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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

INTERMOUNTAIN REAL PROPERTIES, LLC,
an Idaho limited liability company, as assignee of
TMC CONTRACTORS, INC.,

Plaintiff/Appellant,

vs.

DRAW, LLC, an Idaho limited liability company,

Defendant/Respondent.

And

KEVIN TAGGART, an Individual, CAMDEN
COURT, 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
PERSONS UNKNOWN CLAIMING INTEREST
IN THE SUBJECT PROPERTY,

Defendants.

SUPREME COURT # 40335

Bingham County Case No.
CV-2009-1641

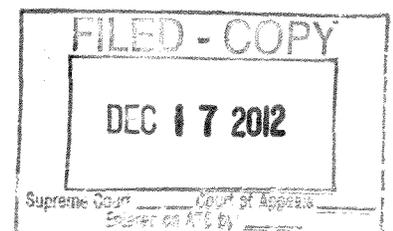
APPELLANT'S BRIEF

Appeal from the District Court of the Seventh Judicial District
State of Idaho In and For the County of Bingham

Honorable Darren B. Simpson, District Judge, Presiding

Attorney for Appellant
Kipp L. Manwaring
Manwaring Law Office, P.A.
381 Shoup Ave., Ste. 210
Idaho Falls, Idaho 83402

Attorney for Respondent
J. Michael Whieler
THOMSEN STEVENS
2635 Channing Way
Idaho Falls, Idaho 83404



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STATEMENT OF THE CASE

This appeal arises from the district court's summary judgment in favor of a property owner determining its real property was not subject to the claim of a materialmen's lien.

At the request of a developer, TMC Contractors, Inc., performed work to grade and pave a private drive and parking spaces in Taylorview Development. Draw, LLC, owned real property within that development, including an easement interest in the private drive.

After completing its work, TMC was not fully paid. It recorded a materialmen's lien against all real property within the development. TMC later assigned its lien to Intermountain Real Properties, LLC.

Initially, the district court determined the developer was not an agent for Draw for purposes of establishing a nexus between TMC's work and Draw and determined Draw's property was not within Taylorview Development. Upon Intermountain's motion for reconsideration, the district court again determined Draw's property was not within Taylorview Development; thus, the materialmen's lien was not enforceable against Draw's property. Additionally, the district court ordered Intermountain to pay some of Draw's attorney fees finding the claims arose from a commercial transaction.

This appeal followed the district court's denial of Intermountain's motion for reconsideration.

Course of the Proceedings

TMC filed a Complaint to foreclose its materialmen's lien on July 23, 2009. (*Clerk's Record*, pp.16-29).

Draw filed an Answer on September 3, 2009. (*Clerk's Record*, pp. 59-61).

After receiving TMC's assignment of its claim and action, Intermountain filed a verified Amended Complaint. (*Clerk's Record*, pp. 38-54).

On March 5, 2010 Intermountain filed its motion and memorandum for summary judgment against Draw and others. (*Clerk's Record*, p. 5 – ROA Report).

Draw filed no response to Intermountain's motion. (*Clerk's Record*, pp. 5-6, 82-83).

Intermountain obtained summary judgment against Draw on April 19, 2010. (*Clerk's Record*, pp. 82-83).

After a sheriff's sale upon writ of execution in November 2010, Draw filed a motion for relief from judgment on December 17, 2010. (*Clerk's Record*, p. 7 – ROA Report).

Intermountain filed its objection to Draw's motion on January 17, 2011. (*Clerk's Record*, 8 – ROA Report).

The district court heard Draw's motion for relief on January 31, 2011. (*Clerk's Record*, p. 8 – ROA Report).

By order filed April 12, 2011 the district court granted Draw's motion for relief. (*Clerk's Record*, p. 8 – ROA Report).

Draw filed its Amended Answer and Counterclaim on September 6, 2011. (*Clerk's Record*, pp. 92-101).

Intermountain filed its Reply to Draw's Counterclaim on October 13, 2011. (*Clerk's Record*, pp. 102-103).

On March 6, 2012, Draw filed its motion for summary judgment. (*Clerk's Record*, p. 8 – ROA Report).

Intermountain on April 6, 2012 filed its response in opposition to Draw's motion supported by affidavits of Shawn Allen and Sandy Gaydusek. (*Clerk's Record*, pp. 105-113).

Hearing before the district court on Draw's motion for summary judgment was held April 30, 2012. (*Transcript of Hearing, Motion for Summary Judgment*, pp. 5-56).

