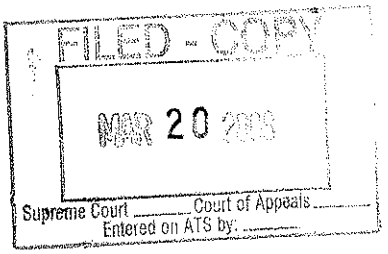
3-20-2008

Borah v. McCandless Appellant's Brief Dckt. 34756

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRENDA BORAH, **Plaintiff/Respondent,** **vs.** **DANA McCANDLESS, d/b/a THE GREAT SNAKE RIVER LOG HOME COMPANY,** **Defendant/Appellant.**	)	**Docket No. 34756** **Ada: No. OC 0506462**



APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Kathryn A. Sticklen, District Judge, Presiding

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STATEMENT OF THE CASE

1. FACTUAL EVENTS

The parties hereto entered into a contract for the delivery of logs for the building of a cabin. The materials were to be delivered by appellant to respondent at a lot in the Royal Elk Subdivision in Camas County, Idaho.

The parties entered into preliminary discussions in the Spring of 2004 and extended throughout the summer. (Tr. pp. 112-113). A contract, Plaintiff's Exhibit 3, (Tr., page 8. L. 16-20) was admitted into evidence and described the details of the arrangement. The contract was signed by the respondent on August 12, 2004; and, by the appellant on September 22, 2004. The contract consisted of three (3) pages with a fourth page that was sent to Appellant in November of 2004. Appellant did not agree to the fourth page attachment or amendment. (See, Tr. p. 103:16-25 through p. 105; p. 125, L.1-18; 241-242).

The respondent had paid a down-payment, Plaintiff's Exhibit 4, dated May 28, 2004 (Tr. p. 8, L. 16-20) in contemplation of the contract. The contract, Plaintiff's Exhibit 3, had various changes by way of hand-written notations modifying the sums for the payment of services, hauling and material. (See Plaintiff's Exhibit 3).

The contract provided that "customer will pay for shipping of logs from log site to his property site". (Plaintiff's Exhibit 3). Further, the contract provided "Log Shell is sold F.O.B. Grangeville, Idaho". In the event of dispute, Arbitration was the contractual obligation for resolution as contained in paragraph G of the contract. (See, Plaintiff's

Exhibit 3). Arbitration was the sole remedy. The parties did not agree to a different manner of resolution viz., initiating court action.

Plaintiff's Exhibit 1 and 2 (Tr. p. 8, L.16-20) were preliminary questions and discussions leading to the contract finalization. The parties could not enter into a final contract until later that Fall. (See, Tr. pp. 112-115; 167-169). No delivery date was agreed upon. (Tr. pp.114:20-25, 115:118, 119:6-13). The parties had no final contract as of the date of sending the check for $16,975. (Plaintiff's Exhibit 4; See, Tr. pp.115; 118, L. 18-25; 121, L. 9-25; 122, L. 14-18).

Appellant began delivery of the logs on September 17, 23 and October 30, 2004. One delivery was not possible, according to Appellant because of the difficulty in getting the logs to the site. Respondent was aware that she had to pay for the shipping charges. (Tr. p. 243, L. 19-22). The respondent knew of the multiple deliveries and was not upset. (Tr. p.131, L. 1-9). The appellant was on schedule with his deliveries. (Tr., p. 130, L.21-25 through p. 133). The respondent, then, indicated that she wanted her money back. (Tr. p. 135., L.19-25). Respondent then changed her mind and decided to continue with the appellant. (Tr. pp. 137, 139).

On May 2, 2005, the parties were to continue with the project. (Tr. p. 140). Delivery charges were expressly discussed by the parties. (See, Tr. pp.142-144). The appellant was still ready, willing and able to perform even though the costs will be higher to him. (See, Tr. p. 144). Appellant re-affirms that freight charges will be added. (See, Tr. pp. 145-146, for continuing issue on freight charges). Appellant becomes worried that respondent is not going to pay for freight charges. (Tr. pp. 147, L.18-25 through 150, L. 4). Appellant is

threatened with a lawsuit and cancels the final log delivery (Tr. p. 150); even though he could deliver the logs. (Tr. p. 155., L. 8-20). Appellant guaranteed logs on June 30, 2005 but was fired by respondent on June 24, 2005. (Tr. p. 155. L. 17-20).

Appellant makes a demand for payment on delivery charges less actual amounts paid. (See Plaintiff's Exhibit 20; Tr. pp. 151-152). The Respondent refused to pay delivery which is standard in the industry. (Tr. p. 161, L. 10-17).

