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Swafford v. Huntsman Springs, Inc. Appellant's Brief Dckt. 44240

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

Supreme Court Case Number : 44240
Teton County District Court Number: CV-2015-203

RONALD L. SWAFFORD AND MARGARET SWAFFORD,

PLAINTIFF-APPELLANT

vs.

HUNTSMAN SPRINGS, INC., an Idaho Corporation,

DEFENDANT-RESPONDENT

Appeal from the District Court of the Seventh Judicial District of the State of Idaho,

in and for Teton County

Hon. Gregory W. Moeller, District Judge

PLAINTIFFS'/APPELLANTS' BRIEF

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STATEMENT OF THE CASE

In May of 2007, the Swaffords, (Plaintiffs) received marketing materials from Huntsman Springs (Defendant) establishing a special "priority sales event" for local purchasers in advance of opening the development sales to the general public. (R. Vol. 1 p. 14-17.) The real property which is the subject of this action is located adjacent to the City of Driggs, Teton County Idaho. The Plaintiffs are residents of Idaho Falls, Bonneville County Idaho.

The marketing literature stated:

> Teton Co. and Driggs have become the hottest real estate market in the west. We have established a "Sales Priority Reservation Program" for early buyers the best values will likely be for those that act first.
>
> Please know our Huntsman Team is absolutely committed to the highest levels of quality and creating the best possible values for you and your family.

At the bottom of the marketing material, on R. Vol. 1 p. 15, there is a footnote and an email address www.huntsmansprings.com for the Master Plan and national articles on Teton Valley. The Master Plan is no longer accessible from the site, as it has been removed. Pictures provided on the site are contained in the transcript. (R. Vol. 1 p. 214 to 234) The Plaintiffs attended the event and were given a Master Plan, (R. Vol. 1 p. 43) which was described as a 1347 acre resort development at completion of the development, several years away. (An exact duplicate color copy of the Master Plan is attached hereto, *Attachment A,* as the black and white copies show little detail.)

Defendant's sales agents described the commercial lots as being reserved for a 300 unit conference hotel and commercial building. The Master Plan was a comprehensive colored depiction of the completed development, with golf courses, luxury five star hotels, a promenade, a recreation center, condominiums, restaurants, a 300 unit conference center, and six public

parks. R. Vol. 1 p. 143-145 and 149) (*Attachment A* to this appellate brief is the exact duplicate color copy for review.)

The Master Plan provided Plaintiffs at the sales meeting depicted the five (5) commercial lots, as the only commercial development on the Master Plan. The Master Plan/ Final Plat R. Vol. 1 p. 45 (hereinafter "Plat") recorded after purchase, contains the same five (5) commercial lots as the only commercial lots in the Plat or Master Plan.

The promotional materials (R. Vol. 1 p. 215 to 216) include the following statements regarding commercial development:

> "Huntsman Springs is an excellent investment...." Of all the plans under consideration one of the most exciting for the community is the luxury lodge, which would be the first of this caliber in Teton Valley, Idaho. Not only will a luxury lodge fill a void in high end accommodations, but will also create valuable employment in the greater community...." Proposed concepts include gourmet restaurant, spa and conference area, all within the village setting that will also feature its own ice rink."

The Master Plan identified 195 Primrose as being adjacent to Primrose street with trees on the Western Boundary between the lot and Primrose; a public walk way and bike path on the Eastern boundary, adjacent to the city. (*See Attachment A* hereto, a duplicate of R. Vol. 1 p.143-145.)

In reliance upon Defendant's Master Plan, the Plaintiffs executed a purchase contract for the lot at 195 Primrose, Driggs, Idaho on July 16, 2007 (R. Vol. 1 p. 24-35) for the purchase price of $387,000.00. (*See Attachment A*, colored duplicate; R. Vol. 1 p. 143-145). The Defendant executed an acceptance of the contract on July 18, 2007.(R. Vol. 1 p. 36)

The development was in its infancy on the date of purchase, with years of construction necessary for completion. The development is not completed today, and is anticipated to take until at least 2020, as evidenced by the City of Driggs Comprehensive Plan of January 19, 2010,

amended January 8, 2015. (R. Vol. 1 p. 147). This comprehensive plan was prepared January 19, 2020, and amended to its current content on January 8, 2015, R. Vol. 1 p. 149, contains additional statements pertaining to the commercial lots, including the lot purchased by Plaintiffs. The comprehensive plan stated in 2015 the following:

> The mixed use commercial area around the new county courthouse was conceived partly as a new location for the many uses in the visitor retail area of the Central Business District, but also as a location for upper floor residential units and a hotel that could in turn increase downtown retail demand. *As of fall of 2014, none of the properties around the courthouse have been developed. (emphasis added).*

On June 16, 2014, Jon Huntsman provided a press release pertaining to Huntsman Springs. (Tr. P. 159-164, on page 160 of the news release by Huntsman states in bold print:

> *"We are only in our third year of development and have a way to go, but I see this as a 40,50 or even 60 year project*..." (emphasis added)

The owner and originator of Huntsman Springs admits that as of 2014 the development was only in its third year of development. This statement verifies that the development did not actually begin until 2011 or 2012, approximately 3 years prior to the Plaintiff's filing their original complaint.

