STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

CHRIS WALSH and SILVIA WALSH, husband and wife,

Plaintiffs/Counter-Defendants,

vs.

EASTSIDE HIGHWAY DISTRICT, ET AL,

Defendants/Counter-Plaintiffs.

Case No. **CV 2012 1540**

MEMORANDUM DECISION AND ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiffs' Chris Walsh and Sylvia Walsh (Walshes) Motion for Partial Summary Judgment, filed May 15, 2012. Walshes filed their Complaint in this matter on February 23, 2012. In that Complaint, Walshes made eleven different claims seeking monetary damages against defendants Eastside Highway District (District) and multiple other individual defendants (the District's Supervisor, Pankratz, and the District's Commissioners) related to the District's removal of a fence on Walshes' property. In their Motion for Partial Summary Judgment, Walshes seek summary judgment on their fourth and fifth claims for relief, respectively, the statutory violation of Idaho Code § 40-2319(4), and breach of contract. Motion for Summary Judgment, p. 2.

The Walshes allege they built a fence on their property and that the District erroneously believed the fence to be an encroachment on the District's right-of-way.

Complaint, p. 3. After receiving notice of the encroachment, the Walshes retained counsel and communicated to the District their denial that their fence encroached on the District's right-of-way. *Id*. Through communications between counsel, the Walshes presumed that until they received notice of the District's intent to physically tear down the fence, the fence would be left alone. Complaint, pp. 4. On September 1, 2011, the District again sent notice of the encroachment, and again, the Walshes communicated their denial of the encroachment. *Id*., p. 5. On September 26, 2011, the District tore down the fence. *Id.,* p. 6.

In their Complaint, the Walshes allege, among other things, that the District trespassed onto their property, caused malicious injury to property, violated I.C. §40-2319(4) related to notice of encroachment removal, breached the contract between the District and the Walshes, intentionally misrepresented facts to the Walshes, and were negligent in their removal of the Walshes' fence. Complaint, pp. 8-11. Walshes' motion for partial summary judgment focuses on the violation of I.C. §40-2319(4) and breach of contract, and claims there is no factual dispute as to either of these claims. Memorandum in Summary of Plaintiffs'/Counter-Defendants' Motion for Partial Summary Judgment, pp. 9-12. Contemporaneous with the filing of the motion for partial summary judgment and memorandum, Walshes also filed an Affidavit of John F. Magnuson in support of Plaintiffs' Motion for Partial Summary Judgment, and an Affidavit of Chris Walsh. Walshes make two arguments in their motion for partial summary judgment: 1) that the District failed to seek removal of the fence via judicial means as required by I.C. §40-2319(4); and 2) that a contract existed between Walshes and the District requiring the District give notice to the Walshes if the District were to remove the fence, and that because the District removed such fence without notice to the Walshes, the

District breached such a contract. Memorandum in Support of Plaintiffs'/Counter-Defendants' Motion for Partial Summary Judgment, p. 8.

The District responded in its Memorandum in Opposition to Motion for Partial Summary Judgment filed on May 30, 2012. The District argues: (1) I.C. § 40-2319 requires a lawsuit for removal of "partial" encroachments, but allows removal without a lawsuit for "complete" encroachments; (2) the Idaho Tort Claims Act prevents liability for the District because private individuals cannot be held liable for monetary damages for violations of I.C. § 40-2319 and so governmental entities similarly cannot be held liable for monetary damages; (3) that it is debatable whether or not a "contract" existed between the parties or instead was just non-binding exchange of professional courtesies because of the ambiguities of the alleged "agreement"; and (4) that even if there was a contract, that there was no breach by the District because the District substantially performed under the contract by giving notice to the Walshes of their intent to remove the fence. Memorandum in Opposition to Motion for Partial Summary Judgment, pp. 3-8.

Walshes filed their Reply Memorandum in Support of Plaintiffs'/Counter-Defendants' Motion for Partial Summary Judgment on June 5, 2012. Walshes claim there is no evidence to support the District's claim that the encroachment was "complete" as opposed to "partial", that whether a private party could recover money damages under I.C. § 40-2319 is premature, and that no dispute as to any material fact exists as to the breach of contract. Reply Memorandum in Support of Plaintiffs'/Counter-Defendants' Motion for Partial Summary Judgment, pp. 3-7.

