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IN THE SUPREME COURT OF THE STATE OF IDAHO

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs-Appellants,

vs.

WILLOW CREEK RANCH ESTATES
NO. 2 SUBDIVISION HOMEOWNERS'
ASSOCIATION, INC., an Idaho
corporation, and DOES I –X, inclusive,

Defendants-Respondents.

Supreme Court Dkt. No. 45390-2017

Appeal from Canyon County
Case No. CV-16-3425

BRIEF OF APPELLANT

APEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE CHRISTOPHER S. NYE, DISTRICT JUDGE

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STATEMENT OF THE CASE

Dale and Kathi Lee (“Appellants” or the “Lees”), appeal the district court’s August 31, 2017 Memorandum Decision and Order on Parties’ Motions for Summary Judgment and HOA’s Motion to Amend (“Memorandum Decision”) wherein the district court granted Willow Creek Ranch Estates No.2 Subdivision Homeowners’ Association, Inc.’s (“Willow Creek HOA” or “HOA”) motion for summary judgment and denied the Lees’ motion for summary judgment. *See* Memorandum Decision, p.9 (R., p. 239). Simply stated, the Lees assert the district court erred by concluding that the doctrine of “partial performance” was not applicable to the present circumstances even though all the material terms of an easement agreement were fully performed and evidence in the record could have been utilized to resolve any potential material ambiguity. The Lees also claim that, to the extent that this Court determines that the doctrine of partial performance is not applicable, this Court should extend the doctrine of equitable servitude to cover present circumstance. As set forth below, the equities clearly favor the Lees. It is uncontroverted fact that that there was an agreement to provide the Lees access to their property from Kemp Road and to construct three access points. Moreover, there is no “real life” ambiguity regarding the agreement as the agreement was substantially performed. It is undisputed that the Lees were provided access and are presently accessing their property from Kemp Road using the three access points constructed by the parties to the agreement. And, it is also clear from the record that relevant parties had knowledge of the agreement and of the Lees’ use of the access points. Here, however, the district court never got to a point to apply these equities because it concluded as a matter of law that those equitable theories are precluded under

Idaho law. The Lees respectfully disagree with this legal assessment and submit that the district court erred in that determination.

STATEMENT OF THE FACTS AND COURSE OF THE PROCEEDINGS

In the summer of 1997, Dale Lee was approached by the Kemps regarding a possible real estate transaction. *See* June 17, 2016 Declaration of Dale Lee (“Lee Decl.”), ¶2 (R., p. 39). The Kemps and the Lees both owned real property north of Purple Sage Road in Middleton, Idaho. *See* Lee Decl., Ex. A (Exhibit A is a map of the property reflecting ownership of the land in 1997) (R., p. 43). To develop the “Kemp property” the Kemps needed approximately 1.8 acres of real property owned by the Lees. The Lees agreed to sell them the 1.8 acres needed, but required as a condition of that sale, that they be given access to the road constructed by the Kemps on the Kemps property. *See* Lee Decl., ¶4 (R., p.39). As explained by Dale Lee in his declaration: “My wife and I were willing to sell them [the Kemps] the 1.8 acres needed, but as a condition of that sale, wanted to ensure that we would have access to the road [] that was to be constructed by the Kemps.” *Id.* Accordingly, Mr. Lee testified that the Kemps and the Lees agreed that “[a]ccess to Kemp Road, [would be] given as a condition to the sale of the 1.8 acre parcel.” The real estate agent involved in the transaction was Alan Mills. *See* Lee Decl., ¶5 (R., p.39); *see also* June 14, 2015 Declaration of Alan Mills (“Mills Decl.”), Exhibit A. (R., p.37). The road referenced above, presently known as Kemp Road, runs along the south border of the Kemp property (“Kemp Road”). *See* Lee Decl., ¶6 (R., p. 6).

