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Harris, Inc. v. Foxhollow Const. & Trucking Respondent's Brief 2 Dckt. 36601

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IN THE SUPREME COURT OF THE STATE OF IDAHO

HARRIS, INC., an Idaho Corporation,
Plaintiffs-Appellant,

v.

FOXHOLLOW CONSTRUCTION &
TRUCKING, INC., an Idaho Corporation,
L.N. JOHNSON PAVING, LLC, a Limited
Liability Company,

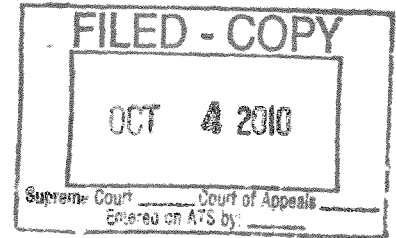
Defendants-Respondents

DAVID EGAN, an Individual,
FERGUSON FARMS, d/b/a FERGUSON
TRUCKING, D. KYM FERGUSON, an
Individual, and MICHAEL FERGUSON,
an Individual,

Defendants-Respondents.

)
)
) Supreme Court
) Docket No. 36601-2009
)

)
) (Jefferson County Case No.)
) CV-2005-642
)



RESPONDENT'S BRIEF
FILED ON BEHALF OF FERGUSON

Appeal from the Seventh Judicial District Court, Jefferson County, Idaho
Honorable Darren B. Simpson, District Judge

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STATEMENT OF THE CASE

NATURE OF CASE

This appeal is from a case that involved three (3) construction projects, two (2) in Jefferson County, Idaho and one (1) in Fremont County Idaho. The Jefferson County Jobs were for construction work on the “Midway Middle School” and a “Water Booster Pump” project. Harris, Inc. (hereinafter “Harris”) was the General contractor on all three (3) jobs. L.N. Johnson Paving, LLC (hereinafter “Johnson”) and Foxhollow Construction & Trucking, Inc. (hereinafter “Foxhollow”) were subcontractors to Harris. Ferguson Farms d/b/a Ferguson Trucking were equipment suppliers to Foxhollow for use on Harris’ jobs. D. Kym Ferguson and Michael Ferguson were minority stockholders and officers and directors in Foxhollow and partners in Ferguson Farms (hereinafter “Ferguson”).

The Plaintiff’s case against Kym Ferguson is based on the alleged fraud committed by Foxhollow by failure to turn in bills and invoices to Harris, that induced Harris to make progress payments to Johnson for work performed by Foxhollow. The fraud on the part of Ferguson was his alleged failure to advise Harris that Foxhollow was not turning in 3rd party equipment suppliers and materialmen’s billings and invoices to Harris in a timely manner so Harris would be apprised of the outstanding claims against Foxhollow and could take that into account before Harris made a progress payment to Johnson. Harris did make progress payments to Johnson, but the work was actually performed by Foxhollow. Johnson paid over the progress payment to foxhollow. Harris and Dave Egan, Johnson’s agent and Foxhollow’s employee, put together this shell game to cover up the fact that Foxhollow did not have a public works license and could not

be on the school jobs, so Harris paid Foxhollow's payroll and all of its business expenses directly as though Foxhollow's employees and suppliers were Harris's employees and suppliers. Harris would then keep internal accounting records charging all of Foxhollow's expenses, that Harris was paying, back to Foxhollow's sub-contract. The result was that the only place Foxhollow surfaced was on Harris' internal accounting records. First you see it then you don't. Scott Harris of Harris, Inc., explained that this procedure was followed in order to assure that all of Foxhollow's suppliers were paid, even though the sub-contract with Foxhollow required Foxhollow to pay all of its own suppliers. The procedure for turning in the billings for Foxhollow's suppliers was designed by Scott Harris and Dave Egan. Foxhollow's manager on the site was Melvin Voss and Harris' superintendent on the job was a man named Tony Robles. Melvin Voss, Foxhollow's manager, took his instructions from Tony Robles, Harris' superintendent and was paid by Harris. Suppliers were directed to turn in their billings to Melvin Voss, Foxhollow's project manager on the job. Melvin Voss collected the billings to Foxhollow and then on the 1st and the 15th, Melvin turned them into Tony Robles, completely bypassing Foxhollow's office, accountant and accounting records. Bessie Bradshaw, a construction accountant with 35 years experience was employed by Foxhollow to keep Foxhollow's accounting records. Harris claims that Kym Ferguson should have advised Harris that Foxhollow's supplier billings were not being submitted, as Harris had planned. The only problem with this is that no one told Kym Ferguson how the system was supposed to work. Kym couldn't advise Harris of anything, because he didn't know billings were supposed to be turned in to Harris so they could be paid by Harris on behalf of Foxhollow. Ferguson could not

figure out why there was no money to pay Ferguson Trucking's equipment rental and payroll taxes. Ferguson Trucking's billings in the amount of \$75,000.00 were piling up in Foxhollow's office and Ferguson, a Vice-President, and Bessie Bradshaw, Secretary/Treasurer, did not know the billings were supposed to be turned into Harris. For Harris to prevail against Foxhollow, it has to prove all nine (9) elements of fraud by clear and convincing evidence. For Ferguson, as an officer and director in Foxhollow, to be held liable for Foxhollow's fraud, he had to specifically direct, actively participate in, or knowingly acquiesce in the fraud that Foxhollow was allegedly perpetrating. The Court below found Harris did not prove all of the elements of fraud against Foxhollow. [*R. Vol.6 p 1502*] The court found that Harris did not prove any damages against any of the Defendants with reasonable certainty. The Court further found that Ferguson was not liable for Foxhollow's fraud as they did not prove ignorance of the falsity of the representations or the silence of Foxhollow and that Ferguson did no direct, actively participate in, or knowingly acquiesce in the alleged fraud that Foxhollow was perpetrating. [*R. Vol. 6 p. 1503*]

COURSE OF THE PROCEEDINGS

Respondent Ferguson does not have any meaningful changes to Appellant's statement as to the course of the proceedings

ISSUES ON APPEAL

1. DID THE COURT ERR IN RULING HARRIS FAILED TO PROVE DAMAGES
2. DID THE COURT ERR IN REFUSING TO AWARD DAMAGES ON THE GROUNDS THAT THE EVIDENCE DID NOT SHOW WHETHER THE DAMAGES

WERE A RESULT OF THE JOHNSON CONTRACT OR THE FOXHOLLOW CONTRACT , OR BOTH?

