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Brown v. Greenheart Appellant's Reply 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 REPLY BRIEF

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

HONORABLE LYNN G. NORTON, DISTRICT JUDGE, PRESIDING

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Plaintiffs - Respondents,

v.

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I. INTRODUCTION

Pursuant to Idaho Appellate Rule 34(c) and 35(c), Appellant Augusta Sayoko Mimoto Greenheart ("Greenheart") submits this Reply Brief in rebuttal to the arguments and additional issues raised by Jay Brown and Christine Hopson-Brown ("Respondent") in their Respondent's Brief filed on January 9, 2014. Greenheart incorporates the statement of the course of proceedings and facts in its opening brief here. As set forth in the *Appellant's Brief* and this *Reply Brief*, the district court's judgment reforming the Warranty Deed in this case should be vacated.

II. ARGUMENT

A. Vacating The District Court's Judgment Regarding Mistake Will Simultaneously Overturn the Judgment Regarding Quasi-Estoppel and Waiver.

The Browns argue that the equitable theories of quasi-estoppel and waiver discussed in the district court's findings of fact and conclusions of law provide and independent basis to sustain the district court's Final Judgment. Moreover, the Browns argue that since Greenheart did not appeal that portion of the district court's decision regarding quasi-estoppel and waiver this Court does not need to address Greenheart's arguments on whether the district court erred in allowing the case to proceed on the issue of mutual mistake. The Browns' argument on this issue has no merit because: (1) if this Court determines that the district court erred in allowing the case to be tried on mistake, the district court's decision on quasi-estoppel and waiver would likewise be automatically vacated because 'extrinsic evidence' of post-sale conduct would have been barred by the parol evidence rule; and (2) the equitable theories of quasi-estoppel and waiver alone are not the correct equitable theories to reform a deed.

Here, the Browns introduction of extrinsic evidence to change the unambiguous language of the Warranty Deed was only made possible because the district court allowed the Browns to

litigate the issue of mistake. 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) (underlining added). The extrinsic evidence such as Greenehart's and Jay Brown's post-sale conduct to the Elmore County Assessor not only laid the foundation for the district court to conclude that a mistake between the parties had occurred, it was the sole basis the district court used to justify its decision on quasi-estoppel and waiver. *See. Findings of Fact and Conclusions of Law* [R. Vol. III, 559-562]. Thus, had the Browns been precluded from litigating mistake, the extrinsic evidence of post-sale conduct would have been precluded by the parol evidence rule and there would have been no evidentiary basis for the district court to find mistake, quasi-estoppel or waiver.

Based on the analysis above, it was not necessary for Greenheart to address the merits of the district court's decision on quasi-estoppel and waiver in her appeal. The legal theory of mistake was the 'Trojan Horse' that allowed Brown to introduce extrinsic evidence of post-sale conduct to support their quasi-estoppel and waiver causes of action. If this Court vacates the district court's judgment as to mistake (on any of the grounds raised by Greenheart in her appeal), the remainder of the judgment dealing with quasi-estoppel and waiver should likewise be vacated.

Secondarily, the equitable theories of quasi-estoppel and waiver that the Browns rely on are not the correct legal theories for reforming the Warranty Deed's language to state that ground water rights were excluded. Courts have used rescission and reformation where they have found mistake in a contract. *See. Thieme v. Worst*, 113 Idaho 455, 745 P.2d 1076 (Ct. App. 1987). Mutual mistake has also been recognized to be the basis to reform a warranty deed. *See. Barnhardt v. Hansen*, 36 Idaho 419, 211 P. 438 (1922); *Moore v. Mullen*, 123 Idaho 985, 855

P.2d 70 (1993); *Hughs v. Fisher*, 142 Idaho 474, 129 P.3d 1223 (2006). Quasi-estoppel and waiver have not been used to reform a deed. The use of those legal theories to reform the Warranty Deed have no application in this case the same as if the Browns tried to use specific performance to require Greenheart to execute a new instrument conveying ground water back the themselves. As such, quasi-estoppel and waiver alone cannot be a basis for a judgment ordering reformation of the Warranty Deed in this case.

B. The Browns Misapply The Standard For Determining Accrual of Their Quiet Title Action Under Idaho Code Section 5-224's Four Year Limitations Period.

