11-17-2008

EVCO Sound & Electronics v. Seaboard Sur. Co. Appellant's Reply Brief Dckt. 34898

IN THE SUPREME COURT OF THE STATE OF IDAHO

EVCO SOUND & ELECTRONICS, INC.,

Plaintiff-Respondent,

v.

CEDAR STREET ELECTRIC AND CONTROL, INC., SEABOARD SURETY COMPANY,

Defendants-Appellant.

Supreme Court No. 34898

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County
Honorable John T. Mitchell Presiding

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I. SUMMARY OF ARGUMENT

Setting aside the case determinative issues of timeliness of suit and the statute of frauds, EVCO's burden in this case was to establish a contractual relationship with Cedar Street. Depending on the type of contract it could establish, if any, EVCO then had to establish its entitlement to either expectation damages or quantum meruit damages, i.e., for its labor and materials. EVCO pled in its complaint that it had a "written contract with Cedar Street." (R. at 3). When it could not demonstrate that there was a written contract, it claimed after trial that its contract was part express and part implied. (Motion to Augment, Ex. 2, p. 6).[1] Contrary to EVCO's own admissions regarding its "implied contract" with Cedar Street, and despite its earlier ruling on summary judgment that, based on the undisputed facts, there was no express contract (R., p. 245), the district court determined after trial that there was an express contract. (R., p. 266-67). In its appellate brief, EVCO repeatedly claims it had a "contract with Cedar Street," but distances itself from the obvious legal conclusion that any such contract, if one existed, was an implied in fact contract. The district court misapplied clear Idaho contract law to find an "express contract" based on the "conduct of the parties" and the amount of the contract based upon the "benefit" conferred upon the School District. It is Seaboard's contention that there was no contract between Cedar Street and EVCO, however, if a contract is found to exist, the only contract that could have potentially existed between the parties was an implied in fact contract.

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[1] Seaboard filed a Motion to Augment the record to include EVCO's Proposed Findings of Fact and Conclusions of Law after trial in which EVCO admitted as follows: "EVCO's contract with Cedar Street was part express and part implied." (Motion to Augment, Exhibit 2, p. 6).

Further, EVCO claims it timely provided its notice of claim to Seaboard, but manipulated its billing invoice to do so. On January 29, 2005, the School District took occupancy of the building which was substantially completed as of that date. EVCO's notice of claim was untimely, as was its action on Seaboard's bond.

EVCO also cannot avoid the statute of frauds. There are no exceptions to the requirement that the alleged contract be in writing. Further, the School District's specifications and the prime contract, as well as Ormond Builders' subcontract with Cedar Street, required that Cedar Street and EVCO contract only by a written agreement. (Ex. N, p. 23).

Finally, EVCO is not entitled to attorney's fees on appeal. Attorney's fees under Idaho Code § 54-1927 are not available on appeal and EVCO has no other basis to obtain such an award.

II. ARGUMENT

A. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT ITS FINDINGS OF FACT DEMONSTRATED AN EXPRESS CONTRACT BETWEEN EVCO AND CEDAR STREET.

As a matter of hornbook law, Seaboard's liability, if any, under its bond is measured by Cedar Street's potential liability to EVCO. EVCO is not entitled to a greater recovery against Seaboard that it could have obtained against Cedar Street. "Since the obligation of a surety is accessory to that of a principal debtor, it follows that the liability of the surety is ordinarily measured by the liability of the principal, and cannot exceed it. This is also the case if a bond mirrors a surety's responsibilities by way of statute; in that the surety's responsibilities cannot exceed those embodied in the statute." 74 Am. Jur. 2d, *Suretyship* § 20 (2008) (footnotes omitted).

"As a general rule, a surety on a bond is not liable unless the principal is, and, therefore, he may plead any defense available to the principal. Thus, a surety may set up in defense to an action against him any matter or any act of the creditor that operates as a discharge of the principal from liability." 74 Am. Jur. 2d, *Suretyship* § 88 (2008) (footnotes omitted). Accordingly, EVCO and Cedar Street's contractual relationship, if any, is critical and directly at issue in determining the extent of Seaboard's liability under its bond, if any.

1. **No Express Contract Was Formed Because Cedar Street Intended a Written Contract to Finalize Any Agreement.**

EVCO offers little discussion regarding Cedar Street's undisputed intent to have a written contract to formalize any agreement. Cedar Street consistently indicated its intent to finalize any agreement, if one was ever reached, in an executed writing. (Tr. Vol. II, p. 43, l.17 - p. 34, l. 25; p. 64, l. 2-7; p. 78, l. 22-25; Ex. M). EVCO bore the burden of proof at trial to show any alleged express contract was binding, in spite of the failure to consummate the written agreement. *See Miller Const. Co. v. Stresstek*, 108 Idaho 187, 188, 697 P.2d 1201, 1202 (Ct. App. 1985) (citing *Mitchell v. Siqueiros*, 99 Idaho 396, 400, 582 P.2d 1074, 1078 (1978)); *Thompson v. Pike*, 122 Idaho 690, 697, 838 P.2d 293, 300 (1992). EVCO failed to meet this burden.