The district court on May 25, 2012 entered its Order Granting Draw's motion for summary judgment. (*Clerk's Record*, pp.175-195).

Judgment for Draw was entered June 7, 2012 and certified as a final judgment. (*Clerk's Record*, pp.200-202).

On June 19, 2012 Intermountain filed a motion for reconsideration together with an affidavit of Robert Butler in support of the motion. (*Clerk's Record*, pp. 220-221; 223-226).

On June 13, 2012 Draw filed a motion and memorandum for costs and fees. (*Clerk's Record*, p. 14 – ROA Report).

Intermountain filed on June 19, 2012 its objection to Draw's motion for costs and fees. (*Clerk's Record*, pp. 232-235).

Hearing on Intermountain's motion for reconsideration was held July 9, 2012. (*Transcript of Hearing, Motion for Reconsideration*, pp. 5-49).

On August 23, 2012 the district court filed its Order denying Intermountain's motion for reconsideration and awarding Draw partial fees. (*Clerk's Record*, pp. 236-260).

Judgment on attorney fees for Draw was entered August 30, 2012. (*Clerk's Record*, pp. 284-285).

Intermountain timely filed notice of appeal on September 17, 2012. (*Clerk's Record*, pp. 287-289).

Statement of the Facts

The following salient facts are derived from the affidavits and pleadings of record.

Intermountain Real Properties, LLC, is an Idaho limited liability company and the assignee of TMC Contractors, Inc.'s, materialmen's lien. (*Clerk's Record*, pp. 37-53).

Shawn Allen was the owner and developer of Taylorview Development in Bingham County, Idaho. (*Clerk's Record*, pp. 138-142).

Kevin Taggart joined Allen in developing Taylorview Development. (*Clerk's Record*, pp. 138-142)

Allen sold to Taggart through Taggart's entity, Timberline, several parcels within Taylorview Development. (*Clerk's Record*, pp. 138-142). In turn, Taggart through Timberline sold a parcel to Draw. (*Clerk's Record*, pp. 138-142; 223-226).

Draw's real property consists of a parcel of undeveloped land together with an easement interest in a private drive accessing Draw's property from a public street. (*Clerk's Record*, pp. 138-142; 223-226). Draw's parcel and the concomitant private drive are situated wholly within Taylorview Development. (*Clerk's Record*, pp. 223-226).

During their development of Taylorview Development, Allen and Taggart hired TMC to perform the work necessary to grade and pave the private drive and parking spaces within

the development. (*Clerk's Record*, pp. 138-142). TMC performed the requested paving work. (*Clerk's Record*, pp. 138-142; 144-156).

In addition to having the private drive paved, Allen improved a spur road on land owned by the City of Shelley. (*Clerk's Record*, pp. 138-142; 144-156).

When its bill was not fully paid, TMC recorded a materialmen's lien against all real property in Taylorview Development, including Draw's parcel. (*Clerk's Record*, pp.16-29).

TMC assigned all of its rights under the materialmen's lien and its foreclosure action to Intermountain. (*Clerk's Record*, p. 45).

ISSUES PRESENTED ON APPEAL

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?

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?

ARGUMENT

A. The District Court erred in disregarding positive testimony found in the affidavit of Robert Butler proving Draw's real property was within Taylorview Development.

Standard of Review

When reviewing a district court's summary judgment, the standard of review on appeal is the same standard as that used by the district court in ruling on the motion. Summary judgment is appropriate 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). Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. The appellate court exercises free review over questions of law.

Castorena v. General Electric, 149 Idaho 609, 613, 238 P.3d 209, 213 (2010).

Argument

The purpose of Idaho's mechanics' and materialmen's lien statutes is to compensate persons who perform labor and provide materials for improvements to or upon real property. *See generally BMC West Corp. v. Horkley*, 144 Idaho 890, 893-94, 174 P.3d 399, 402-03 (2007). Idaho's appellate courts have historically construed materialmen's lien laws "liberally in favor of the person who performs labor upon or furnishes materials" used in making improvements to real property. *Id.* Specific language in Idaho's Constitution guarantees such interest where it states, "[t]he legislature shall provide by proper legislation

for giving to mechanics, laborers, and material men an adequate lien on the subject matter of their labor.” IDAHO CONST. art. XIII, § 6.

