1-16-2013

Intermountain Real Properties v. Draw Respondent's Brief Dckt. 40335

IN THE SUPREME COURT OF THE STATE OF IDAHO

INTERMOUNTAIN REAL PROPERTIES, LLC., an Idaho limited liability company, as assignee of TMC CONTRACTORS, INC.,	)	Supreme Court Docket No. 2012-40335
Plaintiff,	)	Bingham County Case No. CV-2009-1641
v.	)	
KEVIN TAGGART, an Individual, CAMDEN COURT, LLC, an Idaho limited liability company, DRAW, LLC.,an Idaho limited liability company, TIMBERLINE PROPERTIES, LLC., an Idaho limited liability company, AARON DEAN EDDINGTON, an Individual, CITIZENS COMMUNITY BANK, and ALL OTHER PERSON UNKNOWN CLAIMING INTEREST IN THE SUBJECT PROPERTY,	)	
Defendants.	)	

RESPONDENT'S BRIEF

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

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I. STATEMENT OF THE CASE

A. Nature of the Case.

Defendant/Respondent Draw, LLC ("Draw") agrees with Plaintiff/Appellant Intermountain Real Properties, LLC ("Intermountain") statement regarding the nature of the case with the following exceptions:

Intermountain states that Draw owned real property within the Taylorview Development. It is disputed that Draw's real property was within the Taylorview Development. Intermountain also states that the district court determined that Draw's property was not within Taylorview Development. While this statement is accurate, the district court also analyzed this case with the assumption that Draw's property was actually within Taylorview Development. The district court still found no genuine issue of material fact existed even if it was assumed that Draw's property was actually within Taylorview Development.

B. Course of Proceedings Below.

Draw largely agrees with Intermountain's statement regarding the course of proceedings below. However, it should be noted that TMC's original Complaint filed on July 23, 2009 was not solely for foreclosure of a materialman's lien. TMC's Complaint also contained claims for "Debt Due Under Open Account and for Lien Foreclosure," breach of contract, unjust enrichment, and quantum meruit. R. Vol. I, p. 16 - 29. It should also be noted that Intermountain's Amended Complaint filed on August 7, 2009 contained claims in the following order: Count I- Breach of

Contract, Count Two - Open Account, Count Three - Unjust Enrichment, and Count Four - Lien Foreclosure. R. Vol. I, p. 37-54.

C. Statement of Facts.

1. Shawn Allen sold lots located in Shelley, Bingham County, Idaho, to Kevin Taggart and Timberline, LLC. R. Vol. I, p. 138. Timberline was owned by Kevin Taggart. *Order Granting Motion to Augment*, Doc. 3, p. 2, para. 1.

2. Subsequently, on or about December 21, 2007, Draw purchased an unimproved lot in Shelley, Bingham County, Idaho, from Timberline Properties, LLC. R. Vol. I, p. 227; *Order Granting Motion to Augment*, Doc. 1, p. 2, para. 2.

3. In April of 2008, defendant Kevin Taggart entered into a contract with TMC Contractors to pave a driveway/parking lot in a development in Shelley, Bingham County, Idaho. *Order Granting Motion to Augment*, Doc. 3, p. 2, para. 2; R. Vol. I, p. 36.

4. The Proposal and Contract from TMC for the paving work indicates it was sent to Kevin Taggart, Century 21 Advantage, 170 W. Main St., Rigby, ID 83442, Attn: Kevin Taggart 529-1750 Fax, 745-5221. It was signed as "Accepted By" by Kevin Taggart. R. Vol. I, p. 36.

5. In October, 2008, TMC performed the paving work and sent Kevin Taggart an invoice for the amount due. R. Vol. I, p. 30 and 53.

6. Draw was not a party to or involved with the TMC contract in any way and only became aware that the parking lot/driveway was being paved after it was completed. *Order Granting Motion to Augment*, Doc. 1, p. 2, para. 6; Doc. 2, p. 2, para. 6; Doc. 3, p. 2, para. 3. Kevin

Taggart has never had an ownership interest in Draw and was not Draw's agent. *Order Granting Motion to Augment*, Doc. 1, p. 3, para. 12; Doc. 3, p. 2, para. 3-4.

7. Draw only became aware of the existence of the TMC paving contract when it was served with the Complaint in this matter. *Order Granting Motion to Augment*, Doc. 1, p. 2, para. 6; Doc. 2, p. 2, para. 6.

