9-27-2010

Harris, Inc. v. Foxhollow Const. & Trucking Respondent's Brief 1 Dckt. 36601

IN THE IDAHO SUPREME COURT

HARRIS, INC., an Idaho Corporation, Plaintiffs-Appellant, vs. FOXHOLLOW CONSTRUCTION & Trucking, Inc., an Idaho Corporation, L. N. JOHNSON PAVING, LLC, a limited liability company, Defendants-Respondents and DAVID EGAN, and individual, FERGUSON FARMS, d/b/a FERGUSON TRUCKING, D. KYM FERGUSON, an individual, MICHAEL FERGUSON, an individual. Defendants-Respondents	**Supreme Court Case No. 36601-2009** (Jefferson Co. #CV-2005-642)

RESPONDENT, L. N. JOHNSON PAVING, LLC.'S REPLY BRIEF ON APPEAL

Appeal from District Court of the Seventh Judicial District, for Bingham County
Honorable Darren B. Simpson, Presiding

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NATURE OF CASE

As to defendant L. N. Johnson Paving, LLC:

A 2002 construction contract between Harris, Inc. and L. N. Johnson Paving, LLC for Asphalt Concrete Paving at North Fremont High School, in Ashton, Idaho.

STATEMENT OF FACTS

In 2002, Harris, Inc. (hereinafter Harris, Inc. and Scott Harris will be known as "Harris") signed a Contract with Fremont County Joint School District to build the North Fremont High School in Ashton, Idaho ("Fremont Project"). [*Tr. p. 3, LL.19-25; p. 4, LL. 1-10*] The night before Harris opened the bid on the Fremont Project, David Egan ("Egan") telephoned Harris stating that Egan wished to submit a bid for the site work and excavation work. [*Tr. p.4. LL. 11-25; p.5, LL. 1-3*] Harris now claims that Egan was submitting the bid for L. N. Johnson Paving, LLC ("Johnson"). [*Tr p. 5, LL. 4-12*].

Harris testified that prior to executing the contract, Egan and Johnson went to Harris' office, sometime in April 2002, to discuss the job and the contract. [*Tr. p. 23, LL. 9-23. p 24, LL 1-25; p.25, LL. 1-22*]. According to Harris, Egan and Johnson wanted to split the contract into two contracts due to the fact that Johnson had a **PUBLIC WORKS LICENSE** and Egan/ Foxhollow Construction & Trucking, Inc. ("Foxhollow") **DID NOT.** In fact, when Harris was asked if he had "*personal knowledge whether L. N. Johnson had a public works license at the time*", Harris stated he only "*assumed that he* [Johnson] *would because of the contract requirements on the project.*" [*Tr. p. 217, LL. 14-19*]. The Fremont Project required ". . . *public works licensure . .*" [*Tr. p. 218, LL. 8 10*]

Egan, his son Demian, Kym Ferguson and Michael Ferguson were the owners of Foxhollow. According to Harris, Egan and Johnson asked that the "*site work portion of the job*" be under Johnson and the "*structure excavation . . . excavation for the building*," be under Foxhollow. [*Tr. p. 26. LL. 21-25; p. 27, LL. 1-6*]. Harris testified that he thinks that "*Johnson's license would only go up to 500,000.*" [*Tr. p 27, LL. 13-15*]. Harris also stated that he could not remember if Johnson was present when Harris was asked to split the contract. [*Tr. p 27, LL. 16-25; p. 25, LL. 1-25; p. 29. LL 1-5*]. Harris did issue two contracts, "*[o]ne to L. N. Johnson for site work or the alternate portion of the job and one to Foxhollow directly for the structural excavation for the building.*" [*Tr. p. 30. L. 25; p. 31, LL. 1-3*].

Harris was asked about his Exhibit 71, STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND SUBCONTRACTOR to L. N. Johnson Paving Co., on the North Fremont High School for:

> . . .
>
> Section 02200 - Excavation, Filling, Grading, & Culvert
> Section 02513 - Asphalt Concrete Paving
> Includes all site work associated with alternate #1
>
> . . .
>
> For performing this work, subcontractor will be paid in monthly payments per article 3 of the General Conditions to Contract in the amount of $409,363.00.

This document was signed by Egan on June 24, 2002, and by Harris on June 27, 2002. [*R Vol. 6, Plaintiff's Exhibit 71, admitted Tr. p. 35, L 6*].

Harris admitted that Johnson is involved in "*. . . the excavation business, and primarily their specialty is paving . . .*" [*Tr. p. 223, LL 10-16*]

Harris was then asked to review his Exhibit 68, which is the second contract he prepared as instructed by Egan and Johnson. This STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND SUBCONTRACTOR to Foxhollow Construction, on the North Fremont High School for:

> . . .
>
> Section 02200 - Excavation, Filling, Grading, & Culvert
> Includes all material and labor to complete base bid site work per plans and specs.
> . . .
>
> For performing this work, subcontractor will be paid in monthly payments per article 3 of the General Conditions to Contract in the amount of $245,705.00.

This document was signed by Demain Egan on July 1, 2002, and by Harris on July 3, 2002. [*R. Vol. 6, Plaintiff's Exhibit 68, admitted Tr. p. 37, LL. 19-20*].

Harris then reviewed his Exhibit 50, General Conditions to Contract dated October 9th, 2002. [*Tr. p. 38, LL. 12-24*]. According to Harris this document "*would be the supplement*" to the June and July 2002, STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND SUBCONTRACTOR for L. N. Johnson, Inc., and Foxhollow Construction & Trucking, Inc. Exhibit 50 was admitted without objection from any party [R. Vol. 6, *Plaintiff's Exhibit 50, admitted Tr. p. 39, LL. 22-23*]

Harris began work on the Fremont Project in May or June of 2002 [*Tr. p. 43, LL. 3-6*]. At the end of each month, Egan would request progress payments. Egan " . *usually filled out a summary sheet. . .*" produced "*his billings and . . . his payroll records . . . all of his expenses he incurred on the job . .*" [*Tr. p. 43, LL 9-20*]. Egan would either give the documents to Harris or

fax to Harris' office. [*Tr p. 44, LL. 4-13*]. Harris believed Egan when Egan stated that the bills from **materialmen or equipment lessors** had been paid. [*Tr. p. 45. LL. 5-9*]. If Harris had known that Egan was not paying **materialmen or equipment lessors,** he would not have issued progress payments to Egan. [*Tr p. 46, LL 11-15*].

Harris' testified that his Exhibit 18 consists of checks he paid to Egan in May. June, July. August. and September of 2002, for work Egan performed on the Fremont Project. [1] [*Tr. p. 48, LL. 10-25; p. 49, LL. 1-3*] [*R. Vol. 6, Plaintiff's Exhibit 18, admitted Tr. p. 50, LL. 15-16*].