The Browns incorrectly apply the language of Idaho Code § 6-401 to mean that Section 6-401 determines when a quiet title cause of action accrues for purposes of applying the statute of limitations. Section 6-401 reads:

> An action may be brought by any person against another who claims an estate or interest in real or personal property adverse to him, for the purpose of determining such adverse claim, provided that all actions to adjudicate water rights and obtain a decree as to water source, quantity, point of diversion, place of use, nature of use, period of use, and priority as against other water users shall be brought under the provisions of chapter 14, title 42, Idaho Code.

Idaho Code § 6-401 (underlining added). According to the Browns, the underlined language above establishes an, "adverse claim standard" for determining when their cause of action accrues. Specifically, the Browns point to the date at which Greenheart filed a Notice of Claim of Ownership with the Idaho Department of Water Resources ("IDWR"). The Browns are incorrect.

Under Idaho law, a cause of action generally "accrues," and the statute of limitations 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). This Court has been more than clear that

accrual does not occur until damages are incurred: "...we have never held that a statute of limitations may run before an aggrieved party suffers damages. The authority to do so is highly doubtful, since it is axiomatic that a party has no right to sue for damages until actual injury occurs. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 88-89, 730 P.2d 1005, 1008-09 (1986).

Here, the Browns' quiet title action seeks to determine who the legal owner of the ground water rights is. Since Idaho law holds that water rights pass with the conveyance of land (unless water rights are expressly reserved) *Bagley v. Thomason*, 149 Idaho 799, 803, 241 P.3d 972, 976 (2010), the statute of limitations accrued at the time the Warranty Deed was executed by the Browns, not when Greenheart filed a Notice of Claim of Ownership with the IDWR. The Browns' "injury or damage" (i.e. the loss of their water right) occurred at the conveyance of the real property.

If this Court were to adopt the Browns' position that the statute of limitations ran when Greenheart filed her Notice of Claim of Ownership with IDWR, it would create a 'discovery rule' exception to the statute of limitations which has never been applied to this type of case. Generally there is no 'discovery rule' exception to the running of the statute of limitations except in specific cases that have been set forth by the Idaho Legislature. For example, an action for mistake or fraud does not accrue until the discovery of the facts constituting the fraud or mistake. *See.* I.C. § 5-218. Likewise, there is a discovery rule exception in foreign object and fraudulent concealment cases. *See.* I.C. § 5-219(4). There is however, no equivalent Idaho statute or reported Idaho appellate decision applying a discovery rule exception to a quiet title action to interpret the language of a warranty deed.

When the Browns executed the Warranty Deed transferring the real property to Greenheart on January 29, 2007, the ground water rights were transferred to Greenheart as well.

The Browns at that point would have suffered an injury because Greenheart now owned a portion of their ground water rights. 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], which is beyond the statutory limitations contained in Idaho Code § 5-224.

C. The Browns Lawsuit based upon Mutual Mistake is Barred by the Three Year Statute of Limitations Contained in Idaho Code Section 5-218.

The Browns argue that to the extent that their argument is based upon mutual mistake, their claims were brought within three years of their discovery constituting the mistake. However, the Browns' analysis on this issue merely restates the District Court's conclusion that the Warranty Deed could not have reasonably put the Browns on notice that the use of the general appurtenancy clause would convey water rights. The Browns however fail to adequately rebut the case law and policy arguments in Greenheart's opening brief.

The Browns fail to refute Greenheart's citation to, and reliance upon, this Court's holding in *Nancy Lee Mines, Inc. v. Harrison*, 95 Idaho 546, 511 P.2d 829 (1973). As discussed in Greenheart's opening brief, the *Nancy Lee Mines* decision held that the means of knowledge was the equivalent of actual knowledge.

As noted in I.C. § 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).

In this case, nothing has changed factually from the time the Browns executed the Warranty Deed until the time that they consulted with an attorney. Nothing prevented the Browns from reading the Warranty Deed. In fact, nothing prevented the Browns from consulting an attorney prior to, or even after, signing the Warranty Deed. Rather than re-state her arguments, Greenheart respectfully directs this Court to Greenheart's analysis and discussion on pages 19-23 of *Appellant's Brief*- whether the Browns, in the exercise of reasonable diligence should have discovered the mistake at the time they executed the Warranty Deed.