8. Draw's property was and is vacant, unimproved land. *Order Granting Motion to Augment*, Doc. 1, p. 3, para. 13; Doc. 3, p. 2, para. 3. Prior to TMC paving the parking lot/driveway for Kevin Taggart, Draw had and continues to have access to its property by way of a separate gravel road. *Order Granting Motion to Augment*, Doc. 1, p. 2, para. 5; Doc. 2, p. 2, para. 5; Doc. 3, p. 2, para. 3; Doc. 9, p. 2, para. 4, p. 3, para. 7-8.

II. ADDITIONAL ISSUES ON APPEAL

1. Did Appellant Intermoutain Real Properties, LLC waive its contention that the district court failed to apply the language of I.C. § 45-501.

2. Is Apellant Intermountain Real Properties, LLC entitled to attorney fees on appeal?

3. Is Respondent Draw, LLC entitled to attorney fees on appeal under I.C. § 12-120(3)?

III. ARGUMENT

A. APPELLANT INTERMOUNTAIN REAL PROPERTIES, LLC, WAIVED ITS CONTENTION THAT THE DISTRICT COURT FAILED TO APPLY THE LANGUAGE OF I.C. § 45-501.

Intermountain lists in its "Issues Presented on Appeal" section the following two errors it claims the district court allegedly made:

1. Did the district court err in disregarding the positive testimony found in the affidavit of Robert Butler proving Draw's real property was within Taylorview Development?

2. Did the district court err as a matter of law in awarding Draw some of its attorney fees based upon I.C. § 12-120(3) finding there was a commercial transaction between TMC and Draw?

Appellant's Brief, p. 5.

However, in the body of its brief Intermountain also contends that the district court "failed to apply the clear language of § 45-501." *Appellant's Brief*, p. 7. Intermountain failed to include this as an issue in the statement of issues as required by I.A.R. 35(a)(4), which states:

> the brief of appellant shall contain: . . . (4) . . . A list of the issues presented on appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the issues should be short and concise, and should not be repetitious. The issues shall fairly state the issues presented for review. The statement of the issues presented will be deemed to include every subsidiary issue fairly comprised therein.

I.A.R. 35(a)(4).

"Failure of the appellant to include an issue in the statement of issues required by I.A.R. 35(a)(4) will eliminate consideration of that issue on appeal." *Kugler v. Drown*, 119 Idaho 687, 691 (Ct. App. 1991).

This error omitted from Intermountain's "Issues Presented on Appeal" cannot be considered a subsidiary issue fairly comprised within the issue of whether the district court disregarded the positive testimony of Robert Butler. The two issues are separate and distinct. The failure to apply the language of a statute concerns the interpretation and application of a statute to established facts.

Conversely, disregarding affidavit testimony is an evidentiary issue.

Pursuant to I.A.R. 35(a)(4) and Idaho case law, this Court should find that Intermountain has waived the issue as to whether the district court failed to apply the language of I.C. § 45-501. However, in the event this Court fails to find that Intermountain has waived this issue, Draw has addressed this alleged error in Section III, Part B-2 below.

B. THE DISTRICT COURT DID NOT DISREGARD THE TESTIMONY OF ROBERT BUTLER THAT DRAW'S PROPERTY WAS WITHIN TAYLORVIEW DEVELOPMENT.

Intermountain contends the district court made two errors not related to attorney fees. First, that on Intermountain's Motion for Reconsideration, it disregarded positive testimony of Robert Butler establishing Draw's parcel as being part of Taylorview Development. Second, it contends in the body of its brief that the district court failed to apply the clear language of I.C. § 45-501. The district court's decisions were correct in both instances.

1. *The District Court Did Not Disregard the Positive Testimony of Robert Butler.*

Intermountain contends that the district court disregarded the affidavit testimony of Robert Butler that Draw's parcel was at one time part of Taylorview Development. Intermountain contends that the district court erroneously relied upon the "black lines" on the record of survey and the Assessor's plat to reach its determination that Draw's parcel was not located in Taylorview Development. *Appellant's Brief*, p. 9.

