed yesterday, so I haven't seen the proposed amendment, but if all you're doing is putting the heading "mistake" on it, you don't need to do that for the court's purpose. This is not a jury trial. This is a court trial. The court has certainly read the pleading and is able to derive what has been pled.
>
> To the extent you would be reframing those to allege new claims, it is untimely, and it would prejudice the other side, so to that extent, the motion to amend is denied. To the extent that parties can amend a pleading any time up until they've closed their case in chief, you can revisit that if you need, based on the evidence that's presented.

See. [Transcript of February 22, 2013; Tr. p. 56, l. 20 thru p. 57, l. 11].

A court trial on the issue of whether there was a mistake was held on March 5 and 6, 2013. On May 10, 2013, the district court entered its *Findings of Fact, Conclusions of Law, and Directions for Entry of Judgment* [R. Vol. III, p. 537] finding that a mutual mistake had occurred between the parties and that the Browns were entitled to a judgment reforming the Warranty Deed to exclude the ground water rights in dispute. The district court entered its *Judgment* on May 23, 2013. Greenheart filed a timely Notice of Appeal to the Supreme Court of Idaho on June 27, 2013. [R. Vol. III, p. 602].

On May 31, 2013, Plaintiffs filed an application for Costs and Attorneys' Fees along with supporting affidavit. [R. Vol. III, pp. 568-594]. On June 13, 2013, Greenheart filed her *Memorandum in Opposition to Plaintiffs' Application for Costs and Attorneys' Fees*. [R. Vol. III, p. 597]. Oral argument on the Browns' request for attorney's fees and costs was held on August 5, 2013. [R. Vol. III, p. 609]. On August 7, 2013, the court issued its *Memorandum Decision and Order Granting in Part Plaintiff's Fees and Costs.* [R. Vol. III, p. 609]. The district court awarded the Browns their attorney's fees under Idaho Code Section 12-120(3) finding that the sale between the parties was a "commercial transaction."

ISSUES PRESENTED ON APPEAL

A. Did the district court err in permitting the Browns to try the issue of mutual mistake?

B. Did the district court err in holding that the Browns' claims were not barred by the applicable statute of limitations?

C. Did the district court err in not finding that the Browns were negligent and therefore precluded from relying on mistake?

D. Did the district court err in holding that the Purchase and Sale Agreement was ambiguous?

E. Did the district court err in finding that this case involved a 'commercial transaction' and therefore attorney fees were awardable under Idaho Code Section 12-120(3)?

F. Is Greenheart entitled to an award of attorney fees on appeal?

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ARGUMENT

I. Standard of Review.

When questions of law are presented, the appellate court is not bound by the findings of the trial court, but is free to draw its own conclusions from the evidence presented. *Automobile Club Ins. Co. v. Jackson*, 124 Idaho 874, 876, 865 P.2d 965, 967 (1993).

The date when a cause of action accrues may be a question of fact or law. *C&G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 143, 75 P.3d 194, 197 (2003). Therefore where issues on appeal involve questions of law to the application of undisputed facts, an appellate court exercises fee review. *Attorney General of Canada on Behalf of Her Majesty The Queen in Right of Canada v. Tysowski*, 118 Idaho 737, 739, 800 P.2d 133, 135 (Ct. App. 1990).

II. The District Court Erred In Permitting The Browns To Try The Issue of Mutual Mistake.

In denying the parties cross-motions for summary judgment, the district court determined that material issues of fact existed as to whether "there was a mutual mistake in the deed and whether the court may consider extrinsic evidence for that purpose." *See Order On Cross Motions For Summary Judgment* p. 10; [R. Vol. II, p. 375]. The district court erred in holding that the Browns' Complaint requested equitable relief under a theory of 'mutual mistake' and therefore should not have forced Greenheart to go to trial on that issue because (1) Browns did not plead mistake in their Complaint; (2) assuming mistake was pled, it was not pled with particularity and therefore did not comply with I.R.C.P. 9(b); and (3) Greenheart did not litigate the issue of mutual mistake during the parties' cross motions for summary judgment through express consent or by implication.

a. The Browns' Complaint Did Not Plead Mutual Mistake.

The Browns never intended to rely on the legal theory of mutual mistake in their case until the district court raised the issue for the first time in its *Order On Cross Motions For Summary Judgment*. *See*. [R. Vol. II, p. 366]. The Complaint as well as Browns' written and oral arguments on the parties cross motions for summary judgment and later the Browns' attempt

to amend the Complaint [R. Vo. II, pp. 408-422] all demonstrate that the Browns did not rely on mutual mistake. Rather, the Browns sought a declaratory ruling to have the Purchase and Sale Agreement and Warranty Deed interpreted that the adjudicated ground water rights were never transferred to Greenheart in the first place when those respective documents were signed. That requested remedy is very specific and not related to any remedy that could be granted under a theory of mutual mistake.

This Court has recognized that "[t]he liberal construction of a complaint in notice pleading is to avoid dismissal of an inartfully drawn complaint that gives adequate notice of the claims sought to be asserted." *AMCO Ins. Co. v. Tri-Spur Inv. Co.*, 140 Idaho 733, 738-739, 101 P.3d 226, 231 – 232 (2004). However, the *AMCO* court also held that when the complaint is specifically drafted to include specific claims and remedies, the party that drafted the complaint is not allowed to assert more claims that were excluded from the complaint. The *AMCO* court held "...this principle is not applicable where there is a clearly drawn complaint that sets forth very specific claims and remedies." *Id.*

The *AMCO* case involved a declaratory action filed by an insurance company seeking a declaration from the court that the insurance policy's exclusion for bodily injury arising out of civil rights violations barred business liability coverage for claims against the insured for violation of Title VII. *Id.* at 140 Idaho 227-228. The insured argued that although the claims and relief in the complaint were based on Title VII, the facts also revealed potential causes of action for assault, battery, false imprisonment, slander and negligent infliction of emotional distress. *Id.* at 140 Idaho 231. The *AMCO* court disagreed with the insured's argument holding that the complaint was very specific that it only sought claims and remedies arising under Title VII. *Id.* at 140 Idaho 232.

