10-25-2018

Security Investor Fund LLC v. Crumb Respondent's Brief Dckt. 45969

Electronically Filed
10/25/2018 2:00 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

SECURITY INVESTOR FUND LLC, SECURITY FINANCIAL FUND LLC, Plaintiffs/Appellants/Cross-Respondents, vs. BRIAN CRUMB, JENNIFER O'CALLAGHAN and BRIAN O'CALLAGHAN, JITINVEST LLC, SPIRIT ELEMENTS, LLC, and TODD A. REEVE, Defendants/Respondents/Cross-Appellants.	Supreme Court No: 45969-2018 Kootenai County No. CV-17-5541

RESPONDENT/CROSS-APPELLANT'S BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County

Honorable Richard Christensen, Presiding

Darrin L. Murphey
MURPHEY LAW OFFICE, PLLC
402 West Canfield Avenue, Suite 2
Coeur d'Alene, ID 83815

Attorney for Defendant/Respondent/Cross-Appellant Brian Crumb

Arthur M. Bistline
BISTLINE LAW, PLLC
1205 N. 3rd Street
Coeur d'Alene, ID 83814

Attorney for Plaintiffs/Appellants/Cross-Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes

Other Authorities:

Rules:

I. STATEMENT OF THE CASE

A. Nature of case.

The Plaintiffs/Appellants/Cross-Respondents, Security Investor Fund LLC and Security Financial Fund LLC (herein collectively "Security") brought this action for breach of contract, fraud and a declaratory judgment against Defendant/Respondent/Cross-Appellant, Brian Crumb (herein "Crumb"). R. 13, 14, 342. Crumb was a member of Abbey & Crumb Developments, LLC (herein "A&C LLC") for 14 months, withdrawing from the Company on September 26, 2006. R. 99, ¶¶[1] 2-3. Richard Abbey (herein "Abbey") was also a member of A&C LLC. R. 133, 135; Aug. 16. Several years prior to Crumb becoming a member of A&C LLC, Crumb and his wife[2] purchased a parcel of real property adjacent to the Fritz Heath (herein the "Crumb Property"). R. 99, ¶ 4. During the time that Crumb was a member of A&C LLC, the Company worked on continuing to develop the then existing Fritz Heath Forest Second Amended Tracts subdivision, located on Blossom Mountain in Post Falls, Idaho (herein "Fritz Heath"). R. 99, ¶ 5.

During the time Crumb was a member of A&C LLC, it was impossible for anyone to drive a vehicle over and across the Crumb Property to enter the Fritz Heath. R. 105, ¶ 22. The only passable road to and through the Fritz Heath was the road depicted on the recorded Plats (R. 112, 116), a four (4) foot by eight (8) foot sign/billboard (R. 119) placed at the entrance to the Fritz Heath, internet advertising materials (R. 121), and the map attached to the Fire & Rescue District annexation Order. (R. 126). R. 105, ¶¶ 22, 23.

---

1 For those documents in record with numbered paragraphs, citation is made to the paragraph number.

2 Crumb and his wife, Frankie, are co-owners of the Crumb Property. Frankie is not a named party, and although she would be an indispensable party for the relief sought by Security, she is not indispensable for the purpose of dismissal of Security's lawsuit. R. 242, n. 1.

On September 26, 2006, Crumb withdrew from A&C LLC, executing along with all of the other members, including Abbey, a certain Agreement of Members of Abbey & Crumb Developments, LLC as to Transfer of Assets and Withdrawal of Members Interest (herein "Member Withdrawal Agreement"). R. 103, ¶ 17, 133-36. The Member Withdrawal Agreement, by its terms was the entire and complete agreement of the parties, and included a merger clause precluding all prior agreements. R. 136, 239.

Security alleged in their verified Complaint that they were not advised, apparently by Abbey when Security loaned money to Abbey and A&C LLC after Crumb withdrew from A&C LLC on September 26, 2006, that when Security "purchased" lots in the Fritz Heath that an easement over and across the Crumb Property was not recorded. R. 13, ¶ 12. A&C LLC did not enter into any loan or other agreement with Security when Crumb was a member of the Company. R. 107, ¶ 29. Crumb did not sell or transfer any lots to Security. *Id*. Crumb did not discuss with, promise, represent or suggested in any manner whatsoever to Security that he had granted or was going to grant Security an easement over and across the Crumb Property. R. 106, ¶ 25, 107, ¶ 29. Security has not paid Crumb any consideration whatsoever for an easement. R. 106, ¶ 26. Security could have easily searched the records of the Kootenai County Recorder's Office, which show that the lots Security "purchased" or were utilizing as security did not and do not have an easement over and across the Crumb Property. R. 107, ¶ 29. If Abbey made promises to Security, then Security's dispute is with Abbey, not Crumb. *Id*.

Security argues that prior to Crumb's withdrawal from A&C LLC, Crumb orally agreed to an easement that is enforceable as an exception to the Statute of Frauds, ignoring the merger

clause contained in the Member Withdrawal Agreement. Regardless, Security failed to present evidence of price or consideration of the alleged oral agreement. R. 295. Finally, Security argues that the CC&Rs satisfy the Statute of Frauds because a written easement should have been attached as an exhibit. Security ignores the district court's finding that Security presented no evidence of a written instrument, signed by Crumb (and his wife) which both identifies the land subject to the easement and makes clear the parties intention to establish a servitude. R. 299.

The district court found that Security' "claims for breach of contract and fraud to be wholly without merit." R. 342. Security's declaratory judgment action, brought on the same underlying grounds, is likewise wholly without merit. Security plead for an award of attorney fees in what they described as "in this commercial dispute." R. 14, ¶ 15. Crumb is entitled to his attorney fees.

B. Course of the proceedings.

Crumb and Security filed cross motions for summary judgment. R. 57, 186. On January 10, 2018, the district court entered its Memorandum Decision and Order on Plaintiffs' and Defendant Crumb's Cross Motions for Summary Judgment, granting Crumb's Motion for Summary Judgment and denying Security's Motion for Summary Judgment. R. 242. On January 18, 2018, the district court entered its Judgment, dismissing Security's Complaint with prejudice, and found that Crumb is the prevailing party. R. 244-45. On January 22, 2018, Crumb timely filed a Motion for Attorney Fees and Memorandum of Costs. R. 247-257. On February 1, 2018, Security filed a Motion for Reconsideration. R. 266. On February 22, 2018, the district court entered its Memorandum Decision and Order Re: Plaintiffs' Motion to Reconsider, denying the

motion. R. 299. On March 8, 2018, Crumb timely filed a Motion for Attorney Fees in Defending Plaintiffs' Motion to Reconsider and Verified Memorandum of Costs in Support of Motion for Attorney Fees in Defending Plaintiffs' Motion to Reconsider. R. 311-320. On April 5, 2018, Security filed a Notice of Appeal. R. 321. On April 25, 2018, the district court entered its Memorandum Decision and Order Re: Attorney Fees and Costs, denying Crumb's motions. R. 344. On May 21, 2018, Crumb timely filed a Notice of Cross Appeal. R. 346-352.

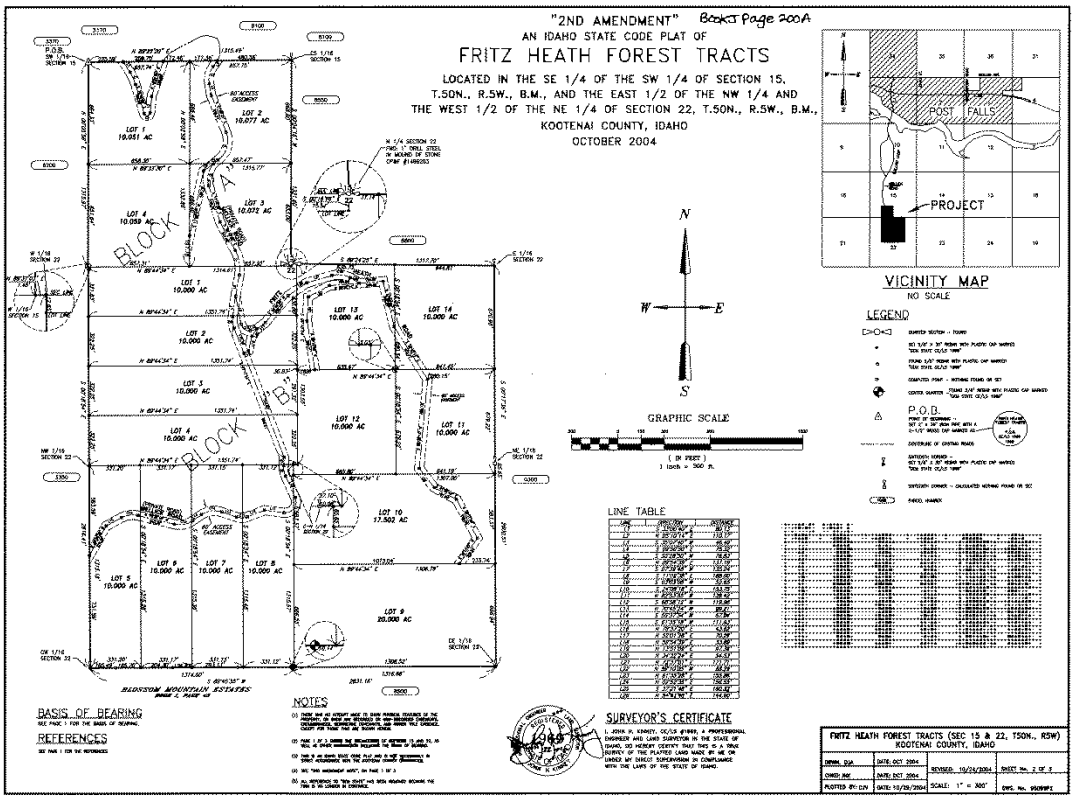
C. Statement of facts.

Crumb disagrees with Security's characterization of the facts.

Crumb was one of the five (5) original members of A&C LLC, with Crumb and his wife holding 1/3 of an interest, Marian Crumb holding 1/3 of an interest and Abbey and his wife holding 1/3 of an interest. R. 99, ¶ 2, 133, 135; Aug. 16. A&C LLC filed its Articles of Organization of Limited Liability Company with the Idaho Secretary of State on July 25, 2005. Aug. 16. Crumb withdrew from A&C LLC 14 months later, on or about September 26, 2006. R. 99, ¶¶ 2-3, 133, 135; Aug. 16. During the time that Crumb was a member of A&C LLC, the Company worked on continuing to develop the then existing Fritz Heath subdivision. R. 99, ¶ 5. On or about October 7, 2003, several years prior to Crumb becoming a member of A&C LLC, Crumb purchased the Crumb Property, a parcel of real property adjacent to the Fritz Heath. R. 99, ¶ 4.

