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AED, Inc. v. KDC Investments, LLC Respondent's Brief Dckt. 38603

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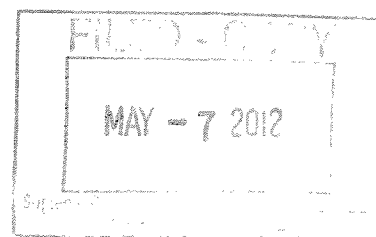
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IN THE SUPREME COURT OF THE STATE OF IDAHO

AED, INC. an Idaho Corporation,)
)
 Plaintiff-Appellant,)
)
 v.)
)
 KDC INVESTMENTS, LLC, a)
 Virginia LLC, and)
)
 LEE CHAKLOS and KRYSTAL)
 CHAKLOS, individually,)
)
 Defendants-Respondents.)
 _____)

NO. 38603-2011

RESPONDENTS' BRIEF



BRIEF OF RESPONDENTS

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

HONORABLE JOHN T. MITCHELL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

This is an appeal by Appellant AED, Inc. (hereinafter AED) from the dismissal of this case on summary judgment in a breach of contract and fraud action regarding the sale of a bridge crossing the Ohio River. AED also appeals the denial of its motion to reconsider and its motion to alter and amend judgment.

The Respondents/Defendants are KDC Investments, LLC (KDC), and Krystal Chaklos and Lee Chaklos individually.¹ They will be hereinafter collectively referred to as Respondents and/or KDC.

Statement of the Facts and Course of Proceedings

Respondents take great issue with the Appellant's statement of facts. Appellant's statement of facts recites evidence which was stricken by the district court, but fails to mention that it was. In its statement of facts, Appellant cites to paragraphs 8, 9, 10, 11, 12, 13, 19, 20, 22, 23, and 24 of the Affidavit of Eric J. Kelly in Opposition to Summary Judgment (appearing at R. p. 469-472). However, all of those paragraphs were stricken by the district court. (R. p. 694-695.) Further, Appellant cites to another affidavit (Mark Wilburn, R. p. 518) which was stricken in its entirety.² (R. p. 695.)

To make matters worse, Appellant's recitation of facts presents conclusory allegations as if they were established fact, whereas they were actually unsupported by the evidence and failed to establish a genuine fact issue. Most important to the issues

¹ All claims against Lee Chaklos individually were dismissed on summary judgment and Appellant does not appeal that ruling.

² On appeal, Appellant does not challenge all the of court's rulings striking the evidence it cites in its statement of facts, but only challenges the exclusion of the Affidavit of Mark Wilburn and paragraphs 9, 10, and 20 of the Affidavit of Eric Kelly.

on appeal, Appellant's statement of facts fails to acknowledge that the district court found there was no competent evidence supporting Appellant's conclusory allegation that the demolition agreement was consideration for the purchase agreement and, rather, found the claim was directly contrary to the evidence in the case. (R. p. 919.)

Accordingly, Respondents will provide the description of facts from their Memorandum in Support of Summary Judgment which while lengthy, properly sets forth the facts that are supported by competent evidence in the record.

On May 20, 2010, AED and KDC entered into an Asset Purchase and Liability Assumption Agreement ("Purchase Agreement") wherein AED sold the Bridge to KDC in exchange for \$25,000 and KDC's assumption of all obligations with respect to the Bridge, including its demolition. (Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment ("Krystal Aff."), ¶ 1; Amended Complaint, Exh. A). The Bridge was the subject of a lawsuit in the United States District Court for the Southern District of Ohio, Eastern Division, and was ordered to be demolished because it is an unreasonable obstruction to navigation and for the protection and safety of those in the area. (See Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction, Exh. 1). The recitals to the Purchase Agreement explain the purpose and intent of the parties. The first recital announces that the sellers' desire to sell their interest in the Bridge, except for any rights held pursuant to an Act of Congress. (Amended Complaint, Exh. A). The fourth recital explains that Eric Kelly, President of AED, was personally entering the Agreement "so that no questions exist as to the authority to transfer the property and obligations set forth in this Agreement." (*Id.*) The fifth recital explains that KDC "desires to purchase the Bridge and to assume all responsibilities associated with the Bridge, including its proper demolition and removal on or before June 1, 2011...." (*Id.*)

The terms contained in the Purchase Agreement are consistent with the intent expressed in the recitals. Paragraph 1 states that "[t]he Sellers agree to sell, transfer, assign and deliver to the Buyer all of their interest in the Bridge...." (*Id.*) Paragraph 5 of the Purchase Agreement explains that a material inducement to the Purchase Agreement is KDC's agreement to demolish and remove the Bridge in accordance with various rules, regulations, laws, agreements, and court orders, and to do so by June 1, 2011.

In addition, all of the obligations assigned and assumed are set forth in paragraphs 8-10, which include all of AED's obligations and interests it had in or to the Bridge by virtue of several other agreements. (*Id.* at p. 4) Paragraph 9 specifically states that "Buyer [KDC] assumes as of the date of possession all future obligations arising by virtue of the fact it owns the Bridge..." (*Id.*) (Emphasis added).

Contemporaneously with the execution of the Purchase Agreement, AED also executed a Bill of Sale and General Assignment ("Bill of Sale"). (*Id.*) The Bill of Sale sold and transferred to KDC all interest in the Bridge, except for two limitations not applicable here. (*Id.*) In the Bill of Sale, AED and Eric Kelly represent that they are "the lawful owner of these goods; that they are free from all encumbrances; that [they] have a valid right to sell them; and that [they] will warrant and defend the same against the lawful claims and demands of all persons." (*Id.*)

Immediately upon purchasing the Bridge, KDC commenced efforts to demolish the Bridge by June 1, 2011. (Krystal Aff., ¶ 5). KDC hired Delta Demolition Group, Inc. ("Delta Demo") to act as the general contractor responsible for demolishing the Bridge. (Krystal Aff., ¶ 5; Affidavit of Lee Chaklos in Support of Motion for Summary Judgment ("Lee Aff."), ¶ 4). AED was to be an independent subcontractor to Delta Demo for purposes of blasting the Bridge. (Lee Aff., ¶ 4). Delta Demo is a Virginia corporation. (Lee Aff., ¶ 2), Defendant Lee Chaklos is the President and sole shareholder of Delta Demo. (Lee Aff., ¶ 2). KDC is a Virginia limited liability company. (Krystal Aff., ¶ 2). Defendant Krystal Chaklos is the President and sole member of KDC. (Krystal Aff., ¶ 1). Lee Chaklos is not an officer, director, or member of KDC. (Lee Aff., ¶ 3).

On November 5, 2009, AED was administratively dissolved by the Idaho Secretary of State. (See Affidavit of Mikela A. French in Support of Motion for Preliminary Injunction, ¶¶ 2 and 4, Exh. "A"). At no time did AED ever inform KDC that it had been dissolved. (Krystal Aff., ¶ 6). AED did not get reinstated by the Idaho Secretary of State until December 3, 2010. (Affidavit of Randall L. Schmitz in Support of Motion for Summary Judgment, Exh. A).

On June 1, 2010, KDC acknowledged receipt of AED's proposed terms for blasting the Bridge by signing the "Proposal" supplied by AED.³ (Krystal Aff., ¶ 37).

FN 3 For purposes of this motion it will be assumed that the Proposal meets all the requirements for a valid contract.

AED refers to this proposal as the "demolition agreement." (Amended Complaint, ¶ 10, Exh. B). At the time of signing the demolition agreement,

KDC intended to hire AED to blast the Bridge. (Krystal Aff., ¶ 7).

The demolition agreement contemplated a “deposit” payment of \$30,000 by KDC on June 9, 2010. (Krystal Aff., ¶ 8; Amended Complaint, Exh. B, p. 3). It also provided that AED would supply all necessary permits, both federal and state, to perform operations in West Virginia. (Krystal Aff., ¶ 8; Amended Complaint, Exh. B, p. 4).

KDC did not pay the \$30,000 deposit. (Krystal Aff., ¶ 8). It did not pay the deposit because AED refused to supply KDC with proof that AED obtained all the necessary permits and licenses to perform operations in West Virginia. (*Id.*) It was not until AED threatened KDC with a lawsuit and claimed entitlement to rescind the agreement that KDC decided it would no longer use AED to blast the Bridge. (Krystal Aff., ¶ 9).

On June 16, 2010, AED submitted applications for certain permits and registrations with the City of Benwood and the State of West Virginia. (Krystal Aff., ¶ 10, Exh. A). AED included a cover letter with the submissions. In the letter, AED informed the City of Benwood that it would not pay the fees associated with any of the applications or permits until the City of Benwood issued Delta Demo a demolition permit for the Bridge. (*Id.*).

On June 23, 2010, KDC received an email requesting payment of the \$30,000 in order to pay for explosives which had been ordered. (Krystal Aff., ¶ 11, Exh. B). KDC informed AED that AED needed to get its permits before any money would be sent. (*Id.*). Later that day, AED responded by arguing that there is no license requirement to buy or sell property in West Virginia. (Krystal Aff., ¶ 12, Exh. C). AED acknowledged that a license was required “to do the contract,” but “not to consummate one.” (*Id.*).