In this case, the Complaint did not plead mutual mistake and in fact the Complaint pled legal theories to the exclusion of mutual mistake. The Complaint is completely devoid of the word 'mistake' or any words synonymous with mistake. Moreover, the Complaint does not

request a remedy such as rescission or reformation, which are generally the remedies for mutual mistake. *See e.g. O'Connor v. Harger Const., Inc.*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008) (mutual mistake permits a party to rescind a contract); *Bailey v. Ewing*, 105 Idaho 636, 641, 671 P.2d 1099, 1104 (Ct. App. 1983) (instrument can be reformed to reflect the intentions of the parties due to mutual mistake). Instead, the Complaint lays out the Browns' legal stance that the ground water never left the Browns' possession and therefore the appurtenance clause in the Warranty Deed only created a rebuttable presumption that water could be transferred:

> The facts and circumstances of the transaction by which Defendant purchased the property from Plaintiffs, and the parties' subsequent conduct thereafter, establish that any presumption that any portion of the Water Rights passed to Defendant Greenheart under the general appurtenancy clause of the Warranty Deed is conclusively rebutted by facts clearly demonstrating that it was known to both parties that no portion of the Water Rights were intended to be conveyed, and compel an interpretation of the purchase agreement and Warranty Deed to the effect that the Greenheart Property was purchased and conveyed without water rights, but as dry land.

Complaint ¶ 27; [R. Vol. II, p. 17].

In the very next paragraph of the Complaint the Browns request very specific relief in the form of a "judgment decreeing and declaring that the Purchase and Sale Agreement did not provide for conveyance of any portion of the Water Rights, and that no portion of the Water Rights was in fact conveyed by the Warranty Deed to Defendant Greenheart as an appurtenance to the Greenheart Property..." Complaint ¶ 28(a); [R. Vol. II, p. 17]. There is no request for reformation of the deed or rescission of the contract.

In fact, the oral and written arguments of the Browns during the parties' cross motions for summary judgment clearly demonstrate that the Browns never intended to raise the legal theory of mutual mistake. For example, in their memorandum in support of summary judgment, the Browns' sole legal argument why the district court should consider 'extrinsic evidence' to explain the Warranty Deed was not due to the parties making a mistake. Instead, the Browns argued that the term "appurtenances" is ambiguous with respect to whether water rights are to be necessarily included in a conveyance of land and therefore the result is to automatically consider

extrinsic evidence. *See. Memorandum In Support of Motion For Summary Judgment*, p. 13; [R. Vol. I, p. 136].

In support of their motion for summary judgment, the Browns also submitted affidavits from Jay Brown [R. Vol. I, p. 142], Terri Larae Manduca [R. Vol. I, p. 151], and legal counsel Tom Dvorak [R. Vol. I, p. 165] all of which contained extrinsic evidence. This Court has recognized that "[it] is an elementary rule for the construction of deeds, the language of which is plain and unambiguous, that, in the absence of fraud or mistake, the intention of the parties must be ascertained from the instrument itself....Parol evidence is not admissible for such purpose." *Koon v. Empey*, 40 Idaho 6, 231 P. 1097, 1098 (1924). In response, to the Browns' attempt to use extrinsic evidence, Greenheart specifically argued that fraud or mistake was not pled by the Browns and therefore extrinsic evidence could not be considered. Applying the *Empey* decision and the parol evidence rule to the facts of this case, Greenheart's memorandum opposing summary judgment stated:

> More importantly, the exception to the parol evidence rule (fraud or mistake) that would permit the introduction of extrinsic evidence has never been pled by Browns. Brown's Complaint does not allege fraud or mistake and certainly does not meet I.R.C.P. 9(b) requiring that fraud or mistake be pled with particularity. As a result, the extrinsic evidence Brown attempts to introduce (which Greenheart currently challenges in her motion to strike filed concurrently) as the foundation for their motion cannot be a basis for granting summary judgment.

See Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment pp. 5-6; [R. Vol. II, pp. 290-291]. The Browns could have responded in writing to Greenheart's argument that mistake had in fact been pled, but the Browns did not do so. Not once in all of the written pleadings and affidavits leading up to oral argument on the cross motions for summary judgment did the Browns say they were or had pled mistake.

Likewise, during oral argument on the motion in limine and cross motions for summary judgment, counsel for Greenheart once again reiterated that the Browns had not pled fraud or mistake in the Complaint:

> **Mr. Villegas**: If you don't exclude water from the deed, the water goes with the land. That's what our courts have held. And, of course, again, the Empey case, absent fraud or mistake. And there's been no allegations of fraud or mistake in

> this case, and there have been no allegations of mistake in this case, which has to be specifically pled.

[Transcript of January 7, 2013; Tr. p. 20, ll. 6012].

Again, the rebuttal by counsel for the Browns never responded that mutual mistake had in fact been pled. One would reasonably presume that had Brown intended to rely on a theory of mutual mistake some statement would have been made at oral argument rebutting Greenheart's objections. This is perhaps the most telling argument that the Browns never intended to litigate the issue of whether there was a mutual mistake. Rather than address mutual mistake, the Browns stuck to their legal theory (as set forth in the Complaint) that it was a rebuttable presumption whether water transferred to Greenheart in the first place and that it had not. Counsel for the Browns argued:

> **Mr. Creamer:** The first legal question that the court needs to answer is, were the water rights appurtenant to these 60 acres in the first place at the time of conveyance? ...Was there water under a water right being beneficially used on the land? In this case, for irrigation purposes, was that land irrigated at the time of the conveyance?

[Transcript of January 7, 2013; Tr. pg. 21, ll. 6-16].

> ***

> **Mr. Creamer**: Your Honor, we would submit that it is clearly undisputed that there was no water used on this property. It's desert land today. It was desert land then. It was desert until, clear back to 1986 when my clients acquired the property.
>
> So whether the water right was appurtenant to the land is a legal question the court can determine, and we'd submit that the water right was not appurtenant to the land, notwithstanding there was a partial decree issued seven years previous to this conveyance...

[Transcript of January 7, 2013; Tr. p. 22, ll. 4-13].

The oral argument quoted above, demonstrates that the Browns did not plead mistake in their Complaint because the Browns did not intend to use mutual mistake as one of their legal theories for recovery. The record on appeal demonstrates that the Complaint was clearly drawn asking for specific claims and remedies to the exclusion of other remedies. Therefore, the district court erred in concluding that mistake had been pled by the Browns.

Finally, the Browns' *Response in Opposition to Defendant's Motion to Shorten Time to Hear Her Motions for Reconsideration and Motion in Limine* [R. Vol. II, p. 425] should leave no doubt that the Browns did not plead mistake. The arguments contained in that opposition brief never acknowledged that the Browns pled mistake. Rather, the opposition brief argues that was impliedly tried on the cross motions for summary judgment. *See.* [R. Vol. II, pp. 427-434]. Had the Browns truly believed that they pled mistake, they would not have had to argue that the issue was impliedly tried, or that the Complaint was insufficient and needed to be amended. The Clerk's record on appeal refutes the Browns' arguments and is addressed below.

b. Mistake was not pled with particularity.