Idaho Code § 45-501 creates two distinct types of liens- a lien against some form of structure, alternately referred to in later sections of the lien law as an “improvement,” and a lien created in favor of one who improves the land, itself, by grading, leveling, and the like. *Hopkins Northwest Fund, LLC v. Landscapes Unlimited, LLC*, 151 Idaho 740, 264 P.3d 379 (2011).

That same statute provides, “any person having charge...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....” Under I.C. § 45-504, any person who, at the request of the owner of any lot in any incorporated city or town, surveys, grades, fills in, or otherwise improves the same or the street in front of or adjoining the same, has a lien upon such lot for his work done or material furnished.

The district court committed two errors in reaching its decision granting summary judgment to Draw: 1) it failed to apply the clear language of § 45-501; and 2) on Intermountain’s motion for reconsideration, it disregarded positive testimony of Robert Butler establishing Draw’s parcel as being part of Taylorview Development.

As developers of Taylorview Development, Allen and Taggart were persons “having charge... in whole or in part, of any building or other improvement” and “shall be held to be the agent of the owner for the purpose of this chapter....” I.C. § 45-501. The district court did

not consider that aspect of the materialmen's lien statute in making its decision because it instead held Draw's parcel was not within Taylorview Development.

The affidavit of Allen was not contradicted by Draw in any manner. Allen's testimony established that the private drive was paved at his or Taggart's direction as the developer and owner of the property. Although there was no clear agency nexus established between Draw and Allen or Taggart for purposes of establishing contractual liability, the applicable statute deems Allen and Taggart shall be the agents of Draw for purposes of the private drive.

In its decision granting Draw's motion for summary judgment, the district court reached a finding that the evidence before it did not clearly show Draw's parcel was part of Taylorview Development. Accordingly, Intermountain filed a motion for reconsideration, which motion was supported by the affidavit of Robert Butler. Butler was the surveying engineer who prepared the Record of Survey for Taylorview Development. In addition, he prepared the legal descriptions for the respective parcels within the Development. Those legal descriptions were used in conveying title to Draw and other purchasers.

Butler affirmatively testified that, "All of the property described in the deed to Draw lies within the Record of Survey for Taylorview Development." (*Clerk's Record*, p. 223-226).

Despite Butler's testimony, the district court on reconsideration focused erroneously on a "black line which appears to define the boundaries of the Taylorview Development." (*Clerk's Record*, p. 142). Further compounding that error, the district court examined a tax

parcel map from the Bingham County Assessor's Office and made the following factual determination. "That document also shows a black line around certain parcels of real estate, but excludes Draw's Property from the group." (*Clerk's Record*, p. 142). The Assessor's tax plat contained no information on its face concerning the line depictions given on the plat. Nor was there any affidavit upon which the district court could rely for explaining the "black lines" on that plat. (*Clerk's Record*, p. 142).

Implied, if not expressed, within the district court's decision is a factual finding that the "black lines" seen on the record of survey and Assessor's plat are the actual boundary lines for Taylorview Development. That finding is not supported by any factual evidence. To the contrary, the evidence before the court shows Draw's parcel lies within the development.

Nevertheless, the district court relied upon the "black lines" to reach its determination that Draw's parcel was not located in Taylorview Development. Seemingly avoiding its judicial obligation to liberally construe § 45-501 in favor of Intermountain, the district court opted instead to find Draw's parcel was not part of Taylorview Development. Consequently, the district court denied Intermountain's motion for reconsideration.

Idaho has long followed the legal principal that positive testimony cannot be disregarded by a trial court or jury in favor of unsupported testimony or evidence. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447-48, 74 P.2d 171, 175 (1937); *Dinneen v. Finch*, 603 P.2d 575, 582, 100 Idaho 620, 625 (1979).

"The rule was recently announced by this court that the court must accept as true the positive, uncontradicted testimony of a credible witness, unless his testimony is inherently

improbable, or rendered so by facts and circumstances disclosed at the hearing or the trial and that the trial court may not arbitrarily or capriciously disregard the testimony of a witness unimpeached by any of the modes known to the law, if such testimony does not exceed probability.” *First Trust & Savings Bank v. Randall*, 59 Idaho 705, 715, 89 P.2d 741 (1939).

A court “must accept as true the positive, uncontradicted testimony of a credible witness, unless his testimony is inherently improbable or rendered so by facts and circumstances disclosed at the hearing.” *Dinneen v. Finch*, 603 P.2d 575, 582, 100 Idaho 620, 625 (1979).