On June 8, 2012, the District filed an Affidavit of John Pankratz. Later that day, Walshes filed an "Motion to Strike and Objection" to Pankratz' affidavit, as such was

untimely under I.R.C.P. 56(c), and because the District had not made a showing of "good cause" for such late filing. Motion to Strike and Objection, p. 2.

Oral argument was held on June 12, 2012. At oral argument the Court denied the Motion to Strike and overruled the objection filed by Walshes regarding Pankratz' affidavit because the District had shown "good cause" as the photograph attached was not discovered by counsel for the district until a few days before Pankratz' affidavit was filed.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court may properly grant a motion summary judgment only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court construes all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in a light most favorable to the non-moving party. *Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008). The Court draws all inferences and conclusions in the non-moving party's favor, and if reasonable people could reach different conclusions or draw conflicting inferences, then the motion for summary judgment must be denied. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996).

However, if the evidence shows no disputed issues of material fact, then summary judgment should be granted. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary

judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2002). The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Id*.

In ruling on the motion, the Court considers only material contained in the affidavits and depositions which are based on personal knowledge and which would be admissible at trial. *Id*. at 88. Summary judgment is appropriate where a non-moving party fails to make a sufficient showing to establish the existence of an element essential to its case when it bears the burden of proof. *Id.* Neither party to this matter has requested a jury trial. In cases set for a court trial, the Court is entitled to arrive at the most probable inference to be drawn from the undisputed evidence presented to it. *J.R. Simplot v. Bosen,* 144 Idaho 611, 618, 167 P.3d 748, 755 (2006). "The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences." *Id.,* citing *Shawver v. Huckleberry Estates, LLC,* 140 Idaho 354, 360-61, 93 P.3d 685, 691-92 (2004).

III. ANALYSIS.

A. The District is Liable Under I.C. § 40-2319, as Walshes' Fence Was Not a Complete Encroachment.

Walshes own a long, but thin strip of land, comprising two lots. Affidavit of Chris Walsh, p. 2, ¶ 2. The boundary of one long side of the lots is Lake Coeur d'Alene. Walshes have constructed a dock extending from their land out into Lake Coeur d'Alene. *Id.,* ¶ 5. The other boundary of the long side of the lots is Squaw Bay Road. *Id.,* ¶ 2. Squaw Bay Road ends in the area of Walshes' property, and Walshes' property essentially compromises a thin land barrier between a large oval turn-around area at the terminus of Squaw Bay Road. *Id.,* Exhibit A and B. At the far end of the turn-around area is a public dock and boat launch. *Id.,* ¶ 7.

Walshes noticed after they purchased the property, the public would use their property as a boat launch, and an area used for alcohol consumption, fights, a dog run, a trash dump. *Id.* Chirs Walsh got permission and permits from the Director of Kootenai County Parks and Waterways, Kootenai County Planning and Building Department, and Idaho Department of Lands to build a fence around Walshes' land. *Id.,* pp. 2-3, ¶¶ 8-10. Walshes constructed a fence at a cost of $4,500.00. *Id.,* p. 3, ¶ 11. A few months later, the District posted a notice. *Id.,* ¶ 13. Chris Walsh called John Pankratz, Director of the District, and offered to install a gate to facilitate the ability of their vehicles to turn around if needed. *Id.* Pankratz told Chris Walsh "Either you tear the whole fence out or we will." *Id.* Walshes hired attorney John Magnuson, who wrote the District, asserting Walshes' position that their fence did not encroach on the District's right of way. *Id.,* p. 4, ¶ 14, 15. It is undisputed that this was Walshes' "denial" of the encroachment, as required by I.C. § 40-2319(4). Magnuson and the District's attorney, Susan Weeks, exchanged letters and emails, and on July 22, 2009, Weeks wrote an email to Magnuson which read, in part: "My client will not remove the fence without me first providing notice to you that my client intends to remove the encroachment." Affidavit of John Magnuson in Support of Plaintiff's Motion for Partial Summary Judgment, Exhibit E. A copy of that email was sent by Weeks to the District. *Id.* On September 6, 2011, the District again posted the Walshes' fence. Pankratz Affidavit, Exhibit A. It is undisputed that Walshes again at this juncture gave the District their "denial" of the encroachment, as required by I.C. § 40-2319(4). Even with that "denial", on September 26, 2011, without filing any action in court, the District began tearing down the Walshes' fence. Affidavit of Chris Walsh, p. 7, ¶ 28. With about sixty percent of the fence torn down, Chis Walsh arrived and told the District employees they were trespassing and