3. DID THE COURT ERR IN FINDING THAT THE PAYMENTS HARRIS SENT TO JOHNSON WERE NOT FOR JOHNSON'S WORK ON THE FEMONT PROJECT?
4. DID THE COURT ERR IN HOLDING HARRIS FAILED TO PROVE THE GENERAL CONDITIONS WERE A PART OF THE SUBCONTRACT WITH JOHNSON AND FOXHOLLOW AND IN DENYING INDEMNIFICATION TO HARRIS?
5. DID THE COURT ERR IN NOT AWARDING DAMAGES AGAINST FERGUSON?
6. DID THE COURT ERR IN REFUSING TO ADMIT EXHIBIT 55/55-A?
7. DID THE COURT ERR IN DENYING HARRIS' MOTION TO AMEND FINDINGS AND CONCLUSIONS?
8. DID THE COURT ERR IN AWARDING ATTORNEY FEES AND COURT COSTS TO JOHNSON AGAINST HARRIS?
9. DID THE COURT ERR IN AWARDING ATTORNEY FEES AND COURT COSTS TO FERGUSON AGAIN HARRIS?
10. DID THE COURT ERR IN DENYING HARRIS' MOTION FOR NEW TRIAL
11. **THE RESPONDENT, FERGUSON IS ENTITLED TO, AND DOES REQUEST, ATTORNEY FEES AND COURT COSTS INCURRED IN THIS APPEAL PURSUANT TO I.A.R. 41 AND I.C. 12-120(3).**

STATEMENT OF FACTS

Harris presented testimony from Tony Robles that at some point as he was acting superintendent on the Fremont job he became aware of a problems pertaining to the timely submission of pay requests and billings by Foxhollow and after having become aware of this problem, [*Tr. p. 446, LLL 4-7*] Robles testified that he had a conversation with Kym Ferguson on August 28, 2002. [*Tr. p. 444 LL. 21-2; p. 445, LL. 1-25; p. 446, LL. 1-7; p. 447, LL. 1-25; p. 448, LL. 1-25 p 450, LL. 22-25; p. 451, LL 1-22;*] Robles testified that Kym Ferguson “*said he was one of the principals in Foxhollow*” and “*said they were withholding any pay requests and billings until the job was complete by their, their scope of the work*”. [*Tr. 452, LL. 21-25; p.453, LL. 1-21*] Kym Ferguson denies that the conversation took place. [*Tr. 573, LL.1-25; p. 574 LL. 1-25; p. 575, LL. 1-5*]

Melvin Voss testified that he had worked in the Construction industry for 20 to 25 years. [*Tr. p. 626, LL23-25*] Melvin testified that he was hired by Foxhollow, but he was paid by Harris Construction. [*Tr. p. 627, LL 1-7*] Melvin testified that he got his instructions from Tony Robles (Harris’ Superintendent on the Fremont County job) and that his duties on the job were as the project manager, that he ran the job, directed all of the equipment, did the billing on the job, stuff like that. He testified that he recorded “*what the equipment did, like if it was a truck, I’d put down trucking, the name of the trucking company. I’d put down what, what it did for the day, what it hauled and stuff, and the hours*”. Melvin testified that he did this on every piece of equipment on the site. That was his job and it was to “*record everything*”. [*Tr. p. 628, LL 5-25; p.629, LL. 1-6*] He testified that when it came time for the equipment suppliers to turn in their

billings they turned them into him (Melvin Voss) and then he inturn would turn them into Tony Robles. That after he collected the billings from the equipment suppliers, they never left his possession until he gave them to Tony robles. [Tr. p. 629, LL. 7-13] When asked if he was on the North Fremont Job on a daily basis or just occasionally Melvin testified “No. I—it was daily. I was there from the first day the first piece of equiupment started up to the last day that the last piece of equipment left.” In answer to the question “and each day you kept your log as to the equipment that was on the site, who owned the equipment and what work it did? Melvin answered YES,” Melvin testified that he verified the bills from his log and turned them in to Tony Robles; That he turned the bills into Tony Robles on the 1st and the 15th as Tony Robles requested, that way everybody could get their money on the 1st and the 15th [Tr. p. 629, LL. 22-25; p. 630, LL. 1-15] Melvin testified that he never discussed any of the equipment billings with Kym Ferguson. [Tr. p.630, LL 16-18.] When asked, how often did you see Kym Ferguson on the site? Melvin answered “No, I never did see him there until towards the end of the job”. In answer to the question: “would that have been in, in October after he brought his equipment back to the job site?” Melvin answered “yes”. [Tr. p. 630, LL. 19-25] Melvin Voss testified that he could identify the equipment on the cite just by looking at it. In answer to the question “Now?” by looking at the equipment out there on the site, could you identify which equipment was rented from which equipment supplier” Melvin Answered “yes” Q. ‘And how did you do that?’ Melvin answered “well, like Western Sates and that, they have their Logo right on the equipment; like Pro Rental, they do the same thing.” [Tr. P. 637, LL 3-23] It is no wonder that Tony Robles became aware of the fact that Foxhollow was not turning in their billings in a

timely manner. Melvin Voss and Tony Robles were the only ones that saw the billings before they were turned in to Harris. Foxhollow's office, nor Bessie Bradshaw, nor Kym Ferguson ever saw the billings if the suppliers turned in their invoices to Voss pursuant to Harris' plan for handling incoming invoices and billings.

Scott Harris' only basis for his allegation that Kym Ferguson withheld billings from Harris was because Kym was a principal in Foxhollow. "And he had to know". [*Tr. p. 262 LL. 4-25 ; p. 263 LL. 1-23*] Harris testified that he was not paying Ferguson directly and that he knew that Ferguson had not been paid their equipment rental. [*Tr. P. 264, L. 8 – p. 267, L. 5*] Scott Harris testified, upon being asked if he ever advised Kym Ferguson that billings were supposed to be turned into Harris, he answered, "I told Dave Egan".

[*Tr. p. 264 LL 9-25; p. 265, LL. 1-25; p. 266, LL.1-25; p. 267, LL 1-5*] Scott never said that he told Kym Ferguson. Scott Harris testified that invoices from Pro Rental and Western States were not being submitted for payment in a timely manner. When asked the following question, "There is nothing in the contract documents that says they're supposed to turn those in so you can pay them. They are supposed to pay their own, aren't they? Scott Harris answered: "I think its in the subcontract agreement, paragraph – there's a paragraph that gives – oh, I think that you have read – reviewed that they have, they have the obligation to pay their bills in a timely manner". [*Tr. P. 259, LL 7-25; p. 260, LL 1-8*] Scott harris tried to explain why he was requiring the Foxhollow's equipment suppliers to turn in their billings to Harris, but his testimony was confusing and contradictory. [*Tr pp. 253 L-13 – p. 260, L. 8*] Scott Harris was unable to explain why Kym Ferguson is liable for a check [*Exhibit ZZ*] that Harris wrote to

Johnson on a payment request from Egan, Johnson's agent, for work that Scott Harris says Johnson did. [*Tr. P. 241, L 1 – p. 244, L. 16*] When Mr. Harris tried to explain the chain of events when he issued his check [*Exhibit ZZ*] he became confused and finally said "I don't know". Scott Harris could not keep track of what parties were representing what companies.