The Appellant had nothing to do with the building or stacking of the logs or of rental equipment but rather his contract was for delivery and unloading of logs. (Tr., pp. 126, L. 1-18; 158-159).

Respondent owed appellant when respondent terminated the contract. The formula was usable logs 1404 X $10 lineal foot = $14,040 plus $3,310 delivery = $17,350 less amount paid of $16,975 (Plaintiff's Exhibit 4) equals $375 owing to the Appellant. (Tr. pp. 162., L.24-25 through 163., L., 1-6; See, Respondent's testimony of the same figure at Tr. pp. 252-254). She believed the range to be $655 to respondent; or, $375 to appellant depending on how many lineal feet were used of the logs delivered by Appellant.

2. LEGAL EVENTS

The respondent filed her legal complaint with the court dated August 31, 2005. (R., p. 5). The appellant filed an answer, after service, on October 3, 2005. (R., p.26). Court trial was held on March 20-21, 2007. (R., p.37).

The court made its initial ruling awarding the respondent $5,087.45. (R., p. 43A). The court, after reconsideration, then amended it ruling and awarded "cover" to respondent with an award of $17,078.38; and, with an award of fees and costs of $18,526.00. (R., p. 54).

The appellant timely appealed on November 8, 2007. (R., p. 66).

ADDITIONAL ISSUES ON APPEAL

1. The Appellant request his costs and fees at trial.

2. The Appellant request his costs and fees on appeal.

ARGUMENT

1. INTRODUCTION.

The major emphasis of this case concerns the willingness of the appellant to perform upon contract after respondent refused to pay shipping costs. The initial remedy that should have alleviated the need for litigation was arbitration. Arbitration was the sole remedy provided in the contract.

At trial, the court incorrectly determined the contract commencement date to be the tender of the initial deposit. Thereafter, the parties had agreed upon continuance of the contract from 2004 to the 2005 year. The respondent fired the appellant before he could complete performance. Thus, the breach was instituted by the respondent. Since the appellant did not breach the contract and merely wanted paid according to the terms of such contract, the legal doctrine of "cover" did not come into play.

2. THE TRIAL COURT DID NOT HAVE JURISDICTION TO HEAR THE CASE BECAUSE OF AN ARBITRATION CLAUSE IN THE CONTRACT.

Jurisdiction is always of prime importance in any case. The trial court did not have jurisdiction to hear this case because the contract between the parties indicated as follows:

> G. ARBITRATION
>
> All claims or disputes between the parties shall be decided by arbitration in accordance with the Construction Industry Arbitration rules of the American Arbitration

Association currently in effect unless the parties mutually agree otherwise. The award rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with applicable law in any court of competent jurisdiction. In the event of arbitration or suit, the prevailing party shall be entitled to recover its costs of arbitration or suit including, but not limited to, reasonable attorney fees. [Plaintiff's Exhibit 3].

> Questions of jurisdiction present an exception to [125 Idaho 376] the general rule and allow the appellate court to consider the issue even when raised for the first time on appeal. Hoppe v. McDonald, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982); Matter of Von Krosigk, 116 Idaho 520, 521, 777 P.2d 742, 743 (Ct.App.1989).
>
> Fix v. Fix, 870 P.2d 1331, 125 Idaho 372, (Idaho App. 1993)
>
> ---------- Excerpt from pages 870 P.2d 1334-870 P.2d 1335.

The district court did not have jurisdiction to hear the claims of the respondent as the contract preempted said court in favor of arbitration. Neither party could consent to jurisdiction or waive the same. Further, "neither party mutually agreed otherwise". Respondent was aware of arbitration and reiterated the same in Plaintiff's Exhibit 21, p. 2.

> Jurisdiction is composed of two parts: subject matter jurisdiction and personal jurisdiction. *Lockhart v. Department of Fish and Game*, 121 Idaho 894, 895-96, 828 P.2d 1299, 1300-01 (1992). Subject matter jurisdiction is the right and abstract power of the tribunal to exercise power over cases of the kind and character of the one pending. Id. Personal jurisdiction is the tribunal's power over the person before it. Id.

The district court lacked subject matter jurisdiction due to the arbitration clause, as the sole remedy, within the contract.

3. THE APPELLANT DID NOT BREACH THE CONTRACT

The appellant, as the facts have been received in evidence, did not breach the contract. The trial court incorrectly found the appellant to have breached the contract. Appellant stated in his testimony that he was ready, able and willing to perform on the

contract. (Tr. p., 163, L. 4-6). His Answer to complaint in Third Affirmative Defense indicated his willingness to perform. (R. p. 30). His e-mail (Plaintiff's Exhibit 20) indicated his willingness to complete the project if he received payment. (Also, see factual statement above with various cites to the transcript of appellant's willingness to finish the contract; See also, court finding number 7 at R. p. 45).