Assuming this Court agrees with the district court that the Browns pled mistake in the Complaint, Greenheart asks that this Court hold that the district court erred in allowing the Browns to litigate the issue of mutual mistake because the Complaint was not pled with particularity.

The general policy behind the current rules of civil procedure is to provide every litigant with his or her day in court. *Carrillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 751-752, 274 P.3d 1256, 1266 - 1267 (2012). The purpose of a complaint is to inform the defendant of the material facts upon which the plaintiff bases his action. *Id.* A complaint need only contain a concise statement of the facts constituting the cause of action and a demand for relief. *Id.* In some cases, a heightened pleading requirement may be imposed by rule such as actions alleging mistake and therefore must be stated with particularity. *Id.*; I.R.C.P. 9(b). Rule 9(b) states in pertinent part: "In all averment of fraud or mistake...the circumstances constituting fraud or mistake...shall be stated with particularity." I.R.C.P. 9(b).

In a case addressing the issue of whether the plaintiff had pled fraud with particularity, the court in *Strate v. Cambridge Telephone Co., Inc.*, 118 Idaho 157, 161, 795 P.2d 319, 323 (Ct. App. 1990) held that the complaint did not adequately plead fraud because: (1) the complaint did not mention fraud by name and (2) the plaintiff failed to allege one of the elements of fraud:

> The circumstances constituting fraud must be stated with particularity in the pleading. I.R.C.P. 9(b); *Theriault v. A.H. Robins Co., Inc.*, 108 Idaho 303, 698 P.2d 365 (1985). The elements of fraud are: (1) a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that the representation will be acted upon in a reasonably contemplated manner; (6) the listener's ignorance of its falsity; (7) the listener's reliance on the truth of the representation; (8) the listener's right to rely on the truth of the representation; and (9) the listener's consequent and proximate injury. *Galaxy Outdoor Advertising Inc. v. Idaho Transportation Department,* 109 Idaho 692, 710 P.2d 602 (1985). **In this case, Cambridge failed to mention fraud by name or to allege that the Strates' representations were knowingly false when made. Consequently, we must agree with the trial court that the fraud issue was not framed by an adequate pleading**.

Strate v. Cambridge Telephone Co., Inc., 118 Idaho 157, 161, 795 P.2d 319, 323 (Ct. App. 1990)(underlining and bolding added).

Similar to fraud, the facts and circumstances constituting the mistake must be pled with particularity. *See.* I.R.C.P. 9(b). A "mistake is an unintentional act or omission arising from ignorance, surprise, or misplaced confidence." *Bailey v. Ewing,* 105 Idaho 636, 639, 671 P.2d 1099, 1102 (Ct. App. 1983). A mutual mistake occurs when both parties share a misconception about a vital fact upon which they based their bargain at the time of contracting. *Id.* The mistake must be material or, in other words, so substantial and fundamental as to defeat the object of the parties. *Id.*

In this case, similar to the complaint in the *Strate v. Cambridge* case, the Browns' Complaint suffers from the same pleading deficiencies. First, the Complaint does not use the word 'mistake', 'mutual mistake' or any words synonymous with mistake and therefore mistake was not identified by name in the Complaint. Second, a review of the Complaint shows that none of the allegations detail with particularity (1) what the mistake or common misconception was; and (2) how or why the mistake was so substantial and fundamental that it defeated the object of the parties. It cannot be said that the Browns' Complaint pled mistake with particularity. Since mistake was not properly pled, the district court erred in allowing the Browns to litigate the issue of whether there was a mutual mistake.

c. Greenheart did not try the issue of whether mutual mistake existed in this case either through express or implied consent at any time during the course of proceedings.

All throughout the summary judgment phase and even leading up to trial, Greenheart maintained her objection that the Browns did not plead mistake and if they did, mistake was not pled with particularity in the Complaint. Therefore it cannot be said that Greenheart tried the issue of mutual mistake expressly or by implication. Based on the analysis in subsections "a" and "b" above, the district court should not have forced Greenheart to defend against a legal theory that the Browns did not ask for.

Generally, issues not raised in the pleadings yet tried by express or implied consent of the parties are to be treated as if as though they had been raised in the pleadings. *Collins v. Parkinson*, 96 Idaho 294, 527 P.2d 1252 (1974); *See also* I.R.C.P. 15(b) ("When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings"). The requirement that the unpled issues be tried by at least the implied consent of the parties assures that the parties have notice of the issues before the court and an opportunity to address those issues with evidence and argument. *M. K. Transport, Inc. v. Grover*, 101 Idaho 345, 349-350, 612 P.2d 1192, 1196 - 1197 (1980).

The case of *Collins v. Parkinson* was a quiet title action where appellant argued that the trial court erred in reforming a quit claim deed due to mutual mistake. *Collins* at Idaho 296. The basis for appellant's argument was that mutual mistake was not presented by the pleadings. *Id.* The *Collins* court held that the parties tried the issue by implication because the appellants did not object, "The record indicates no objection to the inquiries as to the issue of mistake in preparation of the quitclaim deed. Therefore the issue was properly raised at trial." *Id.* Based on the *Collins* court's reasoning, it is reasonable to conclude that had the appellant objected to the inquiries as to the issues of mistake, then the issue would not have been tried by implication.

In this case, Greenheart did not try the issue of mistake expressly or by implication during summary judgment. As discussed above, Greenheart's pleadings in opposition to Browns' motion for summary judgment and pleadings on her motion to strike were premised on the fact

that the Browns did not allege fraud or mistake and therefore the extrinsic evidence offered in support of Browns' motion for summary judgment was barred by the parol evidence rule. Greenheart's memorandum opposing the Browns' motion for summary judgment stated:

> More importantly, the exception to the parol evidence rule (fraud or mistake) that would permit the introduction of extrinsic evidence has never been pled by Browns. Brown's Complaint does not allege fraud or mistake and certainly does not meet I.R.C.P. 9(b) requiring that fraud or mistake be pled with particularity. As a result, the extrinsic evidence Brown attempts to introduce (which Greenheart currently challenges in her motion to strike filed concurrently) as the foundation for their motion cannot be a basis for granting summary judgment.

See Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment pp. 5-6; [R. Vol. II, pp. 290-291]. Greenheart likewise argued in her *Reply Memorandum In Support of Defendant's Motion for Summary Judgment* [R. Vol. II, p. 343] that "Brown has not alleged fraud or mistake that would allow the introduction of extrinsic evidence to change the express intent in the Warranty Deed." [R. Vol. II, p. 345]. Greenheart's arguments on both of these briefs are a clear expression by Greenheart that mistake was not pled by the Browns and that Greenheart did not try the issue of mutual mistake by express consent or by implication.

The next opportunity for Greenheart to object to the Browns' failure to plead mistake occurred during oral argument on the parties' cross motion for summary judgment.

> **Mr. Villegas**: If you don't exclude water from the deed, the water goes with the land. That's what our courts have held. And, of course, again, the Empey case, absent fraud or mistake. And there's been no allegations of fraud or mistake in this case, and there have been no allegations of mistake in this case, which has to be specifically pled.

[Transcript of January 7, 2013; Tr. p. 20, ll. 6012]. In fact, Greenheart's legal counsel was careful to preface on the record that Greenheart was not trying by implication the issue of mutual mistake when legal counsel explained Greenheart's post sale conduct which the Browns had used as extrinsic evidence in an effort to show a contrary intent from the plain language of the Warranty Deed:

> **Mr. Villegas:** And, again I want to be very careful here because I understand there's also case law where parties can, even when one party doesn't plead something, it may be impliedly tried, but I do want to just note for the record again, could this have been a mistake, a mutual mistake by the parties? Maybe.

> But the plaintiffs have not pled that, and our rules of civil procedure require the parties to plead mistake --just like fraud-- with particularity, and so out of an abundance of caution, I need to say that, but I do at least want to explain what [Greenheart] meant in her affidavit when she said --no one ever told her that there was a groundwater right or it was excluded from the sale of the property.
>
> And so there are --should the court consider Ms. Greenheart's post-sale conduct, we submit, that there are issues of fact here, and, certainly the plaintiffs are not entitled to summary judgment. Thank you.

[Transcript of January 7, 2013; Tr. p. 34, ll. 17-35 thru p. 35, ll. 1-9].

Even after the district court ordered the parties to go to trial on the issue of whether a mutual mistake had occurred, Greenheart continued to lodge her objection that the Browns' Complaint did not plead mistake and if they did, mistake was not pled with particularity. Greenheart filed her *Motion for Reconsideration* [R. Vol. II, p. 384] and supporting Memorandum [R. Vol. II, p. 386] as well as her *Defendant's Motion In Limine To Preclude Allegations of Mistake* [R. Vol. II, p. 398].

Based on the forgoing analysis, Greenheart respectfully requests that this Court hold that the district court erred in finding as a matter of law, that the Browns' Complaint pled mistake or that the Complaint met the requirements of I.R.C.P. 9(b) that mutual mistake be pled with particularity. As such, the district court erred in allowing the Browns to litigate the issue of mutual mistake at trial.

III. The District Court Erred In Not Holding That The Browns' Claims Were Barred By The Statute of Limitations.

The district court erred in holding that the Browns' declaratory/quiet title action was not barred by either the four year statute limitations of Idaho Code 5-224 or the five year statute of limitations of Idaho Code 5-216. Alternatively, if this Court determines that mutual mistake was properly pled and was a viable claim for the Browns, the district court erred in holding that the three year statute of limitations set forth in Idaho Code 5-218(4) had not run on the mutual mistake claim.

a. The Browns' action to interpret the Warranty Deed is barred by the four-year statute of limitations of Idaho Code 5-224.

The Browns' Complaint requested the court to interpret the Warranty Deed to mean that the Deed did not include the sale and transfer of ground water. Such an action is governed by the applicable four-year statute of limitations set forth in Idaho Code Section 5-224.

Idaho Code Section 5-224 is the general four-year statute of limitations, "An action for relief not hereinbefore provided for must be commenced within four (4) years after the cause of action shall have accrued." I.C. § 5-224. Under Idaho law, a cause of action generally "accrues," and the statute of limitation begins to run, when a party may maintain a lawsuit against another. *Galbraith v. Vangas, Inc.*, 103 Idaho 912, 915, 655 P.2d 119, 122 (Ct. App.1982). *See also Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 88, 730 P.2d 1005, 1008 (1986) (Cause of action does not accrue until aggrieved party suffers damages.). The statute of limitations may only be asserted as a bar after the expiration of the statutory period following the accrual of the cause of action. *City of St. Anthony v. Mason*, 49 Idaho 717, 291 P. 1067 (1930).

It has long been recognized by Idaho courts that "a water right is an appurtenance to the land on which it has been and will pass by conveyance of the land." *Russell v. Irish*, 118 P. 501, 502 (1911). "Unless [water rights] are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention 'appurtenances.'" *Bagley v. Thomason*, 149 Idaho 799, 803, 241 P.3d 972, 976 (2010) *quoting Joyce Livestock Co. v. United States,* 144 Idaho 1, 14, 156 P.3d 502, 515 (2007). It has been held that the use of the expression "'together with all and singular the appurtenances thereto belonging and appertaining,' or one of similar purport..." in a deed is effective to transfer an

appurtenant water right unless there is a specific reservation in the deed. *Koon v. Empey*, 40 Idaho 6, 231 P. 1097, 1099 (1924).

In this case, the pertinent parts of the Warranty Deed to Greenheart from the Browns read "TO HAVE AND TO HOLD said premises, with their appurtenances unto the said Grantee...." *See* Plaintiff's Exhibit 8 in Clerk's Exhibits on Appeal; also found in [R. Vol. I, p. 29 and p. 121]. The Warranty Deed contains the typical "appurtenance" language effective to transfer the ground water. Thus, when the Browns executed the Warranty Deed to Greenheart on January 29, 2007, the ground water rights were likewise transferred to Greenheart as well. At that point the Browns' cause of action accrued because they could have filed their declaratory/quiet title action against Greenheart the very next day seeking to undo the ground water rights transfer. Instead, the Browns, waited more than four years to bring this lawsuit filing their Complaint on April 5, 2012. [R. Vol. I, p. 11]. Based on the undisputed facts in the record on appeal, Greenheart respectfully requests that this Court find that the district court erred in not finding that the Browns' lawsuit was barred by the statute of limitations.[4]

b. Browns' mutual mistake claim is barred by the statute of limitations found in Idaho Code Section 5-218.