On June 1, 1997, the Lees and the Kemps executed an Agreement for Sale of Real Property (“1997 Agreement” or “Agreement”). *See* Lee Decl., Exhibit B (R., p.44). The 1997

Agreement referenced the fact that the Lees had agreed to sell to the Kemps the 1.8 acres of real property needed by the Kemps to develop their property into the present day subdivision and home owner's association and that in exchange the Lees would be given access to Kemp Road. *Id.* The 1997 Agreement also explained that the Kemps and the Lees were planning future development of their adjoining properties--both the Kemp property and the Lee property. *Id.* And, recognizing future development by the Lees, the 1997 Agreement expressly stated that the Lees would be given three access points to the road:

Seller [Lees] shall also be entitled to 3 driveway access from the gravel road [Kemp Road] to be constructed by Buyer [Kemps] adjoining Seller's [Lees'] property. Such access shall be constructed at Seller's [Lees'] cost and subject to Seller [Lees] obtaining any necessary governmental approvals.

Id. Accordingly, the Lees sold the Kemps the property and the Kemps began developing the subdivision that is now Willow Creek Ranch Estates #2. *See* Lee Decl., ¶12 (R., p. 40).

In 2000, as part of the development, Kemp Road was constructed. The road was asphalted and, consistent with and in performance of the agreements and expectations of the Kemps and the Lees, three driveway access points were constructed giving the Lees' property adjacent to Kemp Road three access points to Kemp Road as agreed. *See* Lee Decl., ¶13 (R., p. 40). To be clear, this construction included the creation of the three access points referenced in the 1997 Agreement and included substantial improvement including twenty-four foot culverts and gravel extending from Kemp Road to the Lees' property. Around that same time, wood fencing and metal gates that corresponded to the three access points were also constructed by the Lees along the road—again, giving the Lees' property clear and obvious access to Kemp Road.

See Lee Decl., ¶14 (R., p. 40, 226-230), Ex. C (R., p. 45); *see also* Horn Aff., ¶8 (R., p. 178). The construction of the road and access points constituted performance of the agreement between the Lees and the Kemps that the Lees would be given the access. Indeed, the only aspect of the agreement that had arguably not been performed was that the Lees had not yet sought “necessary governmental approvals” to use the road.

Significantly, one of the access points was constructed adjacent to a lot purchased by Mr. Horn. *See* Horn Aff., ¶6 (R., p. 176). According to Mr. Horn, a member of the HOA, because of the access points and the gates, it was obvious to him and to the other HOA members living in the subdivision, that the Lees accessed their property through Kemp Road. *See* Horn Aff., ¶7 (R., p. 176) (“It was obvious to me and anyone living in the subdivision, that the Lees accessed their property from Kemp Road.”).

In 2005, as part of the continued development of the Willow Creek Ranch Estates, the Kemps transferred Kemp Road to the HOA as a common area owned by the HOA. *See* Lee Decl., Ex. D (LEE0010) (R., p. 50) (“The Trust was the developer of Willow Creek Ranch Estates. The Kemps transferred Kemp Lane to the HOA as part of the common area owned by the Association.”). Of note, the “Warranty Deed” provided to the HOA from the Kemps, did not convey Kemp Road free from all encumbrances, but rather excluded from the conveyance “all existing easements and rights-of-ways of record or implied.” *See* August 4, 2016 Affidavit of Matthew C. Parks in Support of Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment (“Aug. 4, 2016 Parks Aff.”), Ex. D (R., p. 101). Again, this conveyance was after

Kemp Road and the access points had been constructed and after the Lees had been provided access and were using Kemp Road as witnessed by HOA member Mr. Horn.

To be clear, there is substantial evidence that the HOA—when it received Kemp Road from the HOA—had knowledge of the Lees’ use and access of Kemp Road. From its inception until 2005, the HOA and the board of directors for the HOA had been primarily controlled by the Kemps. *See* Mills Decl., Ex. A (R., p. 37). Mary Kemp, trustee of the Kemps, and Alan Mills, the Kemps’ real estate agent, served as the initial board members for the HOA. Mr. Mills served as president. *Id.* Alan Mills has admitted that he had knowledge of the Kemps’ agreement to provide access points along Kemp Road to the Lees. *Id.* Mr. Mills testified as follows:

During the development of the Willow Creek Subdivision, I served as one of the initial board of directors for the Willow Creek Ranch Estates No. 2, Subdivision Homeowner’s Association Inc. (the “HOA”) along with Mary Kemp, the trustee for the Kemp Family Trust. As the developer of the Subdivision and who also controlled the HOA, the Kemp Family Trust paid to have the three driveway access constructed just as the parties agreed to do in the Agreement For Sale of Property. *As a former HOA board member, I can say with a high degree of certainty that the HOA at the time was aware of the Agreement and its terms regarding the three driveway access.*

See Mills Decl., Ex. A (R., p. 37) (emphasis added).