Harris was asked to identify his Exhibit 19, which included checks for the Fremont Project. [2] Those checks are as follows:

DATE	CHECK NUMBER	TO	AMOUNT
6/12/02	12275	Foxhollow Construction, Inc.	$414.22
7/24/02	12667	Clem Atchley	$2,730.00
10/10/02	13733	Pro-Rental & Sales, Inc.	$3,443.00

[*R. Vol. 6, Plaintiff's Exhibit 19, admitted Tr. p 54, LL. 7-8*]

Harris issued two [2] Change Orders on the Fremont Project [Exhibit 16]. Harris testified that both Change Orders were issued to L. N Johnson Paving. Co., and signed by Egan. Change Order No. 1, dated July 30, 2002, is for "*. . .geotech fabric underneath the roadways. . .*" [*Tr.p. 73.*

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[1] The first page of the exhibit is a Harris, Inc check number 1173, dated 1/11/01 to Demain Egan, is not at issue in this Appeal.

[2] The first five [5] checks written to Foxhollow; Foxhollow Construction, Inc , or Foxhollow Construction were for work on the Jefferson Project. and are not at issue in this Appeal. [*Tr. p. 51, LL 15-25; p. 52, LL. 1-21*]

LL. 21-22], and Change Order No. 2, dated July 30, 2002, is for "*. . . Vo-Ag Building Pad . . .*" [*R. Vol. 6, Plaintiff's Exhibit 16, admitted Tr. p. 54, LL. 7-8*].[3]

Harris identifies his Exhibit 23 as documents prepared by him which "*. . . represents an original cost breakdown for the two contracts, schedule of values.*" [*Tr. p. 74, LL. 16-17*]. Harris identifies the first page of the exhibit as that for FOXHOLLOW, and the second page as that for L. N JOHNSON. [*Tr. p. 75, LL. 7-9*]. According to Harris the information on the CONTINUATION SHEET is maintained by his office for each sub-contractor, and information is entered as progress payments are made. [*Tr. p 76, LL. 16-25, p. 77, LL. 1-25, p. 78, LL. 1-25, p. 79, LL. 1-7*]. Exhibit 27 was admitted over objection by all defendants as not the best evidence and without supporting documentation. [*Tr. pp. 79-87*] [*R. Vol. 6, Plaintiff's Exhibit 23, objection noted, overruled and Exhibit 23 was admitted Tr. p.87, LL. 12-21*] According to Harris, as of August 31, 2002, the Johnson contract was complete except for $245,452.35[4] of the original contract amount and two [2] Change Orders of $467,846.20. [*Tr. p. 89, LL. 6-8*]. The second page of Exhibit 23 states that as of August 31, 2002, Foxhollow's contract had completed $246,376.60[5] of its original contract amount and four [4] Change Orders of $265,226.60. Harris testified and offered Exhibit 21 as proof that he sent progress payments to L.N. Johnson. [*Tr. p. 12, LL. 24-25; p. 15, LL. 24-25, p. 16, LL. 1-17*] [*R. Vol. 6, Plaintiff's Exhibit 21, objection overruled and Exhibit 21 was admitted Tr. p.21, LL. 15-16*].

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[3] The exhibit consists of four [4] documents – two [2] copies of each Change Order, but on the August 2002, documents one is signed by Harris on 8/5/02 and the other 8/9/02.

[4]Column "G" TOTAL COMPLETED & STORED TO DATE

[5]Column "G" TOTAL COMPLETED & STORED TO DATE

According to Harris, when Johnson failed to complete the work set out in Johnson's contract, Harris had to hire BTC Contractors to do the paving at a cost of "*right around a hundred and forty-seven thousand dollars.*" [*Tr. p. 110, LL. 8-25*].

Harris is asked to identify his Exhibit 52, which according to him is ". . . *a job cost ledger detail analysis of the job, Fremont County job . . . [i]t's L.N. Johnson's contract and Foxhollow's contract.*" [*Tr. p. 154, LL. 12-24*]. Harris goes on to explain that he identified each job by ". . .*the cost code number job. As you look on Page 1, down a couple lines there, 210, excavation, (*Foxhollow*). . . .[a]nd then if you turn to Page 5, and then you go down to where it has the Job No. 215, that's L. N. Johnson's contract.*" [*Tr. p. 155, LL. 5-14*] Exhibit 52 has a "*closure date for the data*" of 12-31-03, and a "*printout date*" of January 8th of '04 [*Tr. p. 156, LL. 15-25, p. 157, L. 1*] [*R. Vol. 6, Plaintiff's Exhibit 52, objection noted, overruled and Exhibit 52 was admitted Tr p.157, LL. 20-21*].

Harris testifies that page 8 of Exhibit 52 identifies those costs associated with the Johnson Contract, which is $294,813.14. This costs includes equipment at ". . .*hundred and thirty-seven dollars and eighty cents. . .*" [*Tr. p. 163, LL. 5-17*]. Harris claims that Johnson's Contract was not completed as "*the asphalt paving and some of the topsoil placement and some of those kinds of things wouldn't, wouldn't be shown on these cost records. . .* [the costs to complete the project were] *. . . transferred over to . . . the new job cost journal . . .*" [*Tr. p. 165, LL. 1-12*].

In September 2002, correspondence was exchanged between Harris and Egan regarding Harris' alleged defaults on Johnson's and Foxhollow's Contracts. By letter dated September 16, 2002, Egan informs Harris that "*[u]pon our arrival at the North Fremont School site it became very clear that the geographic specs . . . were not correct. When we moved our equipment onto the site*

they sunk down to bedrock (up to 5 feet in places) . . ." This letter is on FOXHOLLOW CONSTRUCTION & TRUCKING, INC. letterhead and signed by Egan as "Business Manager." [*R. Vol. 6, Plaintiff's Exhibit 25B, admitted Tr. p.208, LL. 24-25*] By letter dated September 18, 2002, Harris notifies Egan to "[p]lease consider this letter a notice of default with your contract obligations . . ." [*R. Vol. 6, Plaintiff's Exhibit 25C, admitted Tr. p. 210, LL. 5-6*] Harris, also by a letter dated September 18, 2002, to Egan and LN Johnson Paving/Foxhollow Construction, sets forth a "Proposed Payment Schedule" [6]. . . .to "*restore the default. . .*" [*R. Vol. 6, Plaintiff's Exhibit 25D, admitted Tr. p 271, LL. 8-11*].

