10-5-2009

Parkwest Homes LLC v. Barnson Appellant's Reply Brief Dckt. 36246

IN THE SUPREME COURT OF THE STATE OF IDAHO

PARKWEST HOMES LLC, an Idaho limited liability company,

Plaintiff/Appellant,

vs.

JULIE G. BARNSON, an unmarried woman; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, as Nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.), a Delaware limited liability company; and DOES 1-10,

Defendants-Respondents.

Docket No. 36246-2009

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF CANYON
HONORABLE GORDON W. PETRIE, DISTRICT JUDGE, PRESIDING

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Plaintiff-Appellant ParkWest Homes LLC ("ParkWest") respectfully submits its rebuttal to the arguments raised in this appeal by Defendant-Respondent Mortgage Electronic Registration Sysems, Inc. ("MERS").

I. REPLY

A. Because ParkWest's Claim of Lien Substantially Complies with the Requirements of Idaho Code Section 45-507, the Lien Is "Facially Valid."

All but ignoring the grounds on which the district court relied in ruling that ParkWest's Claim of Lien failed to substantially comply with the requirements of Idaho Code Section 45-507 (hereinafter "Section 45-507"), MERS instead re-argues the grounds it advanced in the proceedings below, and were there ignored by the district court. However, irrespective of the grounds being considered, MERS cannot credibly challenge the established standards by which ParkWest's Claim of Lien is to be reviewed:

> "The purpose of these statutes is to compensate persons who perform labor upon or furnish material to be used in construction, alteration or repair of a structure." *Franklin Building Supply Co. v. Sumpter*, 139 Idaho 846, 850, 87 P.3d 955, 959 (2004). Materialman's lien laws are construed liberally "in favor of the person who performs labor upon or furnishes materials to be used in the construction of a building." *Id.* "To create a valid lien, there must be *substantial compliance* with the requirements of the statutes." *Id.*

BMC W. Corp. v. Horkley, 144 Idaho 890, 893-94, 174 P.3d 399, 402-03 (2007) (emphasis added).

Nevertheless, MERS quotes an argument once made to the Idaho Court of Appeals, but *not* adopted by that court, in arguing that ParkWest's Claim of Lien is "facially invalid": "where a lien claimant 'has failed to *strictly comply* with the requirements of I.C.

§ 51-109(4) . . . its liens do not substantially comply with I.C. § 45-507.'" Respondent's Brief ("RB") 17 (quoting the defendant/appellant's argument in *Cornerstone Builders, Inc. v. McReynolds*, 136 Idaho 843, 845, 41 P.3d 271, 273 (Ct. App. 2001) (emphasis added)). But not only did the court in *Cornerstone* not adopt this tortured argument,[1] but the argument is contrary to the following *ratio decidendi* articulated in *BMC*:

> [S]ince Kamachi, the agent of BMC, typed her name rather than signing it, Horkley argues that the lien was not properly verified by oath. Idaho Code § 45-507 requires that claims of lien "be verified by the oath of the claimant, his agent or attorney, to the effect that the affiant believes the same to be just." Black's Law Dictionary (8th ed. 2004) defines *"verification" as a "formal declaration made in the presence of an authorized officer, such as a notary public . . . ."* Kamachi was "sworn upon oath" by a notary public. *Idaho Code § 45-507 does not state that the lien must be signed*; it only states that it must be verified by the oath of the claimant. Because Kamachi was given an oath by a notary public, and *because a signature is not explicitly required,* her typewritten name suffices. Kamachi's verification therefore was not defective.

144 Idaho at 896-97, 174 P.3d at 405-06 (emphasis added).

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[1] I.e., that the failure to *strictly comply* with an extraneous statutory provision nowhere mentioned in Section 45-507 constitutes a failure to *substantially comply* with the requirements of Section 45-507.

Thus, as held in *BMC*, unless Section 45-507[2] *"explicitly"* requires certain conduct, a lien claimant is only required to substantially comply with the section's provisions.