Thus, at the time that Kemp Road was transferred to the Willow Creek HOA in 2005, the evidence in the record clearly establishes that the Willow Creek HOA Board of Directors had actual knowledge of an easement agreement, including the Kemps’ agreement to provide the Lees the three access points, that the easement agreement was performed, and that the Lees were accessing Kemp Road. Furthermore, due to the construction of the three access points, including

culvert construction, gravel work, fencing and gates (*i.e.*, the performance of the easement agreement), the HOA and its members had constructive notice of an easement agreement that allowed the Lees to use Kemp Road to access their property through those three access points.

Accordingly, it came as a significant surprise when the HOA objected to the Lees' attempts to proceed with the county (*i.e.*, governmental approval) to develop the property and to create driveways for homes utilizing the access points--access points that had already been constructed. Accordingly, on April 11, 2016, the Lees initiated legal action to prevent the HOA from blocking their work with the county. That legal action, the underlying action, was a declaratory action requesting a determination from the district court that "Kemp Road, is encumbered by equitable servitudes, conditions and restrictions allowing for access by the Lees..." *See* Complaint, p.6 (R., p. 16).

Significantly, because it was undisputed that the 1997 Agreement, by itself, was not an enforceable easement agreement, the existence of an enforceable encumbrance centered on two legal theories: 1) partial performance of an easement agreement memorialized at least in part by the 1997 Agreement and 2) equitable servitude—that the equities created an encumbrance that prevented the HOA from preventing the Lees from using Kemp Road. First, the Lees asserted that the agreement between the Kemps and the Lees--that the Lees would be given access to Kemp Road--had been partially performed and became an enforceable agreement regardless of the statute of frauds issues identified by the HOA. Second, the Lees claimed the existence of an equitable servitude because it was uncontroverted fact that the HOA Board and membership had knowledge of the Kemps' agreement to provide the Lees with access to Kemp Road and that it

was not equitable or fair to preclude the HOA from presently precluding the Lees from accessing Kemp Road.

The HOA disagreed and, ultimately, in the spring and summer of 2017, both parties moved for summary judgment. *See* May 18, 2017 Defendant’s Motion for Summary Judgment (R., p. 115) and July 21, 2017 Plaintiffs’ Motion for Summary Judgment or Alternatively Partial Summary Judgment on Issue of Partial Performance (R., p. 157). As a basis for summary judgment, the HOA argued that Idaho’s Statute of Limitations precluded the Lees from arguing that an easement agreement existed or was enforceable. The HOA argued the Statute of Limitations precluded evidence of the agreement because: “The 1997 Agreement does not contain a valid legal description of the purported easement...[and that] [t]he 1997 Agreement is not notarized and the record contains no evidence that can establish the Kemp Family Trust executed the 1997 Agreement.” *See* May 18, 2017 Memorandum in Support of Defendant’s Motion for Summary Judgment, p.2 (R., p. 118). The HOA also asserted that Lees were not entitled to an “equitable servitude because the elements of establishing an equitable servitude cannot be established.” *Id.* at p.3 (R., p. 119).

On August 31, 2017, the district court issued a Memorandum Decision and Order on Parties’ Motions for Summary Judgment and HOA’s Motion to Amend (“August 31, 2017 Memorandum Decision” or “Memorandum Decision”) (R., p. 231). In that Memorandum Decision, the district court addressed both the “equitable servitude” and “partial performance” arguments. The district court appreciated the Lees’ arguments and found a factual dispute as to whether the HOA had knowledge of an underlying easement agreement. The district court did

find, however, that Kemp Road had in fact been constructed, that the access points from Kemp Road to the Lees' property had also been constructed, including "culverts and gravel extending Kemp Road to the Lee's property," and that "fencing and metal gates corresponding to the access points corresponding to the 3 access points were constructed along the property." *See* Memorandum Decision, pp. 2-3 (R., pp. 232-33). Notwithstanding these factual findings and the factual dispute over the HOA's prior knowledge of the agreement, the district court concluded that summary judgment, as a matter of law, should be entered in the HOA's favor.