The district court found that "based upon the evidence in the record, at best, a fact issue

remains whether or not Draw's Property lies within the Taylorview Development." R. Vol. I, p. 250. However, after making this finding, the district court performed an in depth analysis with the assumption that Draw's property was within Taylorview Development. The district court stated the following in its *Order Denying Plaintiff's Motion to Reconsider:*

> **Assuming, however, that Draw's Property does lie within Taylorview Development**, the record does not support a finding that Draw, **as an owner of one of the Taylorview parcels,** consented to the paving or authorized the paving through Taggart as Draw's alleged agent. Taggart testified that he entered into the paving contract with TMC and that Draw was neither a party to nor involved with the TMC paving contract in any way.
>
> Nothing in the record supports a theory that Draw explicitly granted Taggart authority to act in Draw's name. Neither Taggart nor Draw acknowledged any kind of agency relationship. Since no evidence of a grant of actual authority is found in the record, there is likewise no evidence to support a theory that Taggart had implied authority to carry out the purposes of any alleged express authority.
>
> Furthermore, Intermountain has not produced any facts which, taken as true, amount to evidence of apparent authority or agency by estoppel. Intermountain bases its agency claim upon the alleged words and conduct of the alleged agent, Taggart, to establish the agency between Taggart and Draw. Apparent authority is not based on the words and conduct of the principal towards the agent, but on the principal's words and conduct toward a third party. Apparent authority cannot arise from the acts and statements of the agent alone; it must be based upon the principal's words and conduct. Thus, Taggart's words or conduct toward TMC did not amount to apparent authority to act on behalf of Draw. Only Draw could establish, by words or conduct to TMC, that Taggart was Draw's agent. Nothing in the record indicates that Draw had any contact, by words or actions, with TMC.

R. Vol. I, p. 250-51 (emphasis added).

The district court concluded, stating:

> Draw owns a parcel of real estate contiguous to the paved road, **whether that parcel lies within or outside of the Taylorview Development.** The pavement does not

> extend on to Draw's parcel. Draw has easement rights over the paved road. The record does not establish that Draw contracted with TMC to have the road paved, or agreed to the paving of the road. The record does not establish that Draw authorized Taggart to act on Draw's behalf, or that Draw's words or conduct toward TMC established Taggart as Draw's agent.

R. Vol. I, p. 251 (emphasis added).

It is undeniable that the district court did not disregard Robert Butler's testimony but analyzed the facts assuming that Draw's parcel was within the original Taylorview Development. However, this assumption did not change the district court's determination that there was no evidence that Draw was involved in the paving contract or that there was no evidence of any agency relationship between Draw and Taggart related to the paving contract. As discussed below, this lack of agency led the district court to grant Draw summary judgment. Whether Draw's property was within Taylorview Development or not, the district court's decision was correct and this Court should affirm the same.

2. *The District Court Correctly Applied the Plain Language of I.C. § 45-501.*

Assuming, for purposes of this appeal, that Intermountain did not waive this issue on appeal, the district court correctly applied the language of I.C. § 45-501 to the undisputed facts of this case. Intermountain appears to believe that if Draw's property was within Taylorview Development, than it can establish an agency relationship under I.C. § 45-501 between Draw and Allen and/or Taggart. I.C. § 45-501 states in relevant part:

> Right to lien. Every person performing labor upon, or furnishing materials to be used in the construction . . . or who grades, fills in, levels, surfaces or otherwise improves any land, . . . has a lien upon the same for the work or labor done or professional

> services or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, subcontractor, architect, builder or any person having charge of any mining claim, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this chapter: provided, that the lessee or lessees of any mining claim shall not be considered as the agent or agents of the owner under the provisions of this chapter.

I.C. § 45-501.

Intermountain focuses on the provision of § 45-501 that states "any person having charge of . . . any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this chapter." Intermountain contends that the district court failed to apply this language of § 45-501.

Intermountain's contention is that Shawn Allen and Kevin Taggart were persons having charge of Taylorview Development because, according Allen's affidavit testimony, he was the developer, and at one point in time, the owner of Draw's property. *Appellant's Brief*, p. 7-8; R. Vol. I, p. 138. According to Intermountain, Allen's testimony "established that the private drive was paved at his or Taggart's direction as the developer and owner of the property." *Appellant's Brief*, p. 8.

In other words, Intermountain argues that because Allen or Taggart were former owners of Draw's property they were also person's having charge of Draw's property at the time of the paving. Consequently, the district court should have held them to be Draw's agent solely by virtue of the "person having charge" language of I.C. § 45-501. Intermountain contends that the district court did

not consider the "person having charge" aspect of the statute because it held that Draw's parcel was not within Taylorview Development.

Intermountain's contention is without merit. I.C. § 45-501 requires that the work be "done or furnished **at the instance of the owner** of the building or other improvement or his agent." (Emphasis added). Contrary to Intermountain's contention, it is undisputed that Allen and Taggart had no ownership interest or authority over Draw's unimproved property at the time of the paving. Therefore, Allen's testimony could not establish "that the private drive was paved at [Allen's] or Taggart's direction as the developer and owner of the property" or that Allen and Taggart were "person['s] having charge" of Draw's property.