they had to leave, which they did. *Id.,* ¶ 28. However, the District employees returned later the same afternoon and removed the rest of the Walshes' fence. *Id.,* pp. 7-8, ¶¶ 30-31.

In its memorandum in opposition to the motion for partial summary judgment, the District argues that the Walshes' fence was a complete encroachment on the District's right-of-way and therefore the District was allowed to remove the fence without filing a lawsuit. Memorandum in Opposition to Motion for Partial Summary Judgment, pp. 4. That argument was repeated at oral argument. Idaho Code §40-2319 states in pertinent part:

> (1) If any highway or public right-of-way under the jurisdiction of a county or highway district is encroached upon by gates, fences, buildings, or otherwise, the appropriate county or highway may require the encroachment to be removed. If the encroachment is of a nature as to effectually obstruct and prevent the use of an open highway for vehicles, the county or highway district shall immediately cause the encroachment to be removed.
> (2) Notice shall be given to the occupant or owner of the land, or person causing or owning the encroachment, or left at his place of residence if he resides in the highway jurisdiction. If not, it shall be posted on the encroachment, specifying the place and extent of the encroachment, and requiring him to remove the encroachment within ten (10) days.
> (3) If the encroachment is not removed, or commenced to be removed, prior to the expiration of ten (10) days from the service or posting the notice, the person who caused, owns or controls the encroachment shall forfeit up to one hundred fifty dollars ($150) for each day the encroachment continues unremoved.
> (4) If the encroachment is denied, and the owner, occupant, or person controlling the encroachment, refuses either to remove it or to permit its removal, the county or highway district shall commence in the proper court an action to abate the encroachment as a nuisance.

The power of the state and its political subdivisions to require removal of a nuisance or obstruction, which in any way interferes with the public use of streets and highways, is established. *State ex. rel. Rich v. Idaho Power Co.*, 81 Idaho 487, 501 (1959). Under Idaho Code § 40-2319, the pertinent issue before the Court is whether there is a dispute of fact as to whether the "encroachment" (Walshes' fence) "…is of a

nature as to effectually obstruct and prevent the use of an open highway for vehicles…" There is no appellate case law interpreting this section of the Idaho Code. The Court is left with the plain language of the statute. Fortunately, the statutory language is quite clear.

The District agrees that I.C. § 40-2319(4) requires a lawsuit when a highway district seeks removal of partial encroachments, but argues that the Walshes' fence is a complete encroachment, which allows for removal of the encroachment without going through judicial process under I.C. § 40-2319(1). Memorandum in Opposition to Motion for Partial Summary Judgment, p. 4. The District argues that the Walshes' fence is a complete encroachment because the fence completely crosses part of the area the District claims is its right-of-way, preventing vehicles from utilizing the right-of-way. *Id*., p. 5. Specifically, the District writes: "As demonstrated by the photos and drawings attached to plaintiff Chris Walsh's own Affidavit, the fence completely crossed the part of the area claimed to be ESHD's right of way and prevented that area of right of way from being used by vehicles." *Id.* At oral argument, counsel for the District argued that the fence completely blocked the District's access to gravel on the other side of the fence from the roadway.

The Walshes disagree and argue that the fence does not constitute an encroachment on the District's right-of-way. Memorandum in Support of Plaintiffs'/Counter-Defendants' Motion for Partial Summary Judgment, p. 11. The Walshes argue that the fence is located on their property, not on any portion of legally cognizable District right-of-way. Affidavit of John F. Magnuson in Support of Plaintiffs' Motion for Partial Summary Judgment, pp. 2.