[2] Idaho Code Section 45-507 provides, in its entirety, as follows:

> (1) Any person claiming a lien pursuant to the provisions of this chapter must file a claim for record with the county recorder for the county in which such property or some part thereof is situated.
>
> (2) The claim shall be filed within ninety (90) days after the completion of the labor or services, or furnishing of materials.
>
> (3) The claim shall contain:
>
> (a) *A statement of his demand, after deducting all just credits and offsets*;
>
> (b) The name of the owner, or reputed owner, if known;
>
> (c) The name of the person by whom he was employed or to whom he furnished the materials; and
>
> (d) A description of the property to be charged with the lien, sufficient for identification.
>
> (4) *Such claim must be verified by the oath of the claimant, his agent or attorney, to the effect that the affiant believes the same to be just.*
>
> (5) A true and correct copy of the claim of lien shall be served on the owner or reputed owner of the property either by delivering a copy thereof to the owner or reputed owner personally or by mailing a copy thereof by certified mail to the owner or reputed owner at his last known address. Such delivery or mailing shall be made no later than five (5) business days following the filing of said claim of lien.

(Emphasis added.)

Or otherwise summarized: If Section 45-507 explicitly mandates certain conduct, the lien claimant must satisfy the statutory mandate (i.e., strictly comply with the statute); but if no explicit mandate is stated in the statute, then substantial compliance with the requirements of Section 45-507 suffices. The holdings in all of the cases cited by MERS and decided under Idaho's mechanic's lien law comply with the foregoing principle articulated in *BMC*.[3]

Moreover, MERS' argument that ParkWest's Claim of Lien is facially invalid because, "Statutory conditions for valid liens are *strictly construed*, and . . . a verification in the form required by Idaho Code § 51-109 is a mandatory condition precedent," RB 20 (emphasis added), flies in the face of the following facts:

1. As held in *BMC* and quoted above: "To create a valid lien, there must be substantial compliance with the requirements of the statutes," not strict compliance.

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[3] *See Cornerstone*, 136 Idaho at 846, 41 P.3d at 274 ("We hold that Cornerstone's claims of lien fail to even *substantially comply* with the requirements of I.C. § 45-507 and are therefore invalid." (emphasis added)); *Western Loan & Building Co. v. Gem State Lumber Co.*, 32 Idaho 497, 499-501, 185 P. 554, 554-55 (1919) (enforcing *explicit* statutory requirement that lien-foreclosure action must be commenced within six months after lien claim is filed); *D.W. Standrod & Co. v. Utah Implement-Vehicle Co.*, 223 F. 517, 518 (9th Cir. 1915) ("Under Rev. Codes Idaho § 5118, which *[explicitly]* requires suit to enforce a mechanic's lien to be brought within six months after it is filed, the lien is void as to all incumbrancers not made parties to a foreclosure suit within the six months."); *Utah Implement-Vehicle Co. v. Bowman*, 209 F. 942, 945-47 (D. Idaho 1913) (same holding as in *D.W. Standrod*); *Ashley Glass Co., Inc. v. Bithell*, 123 Idaho 544, 546-47, 850 P.2d 193, 195-96 (1993) (under Section 45-507(5), which *explicitly* requires delivery of a copy of a claim of lien on the property owner, oral notice of lien is insufficient compliance with statutory mandate).

2. As also held in *BMC* and quoted above, the verification required under Section 45-507 is "a 'formal declaration made in the presence of an authorized officer, such as a notary public . . . ,'" not strict compliance with Idaho Code Section 51-109.

3. As argued in ParkWest's opening brief and not contested by MERS, ParkWest's Claim of Lien "was verified by a notary public using the form specified in Idaho Code Section 51-109(2)." Appellant's Brief ("AB") 12.

4. Idaho Code Section 51-109(4) itself requires only substantial compliance ("the verification . . . should be in *substantially* the following form:").

5. The form of the verification set forth as an example in Idaho Code Section 51-109(4) is for use by an officer of a corporation, but not only is ParkWest a limited liability company and *not* a corporation and David Zawadzki (who executed the subject Claim of Lien) an authorized representative of ParkWest and *not* a corporate officer, but Section 45-507(4) expressly provides that the required verification can be made by other than an officer of a lien claimant, including by its "agent or attorney."

6. The form of the verification approved in *Treasure Valley Plumbing & Heating, Inc. v. Earth Resources Co.*, 106 Idaho 920, 684 P.2d 322 (Ct. App. 1984), and acknowledged as complying with Section 45-507 in *Cornerstone, see* 136 Idaho at 845-46, 41 P.3d at 273-74, did *not* conform to the form prescribed by Idaho Code Section 51-109(4).