On September 25, 2002, Harris, again sends a letter to Egan and LN Johnson Paving/Foxhollow Construction regarding "*. . . our agreement to restore the contract default* [7] . . ." [*R. Vol. 6, Plaintiff's Exhibit 25E, admitted Tr p. 274, L. 25, p. 275, L. 1*] Again by letter dated September 25, 2002, Harris sends a letter to Egan and LN Johnson Paving/Foxhollow Construction with "*. . . some modification to my original proposal faxed to you this morning* [8] . . ." [*R. Vol. 6, Plaintiff's Exhibit 25F, admitted Tr p. 276, LL. 13-16*]. By letter dated September 27, 2002, Harris sends a letter to "Wayne" and "LN Johnson Paving/Foxhollow Constructions" regarding an

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[6] A copy of the "Proposed Payment Schedule" was not attached to Harris' Exhibit 25D, and was not provided in any other exhibit offered by Harris.

[7] Harris did not provide a copy of "agreement" in its Exhibit 25E.

[8] Harris did not provide a copy of "modifications to my original proposal faxed" in its Exhibit 25F.

"*. . . attached proposal for satisfaction of the default . . .*"[9] [*R. Vol. 6. Plaintiff's Exhibit 56, admitted Tr. p. 271, LL. 20-21*].

Harris only had one meeting with Johnson concerning the Fremont Project. Harris does not recall the date, made no notes or recordings of that meeting. [*Tr p.211. LL. 3-25. p. 212. LL. 1-12*]. Harris admits that the Johnson and Foxhollow bids were accepted by a telephone call he received from Egan. Harris never received a written bid from Johnson. [*Tr. p. 212, LL. 13-25; 213, LL. 1-13*]. In fact, Harris never called Johnson after Harris accepted Egan's bid and Egan signed the contract [*Tr. p. 215, LL. 20-23*].

Harris never telephoned Johnson prior to the September 2002. letters. [*Tr. p. 215. LL. 24-25; p. 216, LL. 1-6*].

In support of his claim that Harris had a Contract with him, Harris offered Exhibit 21, which consisted of copies of three [3] checks. Those checks are as follows:

DATE	CHECK NUMBER	TO	AMOUNT
6/8/01 [10]	10084	L N JOHNSON PAVING CO	$25,868.45
6/21/02	12277	LN JOHNSON PAVING CO	$7,467 44
8/20/02	13182	LN JOHNSON PAVING CO	$21,904 00

[*R. Vol. 6. Plaintiff's Exhibit 21, objection overruled* [11] *and admitted Tr. p. 21, LL. 15-16*].

Harris had also sent Johnson another check:

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[9]*Harris' Exhibit 56 did not have a copy of the "attached proposal for satisfaction of the default."*

[10]Check No. 10084, in the amount of 25,868.45. was for the Jefferson County - Mid-Way Project. not the Fremont Project [*Tr. p. 22, LL. 1-13*]

[11]Johnson objected "*. . . for the reason that in the foundation the purpose for which the payment is made has not been identified*" [*Tr. p. 18. LL. 14-16*]

12/05/02	14270	L &M LANDLEVELING LN JOHNSON PAVING CO	$8,000.00

[*R. Vol. 6, Defendant L.N. Johnson Paving Co., Exhibit F. admitted Tr. p. 223, LL. 7-8*].

Harris' check no. 12277, in the amount of $7,467.44, was deposited by Johnson on June 26, 2002, and Johnson's check No. 6751, in the amount of $7,467.44 was sent to Fox Hollow Const. on same date. [*R. Vol 6, Defendant L. N. Johnson Paving Co. Exhibit C, Tr. p. 488, LL. 22-23*]

Harris' check No. 13182, in the amount of $21, 904.00, was deposited by Johnson on August 21, 2002, and Johnson's check no 6886, in the amount of $21, 904 00 was sent to Fox Hollow Construction on same date. [*R. Vol. 6, Defendant L. N Johnson Paving Co. Exhibit D, Tr. p 490, LL. 19-20*].

Check No. 14270, in the amount of $8,000.00, was returned to Harris by Johnson's attorney by letter dated December 12, 2002. [*R. Vol. 6, Defendant L. N. Johnson Paving Co. Exhibit E, Tr. p. 493, LL. 2-3*]. By letter dated July 13, 2005, Johnson's attorney informed Harris' attorney "*that Wayne Johnson (not Blaine) . . .[a]t no time . . . made any agreement with Harris, Inc. . .*" [Copies of the December 12, 2002, letter and Check No. 14270, and July 13, 2005, are included in *Defendant L.N. Johnson Paving Co., Exhibit F*]

Harris asked the Court to take "*judicial notice of Jefferson County Case Pro Rentals and Sales Inc. versus Foxhollow Construction Trucking Incorporated, David Egan, Demian Egan, Harris Inc., United Fire and Casualty Company, Case No CV-2003-314*" wherein a judgment was entered against Harris in the amount of $4,757.90 for the Fremont Project [*Tr. p. 177, LL. 22-25, p. 178, LL 1-9*]. When asked if Johnson's equipment or employees worked on the Fremont Project, Harris testified that he did not know. Harris did agree that Judge St. Clair, in his opinion on the Pro-

Rental consolidated Case CV-03-314 stated that "the equipment was rented by Foxhollow." . [*Tr. p. 225, LL. 4-125; p. 226, LL. 1-4*].

During the Fremont Project, Egan was on Harris' payroll as an employee. [*Tr. p. 229, LL. 23-25; p. 230, L. 1*] Harris was paying Egan and *"everyone so I could manage the payments on the contracts."* But Harris did not believe that he identified Egan as his employee to the school district. [*Tr. p. 242, LL. 11-25*]. Harris provided W-2s to some of Egan's employees. [*Tr. p. 243, LL. 1-4*]. Harris admitted that he reported Egan and Fowhollow employees as Harris Inc. employees to the government [*Tr p. 247, LL. 5-15*]

Harris was asked about Exhibit AAA, page 1 which is an Invoice from L. N. Johnson Paving Co. for $78,727.45, and if that amount was paid to Johnson, Harris stated, *"I don't know for sure. As far as I know we either paid them or paid their equipment suppliers; or we, we – this was shown as to what they're eligible to be paid, and I'm not sure exactly what we did pay them."* [*Tr. p. 233, LL. 5-25; p. 234, LL. 1-13*]; page 2 is an Invoice from Foxhollow requesting payment for the same work that Johnson's Invoice requested. Harris explained, *"[t]hat was probably Dave Egan's estimate. Does that tie in with the continuation sheet? I don't know. Maybe it was his way of assisting my office with the pay request."* [*Tr p. 235, LL. 3-10*] Harris was then asked to review page 4 of Exhibit AAA, which is an undated worksheet stating that Egan was owed $26,047.55 Harris admitted that he would take a 5% retainage on all payments. Harris was then asked to look at Exhibit ZZ, and identified the exhibit as *"a check to L. N. Johnson for $21,904. . .*[dated] . . . *August 20th, 2002."* [*Tr. p. 237, LL. 15-25; p. 238, LL. 1-16*] [*R Vol. 6, FERGUSON'S TRIAL EXHIBITS: Exhibit ZZ admitted Tr. p. 240, LL. 13-14 and the first page of AAA admitted Tr. p. 268, LL. 9-11*].