Since Allen and Taggart were not the owners of Draw's unimproved property at the time of paving, they could not be persons having charge of Draw's property unless Draw gave them agency and authority over the property. Idaho Code§ 45-501 requires the work be "done or furnished at the instance of the owner . . . or his agent." The district court applied this language of I.C. § 45-501 and found that there was no evidence to support that Taggart or Allen had any actual, express, implied, or apparent agency authority to act on Draw's behalf. R. Vol. I, p. 250-251. As quoted above, the district court concluded in its *Order Denying Plaintiff's Motion to Reconsider:*

> Draw owns a parcel of real estate contiguous to the paved road, whether that parcel lies within or outside of the Taylorview Development. The pavement does not extend on to Draw's parcel. Draw has easement rights over the paved road. The record does not establish that Draw contracted with TMC to have the road paved, or agreed to the paving of the road. **The record does not establish that Draw authorized Taggart to act on Draw's behalf, or that Draw's words or conduct toward TMC established Taggart as Draw's agent.**

R. Vol. I, p. 251 (emphasis added).

Thus, the district court applied the plain language of I.C. § 45-501 and found that there was no evidence that Allen[1] or Taggart were Draw's agents at any time after Draw purchased the property from Timberline.[2]

The fact that Taggart and Allen were not owners at the time of paving and that there was no agency relationship between Draw and Taggart or Allen makes Intermountain's argument that Draw's property was within Taylorview Development irrelevant and moot. Without an ownership interest or agency relationship, Taggart and Allen could not be "person['s] having charge" of Draw's property.

Thus, even assuming, as the district court did, that Draw's unimproved property was within Taylorview Development, this fact alone does not make Taggart and/or Allen persons having charge of Draw's property. To establish that Taggart and/or Allen were persons having charge of Draw's property Intermountain must show that Draw gave Taggart and/or Allen charge over its property. The district court found no evidence that Draw gave Taggart and/or Allen charge over its property

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[1] There is no evidence in the record to suggest that Allen was Draw's agent or that Allen ever had any contact with Draw. The evidence only shows that Allen had contact with Taggart about the paving work. R. Vol. I, p. 139, para. 13.

[2] Intermountain only argues that Allen and Taggart were Draw's agents by virtue of the "person having charge" language in I.C. § 45-501. It has not appealed the district court's decision that Draw did not give Allen and Taggart agency authority. Thus, the district court's determination that Draw did not give Allen and Taggart agency authority is not an issue before this Court.

or that Taggart and/or Allen were Draw's agent so as to infer any such authority with regard to the paving contract.[3]

Intermountain also contends that the district court overlooked Draw's interest in the easement to the private road in the development and that the private road was Draw's access to the public street. *Appellant's Brief*, p. 11. The district court considered and addressed the easement in both its *Order Granting Summary Judgment as to Defendant Draw*, LLC (R. Vol. I, p. 193), and its *Order Denying Plaintiff's Motion to Reconsider* (R. Vol. I, p. 250). The district court made the following determination in its *Order Granting Summary Judgment*:

> Even if Draw has an easement over Taylorview's driveway, which is not in the record, Intermountain points to no law which would require a dominant estate owner's payment, save for an express agreement, for the cost of the servient estate owner's easement improvements.

R. Vol. I, p. 193.

The district court's determination was correct. This Court has held the following:

> [A]bsent a showing that the easement owners' maintenance of the easement created an additional burden or interference with the servient estate, **the servient estate cannot dictate the standard by which the easement should be maintained, expend funds to maintain it to the level desired by the servient estate and then seek reimbursement for those expenditures** and contribution for future

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[3] There is no evidence in the record to show that Allen was a person having charge of the paving. The evidence in the record contradicts any such assertion. It is undisputed that Taggart, not Allen, procured the paving estimates and signed the paving contract. R. Vol. I, p. 36, p. 139 para. 13, and p. 218; *Order Granting Motion to Augment*, Doc. 3, p. 2, para. 2. Thus, according to the evidence in the record, it was Taggart who took charge of the paving work - not Mr. Allen - and Taggart has admitted that Draw was not a party to or involved with the paving contract in any way. *Order Granting Motion to Augment*, Doc. 3, p. 2, para. 3.

expenditures from the easement owners.

Beckstead v. Price, 146 Idaho 57, 66-67 (2008) (emphasis added) (citing *Walker v. Boozer*, 140 Idaho 451, 455, 95 P.3d 69, 73 (2004)).