On July 7, 2010, AED sent Delta Demo an email wherein it informed Delta Demo to direct all future correspondence to AED’s attorney and stated it was “moving forward to place an injunction on the bridge and am filing suit to negate our sales contract.” (Lee Aff., ¶ 5, Exh. A).

Also on July 7, 2010, AED's attorney, Mr. Bistline, sent Mr. and Mrs. Chaklos an email informing them that the demolition contract had been breached by nonpayment of the deposit entitling AED to rescind the demolition agreement. (Krystal Aff., ¶13, Exh. D). KDC informed Mr. Bistline that KDC could not convey funds to AED until it was qualified to perform the blasting. (Krystal Aff., ¶ 14, Exh. E). When asked to explain why AED was not qualified, KDC explained that AED had still not provided the necessary paperwork for qualification, AED was well aware of what paperwork was needed, and AED was given ample time to secure the documents. (*Id.*). AED was not qualified because it did not have the

appropriate permits and licenses to perform the blasting. At this point, KDC informed AED's attorney that the demolition agreement was terminated and KDC would search for a new blasting contractor. (*Id.*).

In July 2010, AED proposed rescinding the Purchase Agreement as a way to resolve the dispute between AED and KDC concerning demolition of the Bridge. (Krystal Aff., ¶ 15). However, at no time did AED actually attempt to return KDC's payment of \$25,000. (*Id.*). AED merely offered to return the payment as part of the proposal to rescind the Purchase Agreement. (*Id.*).

To this date, AED has not supplied proof to KDC that it has the necessary permits and licenses to perform operations in West Virginia. (Krystal Aff., ¶ 8). AED did not even obtain its West Virginia contractor's license until October 17, 2010, three months after the demolition agreement was terminated. (Affidavit of Randall L. Schmitz in Support of Motion for Summary Judgment, Exh. B).

Defendant's Memorandum in Support of Motion for Summary Judgment, p. 3-7 (emphasis in the original, footnotes omitted stating "[t]his affidavit is already on file with the Court."). (R. p. 354-358.)

The procedure of the case was as follows.³ On August 23, 2010, AED filed suit against KDC in Idaho. (R. p. 903.) It later filed an amended complaint which alleged fraud in the inducement and breach of contract and sought rescission, damages, or specific performance. (R. p. 903.) KDC counterclaimed alleging fraud, breach of contract, and sought a declaratory judgment to quiet title to the bridge. (R. p. 903.)

Next, KDC filed a motion for preliminary injunction so that it could continue in the demolition process of the bridge which was halted by the U.S. Coast Guard as soon as AED filed the lawsuit. (R. p. 902-903.) The court denied the motion for preliminary injunction because there were unresolved questions of fact and law. (R. p. 905.)

KDC then filed its Motion for Summary Judgment. (R. p. 905.) AED also filed a

³ These citations are to the Memorandum Decision and Order Denying Plaintiff AED's (Second) Motion for Reconsideration which explains the procedure of the case.

motion to reconsider the court's ruling that it was not entitled to the remedy of rescission, which had been made in conjunction with the denial of the preliminary injunction. (R. p. 905.)

The court ultimately granted KDC's motion for summary judgment and denied AED's motion for reconsideration. (R. p. 905.) The court also granted in part KDC's motion to strike one affidavit and portions of the affidavit of Eric Kelly. (R. p. 694-695.)

The court's specific rulings when granting KDC's motion for summary judgment were as follows: First, the court dismissed AED's breach of contract claim on the demolition agreement because it was an illegal contract given AED's failure to obtain a valid West Virginia contractor's license before entering into the demolition agreement with KDC and its continuing failure to procure the necessary permits. (R. p. 730.)

Second, the court dismissed AED's fraud claims because 1) AED had no right to rely on any alleged misrepresentations since it did not have a West Virginia contractor's license, and 2) no evidence existed that KDC had no intention of allowing AED to blast the bridge when entering into the demolition agreement. (R. p. 730.)

Third, the court denied AED's claim of rescission because that remedy was not available since AED did not tender nor offer to tender the \$25,000 to KDC when it had a legal duty to do so. The court also denied AED's motion for reconsideration regarding its ruling that rescission was not an available remedy and added it was not entitled to that equitable remedy since it did not have clean hands. (R. p. 730-731.)

Fourth, the court dismissed AED's claim for specific performance because that remedy was not available to AED. (R. p. 731.) Appellant does not challenge this ruling on appeal.

Fifth, the court dismissed AED's claims against Lee Chaklos because he was not an owner, director, officer, or agent of KDC. (R. p. 731.) Appellant does not challenge this ruling on appeal.

Sixth, the court granted KDC's claim of quiet title to the bridge since it had dismissed all claims of ownership by AED. (R. p. 731.)

Several days later, the parties stipulated to dismiss KDC's counterclaims since they were moot. (R. p. 733-735). The court then entered its judgment in favor of the defendants. (R. p. 770-771.)

Thereafter, AED filed its second motion for reconsideration, requesting that the court vacate its earlier decision quieting title to the bridge in KDC or, alternatively, setting the matter for jury trial on the sole issue of whether AED would have sold the bridge without the agreement that AED perform the blast. (R. p. 905.) The court denied this motion to reconsider and struck the Affidavit of Eric Kelly filed in support. (R. p. 919.)

AED then brought a motion to alter or amend judgment requesting the court reconsider its rulings denying the motion to reconsider. The court first ruled that the motion was untimely, but also went on to deny it on the merits. (Memorandum Decision and Order Denying Plaintiff AED's Motion to Alter or Amend and Order Granting Defendant's Memeorandum [sic] for Costs and Fees (hereinafter Decision Denying Motion to Alter or Amend), p. 9-10, 16, 20.)⁴ Also, the court awarded costs to KDC, as well as attorney fees pursuant to I.C. § 12-120(3). (*Id.*, p. 19-20.)

AED timely appeals. (R. p. 1006-1013.)

⁴ This Decision appears in the augmented record in this case which does not contain record pagination.

ISSUES

Appellant has framed the issues as follows:

- I. Did the District Court error [sic] in determining that the Blasting Agreement was illegal and void because AED did not have a West Virginia Contractor's License at the time of the making of the agreement?

- II. Did the District Court error [sic] by enforcing the Sales Agreement even though a material question of fact existed as to whether the Blasting Agreement could be severed from the Sales Agreement?

- III. Did the District Court error [sic] by dismissing AED's claim of fraudulent inducement on summary judgment based on a lack of evidence?

- IV. Did the District Court error [sic] by holding that AED could not seek rescission because AED had not made a proper tender of KDC's consideration?

- V. Did the District Court error [sic] by striking certain portions of AED's affidavits filed in opposition to summary Judgment?

- VI. Is AED entitled to attorneys fees on appeal?

ADDITIONAL ISSUE ON APPEAL

Respondents add the following issue:

Whether Respondents are entitled to attorney fees on appeal?

ARGUMENT

I.

The District Court did not err in determining that the Blasting Agreement was illegal and void because AED did not have a West Virginia Contractor's License at the time of the making of the agreement.

A. Introduction

Appellant argues that the district court erred in finding the demolition agreement (sometimes referred to as blasting agreement) to be illegal because AED did not have the required license at the time it entered into the agreement. Appellant points out that Idaho caselaw provides that work performed by an initially unlicensed contractor is illegal, but that performed after the contractor has become licensed is legal. Despite Idaho authority to the contrary, Appellant nevertheless argues it can be inferred that the failure of the contractor to be licensed at the time of contracting does not render the contract illegal. Alternatively, Appellant argues that even if the contract was initially illegal, once AED obtained its license during the course of the litigation, it reached back and rendered the contract legal and enforceable from the beginning.

Appellant is incorrect, for Idaho caselaw is clear that a contract entered into by an unlicensed contractor is illegal and unenforceable. While a contractor may be able to recover for the reasonable value of his services after he becomes licensed, he cannot recover contract damages for work performed while unlicensed, and at most is entitled to damages to prevent the other party from being unjustly enriched. Here, AED did not do any work after it was licensed (in the middle of the lawsuit) and so even this equitable remedy is inapplicable.

Further, it would lead to absurd results if AED's compliance with the licensing law during the lawsuit retroactively rendered the illegal contract legal. In essence, AED's argument is because during the lawsuit it finally obtained its license (some 5½ months after it was legally required to have it), it should be able to successfully sue KDC for terminating the contract because AED did not have its proper license.

B. Standard of review

This Court explained the well established standards of review for summary judgment in *Jones v. HealthSouth Treasure Valley Hosp.*, 147 Idaho 109 (2009):

When reviewing an order for summary judgment, this Court applies the same standard of review as was used by the trial court in ruling on the motion for summary judgment. Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). "If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review."

Id., p. 112 (internal citations omitted).