Of major significance is the respondent's own testimony in the year 2005, wherein she has waived any prior problems of the parties and affirmatively states as follows:

Q: And you had both let the past or the bygones be bygones, correct?

A: Correct.

Q: So as of May 1, 2005, you were working towards completing the cabin for that year; is that correct?

A: Correct. (See complete transcript, Tr. pp. 244-246).

The district court could not have determined, based upon the testimony, that either party had breached the contract as of May 1, 2005. (See also, Tr. pp. 253-254). The dispute occurred in June of 2005 when the respondent would not pay the delivery charges and the final amount owed. Respondent was aware of the charges and of the contract. (Tr. pp.246-248; 253-255). It is also clear from the testimony of the respondent, herself, that appellant desired to finish the contract. (See, Tr. pp. 260-261). However, the respondent fired the appellant by attorney letter of June 24, 2005. (Plaintiff's Exhibit 23). Thereafter, appellant cancelled the ordered product and did no further delivery even though he was ready, willing and able to perform if he received the money due and owing to him. (Plaintiff's Exhibit 20; Tr. pp. 145-147; 155; 244-246).

The respondent promised to pay the delivery charges (Plaintiff's Exhibit 21, p.3) but refused to do so until all was completed and in a "separate check". The appellant could not work for the respondent not knowing if she was going to pay for the services and materials. She refused. Respondent breached the agreement and caused the appellant to cancel the log order to be delivered on June 30, 2005.

4. THE COURT COULD NOT SUPPLEMENT THE CONTRACT BY TESTIMONY IF THE CONTRACT IS CLEAR WITHIN THE FOUR CORNERS OF THE CONTRACT.

It is very clear that the contract was not ambiguous concerning the amount due and owing and upon the delivery charges. The contract, Plaintiff's Exhibit 3, had the definite sums that were to be paid plus the delivery charges. Respondent owed the final amounts when the appellant tendered the product to the site. She acknowledged this fact. (Tr. pp.246-248; 253-255). She already owed for past delivery charges and wanted to pay by separate check when the project was completed. Appellant re-affirms that freight charges will be added. (See, Tr. pp. 145-146, for continuing issue on freight charges). Appellant did not believe he would be paid. (Plaintiff's Exhibit 20; Tr. pp. 145-147; 155; 244-246).

As such, if the respondent had paid for the delivery charges thus incurred, the project would have been completed by appellant. As cited previously, the appellant cancelled the order when he was terminated on June 24, 2005. (Plaintiff's Exhibit 23). The court acknowledged the Appellant was willing to perform in June of 2004. (R. p. 45, par. 7). The delivery charges remain unpaid.

The court attempted, in its findings and conclusions, to alter the contract formation

date; to alter the payments for delivery due to the appellant; and to insert negotiations leading up to the formation of the contract. The four corners of the contract are very clear in all respects on the issues the trial court altered.

> Preliminarily, we note our standard of review. The determination whether a contract is ambiguous presents a question of law over which we exercise free review. DeLancey v. DeLancey, 110 Idaho 63, 714 P.2d 32 (1986). Where the language of a contract is clear, we deem the contract to be unambiguous. See Wood v. Simonson, 108 Idaho 699, 701 P.2d 319 (Ct.App.1985).

> Roeder Min., Inc. v. Johnson, 794 P.2d 1152, 118 Idaho 96, (Idaho App. 1990)

> ---------- Excerpt from page 794 P.2d 1153.

> In construing a written instrument, an appellate court must consider it as a whole and give meaning to all the provisions of the writing to the extent possible. Magic Valley Radiology Assoc., P.A. v. Professional Business Svcs., Inc., 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991).

> Schiewe v. Farwell, 867 P.2d 944, 125 Idaho 70, (Idaho App. 1992)

> ---------- Excerpt from page 867 P.2d 949.

> Furthermore, it is presumed that preliminary oral stipulations, agreements, and negotiations are merged into the subsequent written agreement and "will not be admitted to contradict the plain terms of the contract." Valley Bank, 119 Idaho at 498, 808 P.2d at 417.

> Thorn Creek Cattle Ass'n, Inc. v. Bonz, 830 P.2d 1180, 122 Idaho 42, (Idaho 1992)

> ---------- Excerpt from page 830 P.2d 1184.

The trial court committed reversible error. The terms of the contract were clear on the formation date; on the duty of the respondent to pay for delivery charges; and, should not have been supplemented by preliminary negotiations.

5. THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS CONTAIN ERROR AND ARE NOT SUPPORTED

A) The court could not "finalize" the contract until it was signed and completed. The court accepted the down payment contained in Plaintiff's Exhibit 4 as the commencement date of the contract and indicated the contract was "formed" on June 3, 2004. The contract was signed August 12, 2004 by respondent; and, was signed by appellant on September 22, 2004. (Plaintiff's Exhibit 3). It is noteworthy that the contract sums were altered by both the respondent and appellant; and, the appellant did not have the entire plans to even begin the order on June 3, 2004. (Plaintiff's Exhibit 4; See, Tr. pp.115; 118, L. 18-25; 121, L. 9-25; 122, L. 14-18; 125). Granted, negotiations were occurring and discussions were had; but, the contract is very clear on the date it was signed and the contract formed. The court acknowledged that the deliveries did not occur until after the contract was signed. (R. p.44-45, par. 5-6). The trial court erred by interpreting the contract formation date based upon preliminary negotiations in contradiction of the signed contract.

B) The court's conclusion number 2 (R. p. 46) indicates that the delivery must be in a reasonable time period. The respondent acknowledged, as cited earlier, that the parties had settled their disputes as of May 1, 2005 and, thus, all prior delivery date issues were no longer an issue. The appellant indicated that all logs would be delivered by June 30, 2005. Thus, no delay or unreasonableness as to delivery date could have been applicable. The court states: "McCandless (appellant) did not make delivery within a reasonable time and therefore breached the contract without excuse." May 1 to June 30 is a reasonable time period for delivery. The trial court arbitrarily ruled that the two month time period was not

reasonable. Given the fact that the respondent terminated the appellant, the court could not and should not have made such a finding and conclusion. The trial court erred.

C) Nothing within the four corners of the contract would require appellant to construct or build the log home. In fact, it was specifically agreed otherwise. The court includes as damages equipment rental of $1,245.79 along with labor and expenses of $632.79. These costs could not and were not the responsibility of the appellant. (See, contract between the parties, Plaintiff's Exhibit 3 and testimony outlined above). The trial court erred.

D) The court erred in calculating damages between the amount paid and the amount delivered. Also, the trial court did not add the delivery expenses. The only potential amounts that could be found, to either party, were as follows:

The appellant had nothing to do with the building or stacking of the logs or of rental equipment but rather his contract was for delivery and unloading of logs. (Tr., pp. 126, L. 1-18; 158-159). Respondent owed appellant when respondent terminated the contract. The formula was usable logs 1404 X $10 lineal foot = $14,040 plus $3,310 delivery = $17,350 less amount paid of $16,975 (Plaintiff's Exhibit 4) equals $375 owing to the appellant. (Tr. pp. 162., L.24-25 through 163., L., 1-6; See, respondent's testimony of the same figure at Tr. pp. 252-254). She (respondent) believed the range to be $655 to respondent; or, $375 to appellant depending on how many lineal feet were used of the logs delivered by appellant.

E) In the Memorandum Decision and Order on reconsideration, the court decides, for the first time, that "cover" should apply. (This issue will be discussed later in this brief.) Assuming, arguendo, that "cover" applied, the court's application of damages is incorrect.

At R. p. 55, the court determines that respondent overpaid by $4,913, which given the very best scenario, would be $655 to respondent. (See D above; appellant argues that he should have received $375.) The balance due on the original contract was $10,125. The court then concluded that the Western Contract for "cover" was $25,324.80 and did not subtract the amount of credit that usable logs and services that appellant supplied, to-wit: $17,350. "Cover", if it were applicable, would be $25,324.80 minus $17,350.00 = $7,984.80.

6. THE CONCEPT OF "COVER" DOES NOT APPLY BECAUSE THE APPELLANT DID NOT BREACH THE CONTRACT.

As argued previously, "cover" would only apply if the appellant breached the contract. The appellant did not breach the contract because the respondent terminated his services on June 24, 2005. The final delivery of logs was scheduled for June 30, 2005. The appellant reiterated, as stated above, that he was ready, willing and able to perform and had to cancel the order because the respondent terminated his services. Factually, the court could not have made the determination that the appellant breached the contract because he was willing to perform and had the logs ordered.

The respondent knew that appellant was willing to deliver if he received payment for delivery charges and the final balance owing. Legally, the doctrine of "cover" could not apply because the appellant had the goods (logs) to complete the contract.

Idaho Code § 28-2-713 provides in relevant part that the,

> " * * * measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this chapter * * *."

Idaho Code § 28-2-715 includes as the buyer's consequential damages,

"any loss resulting from general or particular requirements and needs of which the seller at the time of the contract had reason to know and which could not reasonably be prevented by cover or otherwise."