Assuming this Court determines that the Browns could maintain their lawsuit under a theory of mutual mistake, the evidence at trial establishes that the Browns could have and should have discovered the mistake within the earlier of three years from the date the Complaint was

[4] Although the Browns' Complaint also sought declaratory relief to interpret the Purchase and Sale Agreement, the Doctrine of Merger dictates that "[w]hen a deed is delivered and accepted as performance of the contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, the deed alone must be looked to determine the rights of the parties...." *Capstar Radio Operating Co. v. Lawrence*, 143 Idaho 704, 710, 152 P.3d 575, 581 (2007). As such, the five year statute of limitations governing written contracts found in Idaho Code Section 5-216 would not apply. However, assuming that Section 5-216 applied, the Browns' lawsuit would still be untimely under the five year statute of limitations because the contract and counteroffer were not signed until January 9, 2007. *See* [R. Vol. II, p. 120]. To be timely within five years the Complaint would have to have been filed on or before January 9, 2012.

filed. Specifically, the Browns should have discovered the mistake when they signed the Warranty Deed. The district court erred in holding that the Browns could not have discovered the mistake at that point.

The statute of limitations on the ground of fraud or mistake must be commenced within three (3) years. I.C. § 5-218. Section 5-218 states that a cause of action for fraud or mistake does not accrue "until discovery, by the aggrieved party, of the facts constituting the fraud or mistake." *Id.* In the context of fraud, "our Supreme Court has held that 'actual knowledge of the fraud will be inferred if the allegedly aggrieved party could have discovered it by the exercise of due diligence.'" *Aitken v. Gill*, 108 Idaho 900, 901, 702 P.2d 1360, 1361 (Ct. App. 1985) (quoting *Nancy Lee Mines, Inc. v. Harrison*, 95 Idaho 546, 547, 511 P.2d 828, 829 (1973)). The *Aitken* court held that this same principle applies to causes of action based upon mistake:

> We believe the same principle logically applies to causes of action based upon mistake. Accordingly, we hold that an action seeking relief from mistake will be time-barred under I.C. § 5–218(4) unless it is filed within three years after the mistake **could have been discovered in the exercise of due diligence**.

Id. (underlining and bolding added). Thus, the Browns' claim for mutual mistake would be barred by the three year statute of limitations of § 5-218(4) if the record shows (as Greenheart had argued at trial) that the Browns could have discovered the mistake at the time they signed the Warranty Deed on January 29, 2007.

The holding in the *Nancy Lee Mines* case is particularly applicable to this case. *Nancy Lee Mines* involved an action by class representatives for stock holders of Nancy Lee Mines, Inc. seeking to recover sales of certain stock alleging fraud and illegal procedures surrounding the sale of said stock. *Id.* at 95 Idaho 546. The appellant-class representatives argued on appeal that there was substantial and competent evidence of fraud by the manager and attorney for Nancy

Lee Mines that should have delayed the running of the statute of limitations. The *Nancy Lee Mines* court held that the statute of limitations ran because the stockholders had access to the corporate records regarding the sale and therefore the means of knowledge was equivalent to actual knowledge. *Id.* at 95 Idaho 547. The relevant portion of the *Nancy Lee Mines* decision reads:

> As noted in I.C. s 5-218, the statute does not begin to run in fraud cases 'until the discovery' of the fraud. However, actual knowledge of the fraud will be inferred if the allegedly aggrieved party could have discovered it by the exercise of due diligence. It is unnecessary to consider the issue of whether or not there was any fraud (actual or constructive) in this case. If there was any fraud it could have been discovered in the exercise of reasonable diligence at the time it was alleged to have been committed.
>
> The reasoning of the Washington Supreme Court in Davis v. Harrison [25 Wash.2d 1, 167 P.2d 1015 (1946)] is applicable in this case:
>
> 'We hold that this action was barred by the three year statute of limitations, whether appellants had actual knowledge of the various transactions or not, for the reason that the facts were open and appeared upon the records of the corporation, subject to inspection by stockholders. If the stockholders failed to examine the corporate records, **they must have been negligent and careless of their own interests**. The means of knowledge were open to them, and means of knowledge are equivalent to actual knowledge.'

Id. (underlining and bolding added).

Here, the Browns should have discovered the mistake at the time they signed the Warranty Deed and therefore the statute of limitations should have begun to run at that time. As previously stated, "Unless [water rights] are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention 'appurtenances.' " *Bagley v. Thomason*, 149 Idaho 799, 803, 241 P.3d 972, 976 (2010) *quoting Joyce Livestock Co. v. United States,* 144 Idaho 1, 14, 156 P.3d 502, 515 (2007). It is undisputed the Browns read the Warranty Deed before signing it. *See. Finding of Fact No. 17*; [R. Vol. III,

546]. The Warranty Deed was not prepared by Greenheart but was prepared by the title company. *See. Findings of Fact No. 16*; [R. Vol. III, p. 546].

Like the shareholders in the *Nancy Lee Mines* case, the means of knowledge were open to the Browns with respect to whether the Warranty Deed contained exclusionary language excepting the ground water from the transfer of the real property. The district court however focused its analysis on whether the Browns could understand what the legal significance of the phrase "with their appurtenances" meant to determine whether the Browns could have discovered the mistake with due diligence. Greenheart respectfully disagrees with the district court's analysis. The focus should have been on the fact that the Warranty Deed did not have any language reserving or otherwise excepting water from the transfer of the real property. Greenheart cannot find any Idaho cases that require special 'legal' language to accomplish that goal. Therefore, any language such as "Water not included" or "water not part of the transfer" or "excepting water from" or "Water right No. 61-2188 and 61-7151 excluded" or any multitude of exclusionary phrases would have been sufficient to exclude the ground water. Nothing prevented the Browns from reading the missing language nor were the Browns prevented from having an attorney review the Warranty Deed. The Browns were 'negligent and careless of their own interests' at the time they read and signed the Warranty Deed and therefore the district court should have held that the statute of limitations started to run on January 29, 2007 the date the Browns signed the Warranty Deed.

Alternatively, there are two other instances where the Browns could have discovered the mistake. First, upon exercise of due diligence, the Browns could have and should have noticed that the terms of the Purchase and Sale Agreement and in particular Paragraph 16, clearly stated that water was included in the sale of the property. *See. Purchase and Sale Agreement* ¶ 16,

Plaintiff's Exhibit No. 6; also found in [R. Vol. I, p. 117]. So at the time the Browns read and signed the Purchase and Sale Agreement they could have discovered the mistake.

Second, the trial testimony established that when Jay Brown was assisting Greenheart with her tax assessments, Jay Brown knew that either through the assessor or from Greenheart herself that the Elmore County Assessor's office had levied the Greenheart Property as irrigated land. *See.* [March 5-6, 2013 Trial Transcript; Tr. p. 83, l. 18 thru p. 84, l. 24] and [Tr. pp. 104-108]. That fact should have put Jay Brown on notice that something had caused the assessor's office to consider the Greenheart Property as irrigated ground yet Jay Brown did nothing to investigate why the assessor would tax Greenheart's property under that classification. In the exercise of due diligence, Jay Brown could have discovered that something could be wrong with the Warranty Deed at that time. This timeframe again is beyond the 3 year statute of limitations.