C. The contract was illegal because AED was not properly licensed

The first problem with Appellant's argument is that it never actually explains the court's ruling before attacking it as being wrong. Therefore, Respondents will set forth the relevant portion of the court's ruling from its Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment and Denying Plaintiff AED's Motion for Reconsideration (hereinafter Decision Granting Summary Judgment):

It is KDC's contention that the demolition agreement between the parties is illegal, and therefore void, because it amounts to a contract to perform an act prohibited by law; that is, AED entered into the demolition agreement without the required West Virginia contractor's license. *Id.*, p.

9. AED does not deny it lacked a contractor's license when it entered into the contract. AED instead argues the *purpose* of the contract was not illegal, thus, the contract itself is not rendered illegal. Response to Summary Judgment, p. 5. AED states it had the ability to obtain a valid West Virginia contractor's license (and eventually did so), and further, West Virginia law does not render a contract illegal for failure to obtain proper government approval. *Id.*, p. 6.

... The requirements of the Idaho Contractor Registration Act (and/or the Idaho Public Works Contractors Act) and the West Virginia Contractor Licensing Act are substantially similar. Both require a contractor to be registered or licensed in order to engage in the business or act in the capacity of a contractor or when holding himself out as a contractor. See I.C. § 54-1902(1); I.C. § 54-5201(1); W.Va. Code § 21-11-1. Both the Idaho and West Virginia Codes contemplate the licensing and registration requirements to apply when a person submits a bid to perform construction; there is no requirement that actual construction be performed. I.C. § 54-1901(b); I.C. § 54-5203(4)(a); W.Va. Code § 21-11-3(c). Because of the choice of law provision in the Purchase Agreement, Idaho law controls regarding submission of bids and entering into contracts to perform construction while not properly licensed and/or registered.

Here, the facts are more similar to those in *Barry* [*Barry v. Pacific West Construction, Inc.*, 140 Idaho 827 (2004) than *Trees v. Kersey*, 138 Idaho 3 (2002)]. The contract would have been illegal by virtue of AED's failure to properly register/and or be licensed. In the instant matter, KDC's repudiation of the contract was based, at least in part, upon AED's failure to obtain the necessary licensing/registration. The date on which precisely AED obtained its West Virginia contractor's license is unclear, but likely did not happen until October 17, 2010. It is undisputed that AED did not have its West Virginia contractor's license at the time of contracting. In his affidavit, dated November 24, 2010, Mark Wilburn testifies AED "has acquired all necessary permits to demolish the bridge, other than permission of the United States Coast Guard." Affidavit of Mark Wilburn, p. 1, ¶ 3. But November 24, 2010, is not the relevant time period.

Even in the light most favorable to AED, the non-moving party, the motion for summary judgment by KDC on the issue of illegality of the underlying demolition agreement must be granted. Because a contractor must be licensed at the time a bid is submitted, and AED has presented this Court with no evidence as to what precise date upon which it became licensed, AED could not have properly submitted the bid in *spring* of 2010 and then later secure appropriate licensing in the *fall* of 2010. At the time of actual

performance of this executory contract, it is likely that AED could have had, or perhaps even would have had, any necessary licensing/registration to perform the contract as agreed upon by the parties. However, there is simply nothing before the Court to indicate that this licensing/registration was in place at the time AED submitted the bid which gave rise to the demolition agreement.

KDC is entitled to summary judgment on its claim that AED lacked the required license and lacked the required permits at the time it entered into the demolition agreement. The demolition agreement is an illegal contract. KDC is entitled to summary judgment against AED on its breach of contract claims on that agreement.

Decision Granting Summary Judgment, p. 12-16 (emphasis in original). (R. p. 696-700.)

In response, Appellant tries to distinguish our case from *Barry v. Pacific West Construction, Inc.*, 140 Idaho 827 (2004), which held that a contract entered into without the required license is illegal. Since in that case, the goal was to intentionally avoid the licensing laws, AED argues that the “agreement here does not contemplate AED perform any illegal act and specifically requires AED to obtain proper licensing.”⁵ Appellant’s brief at p. 8. Contrary to Appellant’s argument, Idaho caselaw (discussed below) has also found contracts to undertake a legal activity to be illegal simply because the contractor (who may have even performed competently while unlicensed), was in violation of licensing laws.

Further, despite the fact that AED was acting illegally while entering into the contract while unlicensed, Appellant nevertheless argues that the district court erred by invalidating the contract for this reason.

This is in error because in neither West Virginia nor Idaho, the failure of the contractor to have a license at contract formation does not render an executory contract illegal and unenforceable. In Idaho, the contractor can collect for work performed only while the contractor was properly licensed, even if the contractor was not licensed at the time of contract formation.

⁵ Appellant inadvertently points out that AED was also in breach of the illegal contract.

Appellant's brief, p. 8.

It appears that Appellant has reverse engineered its second sentence to create its first, however, it is completely contrary to Idaho law.⁶

In *ParkWest Homes LLC v. Barnson*, 149 Idaho 603 (2010), the case upon which Appellant relies, at the time the contractor negotiated and signed the construction contract, it was not registered under the contractor act which requires registration, but was registered when all construction occurred. The district court held the contract to be void for lack of registration at the time it signed the contract. Appellant in that case did not challenge that ruling, but only that its mechanic's lien was also void. This Court explained that a mechanic's lien is granted for work done or materials furnished, not for simply entering into a construction contract.

“Thus, the contractor is denied a lien for work or labor done or materials furnished in the construction during the period that the contractor is not registered. Although work done by ParkWest while unregistered was illegal, work done after it registered was certainly legal. See *Farrell v. Whiteman*, 146 Idaho 604, 611, 200 P.3d 1153, 1160 (2009) (work performed while an architect was unlicensed was illegal, but work performed after he was licensed was legal).

Id. p. 608.

From this, Appellant mistakenly asserts that this Court “has held that licensing obtained after the construction agreement was entered into validates an otherwise unenforceable agreement.” Appellant's brief, p. 9. Yet this conclusion is directly

⁶ Since the agreements both contained an Idaho choice of law provision the West Virginia cases cited by Appellant do not apply. Respondents also note that the case cited, *Timber Ridge, Inc. v. Hunt Country Asphalt & Paving L.L.C.*, 671 S.E.2d 789 (West Virginia 2008), does not hold that under West Virginia law an executory contract cannot be avoided because of improper licensing as claimed by Appellant. Rather, it allows an action for performance compensation.

contrary to this Court denying a lien for work done prior to registration. Accordingly, Appellant's inferential leap is unwarranted and, further, is directly contrary to the case cited in *ParkWest, to wit, Farrell v. Whiteman*, 146 Idaho 604 (2009) (appeal after remand, 268 P.3d 458 (2012)). There, an architect licensed in Michigan performed work in Idaho both before and after obtaining his Idaho license.

First, this Court disagreed with the district court's findings that because the architect was licensed at "critical times" he did not violate the statute requiring he be licensed in Idaho. This Court stated:

This [the statute] unambiguously requires anyone who practices *any* architecture in Idaho to be licensed as required by the statute. Because Farrell was not licensed to practice architecture in Idaho until February 17, 2004, the architectural services he rendered before then were done pursuant to an illegal contract.

Farrell, 146 Idaho p. 610 (emphasis in the original).

Second, this Court explained that the architect was entitled to the reasonable value of his services after he became licensed:

Although Farrell's work performed while unlicensed was illegal, his actions after receiving his license were certainly legal. "Where a transaction is composed of both benign and offensive components and the different portions are severable, the unobjectionable parts are generally enforceable." *Nelson v. Armstrong*, 99 Idaho 422, 426, 582 P.2d 1100, 1104 (1978). In other words, the implied-in-fact contract in this case is chronologically separable. It was proper for the district court to award damages to Farrell based on quantum meruit for the services he rendered after he received his license.

Id. p. 611.

Third, this Court held that for the architect's services provided prior to his licensing, he was not entitled to the equitable recovery of quantum meruit, but only

unjust enrichment, *to wit*, the value of the benefit obtained by the other party that it would be inequitable for that party to keep without compensation.

In *Barry*, we determined that in the case of an illegal contract, recovery is limited to unjust enrichment. We held that an illegal contract cannot be enforced, and since quantum meruit is the measure of damages for a contract implied-in-fact, awarding damages on that theory would effectively enforce the contract and allow a party to "have his illegal objects carried out." Where an exception allows some recovery to one party to an illegal contract, the Court held that the measure of recovery is limited to unjust enrichment.

Id. p. 612-613 (internal citations omitted).

ParkWest and *Farrell* clearly show that both of Appellant's assertions are wrong. In short, contrary to Appellant's assertions, the failure to be licensed at the time of contracting does render the contract void and unenforceable, and, even if the contractor does later obtain the proper license during the litigation, it does not remove the bar to enforcement of the contract.

First, *Farrell* indisputably shows that the failure to be properly licensed renders a contract illegal, and *ParkWest* shows that the contractor must be licensed at the time of contracting. Further, they both show that later obtaining the proper license does not reach back and validate the contract or allow it to be enforced for matters predating the proper licensing. If this were so, the architect in *Farrell* would have recovered under quantum meruit for the work done prior to obtaining his Idaho license and not merely unjust enrichment for that work. Likewise, in *ParkWest* this Court would not have held that a contractor is denied a lien for work done while unregistered.