7. No Idaho appellate court has ever held that the use of "a verification in the form prescribed by Idaho Code § 51-109 is a mandatory condition precedent" to Section 45-507, as MERS now argues.

8. In rebuttal to MERS' meritless argument that ParkWest's position "has far-reaching implications" and "might, therefore, make the recording laws inapplicable to mechanic's liens and permit a lien claimant alone to determine when a lien has been 'filed of record,'" RB 21, ParkWest points to the *explicit* requirement in Section 45-507(1) mandating that a lien claim be filed "for record with the county recorder for the county in which such property or some part thereof is situated."

9. And in rebuttal to MERS' argument that ParkWest "would have this Court hold that . . . section 45-507 *nullifies* 51-109," RB 21 (emphasis in original), ParkWest replies that it seeks nothing more than to have this Court follow the recent holding in *BMC*, as quoted above.

Accordingly, based both on the foregoing and the points and authorities set forth in ParkWest's opening brief, *see* AB 7-14, ParkWest's Claim of Lien substantially complies with the requirements of Section 45-507.

B. Because the District Court Ruled *Sua Sponte* That the Contract Is Void, the Issues of "Ratification" and "Unjust Enrichment" Are Properly Raised on Appeal.

As the district court acknowledged in its memorandum decision, the question of whether the contract (the "Contract") between ParkWest and Juli Barnson ("Barnson") was void under Idaho law was "not directly raised by either party."[4] R, pp. 130. And because MERS did

[4] Although MERS asserted in its motion for summary judgment that ParkWest's acknowledged failure to make certain disclosures to Barnson required by Idaho Code Section 45-525 "makes the contract void," R, p. 32 at ¶ 3, both MERS' briefing and oral argument on the issue was that such a violation made the Contract "voidable" – and not void.

not contend in the proceedings below that the Contract was void based on ParkWest's untimely registration as a contractor, as the district court ruled *sua sponte*, ParkWest did not raise the issues of ratification or unjust enrichment in the district court.

Although MERS does not assert that the issue of ratification is not properly raised on appeal,[5] MERS has quoted the decision in *Rammell v. Idaho State Department of Agriculture*, 147 Idaho 415, 421, 210 P.3d 523, 529 (2009), for the general rule: "Asserting an issue in the pleadings and failing to actually argue that issue and seek a ruling thereon is inadequate to preserve that issue for appeal." The foregoing statement of the general rule, however, is not a complete statement of the applicable law. Thus, as repeatedly stated by the Idaho Supreme Court: "To properly preserve an issue for appeal, the one must *either* receive an adverse ruling on the issue *or* raise it in the court below." *Kolar v. Cassia County Idaho*, 142 Idaho 346, 354, 127 P.3d 962, 970 (2005) (citing *McPheters v. Maile*, 138 Idaho 391, 397, 64 P.3d 317, 323 (2003)) (emphasis added). Accordingly, because the district court issued, *sua sponte*, its adverse ruling that the Contract is void based on ParkWest's untimely registration as a contractor, both

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See Tr, p. 8, LL. 11-15 ("any person who suffers any ascertainable loss . . . is entitled to treat the contract instant thereto as void – *as voidable, I should say.*" (emphasis added)). MERS' contention that *it* might elect to treat *Barnson's* Contract as voidable months after ParkWest completed construction of *Barnson's* residence and Barnson stipulated to ParkWest's judgment against her was meritless for numerous reasons. *See* Tr, p. 23, L. 23 – p. 29, L. 17. Indeed, not only did the district court not bother to address MERS' contention that the Contract might be voidable by MERS, but MERS has not bothered to raise its meritless argument on appeal. Thus, as the district court acknowledged, the issue of whether the Contact was void *ab initio* was "not directly raised by either party."

[5] MERS does, however, argue that the issue of unjust enrichment is not properly before this Court. RB 23-24.

established Idaho precedent and considerations of elemental fairness should allow ParkWest to establish on appeal (i) why the Contract is not void in light of Barnson's subsequent ratification of it, and (ii) even if it were held to be void, the subsidiary and wholly dependent question of why ParkWest should still recover under the theory of unjust enrichment.[6] For absent the Contract being held void on the district court's own initiative, the question of unjust enrichment was irrelevant. *See Vanderford Co., Inc. v. Knudson*, 144 Idaho 547, 558, 165 P.3d 261, 272 (2007) ("The doctrine of unjust enrichment is not permissible where there is an enforceable express contract . . . .").