Harris called Egan as a witness, and when he was asked about Johnson's interest in the Fremont Project, Egan stated that all Johnson "*was interested in was simply the paving . . . [n]othing else.*] [*Tr. p. 386, LL. 21-25; p. 387, LL. 1-5*]. Egan claims that he and Johnson met with Harris because Egan ". . . *wanted to bid it, and Wayne* [Johnson] *wanted the paving. . .* " Egan was aware that he could not place a bid because Foxhollow did not have a "*public works license.*" therefore, he wanted to make a deal with Harris, where "*. . . Harris would work and cover some of that* [public works license] *by hiring Foxhollow's people and myself directly and paying the bills . . .*" Egan bid as Foxhollow, "*but on the job we're really just employees of Scott Harris or Harris Construction . . . And Wayne* [Johnson] *had some public works licenses, and so he was willing out of the goodness of his heart to let more that the, the paving price come into his side.*" [*Tr. p 395, LL. 3-16*]

Harris agreed to the plan and "*. . . wrote two contracts . . . a contract for L. N. Johnson and used his public works to fund some – or to. to fund some of that job. Now, some of it – he put the paving in there . . the dirt work, maybe the football field. things like that, was under . . . Wayne's project . . . the remaining went under Foxhollow. And then to cover up or to hid, whatever . . .Scott paid all of Foxhollow's people that was on the job . . payroll checks.* [*Tr. p. 396, LL. 3-24*]. Egan is not sure if Johnson requested the split contract, but "*[t]hat's just what Scott had to do . in order to put Foxhollow on the job. . .*" [*Tr. p. 397, LL. 7-14*].

Egan testified that "*Foxhollow did all the work Wayne never done a thing. He had no men, He had no equipment. He – the paving is all he was going to do, and it was way down the road*" [*Tr p. 402, LL. 11-18*].

When Egan was asked about the Plaintiff's Exhibit 71 [sub- contract - L. N. Johnson] he stated that Scott [Harris] or Tony handed them to him after he had started work on the project. Egan signed the Johnson contract, and gave the it back to Harris or Tony. [*Tr. p. 404, LL. 2-25*]. At the time the Johnson/Foxhollow contracts were signed, Foxhollow was already working at the job site. "*L. N. Johnson never had as much as a shovel on the job. .*", no employees; no equipment; and no supervision/direction. [*Tr. p. 417, LL. 3-19*].

Egan testified that Harris knew that Foxhollow did not have a public works license, that Egan and Harris talked about the lack of a public works license and Harris assured Egan that "*. . . he could take care of it . . .*" Harris had to cover up Foxhollow's lack of a license "*. . . he had to take care of it in some way or another.*" Harris prepared the contracts; change orders; and draw requests. Egan "*. . . put together* [his] *pay estimates for all the work that was done on that job for Foxhollow, whether it was done for Foxhollow, whether it was Foxhollow's contract or L. N. Johnson because L. N. Johnson wasn't there. They didn't even need to be there.*" Egan was handling all the paperwork, and he "*had to create it under the name of L. N. Johnson because that's how the contract was.*" Egan was an employee of Harris, and the checks of Plaintiff's Exhibit 18 were his payroll checks. [*Tr. p. 421, LL. 12-25; p. 422, LL. 1-25; p. 423. LL. 1-25; p. 424, LL. 1-20*].

Harris called Tony Robles ["Tony"] as a witness. Tony became employed by Harris in May of 2002, and was employed, as the project superintendent at the Fremont Project [*Tr. p. 439, LL. 11-25; p. 440, LL. 17-22*]. He stated that he was aware of the name Johnson, as its was on his "*. . . job contract list . . . in construction as 02200, which is all the dirt work . . .*" [*Tr. p. 444, LL. 8-20*]

At a point in time, Tony became aware that there were problems with "*. . . timely submission of pay requests and billings by. . .*" subcontractors, and that subcontractor was Foxhollow, and

" . . . *involved the dirt work.*" [*Tr. p. 244, LL. 21-25; p. 445, LL. 1-10*] Tony was aware that Egan was receiving checks from Harris on an ongoing basis. [*Tr. p. 460, LL. 1-19*]. As to the Johnson/Foxhollow contracts, Tony only received billing from Egan or Foxhollow. [*Tr. p. 462, LL. 1-5*].

Johnson testified that he had only been to the Fremont Project site once. He and his employee Dick Smith went to the site with Egan and Demain Egan to look over the site. Once Johnson reviewed the site and the specifications he told Egan that the would not bid on the project. At that time, Egan was Foxhollow's agent. [*Tr. p. 480, LL. 12-25; p. 481, LL. 1-16*].

Johnson was asked why he deposited the checks he received from Harris, and why he sent the monies to Foxhollow. Johnson stated that he was aware that Egan was involved on the Fremont Project, therefore he "*. . . figured that it was his money.*" [*Tr. p. 487, LL. 21-25; p. 488, LL. 1-15*]. When asked why when he received the checks from Harris that he did not just return those checks to Harris, Johnson answered , "*I knew that Dave [Egan] had the contract with Scott Harris on the Fremont job; and so I just figured that he should deserve the monies, that there was a mistake that it was sent to me and not to him.*" [*Tr. p. 508, LL. 1-23*].

At no time did Johnson have his equipment or employees at the Fremont Project. [*Tr. p. 496, LL. 21-25; p. 497, LL. 1-2*]. Johnson testified that Harris did call him one time, and told Johnson to take a check to Western States Equipment. Johnson told Harris that he did not have a contract with Harris, and that Johnson did not have an account at Western. In fact, Johnson has never had a rental agreement with Western States Equipment. [*Tr. p. 498, LL. 3-12*].

Kym Ferguson, who at one time was a member of Foxhollow and used his equipment for work on the Fremont Project, testified that he did not know who L. N. Johnson Paving was until after suit was filed, and he met Johnson at a lawyer's office [*Tr. p. 548; LL. 10-22*].

Harris, as a rebuttal witness testified that in September and October, 2002, he received a demand from Pro Rentals and Western States Equipment for charges ". . . *written to Foxhollow, the charges; but Foxhollow did not pay them. . .*" [*Tr. p. 703, LL. 11-25; p. 704, L. 1*].