Kym Ferguson did not know Foxhollow was submitting supplier invoices to Harris. In answer to the question: "Were you ever advised by Harris or anyone else that you were supposed to be turning your billings and invoices into Harris so that they could be paid"? Kym answered: "No". Kym did not expect Harris to pay his invoices, he was looking to Foxhollow. [*Tr. p. 549, LL. 17-23*] [*Exhibit NN*] Kym Ferguson could not have intentionally withheld billings from Harris when he did not know that billings were supposed to be turned in to Harris.

As the Court pointed out "Contrary to Kym's alleged assertion to Robles, Kym, on behalf of Foxhollow, paid a number of suppliers and materialmen during August and September 2002 . [*R. Vol. 6, p.1499*] Kym Ferguson resigned as an officer withdrew from the corporation on September 24, 2002. [*Ferguson Exhibits GG*] and sold his stock that same day. [*Ferguson Exhibits HH*] Kym Ferguson testified that he only saw one billing from Pro-Rental in Foxhollow's office and he paid it. [*Tr. p. 361, LL 7-12*] and [*Exhibit 32, page 92, 161*] Kym went on to testify that the only other billings or invoices he had seen were the Ferguson Trucking invoices for about \$75,000.00.

Even though Kym had access to the Foxhollow Checking account, he did not pay his own equipment rental (Ferguson Trucking) and actually paid some of Foxhollows IRS withholding taxes. [*R. Vol 6, p. 1499 & 1501*] Kym Ferguson testified that the only bill he saw from Pro-

Rental he paid. [When Kym got out of Foxhollow in September 2002 he was not aware of any outstanding billings to any other equipment supplier besides himself (Ferguson Trucking). [Tr. p. 361 LL13-25; p. 362 LL 1-14] Tony Robles testified that he was certain that the alleged conversation that he testified to took place on August 28, 2002, and that he logged the conversation but did not have the log and he could not produce it. [Tr. p. 451 LL. 3-22] Therefore, Kym Ferguson could not have been referring to any billing except Ferguson Trucking's billing when the alleged conversation took place. Tony Robles testified that "**They** said that they were withholding any pay request submission or any billing until the job was complete by their, their scope of the work". [Tr. p. 453 LL 19-21] No explanation was offered as to who "**they**" were. Tony Robles testified that at some point he became aware that Foxhollow was not turning in some of the equipment billings. Tony Robles, nor anyone else, testified to when he became aware of this situation. This alleged conversation between Tony Robles and Kym Ferguson was presented to attempt to hold Kym Ferguson liable for the fraud that the Plaintiff claimed Foxhollow had committed in the performance of Foxhollow's contract with Harris. The Plaintiff is attempting to reach Kym Ferguson through Foxhollow's contract based on the fact that D. Kym Ferguson was an officer in Foxhollow.

Kym Ferguson was concerned because Foxhollow was not paying the equipment rental to Ferguson Trucking, so he took to signing the Foxhollow checks in order to try to find out what was happening, why he (Ferguson Trucking) was not being paid for his equipment. [Tr. p. 370 ll. 20-25; p. 371, LL. 1-3] In August and September of 2002 Kym was looking to Foxhollow for payment of Ferguson Trucking invoices, not Harris, Inc. Kym signed Foxhollow checks and

paid several supplier's invoices that had been turned into Foxhollow's office, (not to him) in August and September, including a Pro-Rental invoice. [*R. Vol. 6, p. 1449; Plaintiff's Exhibit 32, at pp. 90, 99-103-, 105-106, 109-115, 117-122, 124-135, 156 and 161*] The Foxhollow Check No. 7708 payable to Pro-Rental, for \$1,000.00 is dated August 23, 2002 and Check No.7710 payable to Les Schwab in the amount of \$1,000.00 is dated August 26, 2002, [*Exhibit 32 P. 100*] two (2) days before Tony Robles alleged conversation with Kym Ferguson. Kym Ferguson's alleged statement to Tony Robles was to have taken place in August 28, 2002. Kym Ferguson did not turn in the invoices from third party suppliers that were turned into Foxhollow's office in August and September, 2002. Instead, he paid them and other business expenses out of Foxhollow's business account. [*R. Vol.6, p. 1499; See Plaintiff's Exhibit 32, at pp 90, 99-1032, 105-106,109-115, 117-122, 124-134, 156 and 161*]. Kym Ferguson did not know that invoices and billing were supposed to be turned into Harris. No third party billings or invoices were turned into Kym, nor was he aware of any on August 28, 2002, that he did not pay on behalf of Foxhollow, except for the invoices from Ferguson Trucking.

Tony Robles testified at the trial on behalf of the Plaintiff. [*Tr. P.438, LL 10-18*] He testified that he was employed by Harris as the Project superintendent. [*Tr. P. 440, LL. 20-22*] Mr. Robles testified that at some point in his acting as superintendent on the Fremont project, he became aware of problems pertaining to billings that had not been paid. and billings that had not been submitted in a timely manner by Foxhollow. [*Tr. p. 444, LL. 21-25; p. 445 LL. 1-4*] Tony Robles testified that after he became aware of this problem he had a conversation with D. Kym Ferguson on August 28, 2002. [*Tr. p. 446, LL 1-7; p. 451, LL. 1-13*] Mr. Robles then testified

that “he said he was one of the principals in Foxhollow”. [Tr. p. 452, LL. 2-25;] Tony Robles then testified that Kym “said that they were withholding any pay request submission or billing until the job was complete by their, their scope of the work”. [Tr. p. 453, LL. 1-21] When Tony Robles alleged that he had a conversation with Kym Ferguson on the 28th day of August, 2002, the plaintiff was trying to prove that Kym Ferguson was acting on behalf of Foxhollow in an attempt to impute Foxhollow’s fraudulent conduct to Kym Ferguson. The Plaintiff failed to talk about which pay requests and billings Kym was referring to. The only unpaid pay requests and billing that Kym Ferguson was aware of at that time were Ferguson Trucking’s for renting equipment to Foxhollow for use on the Fremont Job. No matter how Tony Robles testimony is interpreted, and assuming, as the Court did, that if the conversation took place, Tony Robles, Harris’ superintendent, said that he already knew that Foxhollow had not turned in all of their billings. The alleged statement attributed to Kym Ferguson was a straight forward answer and was simply a statement upon which Harris Inc was at liberty to act . [R. Vol 6, p. 1503] Kym Ferguson denies that the conversation took place. [Tr. 573, LL.1-25; p. 574 LL. 1-25; p. 575, LL. 1-5] The question that Mr. Reece put to Tony Robles **was prefaced with** “after you became aware of this problem do you recall having a conversation with D. Kym Ferguson? Mr. Robles answered “yes”. [Tr. p. 446, LL 4-7I]