In August of 2014, the Plaintiff's became aware of the "Master Plan Final Plat," recorded July 20, 2007, two days after the purchase contract was executed by the Defendant. The Defendant recorded a Plat, (hereinafter referred to as the "Plat") which was not previously provided to Plaintiff by Defendant, nor mentioned in negotiations. (R. Vol. 1 p. 90) An examination of the Master Plan colored photo, *Attachment A*, and the Plat, R. Vol. 1 p. 90, shows the depiction of an extremely narrow strip of land sandwiched in between the commercial lots and Primrose Street. The writing on the narrow strip is illegible. The illegible writing later was recently identified as stating "park 3."

The Master Plan or Plat did not identify any access route from Front Street to the commercial lots. The Plat did not depict any indication that access to the commercial lots was not via Primrose Street. The logical implication from the appearance of the Master Plan, was that the commercial lots were a part of Huntsman Springs, with the front of the lots abutting Primrose, the Courthouse, and the Huntsman Springs development as depicted by the photos contained as R. Vol. 1 p. 212. The photo in 2012 further depicts the view toward Huntsman Springs from Primrose. The narrow strip's identification on the Plat did not suggest, imply or indicate Plaintiffs' access via Primrose was obstructed permanently by the separation of a berm and line of seedling trees. The trees which are shown on the photo (R. Vol. 1 p. 212) were seedlings when planted, and grew very quickly. Considering the well advertised long term nature of the development, the location of the trees and small berm were not deemed permanent obstructions to opening access routes to Primrose from 195 Primrose for commercial development once it began. Development still has not begun on these lots.

The recorded Plat did not preclude cutting an access route from Primrose to 195 Primrose at some undetermined time in the future. The Plat did not change the Master Plan's location of the public walkway or bike paths on the eastern boundary of 195 Primrose, nor the location for trees on both the east and west boundary of 195 Primrose. Today, the Defendant has not installed the required public walkway, bike paths or trees required by the Master Plan (*Attachment A*) on the east boundary of 195 Primrose. The 2015 Comprehensive Plan as stated above, confirms that development has not begun on the commercial lots. R. Vol. 1 p. 149 The Plat did not alter or change the Plaintiffs' legal description or affect title.

The 1347 acre development remains incomplete today. The improvements on the Master Plan are incomplete on 195 Primrose, as confirmed by the 2015 City of Driggs Comprehensive

Plan. The abutting streets on the east and west side of 195 Primrose have been paved. A sidewalk/walk way was placed on the west boundary as were seedling trees. However it is undisputed that the trees and public walkway have not been completed pursuant to the Master Plan on the east side of 195 Primrose.

The western boundary trees and path were improvements which made the commercial lots more esthetically pleasing, and presumably more marketable. These improvements were deemed desirable to the value and marketability of the commercial lots when completed. The timeline hereinafter depicts the ongoing development and the basis for Plaintiffs' beliefs that the development of the commercial lot at 195 Primrose according to the Master Plan was to be expected in the future. It was not until 2014, that the Plaintiffs, as well as the general public in Driggs, became aware that the Defendant was "mothballing" the commercial lots, and intended to ignore the Master Plan and the Plat. A demand for compliance with the Master Plan was made on August 14, 2014 by letter from the Plaintiffs. (R. Vol. 1 p. 193-194). The Defendant responded September 3, 2014 (R. Vol. 1 p. 196-197). Until 2014, Plaintiffs presumed the Defendant would complete the development according to the Master Plan.

The Defendant contends that the only access to 195 Primrose is Front Street, which faces the back side of old dilapidated old buildings which are an extreme eyesore. The photographs (R. Vol. 1 pp. 203-208) evidence the ramshackle old buildings across Front Street which dramatically reduces if not eliminates the marketability of these expensive commercial lots. Plaintiffs are currently left with a valueless parcel of commercial real property for which they paid over a third of a million dollars. It was incomprehensible and ludicrous to anticipate Defendant to limit access to the commercial lots from Front Street, considering the decaying, dilapidated condition of the backside of old buildings.