C. Because Barnson Ratified the Contract After ParkWest Obtained Registration as a Contractor, the Contract Is Not Void.

MERS argues the facts, the law, and public policy in opposition to ParkWest's contention that the Contract is not void because Barnson ratified it after ParkWest obtained registration as a contractor. Each of these grounds is addressed below.

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[6] *See* 5 AM. JUR. 2d *Appellate Review* § 618 (2007):

> It is axiomatic that an appellate court will generally not review any issue not raised in the court below. This rule is based on the principle that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Furthermore, it is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable.

(Footnotes omitted.) In the present dispute, of course, not only did the district court rule on its own initiative that the Contract was void and that the issue of unjust enrichment was not before the court, but ParkWest was not given the opportunity to address the district court's error in the proceedings below.

1. The facts establish that Barnson ratified the Contract.

MERS argues that there is no evidence that Barnson could have ratified the Contract "'with full knowledge of' ParkWest's act of unregistered contracting." RB 15 (citation omitted). MERS is wrong. Thus, the uncontested facts in the proceedings below are as follows:

1. Attorney David Wishney appeared as counsel for Barnson in this action on September 4, 2007. R, p. 1.

2. Thereafter, on January 18, 2008, the Chapter 7 Trustee in the Barnson bankruptcy proceedings filed and *served attorney Wishney and Barnson*, among others, with the trustee's Amended Complaint claiming that, "as a consequence of ParkWest's failure to be registered as a contractor at all times during the Wilder Contract, ParkWest has waived any and all lien rights against the Wilder Property in accordance with Idaho Code § 54-5208." R, pp. 62, 67-68, and 71.

3. In response to the Chapter 7 Trustee's complaint in the Barnson bankruptcy proceedings, on February 1, 2008, ParkWest filed and *served attorney Wishney and Barnson*, among others, with ParkWest's answer admitting "that at the time of execution of the Wilder Contract ParkWest was not registered as a contractor as required by the Idaho Contractor's Registration Act . . . ." R, pp. 72, 76, and 86-87.

4. And on September 29, 2008, respective counsel for ParkWest and Barnson filed a stipulation for the entry of default judgment against Barnson, R, p. 2, pursuant to which ParkWest was granted a default judgment against Barnson (the "Barnson Judgment") to the extent of her interest in the liened Wilder property (the "Property"). R, pp. 106-110.

MERS' contention, therefore, that Barnson did not have "full knowledge of ParkWest's act of unregistered contracting" when she ratified the Contract by stipulating to the entry of the Barnson Judgment is without merit. Moreover, in response to MERS' frivolous argument that "there is good evidence in the Record that Barnson has not avoided any obligation[,]" RB 16-17, ParkWest would simply point to the terms of the final, unappealed Barnson Judgment, which grant ParkWest judgment for $141,208.39. R, p. 107.

2. The law establishes that Barnson ratified the Contract.

MERS attempts to distinguish the authorities cited by ParkWest in support of its ratification argument by contending: "a void contract *may* be ratified only when (1) the law has changed, and (2) the facts have also changed. ParkWest has made no showing that the law has changed, and indeed it has not." RB 15 (emphasis in original).

To eliminate any question concerning whether there must be a change in the law before the applicable legal principle inures, as MERS contends, the rule as explained in *Corpus Juris Secundum* and cited by ParkWest in its opening brief is set forth below.

> *Ratification subsequent to change in law or facts removing illegality.*
>
> Although parties to an illegal contract cannot validate it by subsequent ratification, so long as there has been no change in the law or in facts as would cause the bargain to be valid and enforceable if made at the time of ratification, if such a change has occurred, ratification may itself constitute an enforceable contract;[7] neither the making of such a bargain or its performance

[7] MERS' argument that "[i]f ParkWest wanted to have a legal, enforceable contract, it could have registered as a contractor, and then entered a new contract with Barnson . . . ," RB 14, ignores the rule that a "ratification may itself constitute an enforceable contract." Accord 15

being any longer prohibited, and all that is necessary is that the ratifying transaction itself fulfill ordinary contract requirements.