The Fritz Heath is an Idaho Code Plat, which on the August 3, 1998 Amendment and the May 23, 2005 Second Amendment depict a road to the Fritz Heath from Mellick Road, a public

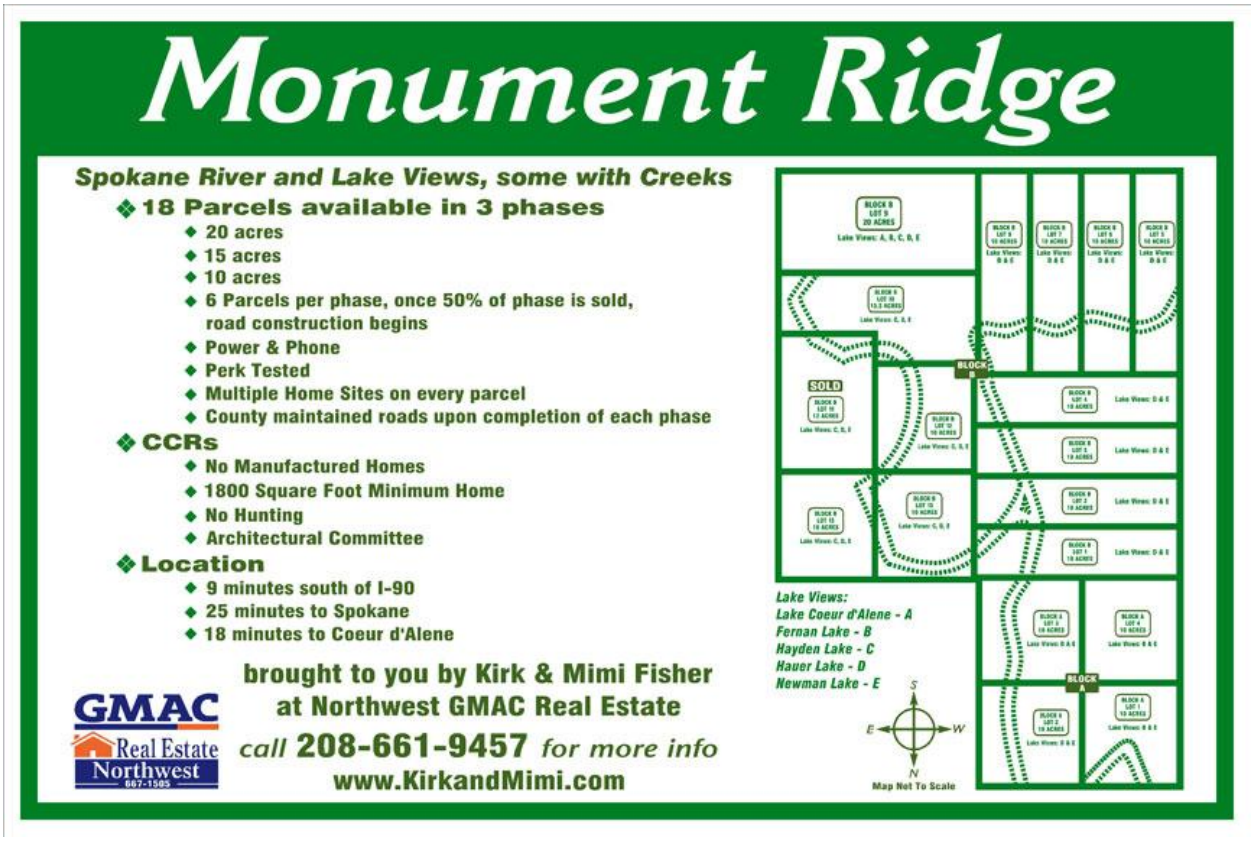
road that intersects and crosses over the northern boundary line of the Fritz Heath, to each of the lots within the Fritz Heath. R. 99-100, ¶¶ 6-8, 111-113, 115-117. Below is a copy of the plat map:



R. 116. The Amendment and Second Amendment to the Fritz Heath do not and did not depict a road from Mellick Road, over and across the Crumb Property, and into the Fritz Heath, and no such road existed when Crumb was a member of A&C LLC. R. 99-100, ¶ 8, 111-113, 115-117.

In an effort to advertise lots for sale within the Fritz Heath, in the fall of 2005, A&C LLC placed a large four (4) foot by eight (8) foot advertisement sign/billboard at the entrance of and within the Fritz Heath at the location of where Mellick Road intersects with the road within the Fritz Heath as described in the Amendment (R. 112) and Second Amendment (R. 116) to the Fritz Heath, and the sign/billboard remained at that location until sometime after Crumb

withdrew from A&C LLC. R. 100, ¶ 9. The sign/billboard depicted a road to the Fritz Heath from Mellick Road, where it intersects and crosses over the northern boundary line of the Fritz Heath, to each of the lots within the Fritz Heath, in the same or substantially similar location as the road depicted in the Amendment and Second Amendment to the Fritz Heath. *Id*. Below is a copy of the sign/billboard:

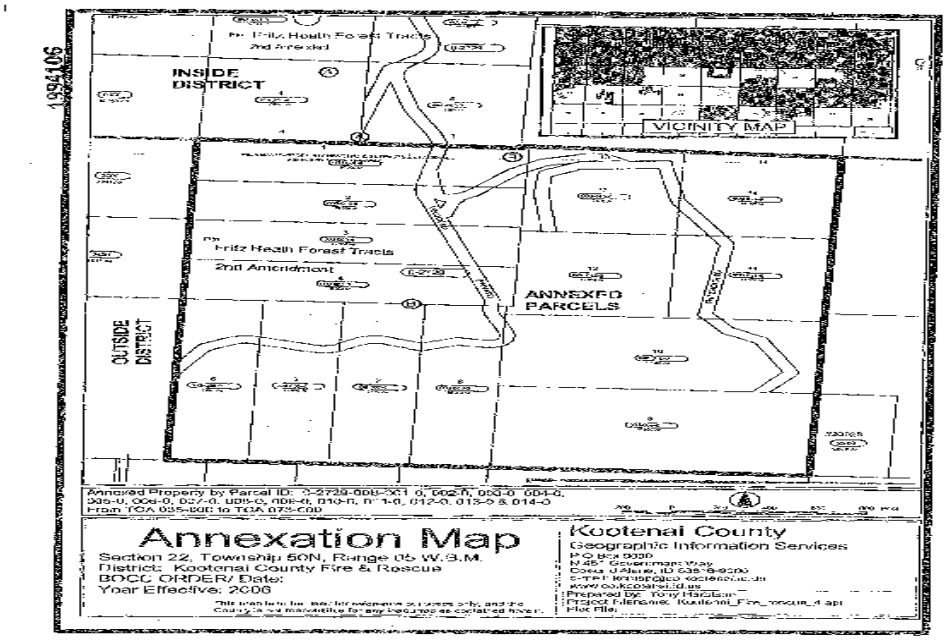


R. 119. The sign/billboard did not depict a road from Mellick Road, over and across the Crumb Property, and into the Fritz Heath, and no such road existed. R. 100, ¶ 9, 119.

Advertisements were also placed on the internet to market the lots in the Fritz Heath when Crumb was a member of A&C LLC, which also depicted a road to the Fritz Heath from Mellick Road, where it intersects and crosses over the northern boundary line of the Fritz Heath,

to each of the lots within the Fritz Heath, in the same or substantially similar location as the road depicted in the Amendment and Second Amendment to the Fritz Heath, and the sign/billboard described above. R. 100-101, ¶ 10. The internet advertising was used in the fall of 2005 until sometime after Crumb withdrew from A&C LLC. *Id*. The internet advertising did not depict a road from Mellick Road, over and across the Crumb Property, and into the Fritz Heath, and no such road existed. *Id*.

During the time Crumb was a member of A&C LLC, the Fritz Heath was annexed into the Kootenai County Fire & Rescue District. R. 101, ¶ 11. The Annexation Order included a map depicting a road in a location substantially similar to that set forth in the Amendment (R. 112) and Second Amendment (R. 116) to the Fritz Heath, the four (4) foot by eight (8) foot sign/billboard (R. 119) placed at the entrance to the Fritz Heath, and the internet advertising materials. R. 101, ¶ 11, 121. Below is a copy of the map:



R. 121. The Annexation Map did not depict a road from Mellick Road, over and across the Crumb Property, and into the Fritz Heath, and no such road existed. R. 101, ¶ 11, 121.

That with the assistance of A&C LLC's realtor, Abbey, Crumb and his wife drafted the CC&Rs for the Fritz Heath together, which were signed before a notary on January 6, 2006. R. 101, ¶ 12; Aug. 26.[3] The CC&Rs state, at paragraph 24, that a road easement "**on each lot**" is shown in an attached exhibit. Aug. 24. However, no exhibit was attached. R. 101-102, ¶ 12. The document that should have been attached to the CC&Rs was a document depicting a road in the location of the only road providing access to the Fritz Heath, as set forth in the Amendment (R. 112) and Second Amendment (R. 116) to the Fritz Heath, the four (4) foot by eight (8) foot sign/billboard (R. 119) placed at the entrance to the Fritz Heath, and the internet advertising materials (R. 121), and the Annexation Map (R. 121). There was no road over and across the Crumb Property to the Fritz Heath when the CC&Rs were recorded. R. 102, ¶ 12.[4]

Crumb did not file or record, nor did Crumb authorize anyone to file or record on his behalf, any documents with Kootenai County or any other agency indicating that Crumb granted A&C LLC or the Fritz Heath an easement over and across the Crumb Property. R. 102, ¶ 13.

During the time that Crumb was a member of A&C LLC, an engineering firm retained by

---

3 The record is not clear as to the date the CC&Rs were recorded. *Compare* R. 101, ¶ 12 (January 5, 2016, which appears to be a clerical error) with Aug. 2, ¶ 4 (January 5, 2006, the day before the document was signed before a notary).

4 According to Abbey, "[i]n 2006, . . . A&C LLC retained an engineering firm named Inland Northwest Consultants (hereinafter, "INC") to design and supervise construction of an engineered road from Mellick Road (a public road) through the FRITZ-HEATH for the purpose of providing residential access to the subdivision. Thereafter, INC informed A&C LLC that it would be much cheaper to construct the entrance road into the FRITZ-HEATH by using a forty (40) foot right of way on an adjoining property owned by Brian Crumb". Aug. 2, ¶ 7. The drawings from the engineers are dated July 18, 2006, several months after the date the CC&Rs were signed, January 6, 2006. R. 43-52. As such, at the time the CC&Rs were signed, the engineer had not yet recommended using the Crumb Property, and the engineering drawings were not created until more than six months later.

A&C LLC recommended relocating the entrance road to the Fritz Heath to a point farther up Mellick Road from the location of the road that was depicted in the Amendment (R. 112) and Second Amendment (R. 116) to the Fritz Heath, which would proceed over and across the Crumb Property. R. 103, ¶ 14. At that time, Crumb discussed with and offered Abbey that upon receipt of payment from A&C LLC in the amount of $200,000, Crumb would grant A&C, LLC an easement. R. 103, ¶ 14.

Crumb, based on the advice of attorney Romer Brown, did not and would not have signed any documents granting or agreeing to grant any easement over and across the Crumb Property, unless and until Crumb received the agreed upon consideration. R. 103, ¶ 15. Crumb did not receive $200,000 or any payment or any other consideration whatsoever for an easement over and across the Crumb Property from A&C LLC. R. 103, ¶ 16.