In that connection, the Idaho Supreme Court has instructively held that when considering motions for summary judgment the trial court should apply the following standard:

In this process the Court must look to the “totality of the motions, affidavits, depositions, pleadings, and attached exhibits,” not merely to portions of the record in isolation. *Central Idaho Agency*, supra, 92 Idaho at 310, 442 P.2d at 446. Circumstantial evidence can create a genuine issue of material fact. “[A]ll doubts are to be resolved against the moving party.” The motion must be denied “if the evidence is such that conflicting inferences can be drawn therefrom and if reasonable [people] might reach different conclusions.”

Ashby v. Hubbard, 100 Idaho 67, 69, 593 P.2d 402, 404 (1979), citing *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 868-69, 452 P.2d 362, 365-66 (1969).

Accordingly, the district court erred in disregarding the testimony of Robert Butler. The district court’s error was compounded by its isolated reliance on black lines on the record of survey and a plat from an assessor’s office that were unexplained and did not contain any positive testimony upon which the court could reasonably rely.

Butler's affidavit contains testimony that is reliable and not inherently improbable. Butler's testimony cannot be ignored. On the strength of Butler's testimony, Intermountain proved Draw's parcel was located entirely within Taylorview Development. The evidence before the district court at least was such that conflicting inferences could be drawn therefrom, thus constituting a question of fact upon which reasonable minds could differ, thus, preventing summary judgment.

In addition, the district court overlooked Draw's interest in the easement to the private road in the development. Not only was Draw's parcel located within Taylorview Development, but also Draw by deed was granted an easement interest in the private road. That private road was Draw's access to the public street.

Therefore, the district court erred in granting summary judgment to Draw.

Based on the record on appeal, the district court did not attempt to apply 45-501 to Intermountain's claim that Allen and or Taggart were persons in charge of the development and "shall be held" agents of Draw. Consequently, the appellate court does not have sufficient record to answer that question itself. See *Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (Ct. App. 1990). Remand is required to allow the district court to consider application of 45-501 to the facts presented on summary judgment.

"Where an appellate court reverses or vacates a judgment upon an issue properly raised, and remands for further proceedings, it may give guidance for... issues on remand." *Clark v. Klein*, 137 Idaho 154, 159, 45 P.3d 810, 815 (2002); *Bratton v. Scott*, 150 Idaho 530, 248 P.3d 1265 (2011).

Intermountain has previously cited the law in Idaho requiring liberal construction of the materialmen's lien statutes in favor of compensation of those who provide labor and materials in the improvement of real property. Intermountain invites the Court on appeal to give direction to the district court on the interpretation of 45-501 where it states "any person having charge...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...."

Application of the statute begins with the language at issue: "and every contractor, subcontractor, architect, builder or any person having charge 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." I.C. § 45-501.

Where the language of a statute is clear and unambiguous, statutory construction is unnecessary, and this Court need only determine the application of the words to the facts of the case. A statute is ambiguous where the language is reasonably capable of more than one conflicting construction. However, "[a]mbiguity is not established merely because differing interpretations are presented to a court; otherwise, all statutes subject to litigation would be considered ambiguous." Therefore, "[t]he interpretation should begin with an examination of the literal words of the statute, and this language should be given its plain, obvious, and rational meaning."

L & W Supply Corp. v. Chartrand Family Trust, 136 Idaho 738, 743, 40 P.3d 96, 101 (2002)(citations omitted).

Construction of a statute is a question of law over which the appellate courts in Idaho have free review. *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 388, 111 P.3d 73 (2005).

In *L&W* the court examined the plain language of the statute in question and found that a supplier was too remote in connection with improvements to constitute a person in charge for purposes of the materialmen's statute.

In this action, TMC was dealing directly with Allen and Taggart, the two and only two persons in charge of Taylorview Development. Under the facts set forth in Allen's affidavit, TMC reasonably relied on Allen and Taggart's positions as developers in agreeing to grade and pave the private drive. Intermountain believes the Court on appeal can give guidance on remand to the district court that if it finds Allen and Taggart were persons in charge of Taylorview Development, it should construe 45-501 in favor of Intermountain.

The summary judgment in favor of Draw should be vacated. This action should be remanded to the district court to consider the positive testimony of Butler and then determine whether there are genuine issues of material fact preventing summary judgment or reverse its decision and grant summary judgment to Intermountain.

B. The District Court erred as a matter of law in awarding Draw some of its attorney fees under I.C. § 12-120(3) finding there was a commercial transaction between TMC and Draw.