17A C.J.S. *Contracts* § 287(a) (1999) (italics in original; footnotes omitted). The applicable legal principle is discussed in detail in *TCA Building Co. v. Northwestern Resources Co.*, 922 S.W.2d 629 (Tex. App. 1996), as follows:

> As a general rule, void contracts cannot be ratified.[8] TCA argues from this general rule that a contract void at its inception for whatever reason will always be void and incapable of ratification notwithstanding any change in the facts relevant to the parties or changes in the applicable law.
>
> Texas authority is clear that this is not the case. The cases have held that, so long as the invalidating condition is removed and a valid ratification subsequently occurs, the previous void contract can be ratified. The rule was accurately and concisely stated by Professor Corbin:
>
> > It is often said that the parties to an illegal contract can not validate it by a subsequent ratification. This is quite true so long as there has been no change in the law or in the facts as would cause the bargain to be valid and enforceable if made at the time of ratification. If, however, such a change has occurred, the ratification may itself constitute an enforceable contract. Neither the making of such a bargain or its performance is any longer prohibited; and all that is now necessary is that the ratifying transaction shall itself fulfill ordinary contract requirements.

GRACE MCLANE GIESEL, CORBIN ON CONTRACTS, *Contracts Contrary to Public Policy* § 89.14 (Joseph M. Perillo ed., rev. ed. 2003).

[8] MERS cites to *Corpus Juris Secundum* in support of the referenced general rule, RB 15, but ignores the explanation in *Corpus Juris Secundum* with respect to the exception to this general rule cited by ParkWest in its opening brief.

922 S.W.2d at 634 (multiple citations omitted).

Finally, MERS is also wrong in arguing that "[t]he lone Idaho case cited by ParkWest has no bearing on this case: *Manning v. Twin Falls Clinic & Hospital, Inc.*, 122 Idaho 47, 830 P.2d 1185 (1992) . . . ." RB 14-15. For as pointed out in ParkWest's opening brief, the decision in *Manning* summarized the analogous doctrine of implied ratification by a principal as articulated by the Idaho Supreme Court. *See* AB 16-17. Accordingly, although the principles explained in *Manning* are not controlling in the present dispute, they clearly have a bearing on the determination of whether Barnson ratified the Contract.

3. Public policy considerations do not support MERS' argument.

MERS' policy arguments fail to apprehend the logical implications of ParkWest's contention that the Contract was adopted and validated when Barnson ratified it after ParkWest obtained registration as a contractor. For based on the facts in this appeal and the legal authorities cited in the preceding subpart, ParkWest argues no more than that one who has full knowledge of all relevant factual circumstances can, at his or her election, enter into a new building contract (through the ratification of a previously void building contract) with a then fully licensed Idaho contractor. Indeed, contrary to the parade of horribles that MERS contends would result from such a holding, *see* RB 16, MERS itself concedes, as previously quoted: "If ParkWest wanted to have a legal, enforceable contract, it could have registered as a contractor,

and then entered a new contract with Barnson . . . ." RB 14. But, of course, this is precisely the legal effect of what ParkWest and Barnson did under applicable law.[9]

D. ParkWest Adequately Pleaded Its Claim for Relief to Recover for Unjust Enrichment.

ParkWest explains in detail in its opening brief why the issue of unjust enrichment was adequately pleaded in its Second Amended Complaint. AB 18-20. Citing *no* authority to support its contention, MERS now argues: "(1) in its Second Amended Complaint, ParkWest only sought the right to foreclose its Lien as against Barnson and MERS' interests in the Property, and the theory of unjust enrichment was never alleged against anyone[.]" RB 24. MERS' unsupported argument is directly contrary to the decisions relied upon and quoted by ParkWest in its opening brief. *See* AB 18.

E. ParkWest Did Not Forfeit Its Lien Rights by Taking a Stipulated Default Judgment Against the Bankrupt Owner of the Property.