On September 26, 2006, Crumb withdrew from A&C LLC, executing along with all of the other members, including Abbey, the Member Withdrawal Agreement. R. 103, ¶ 17, 133-36. The Member Withdrawal Agreement was the entire and complete agreement of the parties, and includes a merger clause. R. 136. The Member Withdrawal Agreement makes no mention whatsoever of Crumb granting an easement over and across the Crumb Property, because no such agreement was consummated. R. 104, ¶ 19. Based on the advice of counsel, Crumb did not and would not have signed any document granting or agreeing to grant any easement over and across the Crumb Property. *Id*.

That when Crumb withdrew from A&C LLC on September 26, 2006, there was no passable road over and across the Crumb Property to the Fritz Heath. R. 104, ¶ 20. The only

passable road to and through the Fritz Heath was the road depicted on the Amendment (R. 112) and Second Amendment (R. 116) to the Fritz Heath, the four (4) foot by eight (8) foot sign/billboard (R. 119) placed at the entrance to the Fritz Heath, the internet advertising materials (R. 121), and the Annexation Order Map (R. 126). R. 104, ¶ 20.

That in 2005, prior to A&C LLC purchasing the Fritz Heath, and during the time Crumb was a member of A&C LLC, Crumb drove his vehicle over and across the Fritz Heath numerous times on the only passable road to and through the Fritz Heath, which was the road depicted on the Amendment (R. 112) and Second Amendment (R. 116) to the Fritz Heath, the four (4) foot by eight (8) foot sign/billboard (R. 119) placed at the entrance to the Fritz Heath, the internet advertising materials (R. 121), and the Annexation Order Map (R. 126). R. 104, ¶ 21.

That during the time Crumb was a member of A&C LLC, it was impossible for anyone to drive a vehicle over and across the Crumb Property to access the Fritz Heath. R. 105, ¶ 22. The only passable road to and through the Fritz Heath was the road depicted on the Amendment (R. 112) and Second Amendment (R. 116) to the Fritz Heath, the four (4) foot by eight (8) foot sign/billboard (R. 119) placed at the entrance to the Fritz Heath, the internet advertising materials (R. 121), and the Annexation Order Map (R. 126). R. 105, ¶ 22.

That at the time Crumb left A&C LLC on September 26, 2006, the lots in the Fritz Heath, including the lots now owned by Security, could have used the only passable road to and through the Fritz Heath, which was the road depicted on the Amendment (R. 112) and Second Amendment (R. 116) to the Fritz Heath, the four (4) foot by eight (8) foot sign/billboard (R. 119) placed at the entrance to the Fritz Heath, the internet advertising materials (R. 121), and the

Annexation Order Map. (R. 126). R. 105, ¶ 23.

That during the time that Crumb was a member of A&C LLC, four (4) lots were sold from the Fritz Heath. R. 105-106, ¶ 24. Having no legal obligation to do so, Crumb verbally promised the four (4) original purchasers that he would grant an easement over and across the Crumb Property, but only one (1) of the four (4) original purchasers requested and was provided an easement. R. 106, ¶ 24. Crumb did not extend such a promise to the three (3) successor owners of the four (4) original purchasers, nor did Crumb extend the promise to purchasers of lots after he withdrew from A&C LLC on or about September 26, 2006, other than to lots owned by Crumb, his mother and a friend. *Id*. Crumb made no such promise whatsoever to Security. *Id*.

Crumb did not discuss with, promise, represent or suggested in any manner whatsoever to Security that he had granted or was going to grant Security an easement over and across the Crumb Property. R. 106, ¶ 25. Security has not paid Crumb any consideration whatsoever for an easement over and across the Crumb Property. R. 106, ¶ 26. Security has not performed any improvements on the road over and across the Crumb Property. R. 106, ¶ 27.

Abbey has always been aware that Crumb did not sign an easement or agreement to provide an easement to A&C LLC and the lots of the Fritz Heath, and certainly since September 26, 2006, the date Crumb withdrew from the Company and executed the Member Withdrawal Agreement. In fact, on October 10, 2011, Crumb forwarded an email to Abbey, with an unsigned statement attached, which Crumb was asked to sign on behalf of the Lenharts, one of the lot purchasers when Crumb was a member of A&C LLC, concerning access to the Lenharts' lot within the Fritz Heath. R. 106, ¶ 28. Crumb did not sign the statement because it was

inaccurate in part, but it did accurately describe that the Lenharts did not have legal access across the Crumb Property, as no easement was signed and recorded. R. 106-107, ¶ 28. In addition, the Lenharts stated in a letter dated January 31, 2013, that there was never any signed and recorded easement over the Crumb Property, and that they had been informed by Abbey that Crumb was going to charge people if they wanted to cross Crumb's land. R. 107, ¶ 28, 138-139, 141.

Although Security allege in their verified Complaint that they purchased their lots, Security states in their discovery responses that they obtained their lots within the Fritz Heath by agreeing to a deed in lieu of foreclosure, apparently for a default on a loan to Abbey and A&C LLC after Crumb withdrew from the Company on September 26, 2006. R. 107, ¶ 29, 150, Answer to Interrogatory No. 8. Security allege in their verified Complaint at paragraph 12 that they were not advised when they "purchased" lots in the Fritz Heath that easements over and across the Crumb Property were not recorded. R. 13, ¶ 12, 107, ¶ 29. However, that is not Crumb's fault. R. 107, ¶ 29. A&C LLC did not enter into any loan or other agreement with Security when Crumb was a member of A&C LLC. *Id*. Crumb did not sell or transfer any lots to Security. *Id*. Crumb did not offer, promise, or otherwise agree to grant an easement to Security over and across the Crumb Property. *Id*. Security could have easily searched the records of the Kootenai County Recorder's Office, which show that the lots they "purchased" or were utilizing as security did not and do not have an easement over and across the Crumb Property. *Id*. If Abbey made promises to Security, then Security's dispute is with Abbey, not Crumb. *Id*.

II. ISSUES PRESENTED ON APPEAL

Crumb restates the issues on appeal as follows:

1. Whether Security's action to enforce an easement is precluded by the Statute of Frauds.
2. Whether Security's action to enforce an easement is precluded by the Member Withdrawal Agreement.
3. Whether Security's action to enforce an easement is precluded by the Statute of Limitations.
4. Whether Security is entitled to attorney fees on appeal.
5. Whether Crumb is entitled to attorney fees and costs on appeal pursuant to Idaho Code § 12-120(3) and 12-121.

III. ADDITIONAL ISSUES PRESENTED ON CROSS APPEAL

1. Whether Crumb is entitled to attorney fees and costs incurred in the district court and on appeal pursuant to Idaho Code §§ 12-120(3) and 12-121.

IV. ARGUMENT IN RESPONSE TO APPELLANTS' BRIEF

A. Standard of review.

The standard of review of a decision on a motion for summary judgment is de novo; i.e., this Court reviews the motion based upon the same standard as the court below. Massey v. ConAgra Foods, Inc., 156 Idaho 476, 479-80, 328 P.3d 456, 459-60 (2014). Summary judgment is appropriate only when the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. I.R.C.P. 56. "Generally, when considering a motion for summary judgment, a court 'liberally construes the record in a light most favorable to the party opposing the motion and draws all reasonable inferences and conclusions in that party's favor.'" Drew v. Sorensen, 133 Idaho 534, 537, 989 P.2d 276, 279 (1999) (quoting Brooks v. Logan, 130 Idaho 574, 576, 944 P.2d 709, 711 (1997). "The general rule for reviewing grants of summary judgments does not apply where the parties below filed cross motions for summary judgment, each relying on the

same facts, issues and theories." Walker v. Hollinger, 132 Idaho 172, 176, 968 P.2d 661, 665 (1998).

> "Where ... both parties file motions for summary judgment relying on the same facts, issues and theories, the parties essentially stipulate that there is no genuine issue of material fact which would preclude the district court from entering summary judgment." Brown v. Perkins, 129 Idaho 189, 191, 923 P.2d 434, 436 (1996). When the evidentiary facts are undisputed, leaving the dispute only as to inferences, the judge, as the trier of fact, may resolve the conflict between the inferences. Riverside Dev. Co. v. Ritchie, 103 Idaho 515, 518-19, 650 P.2d 657, 661 (1982). The test for reviewing the inferences drawn by the district court is whether the record reasonably supports the inferences. *Id*. at 518-20, 650 P.2d at 662.

Walker, 132 Idaho at 176, 968 P.2d at 665.

B. The alleged oral easement was properly dismissed for failing to comply with the Statute of Frauds.

Security allege in their verified Complaint that they were not advised, apparently by Abbey when Security loaned money to Abbey and A&C LLC after Crumb withdrew from A&C LLC on September 26, 2006, that when Security "purchased" lots in the Fritz Heath that an easement over and across the Crumb Property was not recorded. R. 13, ¶ 12. Security could have determined if an easement was recorded by searching the County Recorder's Office for an easement, which would have shown that no such easement exists. With even less effort, Security could have simply asked Crumb if there was an easement. Security could have looked at the road described in the recorded plat. In any event, Security alleges that it is seeking to enforce an alleged oral agreement for an easement made prior to Crumb's withdrawal from A&C LLC on September 26, 2006, as a third party beneficiary. R. 66, ¶ 25. Notwithstanding that no

consideration was paid to Crumb for the alleged easement, any such agreement is barred by the Statute of Frauds.

> Certain agreements to be in writing. **In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent**. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:
> . . .
> 4. **An agreement for** the leasing, for a longer period than one (1) year, or for the sale, of **real property, or of an interest therein**, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.
> . . .

Idaho Code § 9-505(4)(emphasis added); Bank of Commerce v. Jefferson Enters., LLC, 154 Idaho 824, 830, 303 P.3d 183,189 (2013)(affirming district court's summary judgment decision that even assuming that there was in fact a pre-commitment agreement to loan money and that the Bank agreed to take a second position, because no writing exists, the Statute of Frauds bars any alleged oral agreement); Lettunich v. Key Bank Nat. Ass'n, 141 Idaho 362, 367, 109 P.3d 1104, 1109 (2005)(affirming district court's summary judgment decision that commitment letters did not satisfy the writing requirement of the Statute of Frauds because they were never executed by the parties). Easements are interests in real property subject to the Statute of Frauds. Bob Daniels and Sons v. Weaver, 106 Idaho 535, 541, 681 P.2d 1010, 1016 (Ct.App. 1984).

"Failure to comply with the statute of frauds renders an oral agreement unenforceable both in an action at law for damages and in a suit in equity for specific performance." Hoffman

v. S V Co., Inc., 102 Idaho 187, 190, 628 P.2d 218, 221 (1981).[5]

"An easement established by unwritten agreement is merely a license, revocable by the licensor." Weaver, 106 Idaho at 542, 681 P.2d at 1017 (*citing* Howes v. Barmon, 11 Idaho 64, 81 P. 48 (1905)). The rule is based on the proposition that "a parol license to impress real property with a servitude cannot be perpetual or irrevocable, on account of the prohibitions of the statute of frauds, and the parties not having complied with the requirements of the statute, they will be presumed to have dealt in conformity with law, and therefore to have intended a license rather than an easement." Howes, 11 Idaho 64, 81 P. at 50. This is the rule required by public policy which "prevents the burdening of land with restrictions founded upon oral agreements easily misunderstood." *Id*.