The evidence presented clearly shows that Harris knew that billings and invoices had not been turned in prior to August 28th, 2002, the date of the alleged conversation between Tony Robles and Kym Ferguson but Harris continued to pay Foxhollow’s payroll and equipment suppliers. Harris paid Egan \$1,570.00 on 9/6/2002 and \$392.50 on 9/20/2002 without recording

any hours for payroll, and Harris paid Egan, \$1,492.51 for 88 hrs on 9/6/2002 and \$503.73 for 27 hrs. on 9/20/2002 and Harris paid Voss' payroll on 9/6/2002 for \$1,448.88 for 88 hrs. and on 9/20/2002 for 30 hrs Harris paid Voss \$469.43. [Exhibit 52, p.14] On 12/5/2002, Harris issued its check No. 14270 payable to L & M Land Leveling and LN Johnson Paving Co. for \$8,000.00. [Exhibit E] Harris has taken the position that it would not have paid Johnson or Foxhollow if it had known that the billings had not been turned in to Harris. [Harris' complain R-Vol 1. p. 6, par. 26; Tr P. 245, LL. 1-25; p. 246, LL 1-5]

FINDINGS OF FACT [R. Vol. 6, pp. 1498 – 1500]

The Court found:

- a. In its Complaint harris, Inc. premises its fraud claim against kym Fergusonupn, *interalia*, Egan's assurance to Scott Harris that all material and equipment bills incurred by Foxhollow or Johnson had been paid or submitted to Harris, Inc. At trial, Harris, Inc. limited its claim against Fergusons to intentionanally withholding billings. Since this Court granted summary judgment in favor of Ferguson Farms and Mike Ferguson, this Court reviews only allegations of fraud as to Kym Ferguson.
- b. * * * From August through September 2002, Kym wrote checks from Foxhollow's corporate account for payment of loans , materialmen, supplies, employee payroll and employee reimbursement.
- c. During his tenure as Vice-President of Foxhollow, Kym (along with Mike invested approximately \$70,000.00 in FoxHollow. Fergusons rented euipment to Foxhollowfor use on

the Fremont Project for which Ferguson was never paid. That Ferguson Farms also paid some of Foxhollow's withholding taxes.

d. During the Kym's tenure as Vice-President of Foxhollow, Bessie Bradshaw served as Secretary/Treasurer of the corporation. She was also responsible for Foxhollow's accounting records.

e. Kym did not work at the Fremont project at the beginning of the project. He did work at the construction project at the "tail end" of the Fremont Project.

f. According to Harris Inc., Kym had a discussion with Tony Robles toward the end of August at the Fremont Project Construction site. In that conversation, Kym allegedly told Robles that Foxhollow was intentionally its supplier invoices until the end of the Fremont Project. Kym disavowed any such discussion.

g. Contrary to Kym's alleged assertion to Robles, Kym, on behalf of Foxhollow, paid a number of suppliers and materialmen during August and September 2002. In addition Scott Harris testified that Egan brought in billings, Payroll records and any expense incurred by Foxhollow on the Fremont Project, showed the documentation to Scott (by facsimile or through "Cindy", an office employee of Harris, Inc.), filled out a summary sheet, and then received progress payments from Harris, Inc. (Scott did not specify the date or dates when Egan turned over these billing to Harris, Inc.) Scott also testified that Harris, Inc. made payments directly to suppliers on the Foxhollow and Johnson subcontracts. Robles testified that he received some Foxhollow billings and invoices from Egan. Again, the evidence does not reflect

which invoices Egan turned over to Harris Inc. or when Harris, Inc. paid Foxhollow billings and invoices.

CONCLUSIONS OF LAW [*R. Vol. 6, pp 1501 – 1503*]

The Court concluded:

a. Corporate directors are not liable, merely by virtue of their office, for fraud or other tortuous wrongdoing committed by the Corporation or its officers. Instead, to be held liable a corporate director must specifically direct actively participate in or not knowingly acquiesce in the fraud or other wrongdoing of the Corporation or its officers.

b. A party must establish nine (9) elements to prove fraud: "1) a statement or a representation of fact; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity; 5) the speakers intend that there be reliance; 6) the hearers ignorance of the falsity of the statement; 7) reliance by the hearer; 8) justifiable reliance; and 9) result in injury."

c. The evidence reflects that Foxhollow was poorly organized and managed from as early as November of 2001. Both Egan and Voss handled equipment rental receipts on the Fremont Project and turned them into Tony Robles. Bessie Bradshaw, the Secretary/Treasurer of Foxhollow and a construction accountant with thirty five (35) years of experience, had little control over Foxhollow's cost billings for the Fremont Project Kym Ferguson took over the Foxhollow corporate checkbook in August and September of 2002 and paid a number of payroll, reimbursement and supplier costs on the Fremont Project, including a check to Pro-Rentals. None of the directors or employees of Foxhollow appear to have much control over the materialmen and/or supplier invoices. Despite Bradshaw's skills, Foxhollow did not appear to

have a system for tracking supplier or materialmen invoices. Fox hollow's failure to alert Harris Inc. regarding unpaid supplier invoices was material that such information was an important element in determining Harris Inc.'s course of action on the Jefferson and Fremont construction Projects.

Foxhollow new or should have known that any assurances or silence about unpaid invoices was false and that Harris Inc. would rely upon Foxhollow's assurances or silence about supplier invoices

As a subcontractor of Harris Inc., Foxhollow intended Harris Inc. to rely upon its communications (or silence) with regard to supplier invoices.