Whether or not the fence was on the Walshes' property is not the issue under I.C. § 40-2319. Even if the fence is entirely on the District's right of way, the issue is

whether "…the encroachment is of a nature as to effectually obstruct and prevent the use of an open highway for vehicles…" The statute quite clearly requires the District show the Walshes fence *both* effectually obstruct *and* prevent the use of the open highway for vehicles. If the fence did effectively obstruct and prevent the use of an open highway for vehicles, then the District was free to remove the fence *sua sponte,* as it did in this case. I.C. § 40-2319(1). If the fence did not effectively obstruct and prevent the use of an open highway for vehicles, then the District *must* utilize the courts and get authorization from the courts to abate the nuisance (remove the fence). I.C. § 40-2319(4). The statute does not use the word "complete", but the parties use the term "complete" to describe the situation where, as the statute reads: "…the encroachment is of a nature as to effectually obstruct and prevent the use of an open highway for vehicles…"

Whether the fence completely obstructed the District's ability to access its gravel on the other side of the fence, is not the issue either under I.C. § 40-2319. The issue is whether "…the encroachment is of a nature as to effectually obstruct and prevent the use of an open highway for vehicles…", not whether a tiny portion of its gravel was out of the District's reach due to the fence.

Factually, the District has provided *no evidence* to support this "complete" encroachment claim. The Affidavit of Chris Walsh has a plat map and an aerial photograph showing the fence relative to the turn-around area the District uses. Even if every lineal foot of Walshes' fence (obliterated by the District on September 26, 2011) was on the District's right of way, the District still has a very large area within which to turn around its vehicles. Even if the District could not turn its vehicles around in the area that is left, the statute requires obstruction of the area as "an open highway for vehicles",

not a turn-around spot. The District has produced no evidence to show the fence in any way interfered with "an open highway for vehicles." Thus, the District has failed to show that there is a disputed factual issue "…the encroachment is of a nature as to effectually obstruct and prevent the use of an open highway for vehicles…" The District has, untimely, submitted the Affidavit of John Pankratz, Director of the District. The following is a continuum of what Pankratz could have testified about, from satisfying the statute to corroborating the District's attorney's argument at the June 12, 2012, hearing. Pankratz could have testified that the encroachment (Walshes' fence) "…effectually obstruct[ed] and prevent[ed] the use of an open highway for vehicles…", but did not. Pankratz could have testified the encroachment (Walshes' fence) caused difficulty turning District vehicles around, but did not. Pankratz could have testified that the encroachment (Walshes' fence) caused the District difficulty accessing its gravel that was on the Walshes' side of the fence, but did not.

The District's own actions show that the District knew the Walshes' fence was, at best (from the District's position), a partial obstruction. **First,** back in the summer of 2009, the District posted a notice on the Walshes' fence. There is no testimony as to what that notice said, but it is uncontradicted that the notice was from the District. If the obstruction was "complete", no notice need be given by the District; in fact, the statute *mandates* immediate removal…no notice is contemplated in that situation due to the immediacy required. If the encroachment is of a nature as to effectually obstruct and prevent the use of an open highway for vehicles, the statute mandates: "…the county or highway district *shall immediately* cause the encroachment to be removed." I.C. 40-2319(1). Under the statute, notice is given only when the obstruction is less than complete (I.C. § 40-2319(1) and (2)), and the owner has ten-days to remove the encroachment or face a $150 per day forfeiture (I.C. § 40-2319(3)), or the owner can

"deny" the encroachment and then the District *shall* commence a court action, (I.C. § 40-2319(4)), and if the owner fails to deny and fails to remove the obstruction, the District may remove the encroachment, recover its costs of removal and the $150/day forfeiture from the person controlling the encroachment. I.C. § 40-2319(5). **Second,** on September 6, 2011, the District again posted the Walshes' fence. Pankratz has produced a photograph of that notice. That notice reads:

> This fence is an encroachment and a violation of Idaho Code 40-2319. Please call East Side Highway District at 208-765-4714 for information within 10 days or the encroachment may be removed.