Although the law presumes that parties act in conformance of the law, equity will compel specific performance where the party invoking the court's aid has parted with consideration, has suffered irreparable damage, that failure to enforce the oral agreement amounts to fraud, and that the status quo of the party seeking enforcement will change if the easement is not enforced. Howes, 11 Idaho 64, 81 P. at 50. The Idaho appellate courts have more recently described the equitable doctrine as part performance and equitable estoppel.

"Before an oral agreement to convey land will be specifically enforced, the underlying contract must be proven by clear and convincing evidence." Bear Island Water Ass'n, Inc. v. Brown, 125 Idaho 717, 722, 874 P.2d 528, 533 (1994) (*citing* Anderson v. Whipple, 71 Idaho

5 Weaver, 106 Idaho at 541, 681 P.2d at 1016; Mickelsen Const., Inc. v. Horrocks, 154 Idaho 396, 401, 299 P.3d 203, 208 (2013); Wakelam v. Hagood, 151 Idaho 688, 691, 263 P.3d 742, 745 (2011); Ray v. Frasure, 146 Idaho 625, 628, 200 P.3d 1174, 1177 (2009); Bauchman-Kingston Partnership, LP v. Haroldsen, 149 Idaho 87, 91, 233 P.3d 18, 22 (2008); Lexington Heights Development, LLC v. Crandlemire, 140 Idaho 276, 285, 92 P.3d 526, 535 (2004); Hemingway v. Gruener, 106 Idaho 422, 424, 679 P.2d 1140, 1142 (1984).

112, 123, 227 P.2d 351, 358 (1951)); Rice v. Rigley, 7 Idaho 115, 61 P. 290, 294 (1900)(the oral agreement "must be so clear and certain as to leave no well-founded doubt in the mind of the court."). "Further, the proof must show that the contract is complete, definite and certain in all its material terms, or that it contains provisions which were capable in themselves of being reduced to certainty." *Id*. The material terms which must be identified in a contract to convey land include the parties to the contract, the subject matter of the contract, the **price or consideration**, and a description of the property." *Id* (emphasis added) (*citing* Hoffman, 102 Idaho at 190, 628 P.2d at 221). "There can be no part performance of an agreement that was never made." Bear Island, 125 Idaho at 723, 874 P.2d at 534.

"To be enforceable, a contract must provide a price or a means of determining the price." Haroldsen, 149 Idaho at 93, 233 P.3d at 24 (*citing* Garmo v. Clanton, 97 Idaho 696, 699, 551 P.2d 1332, 1335 (1976)). In Haroldsen, the Supreme Court affirmed the district court's summary judgment dismissal of plaintiff's lawsuit, holding that where "the parties had not agreed on what consideration supported the agreement," the equitable doctrine of part performance is not available to enforce an agreement that is otherwise invalid under the Statute of Frauds. *Id*.

"[U]nder Idaho law part performance per se does not remove a contract from the operation of the statute of frauds. Rather, '[t]he doctrine of part performance is best understood as a specific form of the more general principle of equitable estoppel.'" Treasure Valley Gastroenterology Specialists, P.A. v. Woods, 135 Idaho 485, 489, 20 P.3d 21, 25 (2001) (*quoting* Frantz v. Parke, 111 Idaho 1005, 1009, 729 P.2d 1068, 1072 (Ct.App.1986)); *See also* Wing v. Munns, 123 Idaho 493, 500, 849 P.2d 954, 961 (Ct.App.1992). "Therefore, the question whether

part performance allows [one party to an otherwise unenforceable oral agreement] to avoid application of the statute of frauds depends upon whether the part performance is such as to equitably estop [the other party to an otherwise unenforceable oral agreement] from relying upon the statute as a defense." Treasure Valley, 135 Idaho at 489-490, 20 P.3d at 25-26.

The Court in Treasure Valley then directed the analysis to equitable estoppel, setting forth the elements of equitable estoppel as follows:

> ... (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) **Lack of knowledge and of the means of knowledge of the truth as to the facts in question**[;] (2) **reliance upon the conduct of the party estopped**; and (3) **action based thereon of such a character as to change his position prejudicially**.

Treasure Valley, 135 Idaho at 490, 20 P.3d at 26 (emphasis added) (*quoting* Tew v. Manwaring, 94 Idaho 50, 53, 480 P.2d 896, 899 (1971)); Charpentier v. Welch, 74 Idaho 242, 248, 259 P.2d 814, 817 (1953); Frantz, 111 Idaho at 1010, 729 P.2d at 1073); Hoffman, 102 Idaho at 192, 628 P.2d at 223.

1. The alleged oral agreement for an easement cannot be enforced in equity by Security, a third party.

As a matter of law, the failure to comply with the Statute of Frauds is a complete bar to an action by a third party.[6] Security claims to be a third party beneficiary to an alleged oral

6 Security presented no argument or authority to the district court in response to Crumb's Motion for Summary Judgment that failure to comply with the Statute of Frauds constitutes a complete bar to an action by a

agreement to grant an easement over and across the Crumb Property. R. 66, ¶ 25. In order for a third party to enforce a contract, the contract itself must be enforceable. 17A Am. Jur. 2d Contracts § 436 (2017). "Failure to comply with the statute of frauds renders an oral agreement unenforceable both in an action at law for damages and in a suit in equity for specific performance." Hoffman, 102 Idaho at 190, 628 P.2d at 221.[7] "[T]he failure to comply with the Statute of Frauds is a bar to an action by an alleged third-party beneficiary." Hanrihan v. Parker, 19 Misc.2d 467, 470, 192 N.Y.S.2d 2, 5 (1959). Here, the district court found that "[t]he Court has not received any written instrument, signed by Defendant Crumb, which both identifies the land subject to the easement and makes clear the parties' intention to establish a servitude." R. 299. As such, this Court should affirm the dismissal of Security's lawsuit, as a matter of law, on the grounds that the failure to comply with the Statute of Frauds is a complete bar to an action by a third party.

2. Security failed to present evidence that Security partially performed on an oral agreement between Security and Crumb or that Crumb acted in a manner with Security such that Crumb should be equitably estopped from relying on the Statute of Frauds.

Part performance can remove a contract from the Statute of Frauds when the part performance by one party to an otherwise unenforceable oral agreement is such to equitably estop the other party to an otherwise unenforceable oral agreement from relying upon the statute as a defense. Treasure Valley, 135 Idaho at 489-490, 20 P.3d at 25-26. Security, "the party

---

third party beneficiary, and the district court did not address the issue in its decision. R. at 218. "When a judgment on appeal reaches the correct conclusion, but employs reasoning contrary to that of this Court, we may affirm the judgment on alternate grounds." Martel v. Bulotti, 138 Idaho 451, 454-55, 65 P.3d 192, 195-96 (2003).

7 Weaver, 106 Idaho at 541, 681 P.2d at 1016; Horrocks, 154 Idaho at 401, 299 P.3d at 208; Wakelam, 151 Idaho at 691, 263 P.3d at 745; Ray, 146 Idaho at 628, 200 P.3d at 1177; Haroldsen, 149 Idaho at 91, 233 P.3d at 22; Crandlemire, 140 Idaho at 285, 92 P.3d at 535; Hemingway, 106 Idaho at 424, 679 P.2d at 1142.

claiming the estoppel" failed to present any evidence showing Security's: "(1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question[;] (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially." Treasure Valley, 135 Idaho at 490, 20 P.3d at 26 (*quoting* Tew, 94 Idaho at 53, 480 P.2d at 899); Charpentier, 74 Idaho at 248, 259 P.2d at 817; Frantz, 111 Idaho at 1009, 729 P.2d at 1072; Hoffman, 102 Idaho at 192, 628 P.2d at 223.

The evidence is undisputed that Crumb did not sell, transfer, or promise Security anything whatsoever. R. 236, 241-42. Crumb did not discuss with, promise, represent or suggest in any manner whatsoever to Security that Crumb granted or was going to grant Security an easement over and across the Crumb Property. R. 106, ¶ 25 and 107, ¶ 29. Security did not pay Crumb any consideration whatsoever for an easement over and across the Crumb Property. R. 106, ¶ 26. Security has not performed any improvements on the road over and across the Crumb Property. R. 106, ¶ 27. Crumb did not file or record, nor did he authorize anyone to file or record on his behalf, any documents with Kootenai County or any other agency indicating that Crumb granted A&C LLC or the Fritz Heath an easement over and across the Crumb Property. R. 102, ¶ 13.

Security could have and should have searched the records of the Kootenai County Recorder, wherein Security would have found that no easement existed over and across the Crumb Property to Security's lots. "It has long been established that a purchaser is charged with every fact shown by the records and is presumed to know every other fact which an examination suggested by the records would have disclosed." Kalange v. Rencher, 136 Idaho 192, 195-96, 30

P.3d 970, 973-74 (2001) (*citing* Cordova v. Hood, 17 Wall. 1, 84 U.S. 1, 21 L.Ed. 587 (1873); Northwestern Bank v. Freeman, 171 U.S. 620, 19 S.Ct. 36, 43 L.Ed. 307 (1898)). "One claiming title to lands is chargeable with notice of every matter affecting the estate, which appears on the face of any recorded deed forming an essential link in his chain of title, and also with notice of such matters as might be learned by inquiry which the recitals in such instruments made it a duty to pursue." *Id*. (*citing* Glover v. Brown, 32 Idaho 426, 184 P. 649 (1919)). Security failed to even ask Crumb if there was an easement over and across his property to Security's lots. R. 106, ¶ 25 and 107, ¶ 29. As such, Security failed to present evidence that would entitle Security to equitably estop Crumb from relying on the Statute of Frauds as a defense. Treasure Valley, 135 Idaho at 489-490, 20 P.3d at 25-26. Accordingly, this Court should affirm the district court's dismissal of Security's lawsuit, as a matter of law, on the grounds that the failure to comply with the Statute of Frauds is a complete bar to an action by a third party.

3. Security failed to submit evidence of an agreement as to price or consideration for the alleged oral agreement to grant an easement.

Notwithstanding that the law does not allow a third party to enforce in equity an oral agreement that is otherwise unenforceable under the Statute of Frauds, that Security did not partially perform an agreement and that Security is not entitled to equitably estop Crumb from relying on the Statute of Frauds, Security failed to submit evidence of all of the material terms of an oral agreement by Crumb to grant an easement.