In this case, it was the owners of the servient estate who made the decision to pave the driveway with no involvement from Draw. As a result, reimbursement for the paving cannot be sought or extracted from Draw.

It is clear that the district court correctly applied the language of I.C. § 45-501. The district court's decision concluded that Taggart and/or Allen were not Draw's agents or persons having charge of Draw's property. The decision followed the language of § 45-501 that requires the improvements be done at the instance of the owner or his agent and should be affirmed.

C. THE DISTRICT COURT DID NOT ERR IN GRANTING DRAW A PART OF ITS ATTORNEY FEES UNDER I.C. § 12-120(3).

Intermountain contends that the district court erred in finding that a commercial transaction was the gravamen of Intermountain's complaint because "Draw prevailed at summary judgment in showing there was no contract, agreement, or transaction between it and Taggart or Allen." *Appellant's Brief*, p. 15.

The district court did not err in finding that a commercial transaction was the gravamen of Intermountain's complaint. The district court stated the following in its *Order Granting in Part Defendant Draw, LLC's Request for Attorney Fees and Costs*:

> Intermountain argues that because there was no privity of contract between TMC (of whom Intermountain is the predecessor in interest) and Draw, a commercial

> transaction is not the gravamen of this issues between Intermountain and Draw. Where the action alleged is one to recover in a commercial transaction, the prevailing party is entitled to an award of attorney fees under § 12-120(3) regardless of the proof that the commercial transaction alleged did, in fact, occur.
>
> A review of the Amended Complaint reveals Intermountain's allegation that it contracted to perform paving work for a commercial development and was not paid for its labor and materials. Therefore, it sued the parties allegedly responsible for the paving contract for breach of contract, open account, unjust enrichment, and foreclosure of its materialman's lien. The gravamen of its lawsuit against the defendants was a commercial transaction. Despite this Court's finding the Draw was neither a party to, nor responsible for the paving contract, Draw, as the prevailing party, is entitled to recover its reasonable attorney fees under Idaho Code § 12-120(3).
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> * * * *
>
> As to Intermountain's contention that its lawsuit is essentially a claim for foreclosure of its lien, the Amended Complaint shows otherwise. Intermountain's first cause of action is for breach of contract. Intermountain seeks $23,442.20 in damages for breach of the paving contract. Intermountain's second cause of action is to collect upon an open account. Intermountain again prays for damages in the amount of $23,442.20, together with accruing interest. In its third cause of action, Intermountain claims the defendants were unjustly enriched as a result of the paving. Unjust enrichment is an equitable means of recover where there is no express agreement between the parties. Intermountain seeks the same monetary compensation for its alternative theory of liability. Finally, in its fourth cause of action, Intermountain requests foreclosure of its materialman's lien.

R. Vol. I, p. 252-53.

The district court's decision followed Idaho law and rebuts Intermountain's contention that because the district court found no transaction between Draw and TMC, Draw should not have been awarded attorney fees. Indeed, this Court has previously made clear that

> Where a party alleges the existence of a contractual relationship of a type embraced by section 12-120(3) . . . that claim triggers the application of [I.C. § 12-120(3)] and a prevailing party may recover fees **even though no liability under a contract was**

> **established. This same principle applies where the action is one to recover in a commercial transaction, regardless of the proof that the commercial transaction alleged did, in fact, occur.**

Garner v. Povery, 151 Idaho 462, 469 (2011) (citing *Magic Lantern Productions, Inc. v. Dolsot*, 126 Idaho 805, 808 (1995)) (emphasis added). This Court recently reaffirmed this holding in *O'Shea v. High Mark Dev., LLC*, 280 P.3d 146, 160 (2012).

Thus, the district court's determination that there was no contract, agreement, or transaction between Draw and, Taggart, Allen, or TMC does not prevent an award of attorney fees to Draw. The gravamen of Intermountain's Complaint was the paving services TMC provided and the alleged failure of the parties to pay for those services. This undoubtedly qualifies as a commercial transaction. Intermountain alleged that Draw was a part of the commercial transaction through an agency relationship with Taggart. Therefore Draw is entitled to attorney fees under I.C. § 12-120(3).

Intermountain cites *Hopkins Northwest Fund, LLC v. Landscapes Unlimited, LLC*, 151 Idaho 740 (2011) and *BECO Const. Co., Inc. V. J-U-B Eng'rs, Inc.*, 145 Idaho 719 (2008), in support of its contention that since the district court found no commercial transaction occurred between the parties, then 12-120(3) does not apply. *Appellant's Brief*, p. 14-15. However, these two cases do not support Intermountain's position.