TIME LINE OF EVENTS FROM STATEMENT OF CASE

1. In May 2007: Plaintiffs were provided with promotional marketing materials and notice of a special sales event restricted to local Idaho residents allegedly intended to provide "ground floor special opportunities."(R. Vol. 1 p. 123, 159)

2. The promotional materials were primarily brochures and a Master Plan depicting the future of the entire development over the life of the long term development. (*Attachment A*- colored duplicate, see also R. Vol. 1 p. 143 to 145, black and white)

3. July 16, 2007: Plaintiffs signed the purchase and sales contract. The Defendant signed it and approved the contract on July 18, 2007. It consummated the purchase of the commercial lot located at 195 Primrose, Driggs Idaho, during the corporate sales invitation event. Plaintiffs were provided the Master Plan, depicting the future of this "long term development" involving a golf course, luxury five star hotels, a promenade titled City Walk, a recreation center, condominiums, restaurants, a 300 unit conference center, six public parks, a residential development and golf club in the 1347 acre comprehensive commercial, residential and recreational plan.(R. Vol. 1 p. 159) (*Attachment A* hereto is a colored copy for convenience and clarification)

4. July 20, 2007 two days after Plaintiffs' purchase, the Defendant recorded a Plat for the development, which was never discussed or mentioned on July 16, 2007. Plaintiffs were not aware of the Plat until 2014. (R. Vol. 1 p. 45-46). However it was titled identically to the Master Plan provided to the Plaintiff at point of sale. The Plat is titled "Master Plan /Final Plat."

5. The Plat recorded two days after the purchase agreement which was signed by Defendant, does not substantially differ from the "Master Plan" provided Plaintiffs. It does not identify any

additional commercial properties for future development. It does not identify any access route to and from 195 Primrose. It has far less detail than the Master Plan. (*Attachment A*)

6. The Plat, though obscure, included a very narrow strip of land between all of the commercial lots and Primrose Street. This narrow strip of land is referred to on the post purchase Plat as "Park 3" but is illegible fine print. (R. Vol. 1 p. 45)

7. The Plat recorded July 20, 2007 did not depict any change in the means of access or ingress to any of the commercial lots, including Plaintiffs'. (R. Vol. 1 p. 45)

8. The Plaintiffs' lot is bounded by Primrose to the West and Front Street to the east. The Plat fails to depict access routes to the commercial lots from either street. (R. Vol. 1 p. 45)

9. The Plat does not depict any change in the location of any walkways or bike paths included within the Master Plan. (R. Vol. 1 p. 45)

10. 2007 to 2015 tax notices: All tax notices received by the Plaintiffs from 2007 to the present, depicts the address of the commercial lot as 195 Primrose, Driggs Idaho. All taxes were paid as they came due on the commercial lot located at 195 Primrose, Driggs Idaho. (R. Vol. 1 p. 191)

11. Fall of 2008: Small seedling trees were planted on the west side of Plaintiffs' lot on the border between Primrose and Plaintiffs' lot. Simultaneously, a small strip of grass was planted in the narrow strip of land between Primrose and the commercial lots. Neither development foreclosed future access to Primrose from the commercial lots.

12. Late fall of 2008: Primrose and Front Street were paved neither indicating or evidencing access to or from the commercial lots, or permanently preventing future access. (R. Vol. 1 p. 207-Front Street and R. Vol. 1 p. 212-Primrose Street)

13. Fall of 2008: the Defendant installed a bike path and walkway on the west side of Plaintiffs' lot, on the border between the commercial lot and Primrose. These improvements did not suggest or prohibit later installation of an access route from Primrose to the commercial lots. The improvements improved the esthetics of the location making it appear more desirable for commercial development. The trees, walk way, and bike path identified on the Master Plan for the east boundary have not been completed. (R. Vol. 1 p. 207, 143, 145, *Attachment A*)

14. The Activity Center was completed in 2012. (R. Vol. 1 p. 164)

15. In 2013 the board walk was constructed, as was the fitness center, locker rooms, pool and hot tubs. (R. Vol. 1 p. 159-162)

16. The Wellness center was completed in June of 2014. (R. Vol. 1 p. 169)

17. In June of 2014, Jon Huntsman stated in a news conference article that Huntsman Springs was only in the third year of the development, and that they had a long way to go. In 2014, Defendant stated that it was "long term project." (R. Vol. 1 p. 157)

18. 2015 construction plans on the "Park side" of the project began.

19. In the fall of 2014, the citizens of Driggs became aware that the Defendant was proposing changes which conflict with the design proposals the Defendant made to obtain original approval. A citizen's committee was formed called "VARD." (Valley Advocates for Responsible Development). In September of 2014, public meetings were held on the complaints which were registered over the Defendant ignoring the south end of the development being the location of the commercial lots. VARD as well as the Plaintiffs became concerned for the first time that the Defendant's publicized plans for commercial development were being changed. VARD President David Axelrod published an article in the Teton Valley News and Valley

Citizen which described the surprise of the citizenry along with the Plaintiffs with regard to changes in the development. Mr. Axelrod stated:

> Did you know that the resort hotel and conference center we all thought were planned next to the county courthouse has been mothballed indefinitely—likely forever—while Huntsman instead pursues a luxury resort at the far north end of the development. The building sites plans for this north end hotel resort including a spa, pool, tennis courts, fitness center, café and two restaurants, conference facilities and plaza both a 6166 Sq. ft. excursion center and approximately 13,500 s. ft. of commercial retail."(R. Vol. 1 p. 174)
>
> "When Huntsman Springs first applied to create its 1347 acre development it presented a comprehensive residential and recreational plan that would be integrated with the city of Driggs. Huntsman insisted on the current location of the new County Courthouse as one way to connect their development to the town. They platted a 300 unit conference hotel and commercial buildings in the empty fields surrounding the freshly built courthouse". (R. Vol. 1 p. 175)
>
> "Just last month, with several missing pieces of critical information land without receiving any pre-hearing public comment, the Driggs' P and Z recommended allowing Huntsman to now focus their hotel resort and their commercial plaza a mile north into the development where it will not provide Driggs with any of the promised and anticipated benefits of integration with the City, revitalization of Driggs west side, or stimulation of downtown Driggs economy." (R. Vol. 1 p. 175-176)
>
> "The public notices were vague and did not disclose Huntsman Springs proposal to abandon the promised hotel next to the courthouse, nor to create the remote commercial plaza, or the changes to the public pathways. Huntsman says it no longer makes economic sense to fulfill its original promise." (R. Vol. 1 p. 176)
>
> "Bait and switch on Huntsman Springs? Is Driggs getting Steamrolled?"(R. Vol. 1 p. 176)

20. On Sept. 10, 2014 VARD Issued a public comment to the City of Driggs, City Counsel. The public comment of VARD contains the following:

> "Right now Huntsman is mothballing indefinitely their original intention of building and investing in downtown Driggs with a hotel and supporting facilities west of the County Courthouse. At the August 14, P and Z hearing Huntsman representatives emphasized that there were no plans and no intention to do anything with the downtown hotel site in the foreseeable future. Instead they seek to invest their resource is a different hotel site far removed from the city center. With the developer expressing no interest in developing their lots already zoned for hotel and commercial sites, this will effectively kill any other interest in investing in this area. This barren land which abuts Driggs commercial core is likely to persist as undeveloped years if not decades and must be remediated to control blight in interim." "All of the original Huntsman Springs plats and plans depict the hotel that is zoned next to the County Courthouse." (R. Vol. 1 p.185)

21. In August of 2014, the citizens who reside and work in Teton Valley became aware for the first time that Huntsman was refusing to comply with the Master Plan and Plat, to develop the commercial lots, and provide access routes to 195 Primrose.

The Plaintiffs submit, that if the local citizenry, who work, live and take part in the politics and local government learned of the Defendant's refusal to develop according to the Master Plan in August of 2014, the Plaintiffs should not be held to a different standard. It was not until 2014, that the Plaintiffs and the citizens of Driggs became aware that the Defendant was focusing future commercial development to the far Northern end of the development, ignoring the Master Plan for the commercial lots sold to Plaintiffs and others.

22. The Defendant never recorded any Plat identifying any access routes to 195 Primrose. There exists no plat identifying access to the commercial lot purchased by Plaintiffs.

23. On July 17, 2015 after attempting to resolve the dispute with the Defendant and all attempts failing, Plaintiffs filed the Complaint in this matter.

24. Defendant field an Answer on September 28, 2015.

25. On September 29, 2015, Defendant filed for Summary Judgment. The Summary Judgment was supported by affidavits and a memorandum of law.

26. Plaintiffs objected to the Summary Judgment on November 3, 2015. The Objection was supported with a memorandum of law and affidavits.

27. Defendant replied to the Objection on November 10, 2015.

28. Hearing on the Motion for Summary Judgment was held on November 17, 2015.

29. On November 25, 2015, Plaintiff filed a request to amend the Complaint with the Court and a request to submit additional evidence on the Summary Judgment.

30. On February 19, 2016 the Court issued its Memorandum Decision on Defendant's Motion for Summary Judgment.

31. Plaintiffs field the Notice of Appeal in this matter on May 5, 2016.

ISSUES PRESENTED ON APPEAL

I. Was Summary Judgment improperly granted on the basis of the Statute of Limitations?

II. Was Summary Judgment improperly granted as a genuine issue of material fact existed?

III. Attorney Fees on Appeal.

ATTORNEY FEES ON APPEAL

The Plaintiffs hereby request attorney fees on appeal pursuant to Idaho Code §§ 12-120 and 12-121; Idaho Rules of Civil Procedure 54; Appellate Rules 40 and 41; and, all other applicable rules and statutes. . On appeal Idaho Code § 12-120(3) compels an award attorney fees to the prevailing party in any civil action involving a commercial transaction. A commercial transaction is defined as "all transactions except transactions for personal or household purposes." I.C. § 12-120(3). In this case, the underlying transaction between the parties, the sale and purchase of certain commercial property, was commercial in nature. Each claim has been brought and defended based on the record before this Court.