"Before an oral agreement to convey land will be specifically enforced, the underlying contract must be proven by clear and convincing evidence." Bear Island, 125 Idaho at 722, 874 P.2d at 533 (*citing* Anderson, 71 Idaho at 123, 227 P.2d at 358); Rice, 7 Idaho 115, 61 P. at 294

(the oral agreement "must be so clear and certain as to leave no well-founded doubt in the mind of the court."). "Further, the proof must show that the contract is complete, definite and certain in all its material terms, or that it contains provisions which were capable in themselves of being reduced to certainty." *Id*. The material terms which must be identified in a contract to convey land include the parties to the contract, the subject matter of the contract, the **price or consideration**, and a description of the property." *Id* (emphasis added) (*citing* Hoffman, 102 Idaho at 190, 628 P.2d at 221). "To be enforceable, a contract must provide a price or a means of determining the price." Haroldsen, 149 Idaho at 93, 233 P.3d at 24; (*citing* Garmo, 97 Idaho at 699, 551 P.2d at 1335). In Haroldsen, the Supreme Court affirmed the district court's summary judgment dismissal of plaintiff's lawsuit, holding that where "the parties had not agreed on what consideration supported the agreement," the equitable doctrine of part performance is not available to enforce an agreement that is otherwise invalid under the Statute of Frauds. *Id*. "There can be no part performance of an agreement that was never made." Bear Island, 125 Idaho at 723, 874 P.2d at 534.

Crumb disputes that an oral agreement was entered into. Prior to Crumb's withdrawal from A&C LLC on September 26, 2006, Crumb verbally offered that upon Crumb's receipt of payment from A&C LLC in the amount of $200,000, Crumb would grant an easement to A&C LLC. R. 103, ¶ 14. That offer was never consummated, and on September 26, 2006, Crumb withdrew from A&C LLC. R. 103, ¶¶ 16-17. The district court found that Security did not submit any evidence disputing that Crumb was to be paid $200,000. R. 238. The district court further found that "Crumb never actually received any amount of money for the easement from

A&C LLC." *Id*.

Throughout the litigation, Security made various self serving ever changing arguments as to consideration. However, after reviewing all of the evidence, the district court concluded that "[Security] failed to present any evidence tending to show that the road construction, or anything else, was ever agreed upon as consideration in return for Crumb agreeing to grant an easement." R. 240. "Plaintiffs still have not pointed to any evidence in the record which proves the consideration or price term of the alleged oral contract to grant an easement. R. 295. "There can be no part performance of an agreement that was never made." Bear Island, 125 Idaho at 723, 874 P.2d at 534. As such, this Court should affirm the district court's decision that there was not an agreement as to price or consideration. Hoffman, 102 Idaho at 190, 628 P.2d at 221; Haroldsen, 149 Idaho at 93, 233 P.3d at 24.

Security argue that when consideration for a contract fails, that is, when one of the exchanged promises is not kept, the contract may be enforced. Appellant's Brief, pp. 5-6. Again, the district court reviewed all of the evidence, and determined that there was no agreement as to price or consideration. R. 240, 295. Security continues to argue that the consideration was that A&C LLC could make more money selling lots with a more convenient easement through the Crumb Property, which would indirectly enrich Crumb as a member of the Company. Of course a company could make more money if an asset is gifted to the company by a member, and the profits of the company are passed down to its members. Crumb did not offer to gift an easement. As discussed below, nowhere in the Member Withdrawal Agreement does it describe that Crumb made an additional contribution of an easement over the Crumb Property, or that Crumb

otherwise agreed to grant any easement. The district court reviewed all of the evidence, including the inferences argued by Security, and determined that there was no agreement as to price or consideration. R. 240, 295. As such, this Court should affirm the district court's dismissal of Security's lawsuit.

Next, Security argues that assuming that the parties never did agree on the amount of monetary compensation, the oral agreement to use the Crumb Property is still supported by some consideration because it benefited Crumb. Appellants' Brief, pp. 7-8. The district court rejected Security's argument.

> Plaintiffs argue that to form a contract the parties need only come to an understanding of their rights and obligations under the agreement, and they need not agree specifically on the consideration. However, Plaintiffs fail to address the language of Bear Island Water Ass'n. Inc. v. Brown, 125 Idaho 717, 722, 874 P.2d 528, 533 (1994), which states:
>
> > Before an oral agreement to convey land will be specifically enforced, the underlying contract must be proven by clear and convincing evidence. Further, the proof must show that the contract is complete, definite and certain in all its material terms, or that it contains provisions which were capable in themselves of being reduced to certainty. The material terms which must be identified in a contract to convey land include the parties to the contract, the subject matter of the contract, the price or consideration, and a description of the property.
>
> (internal citations omitted). Bear Island is particularly on point because it addresses part performance as an exception to the statute of frauds in the case of an oral agreement to convey an interest in real property. Bear Island requires "clear and convincing" evidence of the "price or consideration" of an oral agreement to convey land in order to specifically enforce the alleged agreement. Plaintiffs still have not pointed to any evidence in the record which proves

> the consideration or price term of the alleged oral contract to grant an easement. There remains no evidence in the record that Defendant Crumb agreed to grant an easement in return for A&C LLC's efforts to construct the road. Plaintiffs failed to submit evidence establishing the material terms of any underlying oral agreement to grant an easement. Plaintiffs had the burden to prove the material terms of the underlying oral contract and failed to provide evidence of the price/consideration term, so the alleged oral agreement cannot be specifically enforced based on part performance.

R. 294-95.

It is undisputed that Crumb was not paid anything for the alleged oral easement. R. 238. "[Security] have not submitted any evidence disputing Crumb's claim that he was to be paid $200,000.00 for the easement by A&C LLC." *Id*. Security's argument that an oral agreement to convey an interest in real property may be enforced in the absence of an agreement as to price or consideration, ignores well settled law.[8] Before an oral agreement to convey an interest in land will be enforced, the material term of price or consideration must be proven by clear and convincing evidence. Bear Island, 125 Idaho at 722, 874 P.2d at 533; Hoffman, 102 Idaho at 190,

8 Security argue that Crumb and A&C LLC had a common understanding that Crumb would provide the property that the Company would use to construct a road, and that so long as Crumb received some benefit, regardless of whether the parties had an agreement as to consideration, and regardless of whether the benefit was referable to the alleged oral agreement, the agreement is supported by consideration. Appellant's Brief, pp. 7-8. According to Security's argument, it does not matter if Crumb and A&C LLC agreed that the price or consideration for the easement was $200,000, and that Crumb did not receive any payment whatsoever for the easement, because the road made it easier for Crumb and anyone else with a license or an easement over the Crumb Property to access the Fritz Heath, then an agreement was supported by consideration. It is an unreasonable inference that Crumb would agree to grant an easement that is worth more than $200,000 for no payment whatsoever. It is a reasonable inference by the district court that the road construction may be referable to some other reason, including a license to certain individuals, including Abbey, especially where Security presented no evidence of price or consideration for the easement, "have not submitted any evidence disputing Crumb's claim that he was to be paid $200,000.00 for the easement by A&C LLC", the deeds transferring lots to Crumb at the time of the Member Withdrawal Agreement do not reserve an easement over the Crumb Property, the Member Withdrawal Agreement includes a merger clause that there are no other agreements between Crumb and A&C, LLC. R. 238, 239 and 296. Thus, the record reasonably supports the inference by the district court that the road construction was not consideration for an easement and was not referable to the alleged promise to grant an easement. Intermountain Forest Mgmt., Inc. v. Louisiana-Pac. Corp., 136 Idaho 233, 235, 31 P.3d 921, 923 (2001).

628 P.2d at 221. The argument and authority cited by Security ignores the plain language of Bear Island. As stated by the district court, "[Security] still have not pointed to any evidence in the record which proves the consideration or price term of the alleged oral contract to grant an easement. There remains no evidence in the record that Defendant Crumb agreed to grant an easement in return for A&C LLC's efforts to construct the road." R. 295. As such, this Court should affirm the district court's dismissal of Security's lawsuit.

4. Security failed to show part performance referable to the alleged oral agreement to grant an easement.

Security argue that assuming that all of the material terms of an oral agreement to grant an easement have been proven by clear and convincing evidence, including price or consideration, part performance by A&C, LLC, and not Security, estops Crumb from relying on the Statute of Frauds. Appellants' Brief, pp. 8 -10. Security, not Crumb, has the burden to prove an agreement to grant an easement, including an agreement as to price and consideration, by clear and convincing evidence. Bear Island, 125 Idaho at 722, 874 P.2d at 533. As discussed above, the district court found that Security did not did not submit evidence establishing all of the material terms of an agreement by Crumb to grant an easement, namely an agreement as to price or consideration. R. 238, 240 and 295. Where the parties failed to agree on what consideration supports an agreement, the equitable doctrine of part performance is not available to enforce an agreement that is otherwise invalid under the Statute of Frauds. Haroldsen, 149 Idaho at 93, 233 P.3d at 24.[9] "There can be no part performance of an agreement that was never

9 Security cites McReynolds v. Heregeld, 26, Idaho 26, 140 P. 1096 (1914), for the proposition that an oral license may not be revoked based on part performance or equitable estoppel. Security again ignores the language of Bear Island. "Before an oral agreement to convey land will be specifically enforced, the underlying contract must

made." Bear Island, 125 Idaho at 723, 874 P.2d at 534.

Crumb did grant certain individuals a revocable license. However, the district court did not find and Security did not present any evidence that Crumb granted Security a revocable license. The district court noted that the road construction might be referable to Crumb granting a license. "For example the road construction activities might instead be referable to Defendant Crumb granting a license to use the roadway . . ." R. 240. Security, not Crumb, had the burden to prove that road construction was referable to the alleged oral agreement with A&C LLC. *See* Int'l Bus. Machines Corp. v. Lawhorn, 106 Idaho 194, 198, 677 P.2d 507, 511 (Ct.App. 1984). After reviewing all of the evidence, including the inferences suggested by Security, the district found that the road construction was not referable to the alleged oral agreement with A&C LLC to grant an easement. R. 296-97. It is a reasonable inference by the district court that the road construction may be referable to other reasons, including a revocable license to certain individuals, especially where Security presented no evidence of price or consideration for the easement, "have not submitted any evidence disputing Crumb's claim that he was to be paid $200,000.00 for the easement by A&C LLC", the deeds transferring lots to Crumb at the time of the Member Withdrawal Agreement do not reserve an easement over the Crumb Property, and the Member Withdrawal Agreement includes a merger clause that there are no other agreements between Crumb and A&C, LLC. R. 238, 239 and 296. The alleged partial performance, road construction, is not explainable only by the alleged promise to grant an easement. Frantz, 111

---

be proven by clear and convincing evidence." Bear Island, 125 Idaho at 722, 874 P.2d at 533. Moreover, the Court in McReynolds opined, citing Howes, "where it is held that a court of equity will not lend enforcement to a parol license for an easement in realty where the party invoking its aid has not parted with any consideration or property". 11 Idaho 64, 81 P. at 50. There is no evidence that Security, "the party invoking [a court of equity's] aid" parted with any consideration whatsoever for the alleged oral easement.

Idaho at 1011, 729 P.2d at 1074. The district court considered the inference suggested by Security, and the record reasonably supports the finding that the road construction was not solely referable to the alleged promise to grant an easement. Intermountain Forest Mgmt., Inc., 136 Idaho at 235, 31 P.3d at 923. As such, this Court should affirm the district court's dismissal of Security's lawsuit.