The complaint in *Hopkins* did not allege the existence of a commercial transaction between the two parties but instead was an action to determine the priority of liens the individual parties each filed on the same property. *Hopkins*, 151 Idaho at 742-43. Thus, this Court held that there was no commercial transaction between the parties. *Id.* at 748. Such is not the case in the present matter

as Intermountain alleged a commercial transaction with Draw, including breach of contract, open account, and unjust enrichment.

In *BECO*, the complaint alleged breach of contract, negligence, and intentional interference with contract between BECO and J-U-B Engineers. *BECO*, 145 Idaho at 722. BECO **ultimately withdrew** its claim for breach of contract. *Id.* This Court held the following with respect to attorney fees:

> I.C. § 12-120(3) compels an award of attorney fees to the prevailing party in any civil action to recover on a contract for services or "in any commercial transaction." I.C. § 12-120(3). When this action was initiated, BECO asserted a breach of contract claim against J-U-B and that claim was litigated until August 15, 2005, when BECO dismissed the claim. BECO asserts that, at most, J-U-B is entitled to recover the $ 33,661.92 in fees that were incurred to this point in defending the action. However, BECO asserts there was neither a contract claim nor a commercial transaction that would support a fee award under I.C. § 12-120(3) after that point in the litigation.
>
> BECO claims there was no commercial transaction between these parties. The case at bar clearly involved a "commercial transaction" within the meaning of I.C. § 12-120(3), but the transaction was between the City and BECO and not between J-U-B and BECO. J-U-B was acting as the City's agent in the transaction but there was no commercial relationship between J-U-B and BECO. Therefore, I.C. § 12-120(3) does not provide the basis for a fee award to J-U-B **after the point where the contractual claim was dismissed. Up to that point, J-U-B is entitled to its fees for defending against the contract claim.** After that point, J-U-B is not entitled to its fees because there is no commercial transaction between the parties. The fact that J-U-B may have been the City's agent is not sufficient to establish an independent commercial transaction between J-U-B and BECO. We therefore vacate the fee award and remand this case for determination and award of the amount of fees J-U-B incurred defending BECO's contract claim.

Id. at 726 (emphasis added).

The *BECO* case support's Draw's case for fees. While there was actually no commercial

transaction between BECO and J-U-B, BECO had alleged the existence of a commercial transaction between the two. BECO eventually dismissed the claim that encompassed the commercial transaction. However, this Court upheld the fee award up to the time that BECO dismissed its breach of contract claim, despite the fact that there was no actual commercial transaction or contract between BECO and J-U-B.

This Court's decision to uphold the fee award in *BECO* is instructive as the present case is similar. Here, the district court found that there was no contract or commercial transaction between Draw and TMC, Taggart, or Allen. However, just as in BECO, Intermountain alleged a contract and commercial transaction existed between Draw and TMC. Just as this Court found the award in *BECO* to be proper based on the allegation of a commercial transaction despite the fact that no contract or transaction existed between the parties, the district court's decision to award fees to Draw in this case was proper. The Court should therefore affirm the district court's award of fees to Draw.

D. APPELLANT INTERMOUNTAIN IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL.

Intermountain requests attorney fees on appeal. It requests fees "in accordance with I.A.R. 41 and 35(b)(5)." *Appellant's Brief*, p. 16. Pursuant to Idaho law, Intermountain failed to properly request fees and support the request. Intermountain is therefore not entitled to fees on appeal.

1. *Intermountain failed to properly request fees on appeal.*

I.A.R. 35(a)(5) requires that "if the appellant is claiming attorney fees on appeal **the appellant must so indicate in the division of issues on appeal that appellant is claiming attorney**

fees and state the basis of the claim." I.A.R. 35(a)(5) (emphasis added). Intermountain failed to include its request for fees in its issues presented on appeal section. *See Appellant's Brief*, p. 5. Intermountain's failure prevents this Court from awarding Intermountain fees on appeal. As this Court stated in *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354 (2004):

> I.A.R. 41 requires that the request for attorney fees on appeal be made in the first brief from the respective party. **I.A.R. 35(a)(5) and (6) also require that the requesting party put the request for fees in a separate section after the issues presented section** and the request be discussed in the argument section.