The HOA rejected the Lees argument that they were entitled to an easement. First, with regard to the "equitable servitude" argument, the district court concluded that there could be no equitable relief under this theory because it concluded that "equitable servitudes do not confer an affirmative right to enter and use another's land" and that here, the Lees were asking for an "affirmative right to use or access land [Kemp Road]." *See* Memorandum Decision, pp.5-6 (R., pp. 235-36). Second, with regard to the Lees' "partial performance" argument, the district court simply concluded that the "97 Agreement is too indefinite, incomplete, and uncertain in all of its material terms...to allow enforcement by operation of the doctrine of part performance." *See* Memorandum Decision, p.8 (R., p. 238). Accordingly, the district court concluded that summary judgment should be granted in the HOA's favor as a matter of law. *Id.*

On September 22, 2017, the Lees filed their Notice of Appeal.

ISSUES ON APPEAL

The issues on appeal are as follows:

Did the district court err in concluding that the doctrine of partial performance did not apply to the agreement between the Lees and Kemps regarding access to Kemp Road?

Should this Court apply the doctrine of equitable servitude to the present circumstances regardless of how the right to use Kemp Road is classified?

ARGUMENT

I. The District Court Failed To Appreciate Facts In The Record And Evidence, Including Performance, That Establish The Terms Of Agreement Without Ambiguity

A. Introduction

In Idaho, an agreement regarding an interest in real property, in this case an easement agreement, is invalid unless that agreement is “in writing and subscribed by the party charged, or by his agent.” *See* Idaho Code § 9–505(4); *see also* Idaho Code § 9–503; *Hoffman v. SV Co., Inc.*, 102 Idaho 187, 190, 628 P.2d 218, 221 (1981). Here, there is no dispute. The written agreement, the 1997 Agreement, does not satisfy Idaho’s statute of frauds.

However, Idaho law also makes clear that the statute of frauds shall not be construed “to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof.” Idaho Code § 9–504. The doctrine of part performance provides that when the parties to an agreement fail to reduce the agreement to writing, or otherwise fail to satisfy the statute of frauds, the agreement “may nevertheless be specifically enforced when the

purchaser has partly performed the agreement.” See *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 722, 874 P.2d 528, 533 (1994). In this case, the district court erred when it concluded that it could not apply the doctrine of partial performance simply because a term was not clear, *i.e.*, the 1997 Agreement did not include a property description. Here, the terms of the easement agreement, an agreement that was essentially already performed, was clear, not just by the 1997 Agreement, but by the actions of the parties and other parole evidence.

The Idaho Supreme Court has stated that “what constitutes part performance must depend upon the particular facts of each case and the sufficiency of particular acts is a matter of law.” See *Boesiger v. Freer*, 85 Idaho 551, 556, 381 P.2d 803, 804 (1963). “The most important acts which constitute a sufficient part performance are actual possession, permanent and valuable improvements and these two combined.” *Roundy*, 98 Idaho at 629, 570 P.2d at 866 (quoting *Barton v. Dunlap*, 8 Idaho 82, 92, 66 P. 832, 836 (1901)). The acts constituting part performance must be proven by clear and convincing evidence, *Boesiger*, 85 Idaho at 558, 381 P.2d at 805, and they must also be definitely referable to the alleged oral contract, *Boesiger*, 85 Idaho at 557, 381 P.2d at 805; *Roundy*, 98 Idaho at 629, 570 P.2d at 866. A review of the record shows conclusive evidence of actual possession and improvement. Indeed, there is no real dispute regarding the acts that constitute performance of the agreement. It is incontrovertible fact that Kemp Road was constructed, access points were created and that the Lees accessed their property through Kemp Road. See Memorandum Decision, pp. 2-3 (R., pp. 232-33). Regardless, the district court concluded that the 1997 Agreement “does not contain provisions

that are capable in themselves of being reduced to certainty, to allow enforcement by the operation of the doctrine of part performance.”) *Id.* at p.8 (R., p. 238).