Standard of Review

“Whether a district court has correctly determined that a case is based on a ‘commercial transaction’ for the purpose of I.C. § 12-120(3) is a question of law” over which the appellate court exercises free review. *Fritts v. Liddle & Moeller Const., Inc.*, 144 Idaho 171, 173, 158 P.3d 947, 949 (2007).

Argument

“Under I.C. § 12-120(3), a prevailing party is entitled to an award of attorney fees if a ‘commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover.’” *Carrillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 744, 274 P.3d 1256, 1269 (2012), quoting *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728, 152 P.3d 594, 599 (2007). “We today make clear that, in order for a transaction to be commercial, each party to the transaction *must enter the transaction* for a commercial purpose.” *Id.* (Emphasis added).

“It is oft repeated by this Court that, ‘If the party is claiming that a statute provides authority for an award of attorney fees, the party must cite to the statute and, if applicable, the specific subsection of the statute upon which the party relies.’” *Stephen v. Sallaz & Gatewood, Chtd.*, 150 Idaho 521, 530, 248 P.3d 1256, 1265 (2011).

Draw argued that because Intermountain had alleged in its complaint a contract existed between TMC and Draw, then Draw could claim for fees based on a contract under I.C. § 12-120(3) even if the district court did not find a contract existed. Further, Draw urged the finding that there was a commercial transaction between TMC and Draw. Neither argument was sound. However, the district court found a commercial transaction was the gravamen of Intermountain’s complaint and, thus, awarded fees. (*Clerk’s Record*, pp. 236-260).

The Idaho Supreme Court has held that if there was no commercial transaction between the parties, then 12-120(3) does not apply. “Attorney fees for LU under section

120(3) are inappropriate in this case because there was no commercial transaction between Hopkins and LU.” *Hopkins Northwest Fund, LLC v. Landscapes Unlimited, LLC*, 151 Idaho 740, 748, 264 P.3d 379, 387 (2011).

Relying on its holding in *BECO Const. Co., Inc. v. J-U-B Eng'rs, Inc.*, 145 Idaho 719, 726, 184 P.3d 844, 851 (2008), the Court in *Hopkins* observed that where there is no “transaction” between the parties, 12-120(3) does not apply. *Id.* “Therefore, attorney fees under section 120(3) would be inappropriate.” *Id.*

There was no transaction between TMC and Draw. As determined by the district court, the transaction was between TMC, Allen and Taggart. Draw prevailed at summary judgment in showing there was no contract, agreement, or transaction between it and Taggart or Allen.

Draw may assert a claim for fees under 12-120(3) due to Intermountain’s pleading requesting fees under the same statute. However, the Idaho Supreme Court has ruled that a pleading for fees is not a judicial admission of fact; rather, the question of whether a case arises from a commercial transaction is purely a question of law for the Court to determine. *Carrillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 744, 274 P.3d 1256, 1269 (2012)(footnote 8).

The district court erred in determining there was a commercial transaction between Intermountain and Draw. An award of attorney fees under 12-120(3) to Draw was inappropriate.

As a matter of law, the district court’s judgment awarding fees to Draw must be vacated.

C. Intermountain is entitled to an award of costs on appeal.

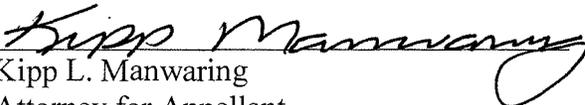
In accordance with I.A.R. 41 and 35(b)(5), Intermountain requests on appeal an award of its costs.

CONCLUSION

The district court's Memorandum Decision and Order on Summary Judgment should be vacated together with the subsequent certified Final Judgment and amended judgment awarding fees.

The case should be remanded to the district court with directions to consider application of I.C. § 45-501 to Intermountain's complaint to foreclose its materialmen's lien against Draw's parcel.

Dated this 12 day of December 2012.

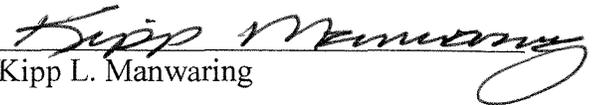

Kipp L. Manwaring
Attorney for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 12 day of December 2012, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

Michael Wheeler
THOMSEN STEPHENS
2635 Channing Way
Idaho Falls, Idaho 83404

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 U.S. Mail, Postage Prepaid
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 Other _____


Kipp L. Manwaring