Id. at 365 (emphasis added);

In *Commer. Ventures, Inc. v. Rex M. & Lynn Lea Family Trust*, 145 Idaho 208 (2008) this Court stated that I.A.R. 35(b)(5) "merely requires that a party indicate in the 'Issues on Appeal' section of its brief that it seeks attorney fees." *Id.* at 219. Intermountain failed to indicate that it was requesting attorney fees on appeal in the issues presented section and is therefore not entitled to fees.

2. *Intermountain failed to properly support its request for fees on appeal.*

Intermountain is also not entitled to attorney fees on appeal because it failed to support its request with propositions of law, authority or argument.

> **Where a party requesting attorney fees on appeal cites the applicable statute but does not present argument in compliance with I.A.R. 35(b)(6), this Court will not address the request**. *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 874, 993 P.2d 1197, 1205 (1999). Under I.A.R 35(b)(6), the argument portion of the respondent's brief "shall contain the contentions of the respondent with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon." I.A.R. 35(b)(6).

Goldman v. Graham, 139 Idaho 945, 947 (2004) (emphasis added).

Merely citing I.A.R. 41 and 35(b)(5) is insufficient for this Court to consider a fee request on appeal:

> [N]either [I.A.R. Rule 35(b)(5) or Rule 41] provide a mechanism by which this Court can award attorney fees. Rule 35(b)(5) merely requires that a party indicate in the "Issues on Appeal" section of its brief that it seeks attorney fees. As we have held numerous times, Rule 41 provides the procedure for requesting attorney fees on appeal, but is not authority alone for awarding fees. *See e.g. Goodman v. Lothrop*, 143 Idaho 622, 628, 151 P.3d 818, 824 (2007).

Commer. Ventures, Inc., 145 Idaho at 219.

This Court has repeatedly enforced this rule. In *State v. Daicel Chem. Indus., Ltd.*, 141 Idaho 102 (2005), this Court denied attorney fees to a respondent who requested fees but only referred the court to I.A.R. 41, stating:

> **We have repeatedly held that a reference to Rule 41 is not sufficient by itself to properly request an award of attorney fees on appeal.** *Bream v. Benscoter*, 139 Idaho 364, 79 P.3d 723 (2003). The requesting party must point to a statute or contractual provision authorizing such award.

Id. at 109 (emphasis added).

In *Parkside Sch., Inc. v. Bronco Elite Arts & Ath., LLC*, 145 Idaho 176 (2008), this Court again denied a request for fees, stating:

> Bronco Elite seeks attorney fees on appeal under I.A.R. 41(a). **However, it neither submits legal argument in support of its request, nor specifies the statute or contractual provision pursuant to which an award of fees would be available.** "As we have long held and oft repeated, Idaho Appellate Rule 41 does not provide an independent basis for attorney fees on appeal because it is a procedural rule. *Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281, 286, 144 Idaho 281, 160 P.3d 438, 443 (2007). Therefore, fees are denied.

Id. at 179 (emphasis added); *see also Dominguez v. Evergreen Res., Inc.*, 142 Idaho 7 (2005)

(holding that because of failure to cite to appropriate authority, fees not granted on appeal).

Intermountain failed to include its request for attorney fees on appeal in the issues on appeal section of its brief. Further, Intermountain's request for fees merely cites I.A.R. 41 and 35(b)(5) and fails to cite to a statute or contractual provision authorizing such an award. Pursuant to Idaho law, Intermountain's request for fees on appeal should be denied.

E. DRAW IS ENTITLED TO COSTS AND FEES ON APPEAL UNDER I.C. § 12-120(3).

In order for a prevailing party to receive an award of fees and costs, such an award must be provided for by a statute or contract. I.C. § 12-120(3) provides for an award of attorney fees in this case. It states:

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.
>
> The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Id.

1. *Draw is entitled to fees on appeal under the commercial transaction prong of I.C. § 12-120(3)*

I.C. § 12-120(3) provides for fees in "any commercial transaction." Commercial transaction is defined as "all transactions except transactions for personal or household purposes." In its

complaint, Intermountain alleged the existence of a commercial transaction. Intermountain's claims against Draw were based entirely upon Draw allegedly entering into a transaction with TMC for paving services. This undoubtedly qualifies as Intermountain's attempt to recover based upon a commercial transaction.

The commercial transaction must also constitute the gravamen of the lawsuit. In *Brower v. E.I. DuPont*, 117 Idaho 780 (1990), the Supreme Court held:

> the award of attorney's fees is not warranted every time a commercial transaction is remotely connected with the case. **Rather, the test is whether the commercial transaction comprises the gravamen of the lawsuit.** Attorney's fees are not appropriate under I.C. § 12-120(3) unless the commercial transaction is integral to the claim, and **constitutes the basis upon which the party is attempting to recover.** To hold otherwise would be to convert the award of attorney's fees from an exceptional remedy justified only by statutory authority to a matter of right in virtually every lawsuit filed.