C. The alleged oral easement is precluded by the Member Withdrawal Agreement.

The Member Withdrawal Agreement is a fully integrated contract that precludes enforcement of an alleged oral agreement to grant an easement over and across Crumb's adjacent property.[10]

> If a written contract is complete upon its face and unambiguous, no fraud or mistake being alleged, extrinsic evidence of prior or contemporaneous negotiations or conversations is not admissible to contradict, vary, alter, add to, or detract from the terms of the contract. Kimbrough v. Reed, 130 Idaho 512, 943 P.2d 1232 (1997). A written contract that contains a merger clause is complete upon its face. *Id*; Chambers v. Thomas, 123 Idaho 69, 844 P.2d 698 (1992); Valley Bank v. Christensen, 119 Idaho 496, 808 P.2d 415 (1991). The purpose of a merger clause is to establish that the parties have agreed that the contract contains the parties' entire agreement. The merger clause is not merely a factor to consider in deciding whether the agreement is integrated; it proves the agreement is integrated. To hold otherwise would require the parties to list in the contract everything upon which they had not agreed and hope that such list covers every possible prior or contemporaneous agreement that could later be alleged.

Howard v. Perry, 141 Idaho 139, 141-42, 106 P.3d 465, 467-68 (2005).

Security allege that in 2006, when Crumb was a member of A&C LLC, and prior to

10 The district court did not grant Crumb's Motion for Summary Judgment exclusively on the grounds that the merger clause in the Member Withdrawal Agreement bars the alleged prior oral agreement to grant an easement. "When a judgment on appeal reaches the correct conclusion, but employs reasoning contrary to that of this Court, we may affirm the judgment on alternate grounds." Martel, 138 Idaho at 454-55, 65 P.3d at 195-96.

Crumb's withdrawal from A&C LLC on September 26, 2006, that Crumb orally agreed to grant an easement over and across the Crumb Property to A&C LLC. In withdrawing from A&C LLC, the members executed the Member Withdrawal Agreement. The Member Withdrawal Agreement includes a merger clause, which states:

> ENTIRE AGREEMENT OF THE PARTIES: It is agreed, this is the entire agreement of the parties, and any amendment or additions to the Agreement must be in written form similar in form to this agreement, with all parties signing said Amendment.

R. 136. The Member Withdrawal Agreement is complete upon its face and unambiguous. The Member Withdrawal Agreement makes no mention whatsoever of an obligation on the part of Crumb to grant an easement over his existing property, and Security's attempt to offer self serving parol evidence of an agreement otherwise is barred as a matter of law. Howard, 141 Idaho at 141-42, 106 P.3d at 467-68. The district court found that Member Withdrawal Agreement's "merger clause serves as further evidence that there was no additional agreement between Defendant Crumb and A&C LLC to grant an easement." R. 239.

Security argue that the merger clause does not apply to Security, purportedly third party beneficiaries to the alleged oral agreement for an easement, because Security were not parties to the Member Withdrawal Agreement. Appellant's Brief, p. 10. "The right of a third person for whose benefit a promise is made is affected with all the infirmities of the contract as between the parties to the agreement. The beneficiary is subject to all the equities and defenses that would be available against the promisee". 17A Am. Jur. 2d Contracts § 438 (2017). Thus, even assuming that Security are third party beneficiaries to an enforceable agreement, their Complaint is barred for the same reasons that any cause of action by A&C LLC would be barred, the merger clause.

As such, this Court should affirm the district court's dismissal of Security's lawsuit on the grounds that the alleged oral easement is precluded by the merger clause.

D. The alleged oral easement is precluded by the statute of limitations.

The statute of limitations on a written contract is five (5) years, Idaho Code § 5-216, on an oral contract is four (4) years, Idaho Code § 5-217, on a fraud or mistake is three (3) years, Idaho Code § 5-218, and for other relief is four (4) years, Idaho Code § 5-224.[11] The alleged oral agreement to grant an easement over and across the Crumb Property was made, according to Abbey, in 2006. Aug. 4, ¶ 9. Subsequently, Crumb withdrew from A&C LLC on September 26, 2006. R. 103, ¶ 17. No easements were granted by Crumb to A&C LLC within (5) years from the date Crumb entered into the alleged oral agreement to grant an easement over the Crumb Property, or more importantly, from the date Crumb withdrew from A&C LLC.

Moreover, on October 10, 2011, Crumb forwarded an email to Abbey, with an unsigned statement attached, which Crumb was asked to sign on behalf of one of the purchasers of a Fritz Heath Lot when Crumb was a member of A&C LLC concerning access over and across the Crumb Property. R. 106, ¶ 28, 138-39. Crumb did not sign the statement because it was inaccurate in part, but it did accurately describe that the lot purchaser did not have legal access over and across the Crumb Property, as no easement was signed and recorded. R. 106-07, ¶ 28. In addition, that same lot purchaser stated in a letter dated January 31, 2013, that there was never any signed and recorded easement over and across the Crumb Property, and that the lot purchaser had been informed by Abbey that Crumb was going to charge people if they wanted to cross my

11 The district court did not grant Crumb's Motion for Summary Judgment on the grounds of the Statute of Limitations. "When a judgment on appeal reaches the correct conclusion, but employs reasoning contrary to that of this Court, we may affirm the judgment on alternate grounds." Martel, 138 Idaho at 454-55, 65 P.3d at 195-96.

land. Abbey was clearly aware in 2006, and was certainly on notice in 2011 and January of 2013 that a lot owner within his development did not have a recorded easement over and across the Crumb Property. R. 106-07, ¶ 28, 141.

Likewise, Security were on constrictive notice in the fall of 2006, when Security apparently loaned money to Abbey and A&C LLC sometime after Crumb withdrew from A&C LLC on September 26, 2006, that no easement was recorded over and across the Crumb Property to the Fritz Heath. Kalange, 136 Idaho at 195-96, 30 P.3d at 973-74. Notwithstanding that Security were on constructive notice that no easement was recorded on the Crumb Property, if Security believed an easement should have been recorded based on some agreement by Crumb prior to his withdrawal from A&C LLC on September 26, 2006, Security should not have waited eleven years later to file a lawsuit. As such, this Court should affirm the district court's dismissal of Security's lawsuit on the grounds that the alleged oral easement is precluded by the statute of limitations.

E. The CC&Rs do not satisfy the Statute of Frauds.

The district court's finding that the CC&Rs do not satisfy the Statute of Frauds is supported by the record. The district court succinctly set forth the law:

> An agreement for the sale of real property must not only be in writing and subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold, either in terms or by reference, that it can be ascertained without resort to parol evidence. Parol evidence may be resorted to for the purpose of identifying the description contained in the writing with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the

> parties negotiated, and supplying a description thereof which they have omitted from the writing.
>
> Lexington Heights Dev., LLC v. Crandlemire, 140 Idaho 276, 281, 92 P.3d 526, 531 (2004) (*quoting* Allen v. Kitchen, 16 Idaho 133, 100 P. 1052, 1055 (1909)). In Allen v. Kitchen, the Court did not consider parol evidence to supplement the deficient description of the property, reasoning, "The evidence to be introduced would not be that of identification of a description, good on its face; but it would be for the purpose of supplying, completing, and perfecting a description on its face insufficient and incapable of application." Allen v. Kitchen, 16 Idaho 133, 100 P. 1052, 1055 (1909). The Court added, "The distinction, however, should always be clearly drawn between the admission of oral and extrinsic evidence for the purpose of identifying the land described and applying the description to the property and that of supplying and adding to a description insufficient and void on its face." *Id* at 1056.

R. 298.

The district court reviewed all of the evidence and considered the inferences suggested by Security and found that the "CCRs presented to the Court do not contain any identification of the land subject to the claimed easement." R. 298-99. The court continued:

> The Court has not received any written instrument, signed by Defendant Crumb, which both identifies the land subject to the casement and makes clear the parties' intention to establish a servitude. The CCRs themselves do not describe the property subject to the easement, nor do the CCRs address any ingress or egress into the subdivision. *See* Decl. Abbey, Ex. D. Additionally, without the missing attachment, there is no description whatsoever of the property subject to the agreement, and the land about which the parties negotiated cannot be ascertained without resorting to parol evidence. Therefore, the CCRs are not sufficient to create an express easement and satisfy the statute of frauds.

R. 299.

The district court's findings, after considering all of the evidence and inferences

suggested by Security, are supported by the record. There is no language in the CC&Rs that describes that Crumb granted an easement over and across the Crumb Property. R. 298; Aug. 20-26. There was no exhibit attached to the CC&Rs. R. 298-99. There is absolutely nothing whatsoever in or attached to the CC&Rs that indicates that there is an easement or road over and across the Crumb Property.[12] R. 298-99; Aug. 20-26. Security did not present any legible evidence of what it argues should have been attached as an exhibit to the CC&Rs. Aug. 49.[13] Even assuming that a map was attached to the CC&Rs depicting a road across the Crumb Property, that is not evidence of a grant of an easement by Crumb. Security's argument that **IF** a map had been attached to the CC&Rs is proof of written easement over and across the Crumb Property, is no different than arguing that **IF** an easement document had been drafted and signed

12 The CC&Rs, which were drafted by a realtor, Abbey, Crumb and his wife, were executed on January 6, 2006. R. 101-102, ¶ 12; Aug. 26. The CC&Rs state, at paragraph 24, that the declarant reserves an easement for a private road through "**each lot**" and that a road easement "**on each lot**" is shown in Exhibit "A" attached to the CC&Rs. Aug. 24-25. The CC&Rs do not state that a road easement is reserved on each lot AND that Crumb also granted an easement over and across the Crumb Property as shown in an attached exhibit. Regardless, no exhibit was attached to the CC&Rs. R. 298-99.

Although a determination of what document should have been attached to the CC&Rs is an academic exercise, it is apparent that the intended exhibit was a document depicting a road in the location of the only road providing access to the Fritz Heath at that time, as set forth in the Amendment (R. 111-113) and Second Amendment (R. 115-117) to the Fritz Heath, the four (4) foot by eight (8) foot sign/billboard advertising the lots in the development which was located at the entrance to the Fritz Heath (R. 119), the internet advertising materials (R. 121-122), and the Annexation Order Map. R. 126. There was no road over and across the Crumb's property to the Fritz Heath when the CC&Rs were recorded. R. 102, ¶ 12. "In 2006, . . . A&C LLC, retained an engineering firm named Inland Northwest Consultants (hereinafter, "INC") to design and supervise construction of an engineered road from Mellick Road (a public road) through the FRITZ-HEATH for the purpose of providing residential access to the subdivision. Thereafter, INC informed Abbey and Crumb that it would be much cheaper to construct the entrance road into the FRITZ-HEATH by using a forty (40) foot right of way on an adjoining property owned by Brian Crumb. (Aug. 3, ¶ 7). The drawings from the engineers were not created until July of 2006, several months after the date the CC&Rs were recorded, January 5, 2006. R. 43; Aug. 2, ¶ 4. Thus, the engineered drawing of a road over the property owned by Crumb did not exist when the CC&Rs were recorded.