Harris admitted "*. . . that there probably wasn't enough money to go around on this project and that it's – it probably was underbid or a combination of being undermanaged at the job. . .*" [*Tr. p. 714, LL. 3-12*].

RESPONSES TO APPELLANT'S ISSUES ON APPEAL AND AN ADDITIONAL ISSUE [FRIVOLOUSNESS] BY L.N. JOHNSON PURSUANT TO HARRIS' APPEAL

A. HARRIS FAILED TO PROVE DAMAGES, PARTICULARLY AS TO JOHNSON; AND UNDER ITS CONTRACTS WITH JOHNSON AND/OR FOXHOLLOW.

B. MONIES PAID TO JOHNSON ON THE FREMONT PROJECT WERE FOR WORK PERFORMED BY DAVID EGAN/FOXHOLLOW, NOT FOR WORK PERFORMED BY JOHNSON.

C. THE "GENERAL CONDITIONS" WERE NOT A PART OF ANY SUBCONTRACT WITH JOHNSON AND/OR FOXHOLLOW.

D. HARRIS' EXHIBIT 55/55-A WAS NOT ADMISSIBLE.

E. THE COURT DID NOT ERR IN DENYING HARRIS' MOTION TO AMEND FINDING AND CONCLUSIONS.

F. THE COURT'S AWARDING OF ATTORNEY FEES AND COURT COSTS TO JOHNSON WAS APPROPRIATE.

G. HARRIS' MOTION FOR A NEW TRIAL WAS PROPERLY DENIED.

H. THE WITHIN APPEAL IS FRIVOLOUSLY BROUGHT AND PURSUED, BY REASON OF WHICH JOHNSON IS ENTITLED ITS FEES AND COSTS.

ATTORNEY FEES ON APPEAL

IAR 41 allows attorney's fees on appeal when appropriate. Respondent Johnson requests attorney's fees on appeal, as Harris' appeal is frivolously brought and pursued.

ARGUMENT AND AUTHORITIES

OVERVIEW:

It is held that:

> *The review of a trial court's decision after a court trial is limited to ascertain whether the evidence supports the findings of fact, and whether the finds of fact support the conclusions of law. The trial court's findings of fact will not be set aside unless clearly erroneous. Idaho R. Civ. P. 52(a). Thus, if the finds of fact are supported by substantial and competent evidence, even if the evidence is conflicting, the Supreme Court of Idaho, will not disturb those findings. In view of the trial court's role to weigh conflicting evidence and testimony and to judge the credibility of witnesses, the trial court's findings of fact will be liberally construed in favor of the judgment entered. In reviewing a trial court's conclusions of law, however, a different standard applies: the supreme court is not bound by the legal conclusions of the trial court, but may draw its own conclusions from the facts presented.* Griffith v. Clear Lakes Trout Co., Inc., 143 Idaho 733, 737; 152 P. 3d 604, 608 (2007)

On December 2, 2008, a three-day Court Trial commenced on the case filed by Harris, Inc against Foxhollow Construction & Trucking, Inc.; L. N. Johnson Paving, LLC; David Egan; Ferguson Farms; D. Kym Ferguson; Michael Ferguson; and Does I-X. Harris alleged (1) breach of sub-contract, (2) unjust enrichment, (3) breach of good faith and fair dealing in performance of sub-contracts; (4) fraud and misrepresentation; and (5) indemnification from Foxhollow and Johnson.

On February 11, 2009, the Court issued its FINDINGS OF FACT AND CONCLUSIONS OF LAW. [*R. Vol. 5, pp. 1213-1264*] On June 30, 2009, the Court issued its FIRST AMENDED FINDINGS OF FACT AND CONCLUSION OF LAW. [*R. Vol. 6, pp. 1456 - 1507*]

As to Harris' claims against Johnson, the Court found:

1. Breach of Contract: Harris "*. . . failed to prove, with any reasonable sort of accuracy, the amount of damages it suffered as a result of Johnson's breach. For these reasons, Harris, Inc. shall take nothing by it breach of contract claim against Johnson.* [Emphasis added] [*R. Vol. 5. p.1230*] [*R Vol. 6, p. 1474*]

2. Unjust Enrichment: Harris "*. . .put on no evidence that money paid to Johnson, for the benefit of Foxhollow, was not validly earned by Foxhollow. . . put on no evidence of any benefit to Johnson directly . . .For these reasons, this Court finds that Harris, Inc. has not shown, by the preponderance of the evidence that Johnson received a benefit for which equity requires recompense. . .*" [Emphasis added] [*R. Vol 5. p.1231*] [*R. Vol. 6. p. 1475*]

3. Breach of Good Faith and Fair Dealing:

Harris "*. . . failed to prove what portion of liability should inure to Johnson based upon Foxhollow's default. Furthermore, Harris, Inc. failed to show the cost of the paving work, apparently completed by a third party . . . Accordingly . . . Harris, Inc. shall take nothing by its breach of the covenant of good faith and fair dealing as against*

Johnson." [Emphasis added] [*R. Vol. 5, p.1244*] [*R. Vol. 6, p. 1488*]

4. Fraud: ". . . ***Based upon the lack of proof of Harris, Inc.'s ignorance of the alleged fraud by Foxhollow, and lack of proof of causation as to Johnson, this court finds that Harris, Inc. shall take nothing by its claim of fraud against Johnson.***" [Emphasis added" [*R. Vol. 5, p.1250*]

"***Based upon the lack of proof of Harris, Inc.'s ignorance of the alleged fraud by Foxhollow, and lack of proof of causation as to Johnson, this Court finds that Harris, Inc. shall take nothing by its claim of fraud against Johnson.***" [Emphasis added] [*R. Vol. 6, p. 1494*]

5. Indemnification: "***Based upon the lack of evidence that the 'General Conditions to Contract' was part of the agreement between Harris, Inc. and Johnson, this Court finds that Harris, Inc. cannot rely upon those conditions to prove it indemnity claim against Johnson. . .***" [Emphasis added] [*R Vol 5, p.1261*] [*R. Vol 6, p. 1504*]

A. HARRIS FAILED TO PROVE DAMAGES, PARTICULARLY AS TO JOHNSON; AND UNDER ITS CONTRACTS WITH JOHNSON AND/OR FOXHOLLOW.

Throughout the trial, Harris, when asked regarding a particular dollar amount of damages claimed, he answered, using:

1. "**around**":

i. $147,000.00 payment to BTC Contractors to finish project. [*Tr. p. 110, LL. 21-25*].

ii. [regarding Pro-Rentals litigation] $10,000.00 for generator. [*Tr. p. 180, LL. 18-25, p. 181, LL. 1-4*]

2. **"approximately."**

i. $147,000.00 cost to complete contract. [*Tr. p. 112, LL. 1-5*].

ii. $147,000.00 to complete Johnson subcontract. [*Tr. p. 167, LL. 22-25; p. 168, LL. 1-3*].

iii. [regarding Ferguson suit] "ten or twelve – ten or eleven thousand." [*Tr. p. 185, LL. 3-11*]. Harris was shown his Exhibit 25[A], and then testified he paid $10,348.75. [*Tr. p. 185, LL. 12-15*] [*R. Vol. 6, Plaintiff's Exhibit 25A, admitted Tr. p. 189, LL. 4-7*].