Brower, 117 Idaho at 784 (emphasis added); *see Blimka v. My Web Wholesaler*, 143 Idaho 723, 728-29 (2007).

The commercial transaction (the paving services) comprised the gravamen of Intermountain's lawsuit and constitutes the basis upon which Intermountain attempted to recover on all its claims. All four of Intermountain's claims in its Amended Complaint – breach of contract, open account, unjust enrichment, and lien foreclosure – arise out of TMC allegedly providing paving services for Draw. Without the alleged commercial transaction between Draw and TMC, Intermountain could not have brought a breach of contract or open account claim and could not have alleged that Draw had been unjustly enriched. Further, TMC's lien was filed based upon the performance of the paving

services and Intermountain sought to foreclose the lien based upon those same paving services.

In sum, Intermountain could not have proceeded with or recovered on any of its claims without alleging that Draw contracted for or was somehow involved in a commercial transaction with TMC. Thus, the alleged commercial transaction between Draw and TMC for paving services was integral and indispensable to Intermountain's claims and therefore was the gravamen of Intermountain's lawsuit.

2. *Draw is entitled to recover fees under the contract prong of I.C. § 12-120(3).*

It is unassailable that Intermountain alleged in its complaint that a contract between Intermountain and Draw existed and that Draw breached that contract. The case law could not be clearer that '[w]here a party alleges the existence of a contractual relationship of a type embraced by section 12-120(3) . . . that claim triggers the application of [I.C. § 12-120(3)] and a prevailing party may recover fees even though no liability under a contract was established." *Farmers Nat. Bank v. Shirey*, 126 Idaho 63, 73 (1994).

A commercial transaction is not required when recovery is sought on the basis of a contract as Idaho Code § 12-120(3) "provides for the recovery of attorney fees incurred in litigation based upon **any contract**." *Id.* (emphasis added). "Idaho Code § 12-120(3) provides for an award of reasonable attorney fees 'in any civil action to recover . . . on [a] contract relating to . . . services.'" *Noak v. Idaho Dep't of Corr.*, 271 P.3d 703, 711 (Idaho 2012) (quoting I.C. § 12-120(3)).

Intermountain alleged the existence of a contractual relationship of a type embraced by I.C. § 12-120(3). Therefore, Draw is entitled to an award of attorney fees and costs on appeal under the

contract prong of I.C. § 12-120(3) should it prevail against Intermountain's appeal.

3. *Draw is entitled to fees under the open account prong of I.C. § 12-120(3).*

Further, Intermountain brought a claim to recover on an open account. Similar to a claim on a contract, § 12-120(3) provides for an award of fees "in **any civil action** to recover on an open account." I.C. § 12-120(3) (emphasis added). Thus, the action for an open account does not have to be based upon a commercial transaction in order to get an award of fees. An action for an open account in a civil action is all that is required.

Intermountain sought to recover from Draw on a claim for open account. Therefore, Draw is entitled to an award of attorney fees under the open account prong of I.C. § 12-120(3).

IV. CONCLUSION

Intermountain waived its contention that the district court failed to properly apply the language of I.C. § 45-501 when it failed to include it as an issue on appeal pursuant to I.A.R. 35(a)(4). Nonetheless, the district court did not disregard the testimony of Robert Butler, but analyzed the facts under the assumption that Draw's property was within Taylorview Development. The district court correctly applied the language of I.C. § 45-501 and determined that there was no evidence of agency between Draw and Taggart and/or Allen. Consequently, the district court's decision granting Draw summary judgment was correct and this Court should affirm the same.

The gravamen of Intermountain's Complaint was the paving services TMC provided. This is clearly a commercial transaction which Intermountain alleged was between Draw and TMC through an agency relationship. As a result, the district court's decision granting Draw partial

attorney fees under I.C. § 12-120(3) was correct. This Court should affirm the district court's decision and also award Draw attorney fees and costs on appeal should it prevail on appeal. Intermountain failed to properly request and support its request for costs and fees on appeal and this Court should therefore deny Intermountain's request should it prevail on appeal.

DATED this 14 day of January, 2013.

THOMSEN STEPHENS LAW OFFICES, PLLC

By: _____
Richard R. Friess, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 14 day of January, 2013, I caused a true and correct copy of the foregoing **RESPONDENT'S BRIEF** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

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