It should be noted that Greenheart's *Appellant's Brief* also argued, in the alternative, that the statute of limitations for mistake could accrued on two other occasions: (1) the mistake could have been discovered at the time the Purchase and Sale Agreement was signed; and (2) the mistake could have been discovered is when the Elmore County Assessor's office levied Greenheart's property as "irrigated" ground. The Browns provide no argument or authority explaining why this Court should not adopt either of those instances discussed in Greenheart's brief as the date the Browns could have discovered the mistake.

Lastly, as set forth in page 23 of *Appellant's Brief*, policy considerations weigh heavily against this Court affirming the District Court's conclusion that the Browns' cause of action for mistake accrued when they spoke to an attorney. *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 the district court's holding the time period of discovery could continue for decades before an aggrieved party speaks to an attorney. This would create a scenario where causes of action could sit dormant for decades until a party speaks with legal counsel who alerts them to a possible cause of action. The evidence produced at trial demonstrated that the Browns could have retained an attorney as easily as they retained a real estate agent and title company. Although Idaho does not require parties to a real estate transaction to consult with an attorney, parties should not be allowed to suspend the running of the statute of limitations on a claim of mistake just because they didn't know what the law was. The relevant inquiry is whether the Browns could have discovered the mistake in the exercise of reasonable diligence. This Court should hold, as a matter of law that the statute of limitations started when the Browns executed the Warranty Deed because the means of knowledge were open to them to discover the mistake.

D. The Issue of The Browns Being Negligent In Reviewing The Warranty Deed was Raised at the Trial Court Level.

The Browns argue that this Court should disregard Greenheart's argument and analysis on the issue of the Browns' negligence because it is raised for the first time on this appeal. The Browns are incorrect.

"To properly raise an issue on appeal there must either be an adverse ruling by the court below or the issue must have been raised in the court below, an issue cannot be raised for the first time on appeal. *Garner v. Bartschi*,139 Idaho 430, 436, 80 P.3d 1031, 1037 (2003) quoting *McPheters v. Maile,* 138 Idaho 391, 397, 64 P.3d 317, 323 (2003).

Greenheart raised the issue of negligence below in her proposed findings of fact and conclusions of law (a fact the *Respondent's Brief* acknowledges). *See Defendant's First Proposed Findings of Fact and Conclusions of Law*; *Defendant's First Amended Proposed Findings of Fact and Conclusions of Law*, [R. Vol. II, 468 and 502]. The district court expressly addressed negligence when it held:

> It is clear from the evidence that the Browns read the Warranty Deed before they signed the deed but did not attach the weighty 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 only basis for the Browns' argument that negligence is raised for the first time on appeal is their belief that had Greenheart intended to raise the issue of negligence, the record would have been more 'fully developed' on the theories of negligence. *Respondent's Brief pg. 29*. Whether the record contains fully developed arguments from Greenheart is irrelevant to answering the question of whether the issue of negligence was raised. The Browns simply cannot refute that the record on appeal shows that Greenheart submitted negligence in her Proposed Findings of Fact and Conclusions of Law. [R. Vol. II, 468 and 502] and received an adverse ruling from the district court per the quoted language above. Since Greenheart raised negligence below, this Court may consider her arguments discussed in her *Appellant's Brief*.

E. The Browns' Negligence Precludes Their Use of Mistake To Reform The Warranty Deed.

The Browns argue that the district court properly concluded that they were not negligent in reviewing the Warranty Deed. The Browns submit that the only way for this Court to overturn that decision is for Greenheart to show that there was no substantial and competent evidence in the record to support that conclusion because the question of negligence is a question of fact. That argument is incorrect and fails to recognize that the *Appellant's Brief* (pages 24-26) raises the issue whether the Browns' negligence bars them from using mistake to reform the Warranty Deed as a matter of law.

Greenheart's discussion of the Browns' negligence stems from Greenheart's citation to this Court's holding in *Jensen v. McConnell Bros. et al,* 31 Idaho 87, 169 P. 292 (1917). The *Jensen* decision stands for the rule of law that a party will not be relieved from the terms of a contract on the ground of mistake due to that party's own negligence. *Jensen* at 169 P. 292, 293. Like the respondent in *Jensen*, the Browns could have inserted exclusionary language into the Warranty Deed to protect their interest in the ground water rights. Moreover, 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 each testified that they signed the Warranty Deed [Transcript of March, 2013; Tr. p.136, ll. 15-25 and p. 278, ll. 18-21] so each could plainly see that exclusionary language was missing. 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.