Thus, as to the “partial performance” argument, it appears that error turns on whether “the underlying contract can be proven by clear and convincing evidence.” The Lees submit that the underlying agreement can be so proven and that the district court’s determination that it cannot is wrong. Moreover, to the extent that the 1997 Agreement is determined to be ambiguous as to its terms (*i.e.*, lacks a property description), that ambiguity can be cured by parole evidence or at the very least creates a genuine issue of material fact that should have precluded summary judgment. Stated differently, to the extent that parole evidence in the record regarding the ambiguity is not conclusive, the Lees should have been permitted to cure that ambiguity by presenting that evidence to a trier of fact to resolve that ambiguity--something the Idaho Supreme Court has sanctioned in similar circumstances.

B. Standard Of Review

In an appeal from an order granting summary judgment, the appellate court’s standard of review is the same as the standard used by the district court in passing upon a motion for summary judgment. *See Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008). “All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party.” *Estate of Becker v. Callahan*, 140 Idaho 522, 525, 96 P.3d 623, 626 (2004). Summary judgment is proper if the “pleadings, depositions, and admissions on file, together with the affidavits, if

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c).

The “fact that both parties move for summary judgment does not in and of itself establish that there is no genuine issue of material fact.” *Intermountain Forest Mgmt., Inc. v. Louisiana Pac. Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001). The moving party bears the burden of proving the absence of material facts but “is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party’s case on which that party will bear the burden of proof at trial.” *Partout*, 145 Idaho at 688, 183 P.3d at 776 (quoting *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988)). In a case that would otherwise be decided by a jury, the trial court is not free to arrive at the most probable inferences that may be drawn, but is compelled to draw all inferences in favor of the non-moving party. *Mastrangelo v. Sandstrom, Inc.*, 137 Idaho 844, 846, 55 P.3d 298, 300 (2002). The non-moving party “may not rest upon the mere allegations or denials of that party’s pleadings, but that party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” I.R.C.P. 56(e). Summary judgment must be denied “if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions.” *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990).

- C. The Easement Agreement Between The Kemps And Lees Is Not So Indefinite, Incomplete ,And Uncertain That It Is Not Capable To Be Reduced To Writing As Evidenced By The Fact That The Agreement Has Been Performed

The district court over-simplistically concluded that the “easement provision in the 97 Agreement is too indefinite, incomplete, and uncertain in all of its material terms, and does not contain provisions that are capable in themselves of being reduced to certainty to allow enforcement by operation of the doctrine of part performance.” *See* Memorandum Order, p.9. The district court erred in this determination by looking *only* at the 1997 Agreement and ignoring facts in the record that made it possible to specifically enforce an easement agreement that had already been substantially performed and whose terms are not ambiguous or undisputed. Here, it appears from the district court’s Memorandum Decision and the HOA’s arguments that the asserted ambiguity was the admitted fact that the 1997 Agreement did not contain a property description. However, a lack of a proper property description in an agreement nearly fully performed does not preclude the application of the doctrine of partial performance.

An illustrative example of the district court’s misstep is *Simmons v. Simmons*, 134 Idaho 824, 826, 11 P.3d 20, 22 (2000). In *Simmons*, two brothers and their wives were joint owners of farmland. One of the brothers and his wife, Newell and Carol Simmons, also owned a house and approximately sixty acres. *Id.* The other brother and his wife, Joel and DeLila Simmons, also owned a home and land. *Id.* All of the property, the farmland and the two homes and additional acreage, were subject to a Federal Land Bank mortgage and at some point the obligation to the Federal Land Bank was in default. *Id.* The two couples met to discuss possible alternatives in lieu of foreclosure on the farm property and it was determined that Joel and DeLila would file for Chapter 12 bankruptcy to save the property. *Id.* To avoid participation in the bankruptcy proceedings, Newell and Carol Simons quitclaimed their interest in the farmland to DeLila and

Joel Simmons as well as their interest in their house and the sixty acres. The parties agreed that after the Federal Land Bank Debt was satisfied that Joel and Delila Simmons would then convey the home and sixty acres back to Newell and Carol Simmons. *Id.* A memorandum was prepared but had obvious deficiencies including not having all proper signatures and inadequate property descriptions. Years later, after the debt was satisfied, DeLila Simmons (her husband Joel had since passed away) refused to convey the house and sixty acres back to Newell and Carol and litigation ensued. *Id.*