Idaho Code § 28-2-715 only limits the buyer's right to loss of profits when cover is possible. If substitute goods cannot [98 Idaho 505] be purchased by the buyer he is entitled to loss of profits.

Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc., 567 P.2d 1246, 98 Idaho 495, (Idaho 1977)

---------- Excerpt from pages 567 P.2d 1255-567 P.2d 1256.

Both factually and legally, the respondent was not entitled to receive the benefit of "cover" as allowed in the revised opinion of the trial court. No expert testimony is found in the transcript on the issue of "cover". The trial court erred.

ADDITIONAL ISSUES ON APPEAL

1. THE APPELLANT REQUESTS HIS COSTS AND FEES AT TRIAL

Justice Jesse R. Walters, Jr. in his updated primer of the former Lon Davis manual on the award of attorney fees, A Primer For Awarding Attorney Fees in Idaho, Idaho Law Review, Volume 38, 2001, Number 1, indicates that the following steps are necessary for an award of fees and costs:

A. A prevailing party;

B. A statutory or contract basis for award of fees; and,

C. Compliance with Rule 54 of the Idaho Rules of Civil Procedure.

In the case at bar, the appellant was owed $375 for the logs and delivery charges, less

all offsets, at the time the respondent terminated the contract. The appellant prevailed.

Furthermore, the respondent improperly pursued this matter through the court system when arbitration was jurisdictionally proper. Thus, the appellant, once again prevailed.

Finally, the respondent asked for $54,611.36 in monetary damages. (Plaintiff's Exhibit 30). Under any scenario possible, the respondent did not approach the requested sum. Once again, the appellant prevailed.

The contract provided for fees in the arbitration clause. Appellant would be deserving of such fees pursuant to the contract. Appellant also relies upon I.C. § 12-120 pursuant to the commercial transaction language of such statute. Appellant would then submit the appropriate documents pursuant to Rule 54, I.R.C.P. to the proper tribunal for his award of fees and costs.

2. THE APPELLANT REQUESTS HIS COSTS AND FEES ON APPEAL.

An award of attorney fees on appeal requires a statutory or contractual basis. Appellant relies upon the contract and upon Idaho Code §§ 12-120; 12-121 and I.A.R., Rules 40 and 41 in his request for fees on appeal.

Fees are awarded on appeal as follows:

> Section 12-120(3) of the Idaho Code requires that the court hearing any action arising out of a contract for services award reasonable attorney fees to the prevailing party. This Court has interpreted I.C. § 12-120(3) to mandate the award of attorney fees on appeal as well as at trial. Chemetics, 130 Idaho at 258, 939 P.2d at 577.
>
> . . . also asserts a right to attorney fees and costs on appeal based on I.A.R. 40, I.A.R. 41, I.C. § 12-120 and I.C. § 12-121. As stated above, this Court has held that I.C. § 12-120(3) mandates the award of attorney fees on appeal to the prevailing party. Additionally, costs are properly awarded to the

prevailing party on appeal pursuant to I.A.R. 40. Sammis v. Magnetek, Inc., 130 Idaho 342, 353, 941 P.2d 314, 325 (1997).

Hummer v. Evans, 979 P.2d 1188, 132 Idaho 830, (Idaho 1999)

---------- Excerpt from page 979 P.2d 1191.

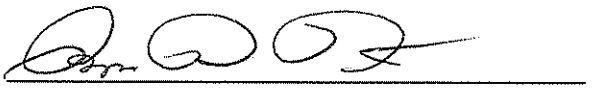
Fees should be awarded to appellant as a prevailing party pursuant to the contract, statutes cited, and Rule 54, I.R.C.P.

CONCLUSION

The trial court lacked jurisdiction as the arbitration clause in the contract was the sole remedy. Further, the appellant did not breach the contract but rather the respondent terminated and breached the same. The contract was clear upon its face and could not be altered or supplemented by parol evidence. The trial court's findings and conclusions are erroneous based upon the state of the record. "Cover" does not apply since the appellant did not breach the contract.

Fees and costs should be awarded to the appellant at trial and upon appeal.

DATED this 19 day of March, 2008.



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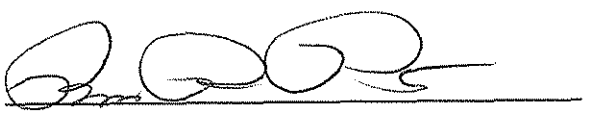
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 day of March, 2008, a true and correct copy of the foregoing was delivered to the following persons(s) by:

Hand Delivery

xx Postage-prepaid mail

Facsimile Transmission



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