F. Neither Party Raised Mistake In Their Pleadings And Therefore The District Court Should Not Have Allowed The Browns To Litigate That Issue At Trial.

The Browns argue that the issue of mistake was properly before the district because both parties raised the issue of mistake in their pleadings and the result in this case would have been the same had the court allowed an amendment under I.R.C.P. 15(b). The Browns are wrong because: (1) the record on appeal demonstrates that the Browns did not intend to rely on mutual mistake as

part of their lawsuit; (2) Greenheart did not try the issue of mistake expressly or by implication; and (3) the Complaint was not amended to conform to the evidence at trial.

1. Mutual mistake was not one of the Browns' legal theories.

The Browns never intended to rely on the theory of mistake to get the relief they sought in this lawsuit. On appeal, the Browns provide no argument or explanation to Greenheart's assertions (*Appellant's Brief* at pages 8-13) that if the Browns had in fact plead mistake, why did their legal counsel make no mention or argument of mistake in their written and oral arguments on summary judgment? During oral argument on Greenheart's the motion in limine and cross motions for summary judgment, counsel for Greenheart once again reiterated that the Browns had not plead 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].

Browns' counsel never stated on rebuttal that the Browns were relying on mistake as one of their theories. Just like the Complaint, the Browns' counsel remained silent at that hearing on the issue of whether they in fact were relying on mistake as one of their causes of action. Had the Browns truly intended to rely on mistake, their arguments in support of their summary judgment would have incorporated that legal theory. For example, the Browns argued on summary judgment that extrinsic evidence should be considered by the district court because the language of the Warranty Deed was ambiguous. *See. Memorandum In Support of Motion For Summary Judgment*, p. 13; [R. Vol. I, p. 136]. Not once did the Browns argue that extrinsic evidence should be considered because a mistake between the parties had occurred. That did not happen in this case because the Browns were not relying on mistake as one of their legal theories.

The language of the Complaint itself suggests that the Browns specifically plead legal theories to the exclusion of mistake. The *Appellant's Brief* cites and discusses *AMCO Insurance*

v. Tri-Spur Inv. Co, 140 Idaho 733, 101 P.3d 226 (2004) for the rule of law that when a 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. *AMCO Ins. Co. v. Tri-Spur Inv. Co.*, 140 Idaho 733, 738-739, 101 P.3d 226, 231 – 232 (2004). The Browns fail to adequately address Greenheart's analysis of *AMCO* in footnote 5 to the *Respondent's Brief* by attempting to dismiss the holding as being inapposite because *AMCO* involved an insurance contract in an insurance defense case. That distinction has no legal significance to the rule of law set forth in *AMCO*.

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 Browns' Complaint [R. Vol. I, 11] plead specific claims and remedies to the exclusion of any mutual mistake theory. Specifically, the Browns sought to quiet title to the disputed ground water rights through a declaratory action to interpret the Purchase and Sale Agreement and to interpret the Warranty Deed. *See Count 1 to Complaint* [R. Vol. I, 17]. Count 2 of their Complaint sought equitable relief stating that Greenheart knew or should have known that the property was being sold as dry land with no water rights. *See Count 2 to Complaint* [R. Vol. I, 18]. The Complaint fails to identify 'mistake' by name or count. The Browns cannot credibly argue that they intended to use the theory of mutual mistake as a basis for relief and that they put Greenheart on notice that "mistake" was at issue.

2. Greenheart did not try the issue of mistake.

Greenheart did not try the issue of mistake by express or implied implication at any time during the course of these proceedings. *See. Appellant's Brief pp. 15-17.* Greenheart did everything she could to object. 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 plead by the Browns and that Greenheart did not try the issue of mutual mistake by express consent or by implication.

Based on the analysis above and the arguments contained in her *Appellant's Brief*, Greenheart respectfully requests that this Court hold that neither party raised the issue of mistake before the district court. The theory of mistake was raised *sua sponte* by the district court forcing Greenheart to litigate a legal theory that the Browns did not ask for.

3. Greenheart was prejudiced by the district court raising *raising the issue of mistake sua sponte.*

The Browns argue that it makes no difference that the district court denied Greenehart's *Motion In Limine* and *Motion to Strike* because it would not have been different had the district court granted a motion to amend the pleadings under I.R.C.P. 15(b). The flaw in the Browns' argument however is they did not move to amend pursuant to I.R.C.P. 15(b) after trial to conform the pleadings to the evidence. Therefore, I.R.C.P. 15(b) is inapplicable to this appeal.