ARGUMENT

I. WAS SUMMARY JUDGMENT IMPROPERLY GRANTED ON THE BASIS OF THE STATUTE OF LIMITATIONS?

Idaho Code § 5-216 sets forth the five (5) year limitation for actions filed for written contracts. When this five (5) year period begins to run is based upon when a cause of action has accrued, meaning when there is a breach of the contract. *Simmons v. Simmons,* 134 Idaho 824, 830, 11 P.3d 20, 26 (2000). The question of when a breach of contract occurs is a factual one. *Spence v. Howell,* 126 Idaho 763, 770, 890 P.2d 714, 721 (1994). The five year statute of limitations will only begin to run when the party asserting the breach is aware of the breach, or should have been aware. *Cuevas v. Barraza,* 146 Idaho 511, 517, 198 P.3d 740, 746 (2008). When the breach of contract is known or should have been known is a question of fact for the jury. *Spence* at 771.

An action under the Idaho Consumer Protection Act is subject to a two (2) year statute of limitations from the time the cause of action "accrued" pursuant to I.C. §48-619.

An action for misrepresentation is subject to a three (3) year statute of limitation pursuant to I.C.§5-218.

Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994).

The party moving for summary judgment initially carries the burden to establish that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct.App.1992).

The District Court found all Plaintiffs' claims were barred for failure to bring those claims within the applicable statute of limitations. R. Vol. 2, pp. 340-342. To support this finding, the District Court made three (2) critical errors:

A. The District Court found that the Plat recorded by Defendant on July 20, 2007 (R. Vol. 1, p. 45) was constructive notice of the breach, and therefore the damage, by Defendant. R. Vol. 2, pp. 340-341

B. The District Court found that the Plaintiffs had actual knowledge of the breach, and therefore the damage, by the Defendant by August, 2008 by virtue of the "construction of the park and planting of the trees." R. Vol. 2. P. 341

A. CONSTRUCTIVE KNOWLEDGE FROM THE RECORDED PLAT

The District Court stated the Plat recorded by the Defendant on July 20, 2007 constituted constructive knowledge of a breach by the Defendant to the Plaintiffs. The District Court based this finding on the case of *Chaplin v. Stewart,* 71 Idaho 306, 230 P.2d 998 (1951) which the District quoted, ""the recording of an instrument affecting the title to real property constitutes constructive notice to all parties interested," because they "had the means of acquiring that knowledge."" R. Vol. 2, p. 341

The Court in *Chaplin* dealt with an entirely different issue. In *Chaplin*, the appellants claimed ownership to a real property previously transferred by recorded deed to their father. The Court in *Chaplin* states,

> "The general rule in this jurisdiction is that the recording of an instrument **affecting the title to real property** constitutes constructive notice to all parties interested, of the

> contents, and the estate claimed thereby." *Chaplin v. Stewart*, 71 Idaho 306, 310, 230 P.2d 998, 1002 (1951) *(emphasis added).*

The decision then goes on to state,

> "While it is stipulated that the appellants did not know of their interest in those lots until about a year before this suit was brought, that makes no difference, for they had the means of acquiring that knowledge, as the deed conveying the title to said lots to their father was of record during all that time in the office of the county recorder of Ada county, where said lots were situated. The means of acquiring this knowledge was open to them, and, under the facts of this case, that places them in the same position as though they had such knowledge." *Id at 311, 1003.*

The appellants in *Chaplin* were prospective heirs, whose title was directly affected by the previously recorded deed.

The holding in *Chaplin* only imputes constructive knowledge when the recorded document affects the actual title to the property, and then only as to the contents of the actual document.

B. THE PLAT HAD NO EFFECT UPON PLAINTIFFS' TITLE TO REAL PROPERTY

The first question is did the Plat affect the title to the real property of the Plaintiffs? When viewing the Plat (R. Vol. 1, p. 45), it is clear that this document does not affect or alter the title or property of the Plaintiffs. This document only identifies various lots within the Huntsman Springs PUD 1 Addition. The Plat does not make any change to the legal description of the Plaintiffs' property, does not create any additional or decreased interest in the ownership of the real property and places no restrictions on the real property. The Plat does affect the title of the real property of the Plaintiffs.

C. THE PLAT DID NOT PROVIDE CONSTRUCTIVE NOTICE THAT PLAINTIFFS HAD NO FUTURE ACCESS VIA PRIMROSE STREET OR ACCESS FROM FRONT STREET

The Plat is labeled "MASTER PLAN/FINAL PLAT." The copy provided by the Title Company is identical with the Plat in evidence. R. Vol. 1 p. 43 The Plat is nearly illegible, with unreadable fine print. With the use of a magnifier, one can depict the words park 3. Park 3 had no discernable meaning to Plaintiffs. The Plaintiffs continued to receive and rely upon tax notices (R. Vol. 1 p. 191) which describe the address as 195 Primrose. The narrow strip of grass or sidewalk does not preclude the Defendant from providing access to the commercial lots. The improvements were esthetically pleasing and consistent with Plaintiffs' conclusion that they were made in an effort to comply with the Master Plan, and improve commercial value of the lots to invite construction. It was anticipated from the date of the first contact with the Defendant, that the lots were intended for a large luxury hotel, which would have required all of them, and involved one source of access from Primrose. The Plat does not identify where the access route to 195 Primrose would be when the commercial development occurred.