In closing, Greenheart asks this Court to consider the policy and legal ramifications if this Court were to affirm the district court's legal analysis on the statute of limitations for mistake. According to the district court, the Browns could not have, in the exercise of reasonable diligence, discover the mistake until they spoke to their attorney Mr. Creamer. *See.* pp. 22-23 of *Findings of Fact Conclusions of Law and Directions For Entry of Judgment*; [R. Vol. III, pp. 558-559]. Based on that legal holding the time period of discovery could continue for decades before an aggrieved party speaks to an attorney. The law in Idaho should be that in cases where it is alleged that a deed mistakenly conveyed water rights with land, the aggrieved party is deemed to have the ability to discover that mistake at the time of signing the deed. That is because all that is needed to reserve the water is the use of simple non legalistic language stating that water is not part of the conveyance. Such a holding will provide certainty in real property transactions and prevent potential claims to water from popping up several years later and save the transferee from costly litigation defending against a seller who now alleges a mistake.

IV. The Browns Were Negligent In Protecting Their Interests and Therefore Cannot Use The Theory of Mistake to Excuse Their Negligence.

In Defendant's First Amended Proposed Findings of Fact and Conclusions of Law [R. Vol. II, p. 502] Greenheart requested that the Court find that Jay and Christine Brown were negligent in reviewing the Warranty Deed. The Idaho Supreme Court has held that a party will not be relieved from the terms of a contract on the grounds of mistake due to his negligence when it was within the parties' power to include a provision in the contract that would have protected their interest. *Jensen v. McConnell Bros. et al,* 31 Idaho 87, 88, 169 P. 292, 293 (1917).

Jensen involved a dispute over the payment of a promissory note given as part of the consideration for the purchase of certain land and a water right. *Id.* at 31 Idaho 87. For the purpose of finally settling all disputes, the parties entered into a written contract wherein the appellant agreed to extend time of payment of the note. *Id.* The settlement agreement contained a general release clause that released each party of, "all claims, offsets, set-offs, and counterclaims, choses in action, causes of action, debts, remedies, or rights to money, property, damages, or legal or equitable relief that it, they, or either of them, has or have against the party of the first part at the date of this agreement or at any time heretofore." At trial, respondent argued that the settlement agreement was never intended to include any waiver of respondent's claim regarding water rights and therefore, the respondent attempted to introduce oral evidence to demonstrate a contrary intent from the written terms of the settlement agreement. *Id.* at 31 Idaho 88. The trial court allowed respondent to present oral evidence and ultimately entered judgment in favor of respondent.

On appeal, the *Jensen* court reversed the trial court's judgment and held that the oral evidence should have been excluded. The *Jensen* court reasoned:

> Where a release is contractual and general in its terms and there is no limitation by way of recital or otherwise, the releasor may not prove an exception by parol.
>
> Nor will one be relieved from the terms of a contract on the ground of mistake due to his negligence when it was within his power to have a stipulation inserted in the agreement which would have fully protected him. He is bound to assume any risk he might have provided against in the contract.

Id. (internal citations omitted). The *Jensen* court noted that the respondent testified that they had read the instrument before signing it and therefore, based upon the rule of law established above, the trial court should have excluded the oral evidence.

The respondent in the *Jensen* case was certainly mistaken as to the effect the legal language contained within the release would have over their ability to assert their rights to the water. Nevertheless, the *Jensen* court held that because respondent could have protected their interest in the agreement by inserting language reserving their right to pursue the water, and did not do so, they were "negligent" in protecting their interests. Therefore, the respondent was not relieved from the terms of the contract on the grounds of mistake.

In this case, the District Court addressed the issue of the Browns' negligence in reviewing the Warranty Deed only in the context of the statute of limitations. The district court held:

> It is clear from the evidence that the Browns read the Warranty Deed before they signed the deed but did not attach the weight legal significance to three words "with their appurtenances" that these words actually carry. They obtained the assistance of a licensed realtor to assist with the sale and the assistance of a professional title company to assist in the document preparation. The Defendant would like for this court to rule that not understanding these three words was "negligence" or that not obtaining legal counsel to provide advice on its legal significance was "negligence." Although many states require licensed legal advice before a real estate closing, this court will not hold that to be the law in Idaho or find that the absence of legal advice at closing is negligence *per se*. This is not an issue of *negligence* but rather whether the Browns could have discovered the mistake in the *exercise of due diligence*.

[R. Vol. III, p. 557] (italics in original). The district court, however, should have determined whether the Browns' negligence barred them from relying on mistake to reform the Warranty Deed at all.

As previously discussed, all that a party needs to do to exclude appurtenant water from the transfer of real property is to use any form of wording/language reserving the water from the transfer. No specific legalistic language is required so long as there is a clear indication that water is being reserved or excluded. Like the respondent in *Jensen*, the Browns could have inserted language into the Warranty Deed to protect their interest in the ground water rights. Similarly, like the respondent in *Jensen* the Browns read the Warranty Deed placed in front of

them *See. Finding of Fact No. 17*; [R. Vol. III, 546] and could plainly see that exclusionary language was missing. The water rights were presumably so important that they hired a real estate agent and title company to assist with the sale of the land and yet, they chose not to have a lawyer review the Warranty Deed. Failing to do so was negligent and therefore the district court should have concluded that the Browns could not use mistake to reform the Warranty Deed.

V. The District Court Erred In Concluding That The Purchase and Sale Agreement Was Ambiguous.

In finding that the Browns proved mutual mistake by clear and convincing evidence, the district court held that the Purchase and Sale Agreement (Plaintiff's Exhibit No. 6 in Exhibits to Clerk's Record; also found in [R. Vol. I, pp. 114-120]) was subject to two reasonable interpretations and therefore the contract was ambiguous. As such, the district court looked to extrinsic evidence to ascertain the parties' intent. *See.* pp. 6-10 of *Findings of Fact Conclusions of Law and Directions For Entry of Judgment*; [R. Vol. III, pp. 542-546]. The district court erred in holding that the Purchase and Sale Agreement and specifically, Paragraph 16 of the Agreement made the contract ambiguous.