Harris Inc. was not aware of the Pro-Rentals or Western States invoices until September 16, 2002 and September 18, 2002, respectively. Despite this knowledge, Harris Inc.t paid payroll for Foxhollow on September 20, 2002. On December 5, 2000 to Harris Inc. paid another supplier which Harris Inc. attributed to Johnson subcontract who was apparently hired by Foxhollow (since Johnson never actually worked on the Fremont Project). Thus, the evidence does not substantiate that Harris Inc. relied upon Foxhollow's assurances or silence to its detriment. (Empasis added)

d. In addition to a lack of sufficient evidence to Harris Inc.'s reliance upon Foxhollow's assurances or silence, Harris Inc. has not shown sufficient evidence that Kym Ferguson specifically directed, actively participate in or knowingly acquiesced in fraud by Foxhollow. If Kim's alleged statement to Tony Robles is true, then Kym was not fraudulently withholding invoices from Harris Inc. Instead he was explaining to Harris Inc. that Foxhollow

intended to withhold its invoices until the completion of the Fremont Project. On that information, Harris was then at liberty to withhold payments to Foxhollow on the Fremont Project, including payroll payments to Egan and Voss. Despite Robles testimony that his conversation with Kym took place in the last days of August 2002, Harris Inc. continued to make Foxhollow's payroll payments to Egan and Voss in September of 2002. Kim's statement does not evince specific direction of, active participation in or knowing acquiescence to fraud. (Emphasis Added) Instead it was a straightforward comment upon which Harris Inc. was at liberty to act.

e. Based on the foregoing conclusions, this Court finds no evidence upon which to hold Kym Ferguson liable for fraud, based upon Harris Inc.'s allegation of fraud against Foxhollow. Accordingly, Harris Inc., shall take nothing by its fraud claim against Kym Ferguson.

ISSUES PRESENTED ON APPEAL

1. DID THE COURT ERR IN RULING HARRIS FAILED TO PROVE DAMAGES.
2. DID THE COURT ERR IN REFUSING TO AWARD DAMAGES ON THE GROUNDS THAT THE EVIDENCE DID NOT SHOW WHETHER THE DAMAGES WERE A RESULT OF THE JOHNSON CONTRACT OR THE FOXHOLLOW CONTRACT , OR BOTH.

In response to the Claims of Error number 1 and 2 (Points One and Two) by the Appellant, Ferguson adopts by reference the pages 15–19 including paragraph A, set forth in Reponsent Johnson's Respondent's Brief filed herein. I.A.R Rule 35(a)(7)(g).

3. DID THE COURT ERR IN FINDING THAT THE PAYMENTS HARRIS SENT TO JOHNSON WERE NOT FOR JOHNSON'S WORK ON THE REMONT PROJECT.

In response to the Claims of Error number 3.(Point Three) by the Appellant, Ferguson adopts by reference paragraph B on pages 19–20, set forth in Reponsent Johnson's Respondent's Brief filed herein. I.A.R Rule 35(a)(7)(g).

4. DID THE COURT ERR IN HOLDING HARRIS FAILED TO PROVE THE GENERAL CONDITIONS WERE A PART OF THE SUBCONTRACT WITH JOHNSON AND FOXHOLLOW AND IN DENYING INDEMNIFICATION TO HARRIS

In response to the Claims of Error number 4. (Point Four) by the Appellant, Ferguson adopts by reference Paragraph C on pages 20-21 set forth in Reponsent Johnson's Respondent's Brief filed herein. I.A.R Rule 35(a)(7)(g).

5. **See below.**

6. DID THE COURT ERR IN REFUSING TO ADMIT ESHIBIT 55/55-A?

In response to the Claim of Error number 6 (Point 6) by the Appellant, Ferguson adopts by reference paragraph D on pages 21–23 set forth in Reponsent Johnson's Respondent's Brief filed herein. I.A.R Rule 35(a)(7)(g).

7. DID THE COURT ERR IN DENYING HARRIS' MOTION TO AMEND FINDINGS AND CONCLUSIONS?

In response to the Claim of Error number 7 (Point Seven) by the Appellant, Ferguson adopts by reference paragraph E on page 23 set forth in Reponsent Johnson's Respondent's Brief filed herein. I.A.R Rule 35(a)(7)(g).

8. DID THE COURT ERR IN AWARDING ATTORNEY FEES AND COURT COSTS TO JOHNSON AGAINST HARRIS?

In response to the Claim of Error number 8 (Point Eight) by the Appellant, Ferguson adopts by reference paragraph F on pages 23-25 set forth in Reponsent Johnson's Respondent's Brief filed herein. I.A.R Rule 35(a)(7)(g).

9. **See below.**

10. DID THE COURT ERR IN DENYING HARRIS' MOTION FOR NEW TRIAL

In who response to the Claims of Error number 10 (Point 10) by the Appellant, Ferguson adopts by reference paragraph G on pages 25--26, set forth in Reponsent Johnson's Respondent's Brief filed herein. I.A.R Rule 35(a)(7)(g).

11. **THE RESPONDENT, FERGUSON IS ENTITLED TO, AND DOES REQUEST, ATTORNEY FEES AND COURT COSTS INCURRED IN THIS APPEAL PURSUANT TO I.A.R. 41 AND I.C. 12-120(3).**

See below for response to Additional claim on appeal, No. 11.

6. **DID THE COURT ERR IN NOT AWARDING DAMAGES AGAINST FERGUSON?**

Responding to Appellant's claim of error number 6, **Denial of Damages against Ferguson is proper.**

AUTHORITIES

It is an established principle of corporations law that corporate directors are not liable merely by virtue of their office for fraud or other tortuous wrongdoing committed by the Corporation or its officers. Instead, to be held liable a corporate director must specifically direct, actively participate in or **knowingly** acquiesce in the fraud or other wrongdoing of the Corporation or its officers. Emphasis Added.

VEP VC v. Dakota Co., 141 Idaho 326, 334, 109 P.3d 714, 723 (S Ct) 2005

“Silence may constitute fraud when a duty to disclose exists. (Citations Omitted) a party may be under a duty to disclose: (1) if there is a fiduciary or other similar relation of trust and confidence between the two parties; (2) in order to prevent a partial statement of the facts from being misleading; (3) if a fact known to one party and not the other is so vital that that if the mistake were mutual the contract would be voidable, and the party knowing the fact also knows that the other party does not know it.

Sowards v. Rathbun, 134 Idaho 702, 707, 8 P.3d 1245, 1251 (S Ct) 2000

"As the District Court stated, the party alleging intentional misrepresentation or fraud as the burden of proving the elements of fraud by clear and convincing evidence. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991), whether the required burden of proof on a particular issue has been met is a question for the trier of fact to decide in the first instance in as much as the Court has primary responsibility for weighing evidence. *County of Canyon v. Wilkerson*, 123 Idaho 377, 848 P.2d 435 (Ct. App. 1993) the trial court's determination that a claim has not been proven is entitled to great weight on appeal. *Id.* this court's review of a trial court's decision is limited to ascertaining whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *Conley v. Whittlesey*, 133 Idaho 265, 985 P.2d 1127 (1999); *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 946, 812 P.2d 253 (1991). The Supreme Court may not set aside a trial court's findings of fact unless they are clearly erroneous, this is, unless the challenged finding is not supported by substantial competent evidence. I.R.C.P. 52(a); *State v. Dept. of Health and Welfare, ex rel. Osburn v. Altman*, 122 Idaho 1004, 812 P.2d 683 (1992) the substantial evidence standard for appellate review requires a greater quantum of evidence in cases where the trial court's findings must be supported by clear and convincing evidence, then in cases where mere preponderance is required. *In interest of Bush*, 113 Idaho 873, 749 P.2d 492 (1988). When reviewing the trial court's findings of fact in a case in which the facts must be established by clear and convincing evidence, the job of the reviewing court is simply to determine whether there is substantial and competent evidence to sustain the finding.