Pankratz Affidavit, Exhibit A. Again, if the obstruction was "complete", no notice is given, the District is mandated to immediately remove the obstruction. Under the statute, notice is given only when the obstruction is less than complete. **Third,** the District's attorney Susan Weeks' agreement back on July 22, 2009, when Weeks wrote an email to Magnuson which read, in part: "My client will not remove the fence without me first providing notice to you that my client intends to remove the encroachment" (Affidavit of John Magnuson in Support of Plaintiff's Motion for Partial Summary Judgment, Exhibit E), is a recognition by the District through their attorney that any encroachment caused by Walshes' fence *was less than complete.* If the obstruction was complete, the District had the ability, indeed the mandatory duty, to immediately remove the fence. **Fourth,** twenty-six months passed from the July 22, 2009, agreement by Weeks on behalf of the District until the District *sua sponte* removed Walshes' fence, and there is no evidence that the District was anything less than fully able to utilize this turn around area.

The argument by District's counsel that the District was somehow unable to access its gravel on the Walshes' side of the fence is not only disingenuous, it is not evidence. In passing on motions for summary judgment, unsworn statements are

entitled to no probative weight; mere denials unaccompanied by facts admissible in evidence are insufficient to raise genuine issues of fact. *Camp v. Jiminez,* 107 Idaho 878, 882, 693 P.2d 1080, 1084 (Ct.App. 2984). The Idaho Court of Appeals in Camp held that an attorney's unsworn denial in an answer, where there was no statement by the attorney that the statement was made with his personal knowledge, was entitled to no probative weight. *Id.*

The argument by District's counsel that the District couldn't reach its gravel also wholly misses the pertinent fact that the statute, in order for the District to summarily remove Walshes' fence, requires "…the encroachment is of a nature as to effectually obstruct and prevent the use of an open highway for vehicles…" I.C. § 40-2319(1).

The District has produced no evidence to show the fence in any way interfered with "an open highway for vehicles." Thus, the District has failed to show that there is any disputed fact on the issue as to whether "…the encroachment is of a nature as to effectually obstruct and prevent the use of an open highway for vehicles…"

If there was *any* encroachment by Walshes and their now non-existent fence, it was at best a partial encroachment and the District had a statutory duty to apply to the courts before removing such fence. I.C. § 40-2319(1)-(4). The District did not apply to the courts. Walshes are entitled to partial summary judgment on the issue of liability under I.C. § 40-2319.

B. Whether the Idaho Tort Claims Act Insulates the District from Liability is Not at Issue in Walshes' Motion for Partial Summary Judgment.

The District also argues that the Idaho Tort Claims Act prevents liability for the District. Memorandum in Opposition to Motion for Partial Summary Judgment, pp. 5. Idaho Code § 6-903 states in part:

> (1) Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of its negligent or

> otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties, whether arising out of a governmental or proprietary function, where the governmental entity if a private person or entity would be liable for money damages under the laws of the State of Idaho . . .

The District is correct in stating that in determining whether the supporting record generally states a cause of action for which a private person or entity would be liable, the trial judge essentially asks, "is there such a tort under the laws of Idaho?" *Czaplicki v. Gooding Joint School Dist. No. 231*, 116 Idaho 326, 330, 775 P.2d 640, 644 (1989). Here, the Walshes do not allege a specific tort on the District in their briefing however they do allege negligence in their Complaint. Memorandum in Support of Plaintiffs'/Counter-Defendants' Motion for Partial Summary Judgment, p. 8 and Complaint, p. 11, ¶¶ 52, 53. In *Czaplicki*, the Court held that the common law tort of negligence was sufficient as a "tort under the law of Idaho." *Czaplicki*, 116 Idaho 330. Therefore, it would appear that there is an alleged theory that would apply. Walshes also point out they have asserted claims of trespass, abuse of process, and malicious injury to property. Reply Memorandum in Support of Plaintiffs'/Counter-Defendants' Motin for Partial Summary Judgment, p. 5. Walshes argue:

> In other words, what Plaintiffs are entitled to is declaratory relief, at this juncture, but the Defendant District breached the terms of Idaho Code §40-2309(4) by removing the fence without first filing suit and obtaining judicial relief. Whether or not money damages are available for a violation of §40-2309(4) is irrelevant at this point in time. The prerequisite is that there was failure on the part of the District to comply with Idaho Code §40-2309(4).