The appearance and location of the commercial lots, with improvements made it obvious that the front would face the Huntsman development, and not the back side of dilapidated old buildings. It would be illogical to expect commercial developers to front their business toward this run down area.

D. THE PLAT DOES NOT DESIGNATE ACCESS TO 195 PRIMROSE FROM ANY ABUTTING STREET

The Plat has no substantial difference with the Master Plan. There is only one difference between the Master Plan and Plat. It is the small strip of land separating the commercial lots

from Primrose actually labeled as "park 3." The remainder of the improvements required by the Master Plan have not been completed to date. The walk way, bike path, and trees depicted on the Master Plan for the east boundary await construction.

The Plat does not show the location of any access to the commercial lots, unlike the Master Plan. The Plat does not depict any trees, fences, berms or other landscaping additions. The Plat does not depict the location of walkways or bike paths. The Plat does show the outer boundary of the development being the east side of the Plaintiffs' property, which was always presumed to be the back end of the commercial lot. Considering the ongoing development continuing to this day, there is nothing in the contents of the Plat that would give any notice of a breach by the Defendant in not completing the Master Plan improvements as represented, including the walkway, bike path and trees on the east side of 195 Primrose, nor permanently separating the Plaintiffs' lot from the remainder of the development, foreclosing access via Primrose.

E. WHAT IS THE RESPONSIBILITY OF REAL PROPRTY OWNERS

An owner of real property should be able to rely on the status of the property at the time of purchase and should not be burdened to continually check all recorded documents during the entire period of ownership. The Plat, by its very nature, does not appear on the title of the property. A title search of the property would not reveal the recorded plat as a "red flag" when reviewing the title. A plat does not give notice of an interest or change to the title of the property. The recording of a plat does not provide the notice equivalent of a deed affecting the real property. It is not a reasonable means for notice of neither potential, adverse, changes nor notification that the plat is not identical to prior plats or a master plan.

Plaintiffs purchased their lot in reliance on the representations of the Defendant and the Master Plan (*Attachment A*) presented to them. They were never advised a subsequent plat was being developed or that any subsequent plat would differ from the Master Plan. They were never notified that the later recorded Plat did no differ substantially from the Master Plan and never asked to approve any changes to the Master Plan by way of a plat or other document.

As the Plat does not affect the title of the Plaintiffs to their property and the contents of the Plat do not show a breach and intent to separate the property from the remainder of the development, the Plat cannot be held, on summary judgment, to provide constructive notice to the Plaintiffs of a breach by the Defendant and start the running of the Statute of Limitation on any claim.

F. ACTUAL KNOWLEDGE BASED ON VIEW OF DEVELOPMENT

The District Court next found that the Plaintiffs had actual knowledge of a breach by the Defendant based on the "construction of the park and the planting of trees." (R. Vol. 2, p. 341) The District Court found that this work was completed by August, 2008. *Id.* While the construction of the park and planting of trees occurred, it was disputed that these actions constituted notice of a breach.

The *Affidavit of Ronald L. Swafford in Opposition to Motion for Judgment on the Pleadings or Summary Judgment* (R. Vol. 1 pp. 123-234) specifically addressed the issue of the park and trees and that this was not notice of a breach. The *Affidavit* states that the park and trees were considered to be normal in the development process and consistent with Master Plan. *Id. at 133, 13, 136, and 137.* Plaintiffs were informed at the time of purchase that the property and adjoining development were a long term project spanning many years. Plaintiffs were informed that in 2014 the development was only one-third completed.

The trees planted in 2008 were seedlings, which took several years to grow and develop into any type of visible divider, and even then could be removed in minutes with appropriate equipment. The grass on the narrow section of land (park 3) along with the seedlings and grass was interpreted as an improvement to invite third-party commercial development of the lots. The commercial lots are small, causing Plaintiffs to anticipate commercial purchasers to purchase all or several at one time for parking and development, and one or two large entrances where the developers requested on Primrose. It would have been extremely simple and inexpensive to cut a road through the seedlings and grass from the commercial lots on Primrose.

The Master Plan provided for the planting of trees on the western side of the Plaintiffs' property. The Master Plan also provided for the planting of trees on the eastern side of the Plaintiffs' property. The eastern side of the Plaintiffs' property was to be the eastern boundary of the development according to both the Master Plan and the Plat. This boundary did not include Front Street on the Plat. This eastern boundary was to be a "Family Walk and Bike Path" according to the Master Plan. This is consistent with the Plat showing this area as the "Property boundary line."

The Defendant did not designate on the Plat any type of access points along Front Street to indicate that Front Street was the intended future access point to 195 Primrose.