3. **"appears"**

i. [regarding Pro-Rentals litigation] $14,000 for unpaid invoices. [*Tr. p. 182, LL. 7-11*].

4. **"estimate"**

i. additional time for Harris and his staff: $7,000.00 ". . . estimate but based on a, a typical management fee –." [*Tr. p. 192, LL. 21-25*].

5. **"assume"**

i. ". . . didn't record time for my equipment . . Backhoe would probably be couple of thousand dollars a month So I'd say probably six thousand dollars. backhoe and dump truck." [*Tr. p. 195, LL. 3-9*].

Harris also admitted that he underbid the Fremont Project and that the project lacked proper supervision. [*Tr. p 714, LL. 3-12*].

When asked about his claim as to Johnson's cost overruns, and how that amount has changed overtime, Harris stated that "*it must have been a, an error or something*." [*Tr. p. 228, LL. 22-23*]. In Harris' April 25, 2008, Answers to Interrogatories he claimed damages as to Johnson of $34,334.80. [*Tr. p. 228, LL. 13-21*]. In a letter dated July 6, 2005, Harris also claimed damages as to Johnson in the amount of $34,334.80. [The July 6, 2005, letter was not admitted, but used by

Harris to refresh his memory] [*Tr. p. 203, Ll. 7-15*]. Throughout Harris' testimony, as to his damages, the amounts given were very confusing and contradictory, and Harris presented no direct evidence as to any damages incurred by Johnson's alleged breach of contract.

The Court found in its FIRST AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW that Harris had notified Johnson that the cost overrun on the Fremont Project was $34,334.80, but at trial Harris testified that Johnson's cost overrun was $39,667.83. Harris admitted Exhibit 23, a "Continuation Sheet", "*. . . **However, Harris, Inc. failed to present invoices, receipts or acknowledgments of any kind, by any third party, to prove the amount Harris, Inc. paid any third party to complete the unfinished work on the Johnson subcontract.***" [Emphasis added] [*R Vol. 6, p. 1471*]

Harris, as Plaintiff, had the burden to prove its damages "***both amount and causation must be proven with reasonable certainty.*** Magic Valley Truck Brokers, Inc. v. Meyer, 133 Idaho 110, 116 P. 2d 945, 951 (Ct App. 1999); Gillingham Constr. v. Newby-Wiggins Constr., Inc. 142 Idaho 15, 26, 121 P. 3d 946, 957 (2005); Griffith v. Clear Lakes Trout Co., Inc., 143 Idaho 733, 740; 152 P. 3d 604, 611 (2007); Bach v. Miller, 224 P. 3d 1138, 1143, 2010 Ida. Lexis 22 (2010)

B. MONIES PAID TO JOHNSON ON THE FREMONT PROJECT WERE FOR WORK PERFORMED BY DAVID EGAN/FOXHOLLOW, NOT FOR WORK PERFORMED BY JOHNSON.

Harris' Exhibit 21 consisted of copies of two checks, that it issued during the time frame of the Fremont Project. Those checks are as follows:

DATE	CHECK NUMBER	TO	AMOUNT
6/21/02	12277	LN JOHNSON PAVING CO	$7,467.44
8/20/02	13182	LN JOHNSON PAVING CO	$21,904.00

[*R. Vol. 6, Plaintiff's Exhibit 21, objection overruled and admitted Tr. p. 21, LL. 15-16*]

Immediately upon receipt thereof, Johnson issued checks to Foxhollow for like amounts. Johnson admitted as Exhibit F, a copy of a check Harris had sent Johnson and an unknown second party – L&M Landleveling – to Johnson.

12/05/02	14270	L &M LANDLEVELING L N JOHNSON PAVING CO	$8,000 00

[*R. Vol. 6, Defendant L.N. Johnson Paving Co., Exhibit F, admitted Tr. p. 223, LL. 7-8*]

Johnson through his attorney returned check no. 14270 to Harris on December 12, 2002. Johnson retained no monies from the Fremont Project!

C. THE "GENERAL CONDITIONS" WERE NOT A PART OF ANY SUBCONTRACT WITH JOHNSON AND/OR FOXHOLLOW.

The Court properly recognized that Harris' "General Conditions" claimed to be an addendum to Johnson's June 24, 2002, contract was "***dated more than three months after the date Egan signed the subcontract . . .*** [and] . . ***[t]he subcontract between Johnson and Harris, Inc. admitted at trial, did not have a General Conditions addendum attached to it.***" [Emphasis added] [*R. Vol. 6, p. 1468*]

Harris admitted Exhibit 71, STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND SUBCONTRACTOR to L. N. Johnson Paving Co., on the North Fremont High School, signed by Egan on June 24, 2002, and by Harris on June 27, 2002. [*R. Vol. 6, Plaintiff's Exhibit 71, admitted Tr. p. 35, L. 6*]. This exhibit consisted of one page.

Harris then admitted Exhibit 50, General Conditions to Contract dated October 9th, 2002. [*Tr. p. 38, LL. 12-24*] [R. Vol. 6, *Plaintiff's Exhibit 50, admitted Tr. p. 39, LL. 22-23*]. According to

Harris this document "*would be the supplement*" to the June 2002, STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND SUBCONTRACTOR for L. N. Johnson, Inc.

Idaho Rules of Evidence 1004 (3) **Admissibility of other evidence of contents**. states:

> **Original in Possession of Opponent**. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; and the party does not produce the original at the hearing; . . .

Harris' August 17, 2005, Complaint [*R. Vol. 1, p. 4*] at ¶ 16 states:

> Incorporated into the agreements attached at Exhibit A and B was a "General Conditions to Contract," a true and correct copy of which is attached as Exhibit C, and its terms and conditions are incorporated as if set forth in full herein.