Moreover, assuming *arguendo* that the Browns had amended their Complaint to conform to the evidence under I.R.C.P. 15(b), it does not cure the district court's abuse of discretion to force Greenheart to defend against a cause of action that the Browns did not intend to litigate. Cases discussing due process and the need for an impartial tribunal are instructive to addressing the error in this appeal.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal." *Davisco Foods Intern. v. Gooding County*, 141 Idaho 784, 791 118 P.3d 116, 123 (2005) *citing Marshall v. Jerrico, Inc.*, 446 U.S. 100 S.C.T. 1610 (1980). The meaning of "impartiality" as it is used in the context of applying the Due Process Clause to judges means "the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is it guarantees a party that the judge who hears his case will apply the law." *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 846 (2007). Likewise, criminal cases speaking to the topic of a judge suggesting a tactic to a prosecutor is instructive. In *Robinson v. U.S.*, 513 A.2d 218, 222 (D.C.,1986) the District of Columbia Court of Appeals held that it was improper for the trial court to suggest a tactical course. The *Robinson* court wrote "...[t]he court went further, however, and suggested to the prosecutor a tactical course which he had not considered. This was improper. The trial court 'must not take on the role of a

partisan.... Prosecution and judgment are two separate functions in the administration of justice; they must not merge." *Id.*

Here, Greenheart was clearly prejudiced in this matter not just in her ability to prepare a defense, but prejudiced in allowing the Browns to proceed on a claim that they did not ask for. This is especially problematic since the district court was the finder of fact. Courts are not in the business of telling a plaintiff what legal theories it should litigate. The district court erred in suggesting a tactical course that the Browns had not thought of by forcing the parties to litigate the issue of mistake.

G. The Browns' Complaint Did Not Meet Idaho Rule of Civil Procedure 9(b) Requiring That Mistake Be Plead With Particularity.

The Browns argue that all their Complaint complied with the pleading requirements of I.R.C.P. 9(b) because all the Complaint needed to do was plead the "circumstances" constituting the mistake with particularity. *Respondent's Brief pg. 31.* The Browns' interpretation of I.R.C.P. 9(b) does not comport with appellate decisions explaining what it means to "plead with particularity."

On this issue, Greenheart's *Appellant's Brief* cites and discusses the holding of *Strate v. Cambridge Telephone Co., Inc.*, 118 Idaho 157, 161, 795 P.2d 319, 323 (Ct. App. 1990), wherein the Court of Appeals held that a complaint did not meet the pleading requirements of I.R.C.P. 9(b) that fraud be plead with particularity because: (1) the complaint did not mention fraud by name and (2) the plaintiff failed to allege one of the elements of fraud. *See Appellant's Brief pgs. 13-14.* Interestingly, the *Respondent's Brief* fails to rebut the *Strate* decision and explain why the Complaint in this case should not suffer the same fate as the complaint in *Strate.*

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. [R. Vol. I, p. 11]. 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 plead mistake with particularity. Since mistake was not properly plead, the district court erred in allowing the Browns to litigate the issue of whether there was a mutual mistake.

H. Whether The Purchase and Sale Agreement Was Ambiguous Is Material To This Appeal.

The Browns argue that since the district court allowed evidence of mistake, this Court's interpretation of paragraph 16 of the Purchase and Sale Agreement (PSA) is immaterial to the outcome of this case. The Browns are incorrect because if this Court determines that the language of the PSA unambiguously states that water was included in the sale of the property, the remaining extrinsic evidence submitted to prove mistake is insufficient to meet the Browns' burden of proof.

"The burden of proof is on the party alleging mutual mistake." *Udelavitz v. Ketchen,* 33 Idaho 165, 190 P. 1029 (1920). In order to prove mistake, "[t]he evidence must be clear and satisfactory, leaving but little, if any, doubt of the mistake. It must be made out by the clearest and most satisfactory testimony such as to leave no fair and reasonable doubt on the mind that the writing does not correctly embody the real intention of the parties. A mere preponderance of the evidence will not suffice..." *Id* 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]. If this Court agrees with Greenehart's analysis, the evidence of the parties' intent, as expressed in the PSA to include water rights in the sale overshadows the significance of all the other evidence introduced by the Browns to prove mistake. For example, the extrinsic evidence of Greenheart's communications with the Elmore County Assessor, Jay Brown's letter to the Elmore County Assessor, the multiple listing advertisement and the property condition disclosure form, when viewed as a whole, cannot sustain a finding of mutual mistake by clear and convincing evidence. Therefore, this Court's analysis of the PSA is necessary for purposes of this appeal to vacate the district court's judgment.