In our case, just as in *ParkWest* and *Farrell*, AED needed to be licensed at the time the demolition agreement was entered into, but was not, and therefore, it was an illegal contract. Under *ParkWest* and *Farrell*, had AED performed work or provided

materials after it obtained its license, it very well may have been able to recover, but it did not, and that is not what AED is trying to do.

Rather, AED desires that the fact that it finally obtained its license some 5½ months after it was legally required to have it should reach back and render the illegal contract legal so it can successfully sue KDC for terminating the contract which was done because AED did not have its proper license. To accept Appellant's theory would lead to an absurd result, since AED is the one who failed to have a license at the time of contracting and refused to obtain it despite KDC's repeated insistence that it do so (and obviously only obtained it as a tactical move in the litigation).

In other words, AED caused the problem that forced the termination of the blasting agreement by KDC, so AED should not be able to later manipulate the situation by getting its license and then claiming the blasting agreement was legal and thus the termination wrongful.

AED's theory could lead to even more absurd possibilities in other cases. For example, if the party terminating the unlicensed contractor proceeded with a new licensed contractor who completed the job and was paid (KDC could not because the U.S. Coast Guard halted the bridge demolition because of the lawsuit), AED's theory would still allow the initially non-licensed contractor to successfully sue for breach of the contract it prevented itself from being qualified for and someone else had to do.

To conclude, Appellant is incorrect in its theory and has failed in its burden to show the district court erred in finding the contract illegal and granting summary judgment in favor of KDC on AED's claim regarding breach of the demolition agreement.

II.

The District Court did not err by enforcing the Sales Agreement because a genuine issue of material fact did not exist as to whether the blasting agreement could be severed from the Sales Agreement

A. Introduction

AED filed a motion to reconsider which claimed that the demolition agreement was consideration for and was entirely dependent upon the purchase agreement, so that if the demolition agreement was illegal it would make the purchase agreement illegal as well since it was based on illegal consideration. AED then argued that it should get its bridge back and return the \$25,000, or, alternatively, that a jury trial should be held on whether AED would have sold the bridge if it could not perform the blast.

The district court denied the motion, finding the claim that the blasting agreement was part of or consideration for the purchase agreement was a conclusory allegation directly contrary to the evidence. That evidence included the purchase agreement which did not mention the demolition agreement at all, stated the consideration was \$25,000, and contained a merger clause. The supposedly contrary affidavit evidence from Eric Kelly (AED's vice president) was inadmissible parol evidence, and even that was contrary to his deposition testimony where he testified the blasting proposal was just a proposal and was separate from the purchase agreement.

AED then brought an untimely motion to alter or amend judgment claiming, *inter alia*, a new theory that it asserted invalidated the court's ruling on its (second) motion to reconsider. AED claimed the purchase agreement had actually been terminated and

then reinstated at the same time the blasting agreement was entered. Therefore, according to AED, the court had previously erred since it relied heavily on the time interval between the two contracts as a factor in determining the one was not consideration for the other. The court denied the motion ruling yet again that the claimed facts were just conclusory allegations contrary to the evidence, including Eric Kelly's contemporaneous written statements that did not show termination of the purchase agreement, as well as deposition testimony.

Respondents assert that this Court need not reach the issue as framed by Appellant since the record shows that even if Appellant was right and the purchase agreement was illegal also, the district court was (properly) not going to provide the requested remedy and give AED its bridge back. Thus, this issue is moot and/or the district court can be affirmed on alternative grounds.

Alternatively, as to the merits of the issue, Respondents assert that the district court's rulings were correct and Appellant has failed in its burden to show error.

B. Standard of review

This issue arose for the first time via AED's motion for reconsideration. Accordingly, the standard of review is as explained in *Straub v. Smith*, 145 Idaho 65 (2007):

A decision to grant or deny a motion for reconsideration generally rests in the sound discretion of the trial court. Abuse of discretion is determined by a three part test which asks whether the district court "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason."

Id. p. 71 (internal citations omitted).

C. This issue need not be addressed since the district court would not have granted the requested relief and it is therefore moot

As to this issue, AED went down a rabbit hole with its motion to reconsider and then motion to alter and amend, and, unfortunately, took everyone along with it. As mentioned above, AED claimed the blasting agreement was consideration for and/or was material to the purchase agreement, so if the former was illegal, it would make the latter illegal as well. AED then argued that it should get its bridge back and return the \$25,000, or, alternatively, a jury trial should be held on whether AED would have sold the bridge if it could not perform the blast.

While the evidentiary and legal failures of AED's argument will be discussed below, Respondents suggest that they actually need not be reached here because even assuming arguendo that AED was right and the purchase agreement was illegal, under the equities of this case and already stated position of the district court, AED would not have obtained its requested relief, whether it be via the motion to reconsider or a jury trial. In other words, even if Appellant had succeeded on this issue, the relief would be no different than where things are now—AED has the money and KDC has the bridge.

Thus, since AED would not receive its desired remedy, the issue is moot (and/or any claimed error is harmless). Alternatively, while the district court did not address the issue in this way, this Court may affirm the district court's decision if an alternative legal basis supports it. *Total Success Investments, LLC v. Ada County Highway Dist.*, 148 Idaho 688, 696 (Ct. App. 2010).

The reason we know that AED was not going to get its bridge back pursuant to its theory raised in the motion for reconsideration is because the district court said this

would be an absurd result. Appellant complains in its brief that the district court seemed offended at Appellant's argument and described it as creative and taking some nerve, but Appellant misrepresents why the court was offended. It was not, as claimed by Appellant in its brief, because AED was suggesting the blasting agreement was illegal. Appellant's brief, p. 11. Rather, it was because AED was trying to take advantage of the illegality that it had itself caused. In its Memorandum Decision and Order Denying Plaintiff AED's (Second) Motion for Reconsideration (Decision Denying Motion to Reconsider) the court explained:

What has happened is, a couple of weeks ago this Court found the demolition agreement to be illegal (due to AED's failure to obtain the proper licensing in West Virginia), then, AED's counsel took that new legal determination, overlayed it on the *Quiring* case, and came up with this creative argument. The truly disturbing feature to AED's argument is it ignores the fact that it was AED's own foibles that caused the demolition agreement to be illegal. In essence, AED argues: "We screwed up and didn't get a valid contractor's license, which caused the demolition agreement to be invalid, and even though the purchase agreement doesn't reference the demolition agreement or our [AED's] ability to blast, and even though we've kept the \$25,000 consideration for the purchase agreement, we would in any event like this Court to find that the purchase [sic] agreement [was] *the* consideration of the demolition [sic] agreement, and since it was illegal, find the purchase agreement was illegal, and give us the bridge back." That takes some nerve. . . .

Decision Denying Motion to Reconsider, p. 11 (emphasis in the original). (R. p. 911.)

The district court then reiterated verbatim its holding in its Decision Granting Summary Judgment, after which, the court explained:

. . . After re-reading this decision, in addition to the obvious fact that it was AED's mistake in not obtaining the proper licensing that cause[d] the demolition agreement to be illegal, another fact should jump out at the reader. The *purpose* of the demolition agreement was to, oddly enough, demolish a bridge. AED didn't have the proper licensing to do that job at the time it entered into the demolition agreement, which meant, by law, AED lacked the ability to enter into that demolition agreement. The *purpose* of the purchase agreement was to *sell* the bridge to AED. No

special licensing is required to sell the bridge. As just mentioned, this Court wrote:

In Idaho, where a public works contractor does not fall within an exemption listed in I.C. § 54-1903, and is required to have a public works license, the failure by a subcontractor to have the requisite license will render its contract with a general contractor illegal, "because the contract constituted an agreement to perform an illegal act." *Barry*, 140 Idaho 827, 832, 103 P.3d 440, 445.

Id., p. 15. Thus, AED's demolition agreement with KDC is an agreement to perform an illegal act (due solely to AED's own negligent act in failing to get the proper licensing, an issue only AED controlled), and thus, an illegal agreement. However, nothing about AED's negligent act caused AED to be unable to convey title to the bridge eleven days before any demolition agreement was entered into. Nothing about AED's own negligent act in failing to obtain the proper licensing caused AED to lack the capacity to contract with KDC to sell KDC the bridge.

To allow AED the ability to use AED's own error in failing to get the required licensing (which seven months later this Court determined caused the demolition agreement to be illegal), to now have this Court also declare the purchase agreement illegal, would allow AED, only with the benefit of hindsight (this Court's decision two weeks ago) to transcend both space and time, as only AED knew at the time that it lacked the required license, to invalidate the sale of the bridge. This would allow any party in AED's position to surreptitiously create its own poison pill, to be used later when that party finds such position advantageous. This Court, and all of contract law, will not countenance such an absurd result.

Decision Denying Motion to Reconsider, p. 14-15 (emphasis in the original). (R. p. 914-915.)

