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Beco Const. Co., Inc. v. J-U-B Engineers Appellant's Reply Brief Dckt. 35873

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BECO CONSTRUCTION COMPANY, INC., an Idaho corporation,

Plaintiff/Appellant,

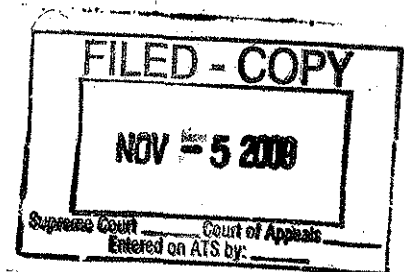
v.

J-U-B ENGINEERS, INC., an Idaho corporation,

Defendant/Respondent.

Supreme Court No. 35873-2008

APPELLANT'S REPLY BRIEF



Appeal from the District Court of the Sixth Judicial District for Bannock County.
Honorable Peter D. McDermott, District Judge, presiding.

Bryan D. Smith, Esq., residing at Idaho Falls, Idaho, for Appellant.
C. Tom Arkoosh, Esq., residing at Gooding, Idaho, for Respondent.

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ARGUMENT

I.

J-U-B'S RESPONDING BRIEF NEVER ADDRESSES THE CENTRAL ISSUE THAT THE COURT AWARDED MORE IN ATTORNEY'S FEES THAN IS EVEN MATHEMATICALLY POSSIBLE.

J-U-B does not dispute that as of August 15, 2005, J-U-B incurred \$33,661.92 in attorney's fees. This is simply a matter of mathematical calculation. This Court has held that J-U-B can recover attorney's fees only for defending BECO's contract claim that BECO withdrew on August 15, 2005. Thus, the district court cannot award more than \$33,661.92 in attorney's fees because \$33,661.92 is the total amount of attorney's fees incurred through August 15, 2005. Nowhere in its responding brief on appeal does J-U-B address how the district court did not abuse its discretion awarding \$35,600 in attorney's fees when the district court could award no more than \$33,661.92 because even J-U-B cannot fashion a reasonable argument that supports the district court's exercise of discretion.

Moreover, common sense dictates that the actual amount of attorney's fees attributable to defending only against the contract claim must be less than \$33,661.92, not \$1,938.98 greater than \$33,661.92. BECO alleged claims against J-U-B for breach of contract, negligence, and intentional interference with contract. J-U-B's answer and motion for summary judgment filed before August 15, 2005 addressed all three claims, not just the contract claim. Thus, not all the \$33,661.92 can be attributed solely to the contract claim. In other words, the attorney's fees attributable only to the contract claim must necessarily be less than \$33,661.92. J-U-B also fails to address this issue in its

responding brief on appeal similarly because even J-U-B cannot fashion a reasonable argument that supports the district court's exercise of discretion.

II.

J-U-B RELIES ON IMPERMISSIBLE EVIDENCE TO SUPPORT THE DISTRICT COURT'S EXERCISE OF DISCRETION.

J-U-B argues that the court reconsidered the testimony of J-U-B's expert witness, Mr. John Bailey, an attorney from Pocatello, Idaho. J-U-B argues that the court relied on Mr. Bailey's testimony to establish (1) the reasonableness of the work done; (2) the reasonableness of the rate charged; (3) his opinion that BECO's complaint was not well researched; and (4) his opinion that litigation against BECO is difficult and unreasonably time consuming. However, the law is well established that expert testimony is not admissible unless it assists the finder of fact. I.R.E. 702. If testimony is within the common experience of the finder of fact, then expert testimony is not admissible. *State v. Varie*, 135 Idaho 848 (2001.)

Here, the finder of fact on the attorney's fees issue is the court. J-U-B cannot argue that Mr. Bailey's testimony on the reasonableness of the work done, the reasonableness of the rate charged, and the sufficiency of the research for the complaint were matters to assist the trial court or beyond the common experience of the trial court. The trial court is the expert that decides these kinds of issues all the time as a matter of law. Moreover, testimony that litigation with any particular party is "difficult and unreasonably time consuming" is also not the proper subject of expert testimony because it does not involve technical, scientific, or specialized knowledge that will assist the trier of fact. Thus, the district court relied on "evidence" that was not appropriate for determining the amount of attorney's fees to award against BECO.

III.

J-U-B'S "RIGHT RESULT/WRONG REASON" ARGUMENT IS MISPLACED.

J-U-B argues that this Court could uphold the district court's award of attorney's fees by applying the "right result/wrong reason" test. In other words, J-U-B argues that the district court could have reached the \$35,600 attorney's fees award "if the district court had held that BECO's unjustifiable claims were made and pursued frivolously."¹ However, this argument flies in the face of the fact that the district court specifically held JUB was not entitled to attorney's fees under I.C. §12-121 since BECO's claims were not pursued frivolously, unreasonably or without foundation.² Because J-U-B has never cross-appealed this finding, J-U-B cannot now challenge it or argue "what might have been" as an alternate basis for upholding the district court's \$35,600 attorney fee award.

IV.

THE DISTRICT COURT ABUSED ITS DISCRETION IN PAYING J-U-B BECO'S CASH DEPOSIT ON APPEAL.

J-U-B and the district court rely on I.R.C.P. 79(e) entitled "**reclaiming exhibits, documents or property**" after trial as the law that authorized the district court to take BECO's \$41,140 cash bond on appeal and pay it over to J-U-B pending appeal. However, a basic tenant of statutory construction is that a more specific statute addressing the issue controls over the statute that is more general. *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52 (2000.) Here, I.A.R. 13(b)(15) specifically addresses the district court's duty with respect to a cash deposit after the appellate court has vacated any money judgment and remanded only for a determination of the amount of the

¹ See Respondent's Brief, p. 11.

² R Vol. IV, p. 813.

judgment. Thus, I.A.R. 13(b)(15) is specific to cash bonds and controls over a general rule regarding “reclaiming exhibits, documents or property.” Under this rule, the district court was supposed to modify the cash deposit by lowering it to 136% of the \$41,140 judgment amount for attorney’s fees rather than paying J-U-B \$41,140 from the cash deposit. Accordingly, this Court should order on remand that J-U-B immediately pay \$41,140 to the Clerk of the Court pending further proceedings on remand.

CONCLUSION

For all the reasons set forth above and in BECO’s Opening Brief, this Court should grant BECO the relief set forth in the Conclusion of BECO’s Opening Brief.

RESPECTFULLY SUBMITTED this 4th day of November, 2009.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 

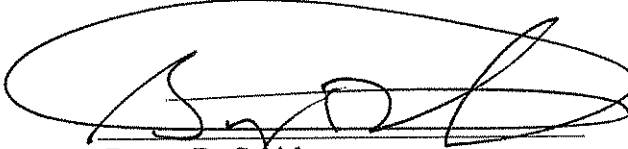
Bryan D. Smith
Attorneys for BECO Construction
Company, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November, 2009, I caused a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

- U.S. MAIL
- FAX
- Overnight Delivery
- Hand Delivery

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