Exhibit A [*R. Vol. 1, p. 13*] is the June 24, 2002, L. N. Johnson Paving Co. contract and Exhibit C [*R. Vol. 1, pp. 17 - 21*] is the October 9, 2002, General Conditions to Contract. Harris had control of the "original" signed contracts, but failed to produce an "original" General Condition to Contract dated prior to or contemporaneously with Johnson's contract. Therefore the Court was correct in discounting Harris' Exhibit 50.

D. HARRIS' EXHIBIT 55/55-A WAS NOT ADMISSIBLE.

Harris testified that Exhibit 55 is "*an accounting of the actual job cost. In this particular sheet, I changed accounting software between – at this point in time; and so if you look in the beginning balances, they were – they come from a previous general ledger, a previous job cost journal.*" [*Tr. p. 92, LL. 17-25; p. 93, LL. 1-2*]. On Exhibit 55 there were two handwritten items, which Harris explained that he is not sure who wrote those entries, but those were costs that were incurred after August 25, 2004. [*Tr. p. 95, LL 6-23*]. Exhibit 55 was objected to as the exhibit

presented to the defendants did not contain handwritten entries, the exhibit contained entries for payroll, lawyers and equipment, and Harris had not produced the payroll records that had been requested. [*Tr p. 96, LL. 19-25, p 97, LL. 1-21*]. Exhibit 55 was not submitted in compliance with the Court's order because Harris noticed missing entries and an updated exhibit was prepared, which Harris offered as an exhibit. [*Tr. p. 98, LL 14 23*]. Harris then offered Exhibit 55A, which was objected to for "insufficient foundation, not best evidence, failure to comply with discovery rules" and the exhibit is a "newly revised document." [*Tr. p. 100, LL. 20-25*]. The Court allowed Harris to testify to Exhibit 55A. Harris testified that Exhibit 55A is ". . . *a job cost journal that shows individual payments and who they were written to. . . with the last invoice dated 5-31-2005* . . ." [*Tr. p. 105, LL. 9-25; p. 106, LL. 1-14*]. Harris again offered Exhibit 55A which was objected as to ". . . *insufficient foundation, not best evidence, violative of the Court's discovery order, and violative of discovery rules. Documents were requested and not produced . . .and add that this doesn't even seem to apply to the same time frame as the contract we're talking about* " [*Tr. p. 109, LL. 7-16*]. The Court stated:

> *I have two concerns. It's the late discovery issue and not being notified immediately upon the discovery of that.*
>
> *The bigger concern I have, however, even though it may be a business record, my problem is is that when it's turned over that late to counsel, they don't have any opportunity to follow up with any discovery or any well, any type of discovery. And so at this point in time, I am going to sustain the objection as to 55-A.*

The Court was correct in it ruling. Idaho Rules of Civil Procedure 26(e)(1) requires a party to "seasonably supplement" its responses and Idaho Rules of Civil Procedure 16 requires the parties to comply with the Court's Scheduling Order. On October 1, 2008, the Court entered its Scheduling

Order requiring each party to deposit all trial exhibits with the "*. . . Clerk of Court fourteen (14) days before trial (November 18, 2008). . . [n]o exhibit shall be admitted into evidence at trail other than those disclosed. listed and submitted to the Clerk of the Court in accordance with this order, except when offered for impeachment purposes or unless they were discovered after the last required disclosure.*" [*R. Vol. 5, p. 1046 - ¶¶ 4 and 5*] Harris admitted that its Exhibit 55 that was provided to the Court and Parties on or about November 18, 2008, was modified, and said modified Exhibit was not presented to the Court or Parties until Harris provided trial testimony

E. THE COURT DID NOT ERR IN DENYING HARRIS' MOTION TO AMEND FINDING AND CONCLUSIONS.

The Court in its February 11, 2009, FINDINGS OF FACT AND CONCLUSIONS OF LAW [*R. Vol. 5, pp. 1213-1264*], and June 30, 2009, FIRST AMENDED FINDINGS OF FACT AND CONCLUSION OF LAW [*R. Vol. 6, pp. 1456 - 1507*], was abundantly clear that it was the Court decision that Harris may have proved a breach of contract by Johnson, but Harris failed to prove it was damaged by any such breach.

F. THE COURT'S AWARDING OF ATTORNEY FEES AND COURT COSTS TO JOHNSON WAS APPROPRIATE.

Johnson prevailed against Harris' alleged damages on all counts. As the prevailing party, Johnson is entitled to its attorneys fees and costs.

In a civil action the court may award pursuant to IRCP 54 (1) "reasonable attorney fees, which at the discretion of the court . . to the prevailing party or parties as defined in IRCP 54 (d)(1)(B), when provided for by any statute or contract."

IRCP 54(d)(1)(B) Prevailing Party.

> In determining which party to an action 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

The determination of who is a prevailing party for purposes of rule regarding award of attorney fees is committed to the sound discretion of the trial court and will not be disturbed absent and abuse of that discretion Rules Civ. Proc., Rule 54. Nelson v. Anderson Lumber Company, 140 Idaho 702; 99 P. 3d 1092 (Ct. App. 2004). The court in determining which party is the prevailing party, should not focus on tallying the issues or the counts in the Complaint, but should evaluate the results in relation to the relief sought by each party.

It has long been held that the decision to award attorney fees rests with the discretion of the trial court and that decision when it rests with sound discretion of the district court will only be reversed where there is an abuse of discretion.

The court is empowered with discretion concerning the awarding of attorney fees by IRCP 54, IC §§ 12-120 and 12-121. Johnson in its Answer stated

> *. . . the within action has been brought and is being pursued by Plaintiff against this Defendant L. N. Johnson frivolously, unreasonably, without foundation and with no basis in either law or fact . . . Plaintiff has full knowledge that this Defendant did not perform any work or services on the subject project nor did L. N. Johnson Paving receive any funds or money thereon. That as a result, this Defendant is entitled to judgment against the Plaintiff for attorney's fees and costs pursuant to I. C. 12-120; I. C. 12-121; and IRCP 54 (d) & (e), et seq.*
>
> [R Vol 1, p. 60]

The Court found that Harris' claims against Johnson were those of a commercial transaction and one under a contract, therefore, pursuant to Idaho Code § 12-120(3), Johnson as the prevailing party is entitled to its attorney's fees and costs. [*R. Vol. 6, 1530 - 1554*]

G. HARRIS' MOTION FOR A NEW TRIAL WAS PROPERLY DENIED.

Harris spent three [3] days to present its case that it had been damaged by the actions of the defendants. **Harris claims it was entitled to a new trial for the purpose of introducing additional evidence as to Harris' claimed damages.** [Emphasis added] [*R. Vol. 6, pp. 1338-1349*]

Harris moved "for a new trial pursuant to" the following Idaho Rule of Civil Procedure:

IRCP 59(a)(6)(7). New trial.