Given these comments by the court, it cannot be seriously believed that the court would have provided the relief requested by AED, which was to vacate its ruling declaring KDC to be the owner of the bridge and order AED to return the \$25,000 KDC paid for the bridge since its recovery was limited to unjust enrichment.⁷ (R. p. 756.)

⁷ Even though KDC had spent \$70,000 (including the purchase price) and performed substantial work in preparing the bridge for demolition before the Coast Guard halted it. (R. p. 152.)

For authority, AED cited to *Barry, supra*, for the proposition that the court will not enforce an illegal contract, but that decision also explains that the court can do so under the circumstances of our case. This Court explained in *Barry*:

The Court will not enforce an illegal contract. Illegal contracts are void, and generally the Court will "leave the parties where it finds them." This Court has stated that, "the rationale for leaving the parties where the law finds them is premised on the notion that both parties are equally at fault." When the Court "leaves the parties where it finds them," it denies recovery to either party.

This Court has recognized situations in which relief to a party to an illegal contract is warranted to avoid unduly harsh results. In such instances, the Court has awarded damages based on the rationale that, although illegal contracts are unenforceable as a matter of public policy, circumstances arise where denying a party relief would frustrate the public interest more than "leaving the parties where they lie." This Court has stated that, "barring the strict application of the illegality doctrine, the central focus must be whether the ends of the law will be furthered or defeated by granting the relief requested."

The Court has recognized an exception to the unenforceability of an illegal contract where the parties are not "in pari delicto," granting relief to the innocent party.

Id., 140 Idaho p. 832-833 (emphasis added, internal citations omitted).

In our case, if the court left the parties where it found them, it means that AED has the \$25,000 purchase price of the bridge and KDC has the bridge. The dismissal of AED's claims as a practical matter established that the bridge was KDC's even if the court did not affirmatively quiet title in KDC's name. However, if this is considered to be enforcing an illegal contract, then the court had the authority to do so since the parties are not in pari delicto, AED having caused the illegality of the purchase agreement.

Back to the point, given that the district court could properly leave the bridge with KDC and the money with AED, it again cannot be seriously believed given the court's

rulings, that it would have done anything else. This is further supported by an earlier ruling by the court that AED was not entitled to rescission as remedy for various reasons including its unclean hands, discussed further below.

Thus, since AED would not have ended up with the bridge, AED's complaints that the district court erred by not giving it the bridge pursuant to its motion for reconsideration or ordering a jury trial with the same ultimate goal are moot, or, alternatively, any error of the district court is harmless.

D. The blasting agreement was separate from and was not consideration for the purchase agreement and so the illegality of the blasting agreement did not render the purchase agreement illegal

Alternatively, Respondents assert that even if the merits are reached, Appellant has failed in its burden of proving the court abused its discretion in denying the motion to reconsider and motion to alter or amend judgment.

The first problem with Appellant's argument is there was insufficient admissible evidence before the court to establish that the blasting agreement was consideration for the purchase agreement.⁸ The factual deficiencies of Appellant's argument are well described by the district court in its Decision Denying Motion to Reconsider, where the court explained:

AED argues:

In this case, the agreement to sell the bridge was contingent upon execution and performance of a contract [sic] for AED to blast the bridge. KDC did in fact execute a document for AED to perform the

⁸ Just as in the district court, Appellant has not been candid with this Court about what evidence is actually in the record and keeps referring to evidence which was stricken.

work and has clearly stated that it had a present intent to perform that obligation incident to the agreement to buy the bridge. This consideration for the sale of the bridge consisted of the TWENTY-FIVE THOUSAND DOLLARS AND NO/100 CENTS (\$25,000.00) recited in the contract, as well as the illegal agreement to perform the blasting work.

Id., p. 2. It is important to note that there is no citation given to the record for these three sentences written by counsel for AED. Perhaps the reason for a lack of citation is the fact that there is nothing in the record which supports any of these three sentences. The purchase agreement does not reference the demolition agreement in any way, and the purchase agreement contains a merger clause. The purchase agreement was entered into eleven days before the demolition agreement, if the demolition agreement was even entered into. Since the purchase agreement is clear and unambiguous and contains a merger clause, any extrinsic evidence is barred by parol evidence.

Additionally, any extrinsic evidence would not be allowed because AED has not asked this Court to reconsider its dismissal of AED's fraud claims. But, the ultimate frustration the Court has with AED's counsel's failure to cite any portion of the record comes from the fact that even if there were some basis to allow extrinsic evidence (there isn't), AED's counsel's own client, Eric J. Kelly, Jr., testified that AED's proposal to blast the bridge was just that, a "proposal", and that the proposal was separate from sale of the bridge. Deposition of Eric J. Kelly, Sr., January 27, 2011, p.76, L. 24—p. 77, L. 13. AED's counsel then makes the following claim: "Here, there is no question that the sales contract would not have been signed but for the illegal consideration of the blasting agreement." Memorandum in Support of Plaintiff's Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment, p. 1. Counsel for AED repeats this mantra; "In this case, the undisputed evidence is that AED would not have sold the bridge to KDC without the commitment by KDC to hire AED to blast the bridge." *Id.*, p. 4. Repetition does not make something true. Repetition does not create admissible evidence. Again, there is no citation to support these claims by AED's counsel and these bald claims are completely unsupported by any admissible evidence, and, in fact are contradicted by AED's own client Eric J. Kelly, Sr.

Decision Denying Motion to Reconsider, p. 6-8 (emphasis added). (R. p. 906-908.)

The court went on to explain that the issue of whether AED would have sold the bridge without the agreement that AED would perform the demolition is completely

irrelevant given the contract language in the purchase agreement (and thus is not a material fact issue). (R. p. 908.)

The court further explained KDC's position, *to wit*, that the purchase agreement itself recites the consideration supporting it, which does not include the demolition agreement. According to the plain and unambiguous language of the purchase agreement, the consideration was \$25,000 plus those additional promises expressed within the terms of the purchase agreement. (R. p. 909.) One of those promises was that KDC would demolish and remove the bridge by June 1, 2011.⁹ (R. p. 68.)

The court continued in explaining that KDC argues nowhere in the purchase agreement is a separate agreement for AED to blast the bridge discussed or even referenced. The purchase agreement also contains a merger clause which limits the parties' agreement to that set forth in the purchase agreement itself. Therefore, if the promises are not expressly within the purchase agreement itself, they are not part of the consideration. In short, the illegal demolition agreement was not part of the consideration for the purchase of the bridge, nor was the sale contingent upon anything (and the purchase agreement itself states there are no contingencies (R. p. 68.)). Finally, KDC pointed out that Eric Kelly's deposition testimony stated the purchase and demolition agreements were separate. (R. p. 909.)

The court concluded:

⁹ The purchase agreement provided that "[a]s a material inducement and as part of the consideration to the Sellers to enter into this Agreement, Buyer [KDC] hereby agrees that it shall demolish and remove the Bridge..." (R. p. 68.) As the court earlier said: "It is difficult to imagine how AED claims it would not have sold the bridge if AED would not retain the ability to blow up the bridge, when in the 'purchase agreement' AED specifically gave KDC the *exclusive* ability to demolish the bridge." Memorandum Decision and Order of Defendant KDC's Motion for Preliminary Injunction, p. 13. (R. p. 334.)

It is patently obvious AED *believes* it had a promise by KDC that KDC would use AED to blast the bridge. AED has a three-fold problem promulgating this belief. First, AED has no admissible evidence to prove such “belief” because the purchase agreement it entered into is not ambiguous. Second, Kelly’s deposition cited above shows the “belief” is at the very least internally contradicted by AED, if not unfounded. Third, from a legal standpoint, this belief is irrelevant. The intention of the parties to a contract is determined by what intention is expressed by the language used; the issue is *not* the intention existing in the minds of the parties.

What KDC argues, and what has not been properly disputed by AED, is that the purchase agreement was a separate agreement from the demolition agreement. Thus, there is no reference in the purchase agreement to any existing or future demolition agreement. This Court has found the purchase agreement is not ambiguous. Absent a showing by AED that the purchase agreement *was* ambiguous (which AED has failed to do), this Court cannot consider parol evidence and alter the written agreement of the parties. This Court has not determined the purchase agreement to be illegal, and there is simply nothing before the Court (other than Eric Kelly’s arguably self-serving affidavit) to indicate that the demolition agreement was to form a portion of the consideration supporting the purchase agreement, which was entered into more than one week prior to the demolition agreement and makes no reference to it.

Decision Denying Motion to Reconsider, p. 18-19 (emphasis in the original, internal citations omitted). (R. p. 918-919.)

AED then filed its motion to alter or amend judgment. In addition to deriding the district court for its legal analysis, it demanded that the court must find certain facts to be true, without mentioning that they had previously been stricken by the court and so were not in the record. (R. p. 996-997.) Further, the motion attempted to create a new factual scenario in an effort to argue the district court erred by heavily relying on the fact that the purchase agreement and blasting agreement were entered into at different times. (R. p. 995-997.) According to AED, the purchase agreement had been entered into on May 20, 2010, but had been terminated on May 27, 2010, due to KDC’s failure

to pay for the bridge and then supposedly entered into again at the same time as the demolition agreement. (R. p. 996.)