When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law. *Lamprecht v. Jordan, LLC*, 139 Idaho 182, 185-186, 75 P.3d 743, 746 – 747 (2003). An unambiguous contract will be given its plain meaning. *Id.* A contract is ambiguous if it is reasonably subject to conflicting interpretations. *Id.* In determining the intent of the parties, a court will view the contract as a whole. *Daugharty v. Post Falls Highway Dist.*, 134 Idaho 731, 735, 9 P.3d 534, 538 (2000).

In this case, the plain language of the terms of the Purchase and Sale Agreement state that water was included in the sale of the property. The Purchase and Sale Agreement specifically reads:

> 16. WATER RIGHTS: Description of water rights, water systems, wells springs, water, ditches, ditch rights, etc. if any, that are appurtenant thereto that are now on

or used in connection with the premises and shall be included in the sale unless otherwise provided herein: [blank]

See Plaintiff's Exhibit 6 in Clerk's Exhibits on Appeal; [R. Vol. I, pp. 114-120]. The district court held that the use of the semicolon made paragraph 16 ambiguous subject to more than one interpretation because it meant water could be excluded somewhere else within the Purchase and Sale Agreement. [R. Vol. III, p. 544]. The district court was incorrect. The phrase "shall be included unless otherwise provided herein" directs that in order to exclude water from the sale, the water would have to be identified within paragraph 16.

Even if this Court were to agree with the district court that the semicolon meant water could be excluded someplace else in the Purchase and Sale Agreement, the rest of that contract has absolutely no reference to water being excluded. The district court incorrectly relies on the use of words N/A (not applicable) in Paragraph 6e as well as the 'costs' box in Paragraph 21 of the Purchase and Sale Agreement to mean that water rights were excluded from the sale. The words "not applicable" mean just that, not applicable. It does not tell Greenheart that there was an adjudicated ground water right related to the property and it is excluded from the sale. The same result applies to the 'costs' box in Paragraph 21. All Paragraph 21 identifies is which party will pay certain costs prior to closing. The Purchase and Sale Agreement is unambiguous as a matter of law-Paragraph 16 specifically included any appurtenant water with the sale of the property.

VI. The District Court Erred Awarding Browns Attorney Fees.

The district court awarded the Browns attorney fees as the prevailing party under Idaho Code § 12-120(3) finding that both parties entered into the purchase and sale agreement for a commercial transaction.[5] The district court erred because: (1) the evidence produced at trial

[5] If this Court reverses the district court on appeal, then attorney fees awarded to the Browns would be improper because the Browns would not be the prevailing party.

established that Greenheart did not have a commercial purpose for the purchase; and (2) there was no evidence at all regarding whether the Browns had a commercial purpose for selling the property.

Idaho Code § 12–120(3) allows for an award of attorney fees to the prevailing party in a civil action to recover "in any commercial transaction." A commercial transaction includes all transactions except those for personal or household purposes. *Carrillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 755-756, 274 P.3d 1256, 1270-1271 (2012); I.C. § 12–120(3). In determining whether attorney fees should be awarded under I.C. § 12–120(3), the Idaho Supreme Court has conducted a two-step analysis: "(1) there must be a commercial transaction that is integral to the claim; and (2) the commercial transaction must be the basis upon which recovery is sought." *Garner v. Povey*, 151 Idaho 462, 469, 259 P.3d 608, 615 (2011). It is important to note that an award of attorney fees under § 12-120(3) requires that the lawsuit and the causes of action must be based on a commercial transaction, not simply a situation that can be characterized as a commercial transaction. "We today make clear that, in order for a transaction to be commercial, each party to the transaction must enter the transaction for a commercial purpose." *Carrillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 756, 274 P.3d 1256, 1271 (2012)(underlining added). In the *Carrillo* case the Idaho Supreme Court held that the "Carrillos transacted with Boise Tire in order to obtain services for their personal vehicle and there is no indication that they intended to use the benefit of those services for a commercial purpose. The transaction here at issue therefore lacked the symmetry of commercial purpose necessary to trigger I.C. § 12–120(3), and the district court properly denied the Carrillos' request for attorney fees."

a. There is no evidence that Greenheart purchased the land for a commercial purpose.

In this case, the district court misconstrued the evidence regarding Greenheart's purpose/intentions for buying the property. The district court referred to its finding of fact

number 12 [R. Vol. III, p. 540] where it held that Greenheart "...wanted to invest in real estate in Mountain Home" along with the finding that Greenheart also wanted low taxes. *See. Memorandum Decision and Order Granting In Part Plaintiff's Fees and Costs* p. 9; [R. Vo. III, p. 617]. The district court also based its determination of commercial transaction on the letter that Greenheart had written to the Elmore County Assessor that read: "At the time of my purchase, I was very aware that my parcel is strictly for farming and that I had no way to build a residence." *Id.* Considering all those findings together, the district court concluded that "She bought the property as an investment, not for household or personal reasons." *See. Memorandum Decision and Order Granting In Part Plaintiff's Fees and Costs* p. 10; [R. Vo. III, p. 618]. Those specific findings however do not establish that Greenheart had a commercial purpose for purchasing the property.

Nowhere in Greenheart's testimony at trial did she say that she intended to 'invest' in property in Mountain Home. The relevant portions of Greenheart's testimony were as follows:

> **Mr. Dvorak:** ...Tell the court, if you would, how you became interested in purchasing this piece of property.
>
> **Ms. Greenheart:** Yes. My mother passed away and left some money, so I wanted to have some land, so I had the Realtor who helped to buy the one in Emmett, and he, I asked him to look around so he gave me a list of it, vacant land.

[March 5-6, 2013 Trial Transcript; Tr. p. 129, ll. 16-21].

***

> **Mr. Dvorak:** And isn't it true that when you were looking for property in Idaho, you thought you might want to live here again?
>
> **Ms. Greenheart:** Yes. I still am entertaining that idea.
>
> **Mr. Dvorak:** And you mentioned vacant land as part of the instructions that you gave to the Realtor?

Ms. Greenheart: Yes, and also a low tax, annual tax.

Mr. Dvorak: Did you discuss maintenance?

Ms. Greenheart: Well, vacant land, I assumed there would not be any maintenance, as long as it is—

Mr. Dvorak: So you wanted no maintenance?

Ms. Greenheart: That's right.

[March 5-6, 2013 Trial Transcript; Tr. pg. 130, l. 12 thru pg. 131, l. 4]

The exchange between the Browns' legal counsel and Ms. Greenheart quoted above is the only line of questioning regarding any purpose why Greenheart wanted to purchase land and establishes that Greenheart did not have a commercial purpose purchasing the property. All she stated was that she was left money from her mother and wanted to buy land and in fact contemplated moving to Idaho in the future. Greenheart's testimony shows that she was purchasing the property for personal reasons rather than for a commercial venture.