Pursuant to the stipulation with Barnson and the resulting Barnson Judgment, MERS now argues: "(3) ParkWest *affirmatively and expressly abandoned* any unjust enrichment claim it might have had when it entered into the Barnson Stipulation;[10] and (4) ParkWest has no claim for unjust enrichment as against MERS under *Great Plains Equipment, Inc. [v. Northwest*

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[9] MERS provides absolutely no explanation for why the law should treat a property owner who enters into a new building contract by signing a document denominated to be a contract dramatically different from a property owner who enters into a new building contract by ratifying a prior void contract – which, according to MERS, "would make that property owner an accomplice to an unregistered contractor in flouting Idaho law . . . ." RB 16.

[10] The stipulation is not part of the record on appeal.

Pipeline Corp., 132 Idaho 754, 979 P.2d 627 (1999)]." RB 24 (emphasis added). Both arguments are meritless.

In response to the first of these two arguments ParkWest responds that at no time did it "affirmatively and expressly abandon any unjust enrichment claim," as MERS contends without citing *any* support in the record. To the contrary, both the stipulation and Barnson Judgment, to use MERS' own words, "affirmatively and expressly" granted to ParkWest "judgment against Barnson to the extent of her interest in the Property, but not personally, for the following amounts as pled in the SAC . . . ." R, p. 107 (Barnson Judgment). MERS' *unsupported* contention that ParkWest "affirmatively and expressly abandoned" any of its lien rights by taking a default judgment against the bankrupt owner of the Property to the extent of her interest in the Property thus borders on the surreal.

Moreover, the decision in *Great Plains* does not diminish ParkWest's right to recover for unjust enrichment – or under any other theory. Indeed, without disclosing either the facts or holding that MERS apparently thinks may be persuasive in this appeal, MERS makes a naked, categorical reference to the 20+ page opinion in *Great Plains* without even referencing the page(s) MERS believes to be relevant. *See* RB 23. Accordingly, without the benefit of understanding what legal point MERS is trying to make, ParkWest can only respond that it is not suing MERS for unjust enrichment, but is rather seeking to recover under Idaho's mechanic's lien statute. *See Great Plains*, 132 Idaho at 768, 979 P.2d at 641 ("In the present case, the plaintiff subcontractors, who did not have express contracts directly with [the defendant], were limited to recovery upon their claims under the mechanic's lien statute.").

F. Because ParkWest Was a Registered Contractor at All Times During the Performance of the Acts and Contract for Which Compensation Is Sought, Idaho Code Sections 54-5208 and 54-5217(2) Are Inapplicable.

The first argument raised by MERS in its brief (and thus apparently its favorite) was also advanced by MERS in the proceedings below, and was there ignored by the district court: Idaho Code Sections 54-5208 and 54-5217(2) proscribe ParkWest's recovery under its Claim of Lien. Neither of these statutes have previously been construed by either of Idaho's appellate courts.

The undisputed factual allegations on which ParkWest relies with respect to the present question are as follows:

1. ParkWest (a) was first registered as a contractor by the State of Idaho on May 2, 2006, (b) obtained a building permit to construct the improvements to the Property on May 18, 2006, and (c) performed its first work in constructing said improvements and in the performance of the Contract with respect to such construction on May 22, 2006. R, p. 112 at ¶ 3.

2. No compensation – not a single penny – is being sought in this action for any work or other acts performed in connection with either the construction of the improvements to the Property and/or the performance of the Contract which were undertaken prior to ParkWest's registration as a contractor by the State of Idaho on May 2, 2006. *Id.* at ¶ 4.

The applicable rules of construction with respect to statutes were recently articulated in *Johnson v. McPhee*, 147 Idaho 455, 210 P.3d 563 (Ct. App. 2009), as follows:

> The interpretation of a statute is a question of law over which we exercise free review. We will construe a statute as a whole, and the plain meaning of a statute will prevail unless clearly

> expressed legislative intent is contrary or unless the plain meaning leads to absurd results. Statutes that are *in pari materia*, i.e., relating to the same subject, must be construed together to give effect to legislative intent. In construing a statute, this Court examines the language used, the reasonableness of the proposed interpretations, and the policy behind the statutes. This Court will avoid an interpretation that would lead to an absurd result or render a statute a nullity.

147 Idaho at 460-61, 210 P.3d at 568-69 (multiple citations omitted). *See also Friends of Farm to Market v. Valley County*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002) ("Constructions that would lead to absurd or unreasonably harsh results are disfavored."). In sum, Idaho Code Sections 54-5208 and 54-5217(2) should be construed together to give effect to legislative intent and avoiding an interpretation that would lead to an absurd or unreasonably harsh result.