In its Decision Denying Motion to Alter or Amend, the court first ruled that the motion was untimely and was incorrectly designated, but went on to consider it anyway.

Id. p. 9-10.¹⁰

The court then ruled:

AED next takes issue with the Court's finding that the purchase agreement and demolition agreement were executed at different times. *Id.*, pp. 2-4. AED sets forth a timeline for the Court, purporting to demonstrate when each agreement was entered into. *Id.*, p. 3. AED contends the purchase agreement was entered into on May 20, 2010, terminated on May 27, 2010, only to be given effect again on June 1, 2010 (with the caveat that KDC execute the demolition contract). *Id.*, p. 3. As noted by KDC, AED cites to portions of the Affidavit of Eric Kelly which have been stricken in supporting this timeline. Defendants' Response to AED, Inc.'s Motion to Alter or Amend Judgment, p. 4, fn. 1. The portions of Eric Kelly's Affidavit which remain in the record do not support the conclusion of termination AED seeks. The May 27, 2010, e-mail of Eric Kelly states he terminated the purchase agreement in writing; this writing was never made part of the record and is not before the Court. Eric Kelly's stating, "I did not [sic] terminate the agreement as I should have..." [Kelly states in his Affidavit he meant to say he did terminate the agreement as he should have] is at best ambiguous. Affidavit of Eric Kelly, Exhibit D. Kelly writes:

AED is presently weighing the opinion [sic] to decline to enter into any agreement with KDC Investments. As of today's date, May 27, 2010, you have not complied with the Contingency Agreement of May 20th, 2010.

Id. This statement is even more unclear than Kelly's misstatement as to whether he should or should not have terminated the purchase agreement. AED is arguing Kelly's *equivocal* statement (that he's weighing the option to decline to enter into an agreement with KDC), as evidence of a termination. KDC notes the deposition testimony of Eric and Lisa Kelly indicates they granted KDC an extension to pay funds under the purchase agreement. Defendants' Response to AED's Motion to Alter or Amend, p. 5.

¹⁰ Respondents suggest that this Court need not go on to merits of the motion to alter or amend because it can affirm the district court under its alternative theory of dismissal.

The evidence before the Court demonstrates the parties had heated e-mail discussions on May 27, 2010, however none of the email exchanges individually nor in their entirety can be said to amount to a termination of the purchase agreement by AED. There is simply no question of fact as to whether "AED is presently weighing the opinion [presumably option] to decline to enter into any agreement with KDC Investments..." amounts to a termination. Whether AED was weighing its options or not, the evidence submitted to this Court simply does not amount to a termination.

Decision Denying Motion to Alter or Amend at p. 13-14 (underlined emphasis added).

Since the court ruled that the evidence does not support AED's contention that the demolition contract was consideration for the purchase agreement, it also rejected AED's argument that it misapplied *Quiring v. Quiring*, 130 Idaho 560 (1997). The court held, *inter alia*, that "[t]he amount and type of evidence in *Quiring*, is simply not present here." Decision Denying Motion to Alter or Amend, p. 15.

The court also addressed and rejected all of AED's other complaints about its earlier rulings. (*Id.* p. 15-16.) The court concluded as follows: "The questions AED has posed in its numerous successive motions for reconsideration do not involve genuine issues of material fact." *Id.* p. 16.

Respondents assert that Appellant has failed in its burden to prove the district court abused its discretion in denying the motions to reconsider and to alter or amend judgment, but will nevertheless further discuss the statements that Appellant claims raise genuine issues of material fact. Respondents assert they do not because the issues are neither genuine nor material. To address materiality first, as explained in *Bennett v. Bliss*, 103 Idaho 358 (Ct.App. 1982):

An important element here is whether a factual dispute addresses a material issue. "A material issue arises only when the matter *placed in dispute by the pleadings* is such a point as will determine the cause." (Emphasis added).

Where a contract is clear and unambiguous, its meaning and legal effect are questions of law for determination by the court. However, where the terms of a contract are ambiguous, the interpretation and meaning of those terms are questions of fact and extrinsic evidence may be considered in attempting to arrive at the true intent of the parties.

Id., p. 360 (internal citations omitted).

The statements that Appellant claims raised genuine issues of material fact that must be determined by a jury are Eric Kelly saying that he never would have sold the bridge if there was any possibility that AED would not have been involved in the demolition of it; that the purchase agreement was terminated; and he proposed to sell the bridge to KDC per the original agreement provided KDC execute a contract allowing AED to blow the bridge.

In our case, the statements are not material because they do not determine any point which will determine the cause because they are parol evidence which cannot be used to change the terms of the unambiguous purchase agreement. In other words, even if Eric Kelly really believed that he did not or would not sell the bridge if he was not going to blast it, that is still not what he contracted for in writing.

Likewise for the termination, even if he believes he terminated and then proposed to reinstate the contract so that the purchase agreement and blasting agreement would be entered into at the same time, the written contract still does not provide that the demolition agreement is consideration for the purchase agreement. In short, since his statements cannot be used to contradict the written contract, they cannot establish a material fact issue that a jury would need to decide.

Even assuming *arguendo* that the extrinsic statements are admissible, they still do not result in the purchase agreement being rendered illegal just because the

demolition agreement was and more steps are required to reach that result. Assuming for the next step of Appellant's argument that the demolition agreement was consideration for the purchase agreement, this term was of course not in writing and so an oral contract would have to be found. Appellant is in essence arguing that the written contracts themselves and an oral contract really formed one big contract, consisting of the written purchase agreement, the written demolition agreement, and an oral agreement joining the two. This in itself would be a void and unenforceable contract since it would violate the statute of frauds. In order for the illegality of the demolition agreement to void the purchase agreement as AED desires, Appellant first needs a finding that there was an (unenforceable) oral contract, with the entire reason for that finding being so it can be voided.

The next problem with Appellant's argument is that even if there was really one big contract and the demolition agreement was consideration for the purchase agreement, the two are obviously severable and so the purchase agreement does not become void simply because the demolition contract is void.

As this Court explained in *Hill v. Schultz*, 71 Idaho 145 (1951):

Where some of the provisions of an agreement are lawful and some are illegal and the same are severable and supported by distinct or apportionable considerations, and the plaintiff does not have to rely upon the illegal provisions to make his cause of action, the illegal provisions in the contract are no bar to such action.

Id. p. 149.

In short, it cannot be seriously argued that each agreement cannot stand without the other. They do not mention each other, and each one is supported by sufficient and valuable consideration (\$25,000 and other valuable promises discussed below for the

purchase agreement and \$175,000 for the demolition agreement). Each one concerns a different matter, one is the sale of a bridge and the other is for the destruction of a bridge. Further, KDC did not rely on the illegal demolition agreement to make its cause of entitlement to the bridge, but relied solely on the terms of the purchase agreement. Finally, the purchase agreement itself contains a severability clause providing that if any provision of it is determined to be illegal, it shall be stricken and the remainder of the agreement shall remain in full force and effect. (R. p. 76.)

Therefore, since the purchase agreement is divisible from the demolition agreement, even if the demolition agreement was consideration for the purchase agreement, it still does not render the purchase agreement illegal.

Similarly, Appellant has misplaced its reliance on *Quiring, supra*. Appellant relied on *Quiring* for the proposition that if any part of the consideration for a contract is illegal it renders that contract illegal as well. There, a wife extorted a quitclaim deed from her husband pursuant to a written agreement (in which he relinquished his interest in the property) in exchange for her not reporting the husband's alleged sexual improprieties with her daughters. This Court refused to enforce the written agreement or the quitclaim deed. This Court stated "The Agreement is illegal. Transfer of the quitclaim deed was premised on illegal consideration. The quitclaim deed was obtained through extortion, threats of violence and public exposure to cause loss of employment." *Id.*, 130 Idaho p. 568.

The result in *Quiring*, refusal to enforce an extorted agreement, simply does not apply here and give AED the bridge back. Even if the demolition agreement was part of the consideration for the purchase agreement (and if it was not, *Quiring* does not apply

at all), KDC did not force AED to enter into the illegal blasting agreement as the wife forced the husband. Instead, KDC entered into a negotiated agreement and paid valuable consideration for the bridge, in addition to what Appellant claims is illegal consideration. In short, AED cannot use its own failings of licensure which resulted in the demolition agreement being illegal to infect the otherwise legal purchase agreement.

To summarize, regardless of whether the parol evidence of Eric Kelly is admissible, it still did not create a material fact issue. If Eric Kelly did condition the bridge sale on the demolition agreement, those two contracts are severable, and the illegality of the demolition agreement does not void the purchase agreement.

Next, the fact issues raised by the statements of Eric Kelly are not genuine. Eric Kelly's claim that the blasting agreement was consideration for the purchase agreement is contradicted by everything else, including the purchase agreement itself which recites the consideration (which does not include the blasting agreement), as well as his own statement in his deposition that they were separate agreements.