The primary issue in *Simmons* was whether enforcement of the agreement was barred by the “Statute of Frauds” on the basis that the “writing was not signed by all the parties, that it does not contain a proper description of the property to ascertain the exact identity of the land in question, and that the oral conditions have been left out of the agreement.” *Simmons*, 134 Idaho at 827, 11 P.3d at 23. The trial court applied the doctrine of part performance and also applied parole evidence to clear up ambiguities in the flawed memorandum and to avoid the application of the Idaho’s Statute of Frauds. Stated differently and to highlight the district court’s error in this case, the trial court did not look exclusively at the terms of the imperfect and flawed written agreement that did not include an adequate property description, but considered whether parole evidence could clear up ambiguities that could enable it to apply to the doctrine of partial performance.

Significantly, the Idaho Supreme Court affirmed the district court and appreciated the fact that there had been full performance of the agreement by Newell and Carol Simmons: “Newell and Carol fully performed their part of the agreement which resulted in DeLila

[Simmons] saving the entire farm property from foreclose” and that “[a]ll that remains is for [DeLila Simmons] to perform her part of the bargain.” *Id.* As for the “lacking essential terms” the Idaho Supreme Court affirmed the district court’s application of parole evidence to address the ambiguity: “Parole evidence is necessary to properly construe the intent of the parties in this case *and to properly identify the property to be conveyed...*” *Simmons*, 134 Idaho at 828, 11 P.3d at 24 (emphasis added). Like in *Simmons*, there is ample parole evidence in the record to construe the intent of the parties—cure the lack of an insufficient property description in the underlying agreement.

Indeed, the circumstances in this case are even stronger in favor of the Lees. In the present case we had an initial oral agreement between the Lees and Kemps, a portion of which was reduced to writing—the 1997 Agreement. Admittedly, in this case, as with the memorandum in *Simmons*, the 1997 Agreement contained an incomplete description of the property at issue, Kemp Road. However, in this case and in *Simmons*, it is clear that there has been performance of an agreement by the parties and there is parole evidence that can be applied definitively to resolve any ambiguity that exists as to the essential terms of the easement agreement (*i.e.*, lack of a property description). Again, here, the agreement has been near fully performed, Kemp Road was constructed and the access points created—we know the property description because Kemp Road was constructed along with the access points. Accordingly, it is a fiction to assert an ambiguity as to what property is subject to the easement.

Also, the equitable argument for partial performance is even stronger than in *Simmons* because the agreement in light of both “possession” and “improvement”—the most important

factors in partial performance. The road and access points were constructed and access to the road was clearly provided to the Lees. The only aspect of the easement agreement that was not performed was that the Lees had not received full “government approval” for use of Kemp Road—a provision spelled out in the written document and that needs no clarification. Thus, performance here was even stronger than it was in *Simmons*. And, again, to be clear, all other obligations had been performed. Thus, given the substantial performance of the obligations, the doctrine of partial performance as a form of equitable estoppel, is even more applicable and an even stronger basis for application in this case.

The Idaho Court of Appeals has stated, “[t]he doctrine of partial performance is best understood as a specific form of the more general principle of equitable estoppel.” *Frantz v. Parke*, 111 Idaho 1005, 729 P.2d 1068 (Ct. App. 1986). The Idaho appellate court went on to state as follows:

The Idaho Supreme Court repeatedly has held that when one party has fully performed an oral contract within the statute of frauds, he is not entitled to collect damages for a breach. Rather, he is entitled to the equitable remedy of specific performance.

Id. at 1009. The court in *Frantz* also stated,

... the object of the statute is to prevent potential fraud by forbidding disputed assertions of enumerated kinds of contracts without any written basis. This purpose is fully satisfied when the parties themselves accept the contract and mutually perform it. For the same reason, the statute of frauds is inapplicable when a contract, although not fully performed by both sides, is mutually acknowledged to exist.

Id. at 1008-1009. The object of the statute, preventing potential fraud, is not an issue in this case.

Consequently, here, consistent with these articulated principles, there is no potential fraud. The

performance and actions of the parties confirm the agreement and informed the world of the terms of that agreement--including the property at issue, Kemp Road.