13 The district court noted that Security failed to present legible evidence of the missing attachment to the CC&Rs. "The Court acknowledges that Exhibit "I" to the Declaration of Richard Abbey is claimed to include the missing attachment to the CC&Rs. *See* Decl Abbey, ¶ 19. However, Exhibit "I" to the Declaration of Richard Abbey contains multiple documents, many of which are untitled, and none of which refer back to the CCRs. Additionally, to the extent that the map on the first page of Exhibit "I" to the Declaration of Richard Abbey is intended to be the missing attachment to the CC&Rs, the map is illegible and unintelligible in the form presented." R. 299, n. 1.

by Crumb and his wife is proof of a written easement. Security's argument is precluded, for good reason, by the Statute of Frauds. As such, this Court should affirm the district court's dismissal of Security's lawsuit.

F. Security is not entitled to attorney fees on appeal.

Security argues that they are entitled to attorney fees on appeal on the grounds that Crumb's defense of the lawsuit and anticipated defense of Security's appeal was frivolous, unreasonable or without foundation. Appellant's Brief, p. 12. Security, not Crumb filed this lawsuit and this appeal. The district court dismissed Security's lawsuit in favor of Crumb. Moreover, the district court found that Security's "claims for breach of contract and fraud to have been brought, pursued or defended frivolously, unreasonably or without foundation." R. 342. As discussed below, Security's claim for declaratory judgment was similarly frivolous.

There is absolutely nothing in or attached to the CC&Rs that indicates that there is an easement over and across the Crumb Property. R. 298-99; Aug. 20-26. The CC&Rs were recorded on January 5, 2006. Aug. 2, ¶ 4. No one contemplated a road over the Crumb Property until sometime in the spring of 2006, after the CC&Rs were recorded, when an engineering firm was retained and suggested using the Crumb Property as an alternate route to enter the Fritz Heath. Aug. 3, ¶ 7. Regardless, there is no written easement granting Security an easement over and across the Crumb Property. R. 298-99. Moreover, Crumb and Abbey executed the Member Withdrawal Agreement, whereby they expressly agreed that there were no other agreements, including the alleged prior oral agreement for an easement. R. 136. The district court found that Member Withdrawal Agreement's "merger clause serves as further evidence that there was no

additional agreement between Defendant Crumb and A&C LLC to grant an easement." R. 239.

Finally, Crumb did not discuss with, promise, represent or suggest in any manner whatsoever to Security that Crumb granted or was going to grant Security an easement over and across the Crumb Property. R. 106, ¶ 25 and 107, ¶ 29. Security did not pay Crumb any consideration whatsoever for an easement over and across the Crumb Property. R. 106, ¶ 26. Security has not performed any improvements on the road over and across the Crumb Property. R. 106, ¶ 27. Crumb did not file or record, nor did he authorize anyone to file or record on his behalf, any documents with Kootenai County or any other agency indicating that Crumb granted A&C LLC or the Fritz Heath an easement over and across the Crumb Property. R. 102, ¶ 13. Security was on constructive notice that there was no easement, as they could have and should have searched the records of the Kootenai County Recorder, wherein Security would have found that no easement existed over and across the Crumb Property to Security's lots. As such, Crumb's defense of this lawsuit is well founded. Security's lawsuit and appeal, on the other hand, is not. As such, Security's request for attorney fees on appeal should be denied. As discussed below, Crumb should be awarded attorney fees and costs before the district court and on appeal.

V. ARGUMENT IN SUPPORT OF CROSS-APPELLANTS' APPEAL

A. Standard of review.

"Whether a district court has correctly determined that a case is based on a commercial transaction for the purpose of I.C. § 12-120(3) is a question of law over which this Court exercises free review." Garner v. Povey, 151 Idaho 462, 469, 259 P.3d 608, 615 (2011). The

Court reviews a district court's decision of whether to award attorney fees under Idaho Code section 12-121 for abuse of discretion. Burns v. Baldwin, 138 Idaho 480, 486, 65 P.3d 502, 508 (2003).

B. The District Court erred and abused its discretion in failing to award Crumb attorney fees pursuant to Idaho Code § 12-120(3).

Idaho Code § 12-120(3) provides:

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.
>
> The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Idaho Code § 12-120(3) applies when "the commercial transaction comprises the gravamen of the lawsuit." Idaho Transp. Dep't v. Ascorp, Inc., 159 Idaho 138, 141, 357 P.3d 863, 866 (2015) (*quoting* Brower v. E.I. DuPont De Nemours & Co., 117 Idaho 780, 784, 792 P.2d 345, 349 (1990). A gravamen is the material or significant part of the grievance or complaint. Idaho Transp. Dep't, 159 Idaho at 141, 357 P.3d at 866 (*citing* Sims v. Jacobson, 157 Idaho 980, 985, 342 P.3d 907, 912 (2015) (*quoting* Merriam Webster's Collegiate Dictionary 509 (10th ed.1993)). The mere fact an action is brought as a declaratory judgment action does not preclude the application of Idaho Code section 12-120(3) to a case where the gravamen is a commercial transaction. Idaho Transp. Dep't, 159 Idaho at 141, 357 P.3d at 866 (*citing* Freiburger v. J–U–B

Engineers, Inc., 141 Idaho 415, 424, 111 P.3d 100, 109 (2005). "Where a party alleges the existence of a contractual relationship of a type embraced by section 12-120(3) ... that claim triggers the application of [I.C. § 12-120(3)] and a prevailing party may recover fees even though no liability under a contract was established." Garner, 151 Idaho at 469, 259 P.3d at 615 (citation omitted); Idaho Transp. Dep't, 159 Idaho at 141, 357 P.3d at 866. "This same principle applies where the action is one to recover in a commercial transaction, regardless of the proof that the commercial transaction alleged did, in fact, occur." *Id.* (citation omitted). Thus, "allegations in the complaint that the parties entered into a commercial transaction and that the complaining party is entitled to recover based upon that transaction, are sufficient to trigger the application of I.C. § 12-120(3)." *Id*. at 470, 259 P.3d at 616.

In Garner, the Garners, the Plaintiffs in that case, alleged in their verified Complaint that:

> The wrongful actions of [the Poveys] include plowing over Segment "A" of the Original Access Road to facilitate sale of their property; wrongfully conveying property without confirming the right-of-way now held by Daniel, his wife, Nola and the Nola Trust; warranting against the right-of-way; and by actions herein seeking to have Daniel, his wife, Nola and the Nola Trust lose all fully effective access rights. *By performing these wrongful actions, the Poveys breached the warranty contained in the Warranty Deed* ....

The Garners' complaint continued, alleging that they

> [brought] and pursue[d] this action to preserve their right-of-way and to recover damages against Defendants Brad Povey and Leiza Povey for their wrongful conduct in seeking to extinguish the right-of-way.... *The purchase of the real estate by Gary and Nola from Povey Defendants was a commercial transaction under Idaho Code Sec. 12–120(3) so Plaintiffs ... should be entitled to recover their reasonable attorney fees* from Defendants Brad Povey and Lezia [sic] Povey.

Id. at 470-71, 259 P.3d at 616-17 (italics original) (underlining added). The Supreme Court held that the allegations of a commercial transaction in the Garners' verified complaint entitled the Defendants to an award of attorney fees pursuant to Idaho Code § 12-120(3). *Id*. at 471, 259 P.3d at 617.[14]

Here, as was the case in Garner, Security's verified Complaint alleges a claim seeking to recover based on breach of contract, and that Security are entitled to recover attorney fees based on "this commercial dispute". Security alleged in their verified Complaint that Defendant "Crumb is bound by an express or implied contract with all FRITZ-HEATH landowners to provide them access to FRITZ-HEATH through the CRUMB ENTRANCE PARCEL", and that "Crumb's conduct constitutes breach of contract and/or fraud."[15] R. 13, § III, ¶ A (emphasis added). Security also alleged in their verified Complaint that "Plaintiffs have been required to retain the services of an attorney in this commercial dispute solely as a result of Crumb's incompetency, fraud, or breach of contract, and are entitled to an award of their reasonable attorneys fees incurred in this matter." R. 14, ¶ 15 (emphasis added). Security further alleged in their verified Complaint that "Plaintiffs have incurred damages in an amount in excess of TEN THOUSAND DOLLARS AND NO/100 ($10,000) to be proved at trial." R. 14, ¶ 16. As such, as was the case in Garner, Crumb is entitled to an award of reasonable attorney fees pursuant to Idaho Code § 12-120(3) based on the allegations in Security's verified Complaint seeking to

14 "This was not a situation where, after the substantive litigation, a party seeking fees attempted to characterize the action as one based on a commercial transaction. Rather, according to the Garners' complaint, the gravamen of this action was a commercial transaction of the type embraced by I.C. § 12-120(3)." *Id.*

15 The district court found that the breach of contract and fraud claims were frivolous: "Therefore, the Court finds such claims for breach of contract and fraud to have been brought, pursued or defended frivolously, unreasonably or without foundation." R. 342.

recover "in this commercial dispute." *Id*. at 470, 259 P.3d at 616.

The district court erred and abused its discretion in failing to award attorney fees because its decision was not consistent with legal standards. The district court opined that Garner requires a finding of privity of contract, and must specifically reference Idaho Code § 12-120(3). R. 340. Garner does not require a showing of privity of contract any more than it requires proof of a commercial transaction.

> Where a party alleges the existence of a contractual relationship of a type embraced by section 12-120(3) ... that claim triggers the application of [I.C. § 12–120(3)] and a prevailing party may recover fees even though no liability under a contract was established. This same principle applies where the action is one to recover in a commercial transaction, regardless of the proof that the commercial transaction alleged did, in fact, occur.

Garner, 151 Idaho at 469, 259 P.3d at 615 (citation omitted)(emphasis added). In Hilt v. Draper, 122 Idaho 612, 836 P.2d 558 (Ct. App. 1992), the Court of Appeals held that where an action was brought founded on an alleged contract within the scope of the statute, the statute applied even though the plaintiff ultimately failed to prove the existence of the contract, and the prevailing defendant was entitled to mandatory attorney's fees under the statute. *Id*. at 622, 836 P.2d at 568 *See also* Miller v. St. Alphonsus Regional Medical Center, Inc., 139 Idaho 825, 87 P.3d 934 (2004) (action by physician alleging contractual right to staff privileges at hospital came under Idaho Code § 12-120(3) even though the court holds no contractual right existed); Noak v. Idaho Dept. of Correction, 152 Idaho 305, 271 P.3d 703 (2012) (award of fees to defendant proper where complaint alleged breach of covenant of good faith and fair dealing, but no contractual relationship was proved); Intermountain Real Properties, LLC v. Draw, LLC, 155

Idaho 313, 311 P.3d 734 (2013) (where complaint alleged commercial transaction defendant entitled to award of fees even though no transaction was proved); American West Enterprises, Inc. v. CNH, LLC, 155 Idaho 746, 316 P.3d 662 (2013) (defendant entitled to award of attorney fees in action where plaintiff alleged implied warranty, even though ultimately no privity of contract, thus no warranty, was found).