Id. This Court agrees, and finds whether the Idaho Tort Claims Act insulates the District from liability has not been put at issue by Walshes' motion for partial summary judgment. What has been put at issue is whether the District violated Idaho Code §40-2309, which this Court has decided affirmatively in favor of Walshes.

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C. A Dispute of Material Fact Exists as to Whether a "Contract" Existed Between the Parties.

It is not disputed that the District's attorney (Susan Weeks) on July 22, 2009, wrote an email to Walshes' attorney (John Magnuson), which reads in part:

> The attorneys will be given an opportunity first to try and work through this matter. My client will not remove the fence without me first providing notice to you that my client intends to remove the encroachment.

Reply Memorandum in Support of Plaintiffs'/Counter-Defendants' Motion for Partial Summary Judgment, p. 6; Magnuson Affidavit, Exhibit E. This Court finds the sentence: "My client will not remove the fence without me first providing notice to you that my client intends to remove the encroachment" to be quite clear and capable of only one interpretation. That interpretation is the District will not remove the fence without Susan Weeks (its attorney) providing notice to you (John Magnuson, Walshes' attorney), that my (Susan Weeks) client (the District) intends to remove the encroachment. At oral argument, counsel for the District argued that the sentence is unclear. The Court finds such argument unpersuasive. The entire sentence is capable of only one interpretation.

Following that July 22, 2009, email, not only was there no notice to Magnuson that the District "intended" to remove the encroachment, there was no notice to Magnuson that the District in fact began removal of the encroachment on September 26, 2011. Affidavit of Chris Walsh, p. 7, ¶ 28. That fact is undisputed. There was "notice" to the Walshes posted by the District on Walshes' fence (Pankratz Affidavit, Exhbit A), but there was no notice to Walshes' attorney, John Magnuson, and it was John Magnuson whom Susan Weeks agreed to provide notice.

The District argues that the letter/e-mail exchange between counsel for both parties does not rise to the level of a contract. Memorandum in Opposition to Motion for Partial Summary Judgment, p. 7. The District argues that the alleged agreement was instead a "non-binding exchange of professional courtesies." *Id*. The Court finds that argument wholly unavailing. Counsel can bind a party to an agreement. At oral argument, Walshes' counsel correctly cited *State of Idaho Department of Health & Welfare,* 133 Idaho 266, 271, 971 P.2d 322, 327 (Ct.App. 1999), where the Idaho Court of Appeals held: "Idaho appellate courts have long held that civil litgants choose their attorneys and cannot avoid the consequences of their attorney's actions." *Citing In re Holt,* 102 Idaho 44, 47, 625 P.2d 398, 401 (1981); *Muncey v. Children's Home Finding & Aid Soc. Of Lewiston,* 84 Idaho 147, 151, 369 P.2d 586, 588 (1962). Weeks' email was an agreement as to how the parties would continue to move forward with resolution of their dispute. There is no language in Weeks' email that indicates this future notice of intent to remove Walshes' fence was merely a "professional courtesy." Generally, in Idaho, formation of a contract is a question of fact for the trier of fact to determine. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007). A valid contract formation requires a meeting of the minds, evidenced by a manifestation of mutual intent to contract, usually in the form of an offer and acceptance. 144 Idaho 233, 239, 159 P.3d 870, 876. Such mutual intent requires that the parties have a common and distinct understanding. *McColm-Traska v. Valley View, Inc.*, 138 Idaho 497, 501, 65 P.3d 519, 523 (2003). A promisee's bargained-for action or forbearance, given in exchange for a promise, constitutes consideration. *Id.* However, a genuine issue regarding a common and distinct understanding of the parties can constitute a genuine issue of material fact sufficient to defeat summary judgment. 138

Idaho 497, 502, 65 P.3d 519, 524. The District's claim that it now has a different understanding is, also, unavailing. The language used by Weeks is clear, and the facts are undisputed.