Moreover, as mentioned previously, Idaho has long acknowledged the importance of the doctrine of partial performance as an equitable remedy. This is especially true when the remedy sought is specific performance—as it is here. *See Tew v. Manwaring*, 94 Idaho 50, 480 P.2d 896 (1971). *See also Hoffman v. SV Co.*, 102 Idaho 187, 628 P.2d 218 (1981). In summation, it is simply unjust and inequitable for the statute of frauds to even be an issue here given the performance by the parties. It is incontrovertible fact that the Lees performed their obligations. They sold their land on the condition that they would be provided access to Kemp Road. And, indeed, the Lees have relied on the terms of the agreement and the fact that the agreement was essentially performed. It is patently unfair and contrary the purpose behind Idaho's statute of frauds to allow the HOA to assert the statute of frauds as a technical basis for disregarding the agreement between the Kemps and the Lees--to essentially to go back on an agreement that has already been substantially performed and to treat it as if it never existed. This case is a blue print for equitable estoppel as applied through the doctrine of partial performance and the reasons why it is an important equitable doctrine that protects Idahoans that perform their agreements.

D. The District Court Failed To Appreciate Facts In The Record, Including Performance, That Establish The Terms Of Agreement

This case also presents this Court with the opportunity to extend and clarify Idaho's interpretation on an important legal doctrine—equitable servitude. In the event the Court concludes it cannot apply equitable relief in the context of equitable estoppel and partial

performance, this Court should extend the doctrine of equitable servitude to the present circumstances.

Here, the Lees assert that they have an equitable interest in real property—access to Kemp Road. Significantly, that interest arises “by implication from the language of the deeds or the conduct of the parties.” *See Birdwood Subdivision Homeowner’s Ass’n, Inc. v. Bulotti Const., Inc.*, 145 Idaho 17, 23, 175 P.3d 179, 185 (2007) (quoting 20 Am.Jur.2d, Covenants, Etc., § 155 (2005) (an equitable servitude arises “by implication from the language of the deeds or the conduct of the parties.”)); *see also Idaho Power Co. v. State, By & Through Dep’t of Water Res.*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983) (“restrictive covenants and equitable servitudes” relate to “[a]greements not to assert ownership rights.”).

The district court declined to extend the doctrine of equitable servitude and ruled as a matter of law that the equities, here the conduct of the parties and performance of the agreement, could not be the basis for conferring an “affirmative right to use land.” *See* Memorandum Decision, p.6 (R., p.236). Instead, the district court focused exclusively on the nature of the property right—whether an “equitable servitude confers an affirmative right to use or access land.” *Id.* As set forth below, this is inconsistent with the direction and purpose of prior rulings from this Court that have focused on the equities as opposed to the classification of the servitude asserted:

Whether a successor in interest takes the interest subject to the equitable servitude is a question of notice. *Streets [v. JM Land & Developing Co.]*, 898 P.2d [377] at 379–81 (Wyo.1995). Whether a party has notice of an issue or event is a question of fact. *See, e.g., Taylor v. Soran Restaurant, Inc.*, 131 Idaho 525, 960 P.2d 1254 (1998) (Whether notice of injury subject to workers' compensation claim was

given to employer was question of fact.) The difficulty presented by this inquiry is that the district court did not ground its judgment in the question of notice. The district court stated, “West Wood cannot improve its position over that of APP.” *This conclusion is in error because the relevant inquiry is not into what right or interest APP had to give.*

West Wood Investments, Inc., 141 Idaho at 85, 106 P.3d at 411 (emphasis added). Significantly, in *West Wood*, the Idaho Supreme Court recognized that the other land owners had an “affirmative right” to use Lot 5. Indeed, the title for Section B states emphatically that: “The District Court Did Not Abuse Its Discretion When It Found That Respondents [Lot Owners and the HOA] Had Equitable Servitudes Affording Them Exclusive Rights and Use of Lot 5.” *Id.* at 83, 106 P.3d at 409 (extra emphasis added). *See also* Section B, Subsection 1: “The owners and association have an equitable interest enforceable against the original promisor.” *Id.* at 84, 106 P.3d at 4010. Clearly, *West Wood* confirms that when looking at equitable relief in the context of a promise regarding real property, whether or not the right is affirmative or negative is not dispositive.