Christensen v. Nelson, 125 Idaho 663, 873 P.2d 917 (Ct.App. 1994); *Kreiensteck v. Cook*, 108 Idaho 657, 701 P.2d 277 (Ct.App. 1985).
Sowards v. Raathbun, 134 Idaho 702, 706, 707, 8 P.3d 1245, 1249, 1250.

ARGUMENT

Tony Robles testified at the trial on behalf of the Plaintiff. [Tr. P.438, LL 10-18] He testified that he was employed by Harris as the Project superintendent. [Tr. P. 440, LL. 20–22] Mr. Robles testified that at some point in his acting as superintendent on the Fremont project, he became aware of problems pertaining to billings that had not been paid. and billings that had not been submitted in a timely manner by Foxhollow. [Tr. p. 444, LL. 21-25; p. 445 LL. 1-4] Tony Robles testified that **after he became aware of this problem** he had a conversation with D. Kym Ferguson on August 28, 2002. [Tr. p. 446, LL 1-7; p. 451, LL. 1-13] Mr. Robles then testified that “he said he was one of the principals in Foxhollow”. [Tr. p. 452, LL. 2-25;] Tony Robles then testified that Kym “said that they were withholding any pay request submission or billing until the job was complete by their, their scope of the work”. [Tr. p. 453, LL. 1-21] When Tony Robles alleged that he had a conversation with Kym Ferguson on the 28th day of August. 2002, the plaintiff was trying to prove that Kym Ferguson was acting on behalf of Foxhollow in an attempt to impute Foxhollow’s fraudulent conduct to Kym Ferguson. The Plaintiff failed to talk about which pay requests and billings Kym was referring to. The only unpaid pay requests and billing that Kym Ferguson was aware of at that time were Ferguson Trucking’ was renting equipment to Foxhollow for use on the Fremont Job. No matter how Tony Robles testimony is interpreted, and assuming, as the Court did, that **if** the conversation took place, Tony Robles, Harris’ superintendent, said that he already knew that Foxhollow had

not turned in all of their billings. The alleged statement attributed to Kym Ferguson was a straight forward answer and was simply a statement upon which Harris Inc was at liberty to act . [*R. Vol 6, p. 1503*] Kym Ferguson denies that the conversation took place. [*Tr. 573, LL.1-25; p. 574 LL. 1-25; p. 575, LL. 1-5*] The question that Mr. Reece put to Tony Robles was prefaced with “**after you became aware of this problem do you recall having a conversation with D. Kym Ferguson? Mr. Robles answered “yes”.** [*Tr. p. 446, LL 4-7I*]

On August 28, 2002, the date of the alleged conversation that Tony Robles testified to, Kym Ferguson did not know that billings and invoices were supposed to be turned into Harris. When Kym Ferguson resigned his office in Foxhollow and sold his stock on September 24, 2002, Kym did not know that billings and invoices were supposed to be turned into Harris. There is no evidence in the record that Kym Ferguson withheld any billings and invoices from Harris, except the invoices from Ferguson Trucking that he turned into Foxhollow. The alleged conversation between Robles and Ferguson was presented in an attempt to show that Kym Ferguson, acting as Foxhollow’s director had intentionally withheld billings for equipment rental due to Western States and Pro Rental and thereby imputing Foxhollow’s fraud to Kym Ferguson. Kym Ferguson did not know that Western States and Pro-Rental’s billings had not been turned into Harris. The only billing Kym saw in Foxhollow’s office, when he was signing checks in August and September of 2002, was one billing from Pro-Rental and on August 23, 2002, he paid it from Foxhollow’s checking account with Check No. 7706. If Foxhollow was intentionally withholding billings from Pro-Rental, he certainly would not have paid Pro Rental on August 23, 2002. If Foxhollow was intentionally withhold in 3rd party billings and invoices

in accord with Robles statement, Egan would not have been turning in invoices or payroll. All billings and invoices would have stopped.

The evidence presented clearly shows that Harris knew that some billings and invoices had not been turned in prior to August 28th, 2002, the date of the alleged conversation between Tony Robles and Kym Ferguson but Harris continued to pay Foxhollow's payroll and equipment suppliers after Kym's alleged statement Harris paid Egan \$1,570.00 without any notation of hrs.. and paid Egan \$1,492.51 for 88 hrs. on 9/6/2002. Harris paid Voss on 9/6 /2002 \$ 1,448.88 for 88 hrs. Harris received written demand for payment of equipment rental from Pro-Rental in the amount of \$8,000.00 on September 16, 2002 and from Western States in the amount \$51,000.00. At anytime after Harris became aware of unpaid invoices that had not been turned in by Foxhollow or Johnson, Harris could have refused to pay any more of Foxhollow's or Johnson's expenses, but Harris went ahead and paid Egan, \$503.73 for 27 hrs. on 9/20/2002, and Harris paid Voss' \$469.43 for 30 hours payroll on 9/20/2002. [*Exhibit 52, p.14*] On 12/5/2002, in addition, Harris issued its check No. 14270 payable to L & M Land Leveling and LN Johnson Paving Co. for \$8,000.00. on 12/05/2002 for equipment rented by Foxhollow. [*Exhibit E*] Harris has taken the position that it would not have paid Johnson or Foxhollow if it had known that the billings had not been turned in to Harris and bases Harris' claim for fraud against Foxhollow on Dave Egan's statement that "all of the bills were paid" [*Harris' complain R-Vol 1, p. 6, par. 26; Tr P. 245, LL. 1-25; p. 246, LL 1-5*] but after the alleged statement by Kym and after the actual written demands for payment from Pro-Rental and Western States, Harris made the above listed payments of Foxhollow's payroll and equipment suppliers. Harris did not rely on Kym

Ferguson's alleged statement to its detriment. Harris has not proven that Ferguson knew that the Egan's statement was made nor that the billings and invoices were supposed to be turned into Harris. Therefore, Harris failed to prove that Kym knew of the falsity of either any misrepresentation or Harris' reliance on his silence. This is a failure to prove the 4th element Fraud, the speaker's knowledge of its falsity. The evidence shows that Harris failed to prove that Harris relied on Foxhollow's failure to turn in billings to its detriment, and therefore did not prove the 7th element of Fraud. (reliance) or the 9th element (resultant injury) and Harris did not rely on Kym Ferguson's alleged statement, nor did Harris prove that Kym knew that the billings had not been turned in. Kym Ferguson's alleged statement, if he made it, it was a statement of what Harris already believed to be the truth. Harris failed to prove damages against Foxhollow, nor reliance on Foxhollow's silence which is fatal to proving Fraud against Foxhollow. If there was no fraud proven against Foxhollow, there is no fraud to impute to Kym Ferguson as a director or officer of Foxhollow.