An appellate court will only set aside a trial court's findings of fact if they are clearly erroneous. I.R.C.P. 52(a) (2002); *McCray v. Rosenkrance,* 135 Idaho 509, 513, 20 P.3d 693, 697 (2001); *In re Williamson v. City of McCall,* 135 Idaho 452, 454, 19 P.3d 766, 768 (2001). In deciding whether findings of fact are clearly erroneous, the appellate court determines whether the findings are supported by substantial and competent evidence. *Aspiazu v. Mortimer*, 139 Idaho 548, 549-550, 82 P.3d 830, 831-832 (2003). The testimony quoted above does not support the district court's findings of fact that Greenheart looked to invest in real property in Mountain Home nor does it support the conclusion that Greenheart was going to use the property for a commercial purpose.

Even if this Court were to infer that Greenheart used her inheritance money to 'invest' into real property that inference does not establish that she had a commercial purpose for purchasing the property. Greenheart's use of her inheritance money to purchase real property as

an investment is no different than someone using part of their salary to put into an individual retirement account (IRA) or someone who puts money in an interest bearing savings bank account. In both those examples, the interest earned in an IRA or savings account (similar to property value going up) is not a commercial venture but done for personal purposes.

On page 11, footnote 26 of the district court's *Memorandum Decision and Order Granting In Part Plaintiff's Fees and Costs*; [R. Vol. III, p. 619] the court held that its decision to award attorney fees was consistent with the following cases:

Herrick v. Leuzinger, 127 Idaho 293, 306, 900 P.2d 201, 214 (Ct. App. 1995) (concluding that the lease of real property constituted a commercial transaction where the land was purchased for the purpose of operating a commercial cattle ranch" and where the purchaser "did not maintain a home on the ranch property"); *Watson v. Watson*, 144 Idaho 214, 216-219, 159 P.3d 851, 853-856 (2007) (concluding sale of real property constituted a commercial transaction where the land was purchased as a family retreat and in large part for the purposes of logging it and the district court was called upon to apportion the logging proceeds"); *Garner v. Bartschi*, 1239 Idaho 430, 439, 80 P.3d 1031, 1040 (2003) (concluding the sale of real property constituted a commercial transaction where the land was purchased "for the purpose of Garner establishing an elk ranch," but not mentioning any residence or home on the property even though the property description was a significant issue in the lawsuit); and *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 869 P.2d 1365 (1994) (concluding the sale of real property constituted a commercial transaction where "Stevenson and the Bank entered into a transaction to finance the purchase of real property, which Stevensen intended to use and did use for his commercial farming operations."

All the cases relied upon by the district court are distinguishable from the facts of this case because there is no evidence that Greenheart intended to use the property for a commercial venture (e.g. cattle operation; elk farm; logging operation etc.) The evidence is clear that Greenheart did absolutely nothing with the property after she bought it. Greenheart only entered into the grazing lease with Jay Brown to get a tax exemption not to run a cattle operation. Therefore the district court erred in holding that Greenheart entered into the contract for a commercial purpose.

b. There was no evidence of the Browns' purpose and intent for selling the property to Greenheart.

The district court specifically held "there was no testimony at trial directly addressing the Plaintiff's purpose for listing the sixty acres for sale" *Memorandum Decision and Order Granting In Part Plaintiff's Fees and Costs* p. 10; [R. Vo. III, p. 618] yet the court chose to cobble together evidence adduced at trial regarding what the Browns did with their property when they owned it to find that the Browns had a commercial purpose for selling the sixty acres to Greenheart. Specifically, the district court noted that the Browns:

> ...leased portions of their land's appurtenant water rights to the Idaho Water Resource Board since 2003 and derived rent from that lease. In 2006, Mr. Brown had contracted to sell 272 acres of the water rights to the Idaho Water Company and that contract was terminated after the sale of the sixty acres to Greenheart. Although the Browns had their residence on the 320 acre tract, they farmed and ranched on the portion of the land.

Id.

How the Browns used their property in the past does not automatically prove that the Browns had a commercial purpose for selling the property to Greenheart. This is not the law. Since the Browns failed to provide evidence of their commercial intent for selling the property, the district court erred in concluding that the gravamen of this lawsuit was a commercial transaction.

VII. Is Greenheart entitled to an award of attorney fees on appeal?

Greenheart requests an award of attorney fees on appeal based on Idaho Code Section 12-121. Idaho Code Section 12-121 permits an award of attorney fees to a prevailing party when a claim is pursued or defended frivolously, unreasonably or without merit. I.C. § 12-121, I.R.C.P. 54(e)(1). An award of attorney's fees award under section 12-121 is discretionary on the court. *Chisholm v. Twin Falls County*, 139 Idaho 131, 136, 75 P.2d 185, 190 (2003).

In this case, attorney fees on appeal are awardable under 12-121 because the Browns did not plead mistake in their Complaint and/or plead mistake with particularity. Since the Browns did not seek a remedy under the equitable theory of mistake, it is clear that the Browns should have recognized that their request for declaratory relief to interpret the Warranty Deed was outside the four year statute of limitations of Idaho Code Section 5-224. Moreover, the *Koon v. Empey*, 40 Idaho 6, 231 P. 1097, 1099 (1924) has made very clear that when a deed uses "appurtenance language" that phrase is unambiguous and has the legal effect of transferring water with the land. As such, the question asked in the Browns' declaratory action had been answered over eighty years ago by the Idaho Supreme Court. Thus, it appears that it cannot be said that the Browns will be able to provide a defense that is not frivolous or unreasonable in addressing its pleading deficiency and failure to bring their case within the statute of limitations in their Respondent's Brief.

CONCLUSION

For the reasons stated above, Greenheart respectfully requests that this Court set aside the judgment reforming the Warranty Deed and granting the Browns attorney fees.

DATED this 14th day of November, 2013

Borton Lakey Law Offices

By Victor Villegas
Victor Villegas, Of the Firm
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2013, I caused to be served a true copy of the foregoing **APPELLANT'S BRIEF** by the method indicated below, and addressed to each of the following:

Michael C. Creamer
Thomas E. Dvorak
GIVENS PURSLEY LLP
P.O. Box 2720
Boise, ID 83701-2720
Telephone: (208) 388-1200
Facsimile: (208) 388-1300
Attorneys for Plaintiffs - Respondents

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy: 208-388-1200

Victor S. Villegas