Additionally, there is no requirement to reference Idaho Code § 12-120(3) where a party makes allegations in the complaint that the prevailing party entered into a commercial transaction and that the complaining party is entitled to recover based on that transaction.

> A party seeking fees based on a mere request under I.C. § 12-120(3) must show that a commercial transaction was the gravamen of the action before a court may award fees. However, allegations in the complaint that the parties entered into a commercial transaction and that the complaining party is entitled to recover based upon that transaction, are sufficient to trigger the application of I.C. § 12-120(3).

Garner, 151 Idaho at 470, 259 P.3d at 616. "In other words, when a plaintiff alleges a commercial contract exists and the defendant successfully defends by showing that the commercial contract never existed, the court awards the defendant attorney fees." Intermountain, 155 Idaho at 320, 311 P.3d at 741. In Intermountain, the Court held:

> Here, Intermountain's amended complaint alleged breach of contract as Count One, and debt due on an open account as Count Two. Because these are both specifically mentioned in I.C. § 12–130(3), the statute applies. Thus, Intermountain alleged the existence of a contract, which triggered I.C. § 12–130(3), and Draw then prevailed in the action by successfully defending against that contract claim. Under Garner, Draw's successful defense makes it the prevailing party, and Draw will recover fees even though no contract or commercial transaction was established. We therefore hold that the district court properly

awarded Draw attorney fees under I.C. § 12-120(3).

Id. As discussed above, Security alleged in their verified Complaint that "Plaintiffs have been required to retain the services of an attorney in this commercial dispute solely as a result of Crumb's incompetency, fraud, or breach of contract, and are entitled to an award of their reasonable attorneys fees incurred in this matter." R. 14, ¶ 15 (emphasis added). Accordingly, the district court applied the wrong legal standard and therefore erred and abused its discretion in failing to award Crumb, as the prevailing party, his reasonable attorney fees pursuant to Idaho Code § 12-120(3). Garner, 151 Idaho at 470, 259 P.3d at 616; Intermountain, 155 Idaho at 320, 311 P.3d at 741. As such, the district court's order denying attorney fees and costs to Crumb should be reversed.

In the alternative, even assuming that Security had not plead a commercial transaction in their verified Complaint, Security pursued this lawsuit on the basis of an alleged commercial transaction and contract. It does not appear that the district court addressed this issue, and therefore abused its discretion. R. 338-341. Security submitted declaration testimony that "All FRITZ-HEATH landowners are intended beneficiaries of the express agreement that the CRUMB ENTRANCE would be used as a permanent access to the FRITZ-HEATH", and that the alleged agreement was made for a commercial purpose, to make money. Aug. 9, ¶ 24. Security argued and submitted evidence that the Member Withdrawal Agreement contractually obligated A&C LLC to provide access to the Fritz Heath through the Crumb Parcel. Aug. 5, ¶ 15. "The agreement that the plaintiffs were attempting to enforce against Crumb was a 'Transfer of Assets and Withdrawal of Members (sic) Interest' agreement". R. 340. The Member Withdrawal

Agreement is a commercial transaction as defined by Idaho Code § 12-120(3). The Member Withdrawal Agreement contains an attorney fees provision.16 R. 355. Security not only alleged damages in their verified Complaint,[17] Security stated in response to discovery, under oath, that "Security will seek at least $700,000 in damages against Brian Crumb in the event that a forty (40) foot right of way easement is not declared over his property." R. 150. As such, the gravamen of the lawsuit pursued by Security "in this commercial dispute" (R. 14, ¶ 15) was an alleged oral agreement to grant an easement, which according to Security was to "make some money selling lots" (Aug. 9, ¶ 24) or "in order to save road construction costs." R. 13, § III, ¶ A. In the alternative, "[t]he agreement that the plaintiffs were attempting to enforce against Crumb was a 'Transfer of Assets and Withdrawal of Members (sic) Interest' agreement". R. 340. Accordingly, Crumb is entitled to an award of reasonable attorney fees pursuant to Idaho Code § 12-120(3). As such, the district court's order denying attorney fees and costs to Crumb should be reversed.

C. The District Court abused its discretion in failing to award Crumb attorney fees pursuant to Idaho Code § 12-121.

Trial courts may award attorney fees under Idaho Code § 12-121 if the case was "brought, pursued or defended frivolously, unreasonably or without foundation." Idaho Code § 12-121; I.R.C.P. 54(e)(1); Burns, 138 Idaho at 487, 65 P.3d at 509. In awarding attorney fees the trial court must (1) perceive the issue as one of discretion; (2) act within the outer boundaries of

16 Where a court holds a contract is unenforceable, the prevailing party may nonetheless be entitled to an award of attorney fees under the contract. Allied Bail Bonds, Inc. v. County of Kootenai, 151 Idaho 405, 414, 258 P.3d 340, 349 (2011).

17 "Plaintiffs have incurred damages in an amount in excess of TEN THOUSAND DOLLARS AND NO/100 ($10,000) to be proved at trial." R. 14, ¶ 16.

its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reach its decision by an exercise of reason. *Id.* at 486-87, 65 P.3d at 508-09 (citing Sun Valley Shopping Ctr., Inc. v. Idaho Power Co., 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

Here, the district court found that Security's claims for breach of contract and fraud to have been brought, pursued or defended frivolously, unreasonably or without foundation:

> The Court finds the plaintiffs' claims for breach of contract and fraud to be wholly without merit. As indicated above, there was no evidence of a contract between the plaintiffs and Crumb, let alone a breach of a contract. The plaintiffs also failed to properly plead a claim of fraud and did not even argue their fraud claim in the cross-motions for summary judgment. Therefore, the Court finds such claims for breach of contract and fraud to have been brought, pursued or defended frivolously, unreasonably or without foundation.

R. 342. However, the district court found that Security's declaratory action claim was an arguable claim, without any reason or explanation. The district court did not reach its decision based on an exercise of reason.

It makes no sense that Security's attempt to enforce and easement based on breach of contract and fraud is found "to be wholly without merit", and the declaratory action claim for an easement, which requires the same proof, a written agreement that satisfies the statute of frauds, or, on a claim of part performance or estoppel, proof of the material terms of an oral contract.

First, it is not debatable that there is no written easement. Security's most egregious argument was that the CC&Rs are a writing that satisfies the Statute of Frauds. There is absolutely nothing whatsoever in the CC&Rs that indicate that there is an easement or road over

and across Crumb's adjacent property. The district court described the frivolous nature of Security's lawsuit in a single sentence: "The Court has not received any written instrument, signed by Defendant Crumb, which both identifies the land subject to the easement and makes clear the parties' intention to establish a servitude." R. 299.

Second, Security attempted to enforce an alleged oral contract for an easement, when there was no agreement as to price or consideration, arguing that any benefit to Crumb is sufficient. The law is not debatable, before an oral agreement to convey land will be specifically enforced, the underlying contract must be proven by clear and convincing evidence." Bear Island, 125 Idaho at 722, 874 P.2d at 533.

Third, Security allege in their verified Complaint that they were not advised when Security purchased lots in the Fritz Heath that easements over and across Crumb's property to the Fritz Heath owners were not recorded. It is not debatable that Crumb did not sell, transfer, or promise Security anything whatsoever. Security could have and should have searched the records of the Kootenai County Recorder, wherein they would have determined no easement existed over and across Crumb's property to Security's lots. Security failed to even ask Crumb if there was an easement over and across his property to Security's lots.

Fourth, it is not debatable that the merger clause contained in the Member Withdrawal Agreement precludes the alleged prior oral agreement to grant an easement. As such, Security's declaratory judgment action for an easement, which required proof of a written easement, or proof of an oral contract, the same proof as Security's breach of contract claim which was found by the district court to have been brought frivolously, unreasonably or without foundation,

should have been likewise so found. Idaho Code § 12-121. The district court did not provide any discussion as to how Security's claim was somehow arguable. Accordingly, the district court did not reach its decision based on an exercise of reason. Therefore, Crumb is entitled to his reasonable attorney fees pursuant to Idaho Code § 12-121; I.R.C.P. 54(e)(1). As such, the district court's order denying attorney fees and costs to Crumb should be reversed.

D. The District Court abused its discretion in failing to award Crumb costs as a matter of right.

Crumb is the prevailing party. R. 245. Crumb sought his notice of appearance fee in the amount of $136.00, which is a cost as a matter of right pursuant to IRCP 54(d)(1)(C)(i). R. 256, ¶ 14. The district court failed to award Crumb that amount. As such, the district court abused its discretion in failing to award that amount.

VI. ATTORNEY FEES ON APPEAL

Crumb seeks costs and attorney fees on appeal as autho1ized by I.A.R. 40 and I.A.R. 41. Pursuant to I.A.R. 41 (a), Crumb has designated the award of attorney foes on appeal as an issue on appeal. Crumb is claiming attorney fees on appeal pursuant to Idaho Code §§ 12-120(3) and 12-121. Crumb bases his claim for fees on Idaho Code§ 12-120(3) as the prevailing party in a commercial transaction or breach of contract, which applies with equal measure at trial and on appeal. *See* Intermountain, 155 Idaho at 320, 311 P.3d at 741 ("Because Intermountain alleged a contractual relationship and open account in its complaint, I.C. § 12-120(3) applies. Under I.C. § 12-120(3), the prevailing party is entitled to attorney fees on appeal.").

"Attorney fees may be awarded pursuant to I.C. § 12-121 on appeal if this Court is left with an abiding belief that the appeal was brought, pursued or defended frivolously,

unreasonably or without foundation. Burns, 138 Idaho at 487, 65 P.3d at 509. (citation omitted) "An award of attorney fees is appropriate if the law is well-settled and the appellants have made no substantial showing that the district court misapplied the law." *Id*. (citation omitted). "An award of attorney fees is appropriate if the appellant simply invites the appellate court to second-guess the trial court on conflicting evidence." Hogg v. Wolske, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006); Gibson v. Ada County, 142 Idaho 746, 761, 133 P.3d 1211, 1226 (2006) ("When ... the appellate court is simply asked to second-guess factual determinations and is not asked to establish new legal standards, nor modify or clarify existing standards, the appeal has been brought frivolously, unreasonably and without foundation"). As discussed above, Security ignored well settled law, failed to make a substantial showing that the district court misapplied the law, and is simply asking this Court to second-guess the findings of the district court. As such, Crumb is entitled to reasonable attorney fees and costs on appeal.

VII. CONCLUSION

Based on the foregoing, Crumb respectfully requests that this Court affirm the district court's Judgment dismissing Security's Complaint with prejudice, reverse the district court's decision denying Crumb's attorney fees and costs, and award Crumb attorney fees and costs on appeal.

DATED this 25th day of October, 2018.

MURPHEY LAW OFFICE, PLLC

By */s/ Darrin L. Murphey*
Darrin L. Murphey,
Attorney for Defendant/ Respondent/ Cross-Appellant Brian Crumb