**9 THE COURT DID NOT COMMIT ERROR IN AWARDING ATTORNEY FEES
AND COSTS TO FERGUSON**

AUTHORITIES

IRCP Rule 54(d)(1)(B). Costs – Items allowed

- (A) Parties Entitled to Costs. Except when otherwise limited by these rules, costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the Court.
- (B) Costs. Except when otherwise limited by these rules, costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the Court.
- (C) Prevailing Party. In determining which party is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

IRCP 54(e)(1). Attorney fees

In any civil action the Court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under 12-121, Idaho Code, may be awarded by the Court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or

without foundation; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

IRCP RULE 54(d)(5) Memorandum of Costs

At any time after the verdict of a jury or a decision of the court, any party who claims costs may file and serve on the adverse parties a memorandum of costs, itemizing each claimed expense, but such memorandum of costs may not be filed later than fourteen (14) days after the entry of judgment. Such memorandum must state that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule. Failure to file such memorandum of costs within the period prescribed by this rule shall be a waiver of the right of costs. A memorandum of costs prematurely filed shall be considered timely.

I.C. 12-120 ATTORNEY FEES IN CIVIL ACTIONS.

* * *

(3) In any civil action to recover on an open account stated, note, bill, negotiable instrument, 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.**

Blimka v. My Web Wholesaler, LLC, 143 Idaho 723, 152 P. 3d. 594

The term “commercial transaction” is defined to mean all transactions except for personal or household purposes. The term party is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or a political subdivision thereof. (Emphasis added)

The Idaho Supreme Court has ruled on the interpretation of I.C. 12-120(3) in *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 152 P.3d 594, 599-600 (S.Ct. 2007)

“Commercial transaction has been defined as “all transactions except transactions for personal or household purposes.” I.C. 12-120(3). An award of attorney fees under I.C. 12-120(3) is proper if “the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover.”
(citations omitted)

“A transaction involving the sale of 26,500 pairs of jeans is not for personal or household purposes. Rather, it is a business or commercial transaction, as *Blimka* obviously intended to market the jeans rather than wear them. **From time to time the Court has denied fees under I.C. 12-120(3) on the commercial transaction ground either because the claim sounded in tort or because no contract was involved. The commercial transaction ground in I.C. 120(3) neither prohibits a fee award for a commercial transaction that involves tortuous conduct (see *Lettunich v. Key Bank Nat’l Ass’n*, 141 Idaho 362, 369, 109 P.3d**

1104, 1111 (205)), nor does it require that there be a contract. Any previous holdings to the contrary are overruled. We hold that Blimka is entitled to a fee award on appeal with respect to his fraud claim, as he is seeking recovery of damages sustained as a result of the commercial transaction involved in this case.” *Blimka v. My Web Wholsaler* 143 Idaho 723, (Emphasis added)

ARGUMENT

PREVAILING PARTY IRCP 54(d)(1)

The Court granted Summary Judgment in favor of Ferguson Farms and Michael Ferguson **on all of Harris’s claims**. None of Harris’s claims against Ferguson Farms and Michael Ferguson were pursued at trial on the merits. [R-1498] The Court states that “**At Trial Harris, Inc., limited it’s fraud claim against Fergusons to intentional withholding of billings**. Since the Court granted summary judgment in favor of Ferguson Farms and Mike Ferguson, this Court reviews only the allegation of Fraud as to Kym Ferguson.”. [R. Vol. 6, p. 1498] Harris has not appealed from the Summary Judgment Order of the Court. [R-1557], Amended Notice of Appeal. [R-1557]

Fergusons have prevailed entirely upon Harris’ claims. [R. Vol. 6, p1548] Prior to trial, Harris Inc. dismissed its contract-based claims against Fergusons. Immediately after trial Mike Ferguson and Ferguson Farms prevailed by summary judgment over Harris Inc.’s remaining fraud and unjust enrichment claims. At the trial Kym Ferguson in his capacity as a former officer in Foxhollow successfully defended against Harris Inc.’s attempts to pierce Foxhollow’s

corporate veil and place liability on him individually and Kym Ferguson prevailed as well on Harris' Claim against Kym Ferguson for fraud based on Foxhollow's fraud that they alleged was chargeable to Kym Ferguson by claiming Kym Ferguson, as a director and officer of Foxhollow, specifically directed, actively participated in or knowingly acquiesced in the fraud committed by Foxhollow.[*R. Vol. 6. p. 1506*]

HARRIS PREVAILED ON FERGUSON'S COUNTERCLAIM.

“The Fergusons alleged that they sent two (2) letters and a stipulation of dismissal of the counterclaim to Harris, Inc. prior to trial with no response. Harris Inc. did not refute this argument. Indeed, the record reflects a letter from Fergusons attorney, William Mulberry, dated October 20, 2006 declaring the Fergusons intent to drop their counterclaim. Mulberry also submitted a blank "stipulation to dismiss counterclaim" which he hand-delivered on July 15, 2008 to Council for Harris Inc. Mulberry did not charge for his time spent preparing either of these documents. Furthermore, in their pretrial memorandum, the Fergusons notified the Court and Harris Inc. that they had abandoned their counterclaim. Thus, the Fergusons counterclaim was a live issue only from the date the Fergusons filed their answer (December 22, 2005) until Mulberry gave Harris Inc. notice of intent to withdraw the counterclaim (October 20, 2006).

Although the counterclaim issue is fairly minor, Kym Ferguson knew that he had signed a release with Harris Inc. over money allegedly owed to Ferguson trucking for finishing work performed on the Fremont Project. The Fergusons counterclaim against Harris Inc. was frivolous. Those amounts of attorney time spent by Mulberry on the counterclaim shall be

deducted from Ferguson's fee award. [*R. Vol. 6, pp 1541 & 1542*] Harris prevailed on Summary Judgment on Ferguson's Counterclaim, [*R. Vol. 6 p, 1542*]

COURTS DETERMINATION AND AWARD OF ATTORNEY FEES TO FERGUSON.