It is important to note that Idaho’s approach to “equitable servitudes” or “equitable interests” is unique and has always been more equitable than in most states. For example, Idaho permits an equitable servitude to be created “because of the actions of the parties, such as oral representations.” *West Wood Investments, Inc. v. Acord*, 141 Idaho 75, 84, 106 P.3d 401, 410 (2005). In fact, Idaho is one of the few states that allows for the creation of equitable servitudes without a written agreement. Moreover, it certainly appears that Idaho has never restricted equitable servitude to particular encumbrances such as an “affirmative right to use land.” And, a

review of the case law shows that Idaho courts have always focused on the equities of why a party should, in equity, have an interest in real property where circumstances so require.

The *West Wood* case cited above is a prime example and illustrates Idaho's unique approach to equitable interests. It further indicates why Idaho should not deny equitable relief simply because the encumbrance relates to affirmative right as opposed to a negative right to use land--a distinction without a difference in the context of equitable relief. In *West Wood* the plaintiffs were a group of owners and associations that asserted an equitable interest in certain real property--the claim, much like the claim here, was that they were entitled to use or have access to a common area. See *West Wood Investments, Inc.*, 141 Idaho 75, 83, 106 P.3d 401, 409 (2005) ("the interest asserted by the Owners [that they had a right to use a common area] was an equitable interest..."). It is significant that in *West Wood* the issue was whether the members of an HOA could enforce an agreement executed by the original land owner—that the lot at issue, Lot 5—would be subject to an easement that allowed use by the other lot owners for recreational purposes. The district court ruled in favor of the HOA and lot owners and concluded, because of the equities, that they should have that affirmative right and that the subsequent owner of the lot could not prevent that use. Of paramount importance, this Court ruled that the "owners and associations have an equitable interest enforceable against West Wood, the subsequent purchaser of APP's [the original owner's] interest." *West Wood Investments, Inc.*, 141 Idaho at 85, 106 P.3d at 411 (2005).

In this case, the Lees and the Kemps agreed to develop their property and that the Kemps would construct a road that would be used by both parties—in essence, a common area. The

conduct of the parties and a written document, the 1997 Agreement, support this fact. This is significant because the primary argument asserted by the HOA at summary judgment and adopted by the district court is that the Lees' equitable claims are precluded simply because the Lees assert an "affirmative right" to use property instead of a negative restrictive covenant:

The Lees are not seeking to limit Willow Creek's use of Kemp Road (which would be a restrictive covenant). Rather, they are seeking a right of use over Kemp Road (which is an affirmative easement). Because the Lees are not seeking a restrictive covenant, which may be created by conduct, but rather they are seeking an affirmative right to use the land of Willow Creek, in order to prevail at trial they must provide a written agreement complying with the statute of frauds.

See Defendant's Motion for Summary Judgment Memo, p. 8 (R., p. 124). This argument is wrong and illustrates the HOA's attempt to remove all equitable relief under the present scenario. While it is certainly appreciated that other jurisdictions may draw a distinction, this Court has not adopted such a distinction and should not adopt one now. Indeed, neither the Kemps nor the district court identified any Idaho case that precludes an Idaho court from recognizing the Lees' equitable interest in the enforcement of an agreement regarding a right to use land, of which the HOA had actual and constructive notice—rather, they argue that no Idaho case allowed the district court to do so. Here, for the reasons explained above, because of the "implications from the language and deeds [and] conduct of the parties" this Court should extend the principles of *West Wood* to the circumstances and find an equitable basis that affords the Lees the right to use Kemp Road to access their property.

CONCLUSION

For the reasons set forth above, the Lees respectfully request this Court reverse the Memorandum Decision granting summary judgment in favor of the HOA and enter summary judgment in favor of the Lees, or in the alternative, remand the case back to the district court to resolve genuine issues of material fact that preclude entry of summary judgment in favor of the Lees. In the event that this Court reverses and/or remands, because the district court has also awarded costs, the Lees would respectfully request that the award of attorney fees and costs also be reversed and/or vacated.

DATED this 6th day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2018, I caused to be served two (2) true and correct bound copies of the Brief of Appellant by the method indicated below, and addressed to the following:

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The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

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