The first of the two statutory provisions on which MERS relies is Idaho Code Section 54-5208 (hereinafter "Section 54-5208"), which provides, in relevant part, as follows:

> A contractor who is not registered as set forth in this chapter, unless otherwise exempt, shall be denied and shall be deemed to have conclusively waived any right to place a lien upon real property as provided for in chapter 5, title 45, Idaho Code.

Because, however, it is undisputed in this appeal that ParkWest was a registered contractor both at the time it constructed all of the improvements to the Property and at the time it filed its Claim of Lien, MERS must argue that the deemed waiver applies equally to both existing and future lien rights arising under Idaho law and cannot ever be cured. RB 12 ("Nothing in the Act gives a contractor an opportunity to cure its failure to register – and thereby rescind the waiver of its lien rights – partway through the relationship."). Thus, extending MERS' argument to its logical conclusion, because ParkWest admittedly (but innocently) entered into the Contract before

registering as a contractor, it could not register as a contractor and save its future lien rights with respect to the Property for work performed under the Contract after it registered, nor apparently could it enter into a new Contract with Barnson after it became registered and save its future lien rights with respect to the Property, nor apparently could it do anything at all to preserve its future lien rights under any other contract, with any other persons, for any other work constructed on any other property.

ParkWest responds that MERS' proffered construction leads to a patently absurd and unreasonably harsh result that should not be adopted. Rather, ParkWest contends that the deemed waiver provided by Section 54-5208 should be construed to apply to a contractor's right to place a lien upon real property for any work performed prior to its registration as a contractor. Such a construction is supported by the language of the second statutory provision here at issue, Idaho Code Section 54-5217(2) (hereafter "Section 54-5217(2)").

Section 54-5217(2) provides, in its entirety, as follows:

> No person engaged in the business or acting in the capacity of a contractor, unless otherwise exempt, may bring or maintain any action in any court of this state *for the collection of compensation for the performance of any act or contract* for which registration is required by this chapter without alleging and proving that *he was a duly registered contractor*, or that he was otherwise exempt as provided for in this chapter, *at all times during the performance of such act or contract.*

(Emphasis added.) MERS argues that "ParkWest is barred under § 54-5217 from bringing this action" because it was not registered as a contractor when the Contract was negotiated and signed. RB 13.

Conversely, ParkWest relies on the express language contained in Section 54-5217(2) providing that it applies where one sues for "the collection of compensation for the performance of any act or contract" if the contractor was not registered "at all times during the performance of such act or contract." ParkWest therefore contends that the statute is inapplicable here because it is undisputed for purposes of MERS' motion (a) that ParkWest performed its first work in constructing the improvements to the Property and in the performance of the Contract with respect to such construction only after it was first registered, and (b) that no compensation is being sought by ParkWest for any work or other acts performed in connection with either the construction of the improvements to the Property and/or the performance of the Contract which were undertaken prior to ParkWest's registration. ParkWest further contends that, as with Section 54-5208, MERS' proffered construction leads to a patently absurd and unreasonably harsh result that should not be adopted.

Accordingly, when Section 54-5208 is read *in pari materia* with Section 54-5217(2) and so as to avoid a patently absurd or unreasonably harsh result, yet while still giving effect to legislative intent, these two sections should be construed together to proscribe a contractor from recovering for work performed prior to its registration as a contractor.

II. CONCLUSION

Based on the points and authorities set forth above and in ParkWest's opening brief, the judgment in MERS' favor should be reversed and the matter remanded to the district court for further proceedings and trial.

DATED this 5th day of October 2009.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October 2009, I caused a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** to be served by the method indicated below, and addressed to the following:

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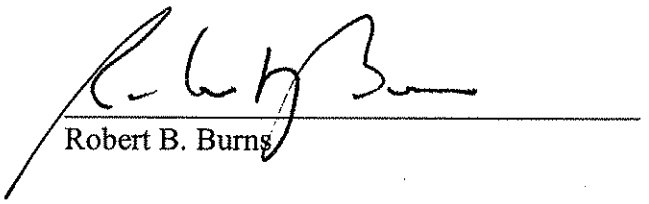

Robert B. Burns