A walk way and bike path was planned for the east side of the lots along Front Street. The additional identical improvements on the western border of Primrose were interpreted as improvements to invite commercial development by esthetically improving the view from Huntsman Springs. The eastern boundary walk way and bike path have not been completed to date.

None of the developments from 2007 to 2014 provided any notification that the Defendant was changing the development from the Master Plan. The rezoning in 2014 brought the issue to Plaintiffs' attention and inquiry, and thereafter the litigation.

The question of when a breach of contract occurs is a factual one. *Spence v. Howell,* 126 Idaho 763, 770, 890 P.2d 714, 721 (1994). When the breach of contract is known or should have been known is a question of fact for the jury. *Id. at* 771. The District Court's determination of what determined the breach of contract and when that was actually known was an issue of fact still at issue. As the fact is one that must be determined by a jury, summary judgment was improper.

II. WAS SUMMARY JUDGMENT IMPROPERLY GRANTED AS A GENUINE ISSUE OF MATERIAL FACT EXISTED ?

Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994).

Based on the actions of the Defendant, and specifically the rezoning, the Plaintiffs inquired with the Defendant about the future development of the area surrounding the Plaintiffs' property. Plaintiffs' letter of August 20, 2014 (R. Vol. 1 pp. 48, 56) requested compliance with the Master Plan in the development of the property. The response from Defendant was that it was not going to further develop the area around the Plaintiffs' property and refused to follow the Master Plan. (R. Vol. 1, p. 135)

Plaintiffs argue that it was not until the refusal of the Defendant to comply with the Master Plan in 2014 and the notification that the Defendant would not develop the area around the Plaintiffs' property that a breach actually occurred. It was not until the letter and the decision by the Defendant to not develop the property that the Plaintiffs were damaged and knew of the damage. Plaintiffs fully expected compliance with the Master Plan until the Fall of 2014. Until this time, Defendant could have continued the development of the area around the Plaintiffs' property at any time. None of the work around the Plaintiffs' property was of a permanent nature, precluding compliant development as depicted in the Master Plan.

The determination of the date of the breach by the Defendant is a question of material fact. This material fact is a question that the jury should determine.

The actions of the Defendant have destroyed the value of the Plaintiffs' commercial lot. It is incomprehensible to expect commercial developers to construct commercial improvements on the commercial lots, which now face decrepit, dilapidated and decayed back sides of old buildings. The actions of the Defendant have completely destroyed the value of the Plaintiffs' commercial lot, making it completely nonmarketable.

CONCLUSION

Plaintiffs respectfully request that the courts summary judgment be reversed, and that the matter be remanded for trial. There are genuine issues of material fact, which are to be determined by the jury. There are significant issues of fact, including but not limited to the following:

1. The point in time that planting of seedlings and installation of a berm and grass strip was grown and of such size and significance that their installation became a notice of breach, or coincided with the future development by enhancing the appearance.

2. The point in time, if ever, the physical appearance of improvements adjacent to195 Primrose gave constructive notice of a breach of contract.
3. Whether the Plaintiffs had a right to rely on City/County tax notices identifying the address of the lot as 195 Primrose, as the location and access point for ingress or egress.
4. Whether the Master Plan or Plat identified a point of ingress or egress to the 195 primrose indicating that the sole access point was from Front Street as opposed to Primrose Street.
5. Whether the continuous publications from Defendant that the development was a long term project spanning many years was reasonably relied upon by the Plaintiffs in delaying action until August of 2014.
6. Whether an access route to 195 Primrose can be created in the future at a reasonable cost from Primrose street.
7. Whether it was reasonable for the Plaintiffs to assume that the Defendant would create an entrance from Primrose to 195 Primrose in the future when commercial development began.
8. Whether the Defendant has breached its contract with the Plaintiffs by currently failing and refusing to install the public walk way, bike path trees and other improvements depicted on the Master Plan for 195 Primrose on the Front Street Boundary.
9. Whether it was reasonable more than 5 years prior to September of 2015 for the Plaintiffs had no intention to develop in conformity with the marketing materials provided at the time of purchase, as well as news publication identified herein, that

the Defendant would eventually build the planned commercial improvements on the commercial lots, as identified on the Master Plan and Plat. (luxury 5 star hotel, promenade, city walk, recreation center, condo's restaurants, 300 unit conference center, etc.)

10. Whether the Plat as provided with limited data, and obscure print was reasonable notice of intent to abandon any part of the Master Plan provided at the date of purchase.
11. Did the paving of both Front Street and Primrose without designated access routes from either, provide constructive notice of a breach by Defendant.
12. What point in time should the Plaintiffs have known that the Defendant had no long range plan or intent of providing access to the commercial lots from Primrose Street.