"The Fergusons prevailed entirely upon Harris Inc.'s claims, including the claim for unjust enrichment" [*R. Vol 6 p. 1505*] As discussed above, the hours spent on the counterclaim, which Kym Ferguson knew or should have known was a frivolous issue in light of the release agreement he signed with Harris Inc., shall be deducted from the overall fees requested by Fergusons. [*R. Vol. 6, p. 1548*] "since the Fergusons' attorney, Mr. Mulberry, did not break out the amount of time spent specifically on the counterclaim issue, the entire charge connected to the counterclaim shall be deducted from the total attorney fee requested. No other entries by Mr. Mulberry are questionable.

FERGUSON COMPLIED WITH IRCP 54(e)(3)

Harris claims that counsel for Fergusons had to address each of the factors listed in IRCP 54(e)(3). These factors are not requirements for counsel to address, they are factors for the Court to consider in making a fee award. As set above, the Court did consider all of the factors set forth in IRCP 54(e)(3). And awarded Ferguson \$33,232,50 in Attorney Fees and \$858.32 in costs as a matter of right. [*R. Vol. 6, p1552*]

Plaintiff raises the issue of Defendant's failure to comply with IRCP Rule 54(e)(3) by addressing in Defendant's, Memorandum of Costs [*R. Vol. 6, 1319*] and Supporting Affidavit, [*R. Vol 6, 1322*] each of the factors that the Court is to consider in making a determination of an

allowance of attorney fees. **Harris failed to raise** this issue in its Motion to Amend Finding and Conclusions of Law and for New Trial, or his brief in support thereof, or in his objection to Defendant's Motion for Allowance of Attorney fees and his brief in support thereof, or in his Notice of Appeal, or any other pleading filed prior to his Appellant's Brief.

Ferguson's Memorandum of Costs and Supporting Affidavit comply with Rule 54 as required. The Affidavit, setting out the time and Charges states that "The charges for Counsel's services are reasonable and are equal to or less than the prevailing charges for similar services." [R. Vol. 6, p1323] The said Affidavit in support of Memorandum of Costs sets out the time and charges and was provided as required by the Rule [IRCP 54(e)(3)], and the Court found that Mr. Mulberry's experience and expertise warrants the \$150.00 per hour fee rate that he charged Fergusons. The Affidavit submitted by Mr. mulberry was considered by the Court and was described as having "exacting detail" and shows a logical and methodical approach to the case. The court noted that the claims against the Fergusons were fairly complex, in that they involved legal theories of partnership liability, piercing the corporate veil, corporate officer fraud and the Fergusons' relationship and actions as agent of foxhollow. The Court noted that the case was document-intensive. Mr. Mulberry's hours spent on the matter were reasonable under the circumstances. [R. vol6, p1549]

The Court does not operate in a Vacuum, nor does the trial judge have blinders on. The trial judge brings with him, his knowledge, expertise and experiences and in making his determinations on an award of attorney fees, he can draw on that knowledge, expertise and experiences to arrive at the award of attorney fees. The Trial Court had ample opportunity to

observe counsel and his performance in the presentation of the case. The Court **specifically listed** the factors that the Court should consider in determining an award of attorney fees. [*IRCP 54(e)(3)*] The Court considered all of the factors listed in IRCP Rule 54(e)(3) in arriving at its decision on an award of attorney fees to Fergusons. [*R. vol. 6, p. 1545 - 1546*] The Court is not required to make findings with regard to each of the factors listed in IRCP 54(e)(3).

The Court found that the Fergusons, as predominantly prevailing party, are entitled to recover their attorney fees. [*R. Vol. 6. p.1550*] The Court Considered IRCP 54(d)(1)(B) and 54(d)(1)(C) and discussed the requirements for awarding discretionary costs. [*R. Vol. 6, p1550-1551*]

THE RELEASE AGREEMENT DOES NOT PROHIBIT THE AWARD OF ATTORNEY FEES.

The Court considered Harris' argument with regard to the "Release Agreement" and found that the Release agreement was not concerning Foxhollow. The release agreement pertained to damages arising in any way out of any work performed by the undersigned (Ferguson) at those certain construction projects in Rigby, Idaho (Jefferson Joint School District 251) and Ashton, Idaho (north Fremont High School) in which the undersigned and the releasees were involved.

The alleged fraud perpetrated by Foxhollow for which Harris is trying to hold Ferguson liable due to his being a director and officer in Foxhollow and claiming that he specifically directed, actively participated in, or knowingly acquiesced in the Fraud allegedly committed

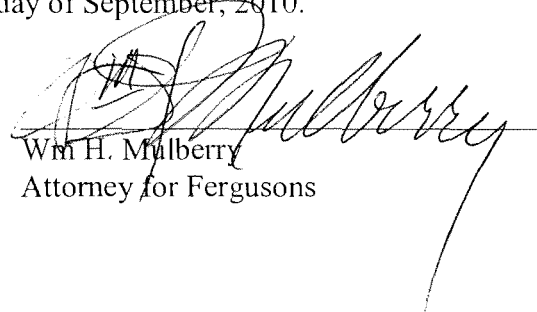
by Foxhollow. The claim has nothing to do with work that Ferguson performed on the Jefferson or North Fremont Projects.

“The fraud alleged against Ferguson is directly tied to the Foxhollow contract with Harris. When Harris Inc. attempted to reach through the Foxhollow contract to capture Ferguson, it did so at the risk of incurring attorney fees by Ferguson if it did not prevail” [*R. Vol. 6, p 1544*] that contingency occurred, and Harris, Inc. Cannot hide behind a release agreement he forged with the Ferguson for the work the Ferguson performed at Harris Inc.'s request, and they separate, oral agreement between Harris, Inc. and the Ferguson. [*R. Vol. 6, p 1544*] The contract with Foxhollow is the gravamen of the case is a commercial transaction, and the fact that it involves a tort is not fatal to the claim for Attorney Fees. The basis for the claim or defense does not have to be based on a contract. *Blimka v. My Web Wholesaler, supra*.

11. RESPONDENT, FERGUSON, IS ENTITLED TO, AND DOES REQUEST ATTORNEY FEES AND COURT COSTS INCURRED IN THIS APPEAL PURSUANT TO I.A.R. 41 AND I.C. 12-120(3).

The prevailing party upon appeal is entitled to Attorney fees as a matter of right pursuant to I.A.R. 41 and I.C. 12-120(3).

RESPECTFULLY SUBMITTED this 30th day of September, 2010.



Wm H. Mulberry
Attorney for Ferguson