Likewise, Eric Kelly's statement that he would not have sold the bridge if there was any possibility AED would not be involved with the blasting is directly contrary to the fact that he did just that in the purchase agreement of May 20, 2010, which did not provide that AED would do the blasting.¹¹

According to Eric Kelly, the parties had been discussing the purchase of the bridge and blasting job for months. It simply strains credulity to suggest that if the blast job was a deal breaker for AED it would not have been included in the purchase

¹¹ Relevant to the materiality discussion, above, this also shows that even if the blasting agreement was subjectively important to Eric Kelly and in his mind was a condition of the sale of the bridge, those beliefs are not the same as legal consideration.

agreement, particularly where AED was able to obtain favorable provisions such as venue in Kootenai County. Significantly, the purchase agreement was not some amateurish or abbreviated document; it contains 11 pages of recitals and terms. (R. p. 129-139.) Simply put, if the blasting job was really material to Eric Kelly, he would have put it in the purchase agreement.

While Eric Kelly's affidavit which purported to establish how much AED expected to make blasting the bridge was stricken (although Appellant does not mention this nor challenge the ruling on appeal), Respondents will nevertheless discuss this point since Appellant does. In short, the consideration AED received from KDC, which was both the purchase price and KDC taking over its significant liability, was considerable, sufficient, and hardly unfair.

While AED no doubt desired to maximize its profit from its dealings with the bridge, simply selling the bridge without the follow up work still turned a handy profit. AED bought the bridge for one dollar (\$1.00), so immediately selling it for \$25,000 represents an extremely good return on its investment. (R. p. 618.)

Furthermore, when AED bought the bridge it also agreed to demolish and remove the bridge by June 1, 2011, and in selling it to KDC, relieved itself of that costly obligation.¹² Demolition and removal of the bridge was a significant undertaking which even Eric Kelly said was fraught with potential problems since the bridge crosses a river with substantial commercial traffic and could not be obstructed for more than 24 hours at a time. (R. p. 469.) AED's job of blasting the steel superstructure was only a part of

¹² AED maintains that its obligation to remove the bridge was non-assignable, while this issue did not need to be resolved below nor does it on appeal, Respondent points out (as did the district court), the "Asset Purchase and Liability Assumption Agreement" unequivocally assigned the obligation to KDC that AED claims it could not assign.

the overall demolition and removal of the bridge, AED was not removing the piers, which is the main cost of the demolition job. Nor was AED responsible for debris removal. (R. p. 84-86.)

As to Eric Kelly's claim that he had terminated the purchase agreement and then proposed to make the blasting agreement a condition of selling the bridge, this, as the district court ruled, is contrary to the evidence, including his email that said he did not terminate the purchase agreement (although he says he meant to say he did) and the depositions of him and his wife where they stated KDC was instead given an extension to pay. Further, it is significant that the previously signed purchase agreement was not re-signed on the later day which Appellant claims it came into existence.

As this Court explained in *Nelson v. Steer*, 118 Idaho 409 (1990):

Additionally, "To withstand a motion for summary judgment, the [non-moving party's] case must be anchored in something more solid than speculation; a mere scintilla of evidence is not enough to create a genuine issue." It is not the judge's function to weigh evidence, "but to determine whether there is a genuine issue for trial . . . [T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Summary judgment should be granted if the evidence in opposition to the motion "is merely colorable" or "is not significantly probative."

Id., p. 410 (internal citations omitted).

In short, these fact issues are not genuine because they are unsupported or contradicted by Eric Kelly himself. This is not a matter of the court making credibility decisions and improperly finding the facts on summary judgment, rather, the court properly found they were not genuine issues. A litigant's claims that are clearly disproved by the record do not create a genuine issue of material fact, and Eric Kelly's new statements which contradict his old ones do not create one here.

To summarize, Respondents suggest that this Court need not consider this issue at all because it is moot, but if it does, Appellant has failed in meeting its burden of showing that the district court abused its discretion in denying the motion to reconsider and motion to alter or amend judgment.

III.

The District Court did not err by dismissing AED's claim of fraudulent inducement on summary judgment.

Respondents have reversed the order of Appellant's issues III and IV because the later is partially dispositive of the former and so will be addressed first.

On appeal, Appellant only argues that the district court erred by dismissing on summary judgment its fraudulent inducement claim due to lack of evidence. However, this was only one of two independent grounds for dismissal utilized by the district court.

The court actually dismissed AED's fraud claims because 1) AED had no right to rely on any alleged misrepresentations since it did not have a West Virginia contractor's license, and 2) no evidence existed that KDC had no intention of allowing AED to blast the bridge when the demolition agreement was entered into. (R. p. 730.)

Appellant has not challenged the first reason for dismissal which held that since AED was unlicensed when bidding and/or entering into the blasting agreement (and thus it was illegal), it could not reasonably rely on alleged misrepresentations regarding that agreement. Thus, even if Appellant is correct and the court erred because there was sufficient evidence of fraudulent inducement, the district court must nevertheless be affirmed since there is an independent and unchallenged basis for the dismissal.

Alternatively, Respondents assert that AED has failed in its burden of proving the error it does raise. Without unnecessarily reiterating its ruling, but for all the reasons in it, the district court did not err because there was not sufficient evidence of fraudulent inducement. In short, AED's argument is just more of the same discussed in Issue II, in other words, there is no evidence, only speculation which does not create a genuine issue of material fact.

To comment on a few points, AED tries to make much of KDC's offer to sell the bridge back to AED for \$175,000, resulting in a profit of \$150,000 (which is not even correct since KDC had bought the bridge and then spent more money preparing it for demolition). AED fails to provide the context, which is during an argument between Eric Kelly and Lee Chaklos, Lee offered to sell the bridge back for \$25,000. Eric Kelly then asked Krystal Chaklos via email if it was a serious offer or just hot air, and if it was serious to put it in writing. (R. p. 507.) Krystal responded that she would sell the bridge back for what she would pay AED to blast due to the fact that she had done a lot of preliminary work and would then have to do more to undo the progress already made, but she would be handing him a project and all contacts and paperwork of approvals she already has. (R. p. 505.)

When all the evidence is considered, the offer simply does not establish a genuine fact issue as to fraud in the inducement, and rather, conclusively disproves it. Appellant argues that offering to sell the bridge back at a profit is evidence that KDC did not really intend for AED to do the blast and only agreed so KDC could buy the bridge. This makes no sense because the first offer of \$25,000 would not result in any profit to KDC from any dealings with AED and would leave KDC without the bridge. Obviously,

buying something and offering to sell it back at no profit does not establish fraud in the inducement, nor can any offer made afterwards even if it contained a profit.

Interestingly, as the dispute continued, Eric Kelly made a very similar offer to KDC when it told it that if it wants AED off the job, it can pay AED \$75,000. (R. p. 649.) Obviously, these types of offers do not show fraud in the inducement, but instead show the frustration and posturing of parties to a deal going bad.

Finally, lack of evidence aside, the fatal flaw with Appellant's fraud in the inducement claim is that KDC did not simply terminate the contract based on AED's failure to have its licensing at the time of bidding or entering into the contract as it could have. Rather, it tried to get AED to obtain the license which AED refused to do.¹³

For example, one email to AED exclaimed in capital letters "[y]ou will need a WEST VIRGINIA CONTRACTORS LICENCE [sic]! from the state of West Virginia to participate in this project." (R. p. 507.) Further, KDC only terminated the demolition agreement after AED's attorney advised that AED was filing suit.

So again, Respondents assert this Court need not reach this argument because the district court must be affirmed on the alternative grounds, or, if it is reached, Appellant has failed in its burden of establishing error.

¹³ AED's refusal to obtain licensing would also be an independent and intervening event.

IV.

The District Court did not err by holding that AED could not seek rescission because AED had not made a proper tender of KDC's consideration

This is again an issue which need not be reached. First, AED requested recession based on its fraud claim, but since AED did not appeal all of the grounds for the dismissal of its fraud claim it must be affirmed, so there is no basis for rescission.

Second, Appellant did not appeal all the decisions necessary to reverse the district court as to the rescission issue. Appellant challenges on appeal only the court's ruling that a sufficient tender must be made prior to the filing of the lawsuit, and Respondents assert Appellant fails in showing error even for that.

Appellant did not challenge on appeal the additional, independent grounds of the district court's ruling that rescission was not an available remedy for AED. This includes the ruling that AED is not entitled to the equitable rescission it requests since it did not have its West Virginia Contractor's license in place and therefore did not have clean hands. (R. p. 712-713.) Further, AED may have assigned what it had no right to assign (AED claims the obligation to remove the bridge was unassignable, but clearly assigned it to KDC in the purchase agreement) and in so doing, committed a fraud upon the party who sold the bridge to AED and the federal court. (R. p. 713.) The district court also ruled that AED had failed to meet the pleading requirements for rescission. (R. p. 713-715.)

Accordingly, Respondents assert that the district court's ruling on rescission must be affirmed for any one of the reasons above.