(a) New Trial – Amendment of Judgment – Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons:

> *6. Insufficiency of the evidence to justify the verdict, or other decision, or that it is against the law.*

At trial Harris testified at length concerning its internal records, but failed to produce supporting documentation. In fact, Harris was not certain as to its damages, using (1) "**around**" [*Tr. p. 110, LL. 21-25; Tr. p. 180, LL. 18-25, p. 181, LL. 1-4*]; (2) "**approximately**." [*Tr. p. 112, LL. 1-5; Tr. p. 167, LL. 22-25; p. 168, LL. 1-3; Tr. p. 185, LL. 3-11; Tr. p. 185, LL. 12-15*] [*R. Vol. 6, Plaintiff's Exhibit 25A, admitted Tr. p. 189, LL. 4-7*]; (3) "**appears**" [*Tr. p. 182, LL. 7-11*]; (4) "**estimate**" [*Tr. p. 192, LL. 21-25*]; and "**assume**" [*Tr. p. 195, LL. 3-9*], when identifying its damages.

Harris admitted the following exhibits:

a. Checks it wrote to Demain Egan: Dave Egan [12]; Foxhollow: Foxhollow Construction, Inc: Foxhollow Construction; Clem Atchley/Foxhollow Construction, Inc. Pro-Rental & Sales, Inc. [*Tr. p. 54, L. 8; R. Vol. 6, Plaintiff's Exhibit 19*]

b. Checks to LN Johnson Paving Co and L&M Landleveling. [*Tr. p. 21, L. 16; R. Vol. 6, Plaintiff's Exhibit 21* and *Tr. p. 493, L. 3; R. Vol. 6, Defendant L. N. Johnson Paving Co. Exhibit E*]

c A "Continuation Sheet" for Foxhollow/ Johnson. Harris was unable to specify which checks, admitted as exhibits, represented which payment for the items identified on said "Continuation Sheet." [*Tr. p. 87, L. 20; R. Vol. 6, Plaintiff's Exhibit 23*]

d. "Job Cost Ledger - Financial Analysis" – 9/26/02 to 12/31/02 identifying "employees", Foxhollow employees; and "subcontract" – Foxhollow and Johnson [LN Johnson for "Excavation"] [*Tr. p. 157, L. 21; R. Vol. 6, Plaintiff's Exhibit 52*]

e. "Job Cost Journal" for Foxhollow. [*Tr. p. 152, L. 16, R. Vol. 6, Plaintiff's Exhibit 53*]

The Court was correct in denying Harris' Motion for a New Trial for Harris to present additional testimony.

> *7. Error in law, occurring at the trial. Any motion based on subdivision 6 or 7 must set forth the factual grounds therefor with particularity . .*

The Court was correct in denying Harris' Motion for a New Trial as Harris failed to provide evidence as to any damages it claimed. Harris' testimony only provided speculation as to its damages, and its exhibits were inconclusive and confusing.

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[12] *Those checks to Dave Egan in the amount of $1,570.00, are payroll checks.*

H. THE WITHIN APPEAL IS FRIVOLOUSLY BROUGHT AND PURSUED, BY REASON OF WHICH JOHNSON IS ENTITLED ITS FEES AND COSTS.

The Court's decision as to Harris' failure to prove its damages was exercised within the trial court's discretion. The Court heard the testimony of the witnesses and reviewed the exhibits admitted. In fact, on several occasions the Court asked questions regarding witnesses testimony and exhibits, for clarification. The Court ruled that, even though, Johnson Breached its contract Harris "***failed to prove, with any reasonable sort of accuracy, the amount of damages it suffered as a result of Johnson's breach***; Harris failed to prove its claim of Unjust Enrichment as Harris failed to prove ***"that money paid to Johnson, for the benefit of Foxhollow, was not validly earned by Foxhollow. . . put on no evidence of any benefit to Johnson directly . . .For these reasons, this Court finds that Harris, Inc. has not shown, by the preponderance of the evidence that Johnson received a benefit for which equity requires recompense. . .***" ; as to Breach of Good Faith and Fair Dealing, Harris "***. . . failed to prove what portion of liability should inure to Johnson based upon Foxhollow's default. Furthermore, Harris, Inc. failed to show the cost of the paving work, apparently completed by a third party . . . Accordingly . . . Harris, Inc. shall take nothing by its breach of the covenant of good faith and fair dealing as against Johnson.***" ; as to Fraud, Harris lacked "***proof of causation as to Johnson, this court finds that Harris, Inc. shall take nothing by its claim of fraud against Johnson.***", and as to Indemnification, Harris failed to admit a valid "*General Conditions to Contract*" which Harris claimed "***was part of the agreement between Harris, Inc. and Johnson, this Court finds that Harris, Inc. cannot rely upon those conditions to prove it indemnity claim against Johnson. . .***"

Harris had sufficient opportunity to provide the Court with evidence of damages, but instead Harris provided only speculation as to how any action or inaction on Johnson's part resulted in any

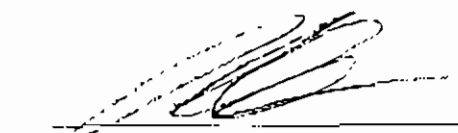
of its alleged damages. Harris' Appeal is frivolous as Harris failed to present "no cogent challenge to the district court's exercise of discretion" in its ruling that Harris failed to prove its damages. Merrill v. Gibson, 142 Idaho 692; 132 P. 3d 449 (Ct. App. 2005). Harris' Appeal was not "brought in good faith; is "without foundation" and is "not founded or plead on any genuine issue of law." Merrill v. Gibson, 139 Idaho 840; 87 P. 3d 494 (2004). Harris, in its Appeal, failed to raise "any genuine issue of law, or error in the application of law" by the district court in its judgment that Harris failed to prove damages as to Johnson. Gulf Chemical Employees Federal Credit Union v. Williams, 107 Idaho 890; 693 P. 2d 1092 (Ct. App. 1984).

Harris was required to prove its allegations and resultant damages, but Harris after **days** in Court failed through exhaustive testimony and admitted exhibits, to prove it was damaged to any degree of reasonable certainty! Therefore, Johnson should be awarded attorneys fees and costs in accordance with I. A. R. 41 and I. C. §12-120(3).

CONCLUSION

Harris failed to prove that Johnson's actions or inactions caused Harris' alleged damages. The damage evidence presented by Harris was base on speculation and faulty business records. Therefore, Harris' Appeal should be denied and Harris should pay Johnson's attorney fees and cost incurred in defense of Harris Appeal.

RESPECTFULLY SUBMITTED This 22nd day of September, 2010.



JOHN M. OHMAN, ESQ.