The Plaintiffs submit that they became aware of the Defendant's lack of intent to perform under the Master Plan in the fall of 2014, concurrent with the point in time the community became aware and the citizens complained. The Plaintiffs submit that the recording of the Plat was not constructive notice of breach of contract, as it did not affect Plaintiffs' title. Further, upon examination of the Plat filed after purchase, there is little difference between the Master plan provided Plaintiffs and the after purchase Plat, which contains only a drawing of a tiny strip of land with illegible markings adjacent. The Defendant represented throughout that the commercial lots identified in the Master Plan and Plat were the future locations of hotels, convention center and other commercial developments.

The Defendant has breached its agreement, and breached its obligation with regard to good faith and fair dealing. The Defendant's final marketing brochure provided May 7, 2007 stated:

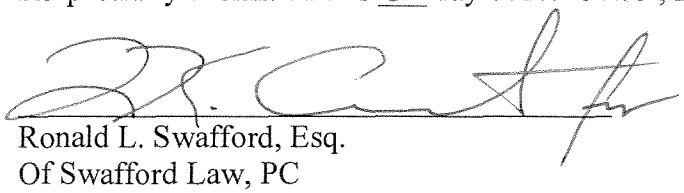
"Please know that our entire Huntsman team is absolutely committed to the highest levels of quality and creating the best possible values for you and your family". (emphasis added)
R. Vol. 1 p. 15

The Defendant marketed these lots with the intent that the Plaintiffs rely on their representations. The Defendant provided a Master Plan, which was described as the future of the development. The Defendant informed the Plaintiffs that this was a long term project and would take years to complete. The Defendant continued the development, and paved the adjacent streets to 195 Primrose. The improvements between 105 Primrose and Primrose Street were minor improvements involving some seedling trees, some grass and a walk path. The Plaintiffs were aware of ongoing developments in 2011 through 2014. The Plaintiffs recognized that eventually commercial development would occur, and the type of development would dictate the location of the entrance off Primrose, and that it could not be determined in advance.

The value of the Plaintiffs' lot has diminished to nearly nothing. None of the adjacent commercial lots have been developed, and now the defendant refuses to comply with the Master plan with regard to 195 Primrose.

The Plaintiffs request this court reverse the Order Granting Summary Judgment to Defendant, and remand the matter to the District Court for trial and for attorney fees and costs on appeal as argued above.

Respectfully submitted this 3rd day of November, 2016.



Ronald L. Swafford, Esq.
Of Swafford Law, PC
Attorney for the Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day I caused to be served a true and correct copy of the foregoing document on the parties designated below and by the method of delivery indicated:

Sean Moulton
Moulton Law Office
PO Box 631
Driggs, ID 83422

☒ MAILING
☐ FAXING ()
☐ HAND DELIVERY
☐ COURTHOUSE BOX

Dated this 3rd day of November, 2016.

RONALD L. SWAFFORD, ESQ.
Of Swafford Law, PC

ATTACHMENT A

HUNTSMAN SPRINGS

HUNTSMAN SPRINGS MASTER PLAN

PLATTED PROPERTY

DESCRIPTION (FIRST PHASE)	NUMBER
RANGE CABINS	73
SINGLE FAMILY CUSTOM HOMESITES	21
DRIGGS TOWN HOMES	50
TOWN PLAZA COMMERCIAL	20
FUTURE DEVELOPMENT	

STOCKED FISHING PONDS

FAMILY WALK & BIKE PATHS

WILDLIFE REFUGE BOARDWALK (1.5 MILES)

N W E S

HUNTSMAN SPRINGS WILDLIFE REFUGE
Permanent Conservation Easement

FAMILY WALK & BIKE PATH

Golf Clubhouse, Fitness & Pool

Practice Range

Huntsman Springs Drive

Sales Center

Curlew

Brood

Wildlife Refuge Boardwalk

Killdeer

Bufflehead

Cygnet

Education Access Road

Widgeon

Basketball Park

Pet Park

Tennis Park

Neighborhood Park

Playground Park

Picnic Park

FAMILY WALK & BIKE PATH

HIGHWAY 33 TO YELLOWSTONE

JACKSON HOLE

Wildlife Refuge Boardwalk

Future Teton County Courthouse

TOWN OF DRIGGS

BATES ROAD

HOLE	1	2	3	4	5	6	7	8	9	OUT	10	11	12	13	14	15	16	17	18	IN	TOTAL
PAR	4	4	4	5	3	4	4	3	5	36	5	3	4	4	4	5	4	3	4	36	72
GOLD	430	442	355	580	162	427	492	191	629	3708	608	204	495	410	430	546	427	120	462	3703	7411
BLACK	415	430	335	550	150	405	465	175	610	3535	585	185	470	390	410	530	405	115	430	3520	7055
BLUE	385	395	315	520	128	375	430	155	565	3268	550	165	445	360	385	505	390	105	400	3305	6573
WHITE	350	342	255	490	105	320	395	130	530	2917	540	145	395	325	350	460	365	95	375	3050	5967
GREEN	310	325	235	445	95	255	345	110	490	2610	490	100	370	290	310	405	335	80	345	2725	5335

For Illustrative Purpose
Subject to Change