V.

The District Court did not err by striking certain portions of AED's affidavits filed in opposition to summary judgment.

A. Introduction

Respondents suggest that this Court need not consider whether the district court committed any error in striking an affidavit and portions of another one. This is because if there was error, it was harmless.

B. Standard of review

Trial court decisions admitting or excluding evidence on summary judgment are viewed under the abuse of discretion standard. *J-U-B Eng'rs, Inc. v. Sec. Ins. Co.*, 146 Idaho 311 (2008).

The harmless error rule provides as follows:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

I.R.C.P. 61.

C. The court did not err, or, if it did, any evidentiary error is harmless

The district court struck paragraphs 6, 8, 9, 10, 11, 12, 13, 14, 17, 19, 20, 21, 22, 23, 24, 30, 31, and 33 of the Affidavit of Eric J. Kelly in Opposition to Summary Judgment, the entire Affidavit of Mark Wilburn in Opposition to Summary Judgment, and the entire Affidavit of Eric Kelly in Support of Motion to Reconsider. (R. p. 694-695,

919.) On appeal, AED challenges only the rulings striking the Mark Wilburn affidavit and of paragraphs 9, 10, 20, 30, 31, and 33 of the Affidavit of Eric Kelly in Opposition to Summary Judgment.

Respondents assert that the district court's rulings are correct and speak for themselves, and Appellant has failed to establish any error in the first instance. However, Respondents will not belabor the rulings because assuming for the sake of argument every ruling of the district court was wrong, reversal is still not required because the errors were harmless.

For example, the district court struck the Affidavit of Mark Wilburn which was propounded to establish that the West Virginia Contractor's license took three days to obtain and it was obtained on October 17, 2010. Ignoring that the court actually had that date before it from other sources, if those facts are considered now, it changes nothing. AED still did not have the license at the time of contracting and did not even apply for it until some 5½ months later after suit was filed. In short, no decision would be any different with the definitive fact that AED applied for the license on October 14, 2010, and received it on October 17, 2010, when the contract was entered into some 5½ months earlier.

Nor would consideration of the paragraphs struck from the Affidavit of Eric Kelly change anything. As to paragraphs 30, 31 and 33, they explain that Eric Kelly is worried if the court continues to rule that AED cannot rescind the purchase agreement, the bridge will be used as security and therefore any damages AED receives from the court will have lower priority. Also, Eric Kelly does not like the way that KDC plans to demolish the bridge. Obviously, given the result below, Eric Kelly's worries were

unfounded, but even before summary judgment was entered, they were not somehow a defense to it.

Appellant also challenges the district court striking paragraph 9 which states that AED was reluctant to sell the bridge to Chaklos or any party because of its ultimate responsibility to assure removal of the bridge. Appellant challenges the district court striking paragraph 10 where Eric Kelly states he believes that the Chaklos' can properly demolish the bridge with AED's assistance and that would keep AED in the loop.

Appellant claims that all these paragraphs (9, 10, 30, 31 & 33) further explain why the demolition agreement was material to the purchase agreement. While Respondents suggest that they either do not or at most do a poor job of it, that is not surprising since that was not the reason they were propounded. The affidavit was filed in opposition to summary judgment, and the consideration for the purchase agreement issue did not come up until the (second) motion to reconsider. However, AED never requested the court reconsider its evidentiary rulings and/or argued the paragraphs were admissible for a new purpose and claim of relevance. Thus, Respondents suggest that this Court should decline to make that determination in the first instance.

In any event, the result of this case would not be different had these five paragraphs been in evidence. This is true whether they were used to explain Eric Kelly's post judgment concerns, or whether used as support for the theory on reconsideration. They are either inadmissible parol evidence being used to change the terms of an unambiguous written contract, or are just cumulative to Eric Kelly's other statements that he would not have sold the bridge if he would not be blasting it, which as previously explained, do not create a genuine issue of material fact.

Finally, Appellant challenges the striking of paragraph 20, which establishes that KDC did not pay the \$30,000 on or before June 9, 2010, and also, that KDC did not substitute itself as the real party in interest into the federal court case. While Appellant does not even attempt to explain the significance of these statements and how they would lead to reversal here, they presumably are related to the fraud claim. However, since dismissal of that claim must be affirmed as explained above, any error regarding striking these claims is harmless.

If Paragraph 20 is not related to the fraud claim, any error is still harmless, since the failure to pay the \$30,000 was an otherwise established fact, and the failure of KDC to substitute into the federal case is not relevant to any issue in this suit. Although interestingly, the fact that AED was complaining that KDC had not substituted into the federal lawsuit in Ohio as the real party in interest strongly suggests that contrary to AED's claims, its obligation to remove the bridge was assigned to KDC.

To conclude, Respondents first assert that Appellant has not shown error, but assuming *arguendo* it did, if the stricken paragraphs are all considered, any error is harmless because they do not change a thing.

VI.

It is KDC, and not AED, who is entitled to attorney fees on appeal.

Since Respondents' response to AED's argument that AED is entitled to attorney fees on appeal is the other side of the same coin regarding KDC's issue that KDC is entitled to attorney fees on appeal, they will be addressed in the same section.

As mentioned above, the district court awarded attorney fees in favor of KDC because the case concerned a commercial transaction pursuant to I.C. § 12-120(3). Appellant does not challenge this award on appeal.

KDC asserts that it is entitled to attorney fees on appeal as the prevailing party and the purchase of the bridge is a commercial transaction under I.C. § 12-120(3) because the purchase agreement was a legal contract.

On the other hand, Appellant is not entitled to attorney fees as it is not the prevailing party. Further, if Appellant should prevail on Issue II and this Court rule the purchase agreement was also an illegal agreement (or that it must be remanded for trial to determine it), AED would not be entitled to attorney fees since attorney fees cannot be awarded based on an illegal contract. *Barry, supra*, 140 Idaho 835. This is particularly true here since Appellant is the one who caused the contract to be illegal.

Further, Respondents assert that they are entitled to attorney fees under I.C. § 12-121. On appeal, an award of attorney fees may be granted under I.C. § 12-121 and I.A.R. 41 to the prevailing party. Such an award is appropriate when the court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably or without foundation. *Excel Leasing Co. v. Christensen*, 115 Idaho 708, 712, (Ct.App. 1989).

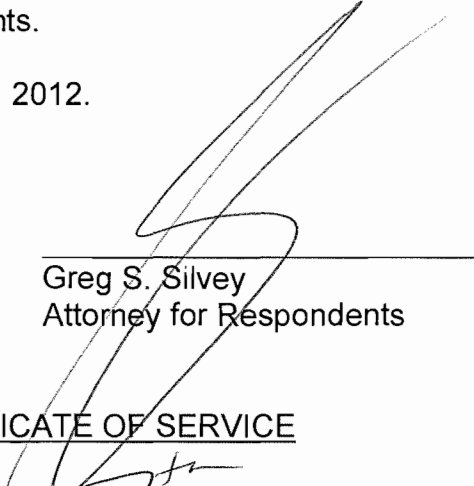
This Court has awarded attorney fees in frivolous appeals under I.C. § 12-121 where the "lawsuit was devoid of any legal or factual basis, as is this appeal." *Rae v. Bunce*, 145 Idaho 798, 806 (2008). Likewise, "[a]n award of attorney fees is appropriate if the appellant simply invites the appellate court to second-guess the trial court on conflicting evidence." *Downey v. Vavold*, 144 Idaho 592, 596 (2007).

Respondents assert that this appeal has been brought frivolously, with Appellant misrepresenting the record, failing to challenge all the district court rulings required to actually win reversal, and, in short, merely inviting this Court to second guess the district court's decisions.

CONCLUSION

Respondents respectfully request that this Court affirm the district court's grant of summary judgment and all relief in favorable to Respondents, and further, to award costs and attorney fees to Respondents.

DATED this 7th day of May, 2012.



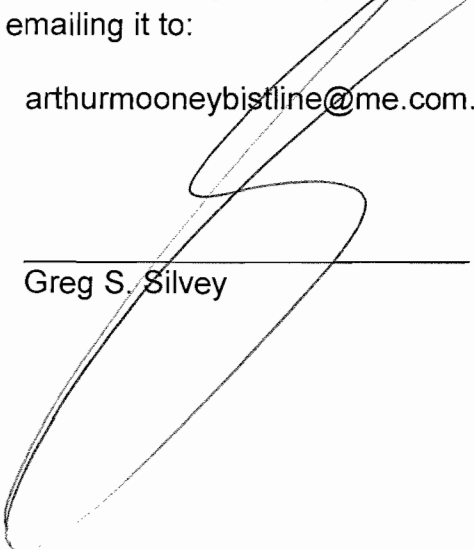
Greg S. Silvey
Attorney for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of May, 2012, pursuant to an agreement with opposing counsel, I served a true and correct PDF copy of the foregoing RESPONDENTS' BRIEF, by emailing it to:

ARTHUR M. BISTLINE

arthurmooneybistline@me.com.



Greg S. Silvey