I. The District Court Erred in Awarding Attorney's Fees Under Idaho Code Section 12-120(3).

The Browns argue that the district court's decision to award the Browns their attorney's fees under Idaho Code § 12-120(3) was supported by substantial and competent evidence and therefore should be affirmed. The Browns are wrong.

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); Idaho Code § 12-120(3). In order for a transaction to be considered 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).

Here, the *Respondent's Brief* pp. 39-40, sets forth in bullet point format examples that they believe support a finding that Greenheart had a commercial transaction. For example, the Browns rely on the fact that Greenheart never lived on the property, Greenheart wanted land with low taxes, and at the time she purchased the property she knew she couldn't build a house on. None of those facts establish that Greenheart did not have a household or personal purpose. As stated in her *Appellant's Brief* at pages 29-30, the Greenheart never testified that she intended to 'invest' in property. In fact, she testified that when she was looking for property in Idaho she wanted to live here:

> **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.

[March 5-6, 2013 Trial Transcript; Tr. pg. 130, l. 12 thru pg. 131, l. 4]. Thus, Greenheart's purpose for purchasing the land was for personal and household purposes.

The evidence that Greenheart changed the classification of the land to dry grazing and that she entered into a dry grazing lease does not establish a commercial transaction. The testimony at trial clearly establishes that Greenheart was not running a commercial cattle grazing operation but that she took those steps to reduce her property taxes and nothing more. *See.* [March 5-6, 2013 Trial Transcript; Tr. pp. 257-262]. Thus, the district court's reliance on that evidence to find a commercial transaction was erroneous.

In order for a transaction to be considered 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). There is no evidence to support the district court's conclusion that the Browns entered into the PSA with Greenheart for a commercial purpose. In fact, 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]. The district court attempted to look at the Browns' use of land prior to selling it to Greenheart as a basis for finding a commercial transaction. That is a clear error of law. As set forth in *Carillo* each party must "enter the transaction" for a commercial purpose. What the Browns did with their property in the past does not automatically prove that the Browns had a commercial purpose for entering into the PSA. 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.

J. The Browns Are Not Entitled To Attorney's Fees And Costs On Appeal

The Browns argue that attorney's fees and costs are awardable to them if they prevail on appeal on the theory that: (1) this is a commercial transaction and therefore, attorney's fees and costs are awardable under Idaho Code § 12-120(3) and; (2) paragraph 9 of the PSA provides that attorney's fees and costs be awarded to the prevailing party on appeal.

First, the Browns should not be awarded attorney's fees and costs under either basis because they will not be the prevailing party in this appeal. Second, if the Browns prevail on appeal, attorney's fees and costs cannot be awarded under Idaho Code § 12-120(3) because this is not a commercial transaction as explained in Section VI of *Appellant's Brief.*

Lastly, Paragraph 9 of the PSA does not provide a basis for awarding attorney's fees in this appeal. Paragraph 9 provides:

> If either party initiates or defends any arbitration or legal action or proceedings which are in any way connected with this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and fees on appeal.

Plaintiff's Exhibit 6.

The plain language of this paragraph contemplates awarding attorney's fees and costs for any action where the gravamen of the lawsuit is the PSA itself. Paragraph 9 does not contemplate an action regarding a dispute over whether a warranty deed was mistakenly prepared. This is particularly the case here when considering the Doctrine of Merger which holds 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). Since the gravamen of this lawsuit ended up being whether there was a mistake in the preparation of the Warranty Deed, Paragraph 9's attorney fees provision is inapplicable to this appeal and is not a basis for awarding attorney fees on appeal.

III. CONCLUSION

For the reasons set forth above and in Greenheart's *Appellants' Brief*, the district court's judgment should be vacated.

DATED this 30 day of January, 2014.

Borton Lakey Law Offices

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Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of January, 2014, I caused to be served a true copy of the foregoing **APPELLANT'S REPLY BRIEF** by the method indicated below, and addressed to each of the following:

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