The District also argues the phrasing of the alleged agreement is unclear as to the timing of performance as well as how long the alleged agreement was intended to remain in effect. Memorandum in Opposition to Motion for Partial Summary Judgment, p. 7. The Walshes in turn argue the District entered into an agreement to take no action to remove the fence without prior notice to the Walshes, through their counsel, sufficient to allow for the Walshes to seek injunctive relief to maintain the status quo. Memorandum in Support of Plaintiffs'/Counter-Defendants' Motion for Partial Summary Judgment, p.12.

The contract does not state how long it remains in effect. Twenty-six months passed from the time Susan Weeks wrote the email to the date Chris Walsh discovered the District was removing the fence. Where no time is expressed in a contract for its performance, the law implies that it shall be performed within a reasonable time as determined by the subject matter of the contract, the situation of the parties, and the circumstances attending the performance. *Weinstein v. Prudential Property and Cas. Ins. Co.,* 149 Idaho 299, 319-320, 233 P.3d 1221, 1241-42 (2010); *Crittenden v. Crane,* 107 Idaho 213, 215, 687 P.2d 996, 998 (Ct.App. 1984) *citing Curzon v. Wells Cargo, Inc.,* 86 Idaho 38, 43, 382 P.2d 906, 908 (1963). Because the facts are not in dispute, the Court could infer what a "reasonable" time would have been. However, the parties at this point have not directed the Court's attention to what facts are pertinent to determine a "reasonable" time, the parties have not been given the opportunity to discover any additional evidence as to what a "reasonable" time might be, and the parties have not been given opportunity to argue the issue.

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D, The District's Claim that Even if There was a Contract, The District Substantially Performed and Thus, no Breach by the District, is Not Before the Court at the Present Time.

The District also argues that even if there was a contract between themselves and the Walshes, that there was no material breach because the District substantially performed by giving the Walshes notice of its intention to proceed via an Idaho Code § 40-2319 Notice in the mail and posting on the property. Memorandum in Opposition to Motion for Partial Summary Judgment, pp. 7-9. The District is correct in stating that where substantial performance has been rendered, there is no material breach of contract. *Roberts v. Wyman*, 135 Idaho 690, 697, 23 P.3d 152, 159 (Ct. App. 2000). Substantial performance occurs when, despite deviation from the contract or some omissions, the performance provides the "important and essential" benefits of the contract to the promisee. *Id*.

The Walshes argue the notice they received was simply "another" notice under I.C. § 40-2319(4), and that in any event, the Walshes disputed that second notice which resulted in the necessity for the District to then seek relief through the courts. Reply Memorandum in Support of Plaintiffs'/Counter-Defendants' Motion for Partial Summary Judgment, p. 7. Walshes also argue the contract required notice to come from counsel for the District, not the District itself. *Id.*

It is not appropriate to address the District's argument regarding substantial performance for two reasons. First, the Court finds that partial summary judgment on Walshes' breach of contract claim is not appropriate at this time, due to the issue as to reasonableness of the time period. Thus, any issue of partial performance is not before

this Court at this time. Second, the District has not filed for summary judgment on its defense of partial performance, and similarly, the issue of partial performance on a breach of contract is not before this Court at this time.

IV. CONCLUSION AND ORDER.

For the reasons stated above, it is proper for this Court to grant Walshes' motion for partial summary judgment as to liability under I.C. § 40-2319, and deny Walshes' motion for partial summary judgment on their breach of contract claims due only to uncertainty as to "reasonable time."

IT IS HEREBY ORDERED Walshes' motion for partial summary judgment as to liability under I.C. § 40-2319 is GRANTED.

IT IS FURTHER ORDERED Walshes' motion for partial summary judgment as to their breach of contract claims is DENIED as an issue remains as to the term or period of the contract.

Entered this 13th day of June, 2012.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 2012, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
John F. Magnuson	667-0500	Bently G. Stromberg	208-746-0753
		Susan P. Weeks	664-1684

_____
Jeanne Clausen, Deputy Clerk