As the district court noted in its summary judgment order, "[u]ndisputed facts reveal that there was never an express contract between EVCO and Cedar Street." (R. at 245). Rather, there were a series of negotiations preliminary to a written subcontract and, although the parties looked to enter into a written contract, it was never consummated by either party. EVCO prepared and submitted a number of bid proposals and Cedar Street submitted a blank subcontract, which was

never signed by either party. (Ex. F). Cedar Street's owner testified it was always his intent to consummate any agreement with a formal written contract. (Tr. Vol. II, p. 64, l. 2-7; p. 78, l. 22-25). No evidence was presented to counter this testimony. Pursuant to its Proof of Claim to Seaboard, EVCO claimed there was a "written" contract. Rather, there was a series of documents, which EVCO argues creates a "written" contract. (Ex. 2). There is no dispute that both Cedar Street and EVCO intended to set forth their agreement by a signed written document to finalize their negotiations. (Tr. Vol. II, p. 12, l. 21 - p. 16, l. 6; p. 20, l. 9-18; p. 42, l. 13 - p. 46, l. 3; p. 78, l. 22-25, p. 109, l. 24 - p. 112, l. 9). Where there is no dispute the parties intended to be bound only by a written agreement, no express contract is formed without the executed written agreement. *See Mitchell v. Siqueiros,* 99 Idaho 396, 400, 582 P.2d 1074, 1078 (1978); *Intermountain Forest Mgt., Inc. v. Louisiana Pacific Corp.,* 136 Idaho 233, 236, 31 P.3d 921, 924 (2001).

Contrary to EVCO's contention, Cedar Street never directed EVCO to "start work." Rather, Cedar Street requested that EVCO provide a very limited amount of materials, back cans (no labor was requested), in the very same document that it asked EVCO to review the subcontract. The request to review the subcontract can be interpreted as nothing other than further evidence of Cedar Street's continued intent to enter into a written contract. Moreover, the fact that Cedar Street used EVCO's bid in its prime bid is immaterial. *See Mitchell v. Siqueiros,* 99 Idaho 396, 399, 582 P.2d 1074, 1077 (1978); *see also C.H. Leavell & Co. v. Grafe & Assoc., Inc.*, 90 Idaho 502, 514, 414 P.2d 873, 879 (1966) ("Mere use of respondent's bid is not tantamount to an acceptance"). There is no

dispute that EVCO did supply some materials to the project, however, it did not do so pursuant to an express agreement or any directive from Cedar Street.

Based on Cedar Street and EVCO's repeated attempts to reach an agreement, including a review of contract documents, it is clear the parties intended their negotiations to conclude with a written contract. Just like *Intermountain, Mitchell* and *C.H. Leavell,* no expressed contract between EVCO and Cedar Street existed because the required written mutual assent never occurred without an executed written agreement. Seaboard respectfully requests that the case be reversed and remanded.

2. **No Express Contract Was Formed Because the Parties Proposed Different Terms and No Acceptance of Either Party's Proposals Occurred.**

The question of whether an express contract existed between EVCO and Cedar Street and the scope of any such contract is a question of law for the court to decide. EVCO failed to prove the existence of an express contract at trial and the district court misapplied the law to the facts in finding that there was such a contract, Seaboard disputes the district court's application of law to the findings of fact. "Appellate judges defer to findings of fact based upon substantial evidence, but they review freely the conclusions of law reached by stating legal rules or principles and applying them to the facts found." *See Haight v. Dales Used Cars, Inc.*, 139 Idaho 853, 855, 87 P.3d 962, 965 (Ct. App. 2003). Consequently, this Court reviews the district court's analysis to the findings of fact *de novo*.

EVCO asserts that the district court correctly found an express contract because "[t]he absence of evidence can be substantial evidence. There were obvious material gaps in evidence to

support Seaboard's case at trial and on appeal." (Respondent's Brief, p. 16). Not only does EVCO admit that it has no affirmative evidence of an express contract, it confuses which party carried the burden of proof at trial. Seaboard did not have to disprove the existence of an express contract. It was EVCO's duty to prove that an express contract (or even an implied contract) existed. EVCO specifically pled that it had a written contract with Cedar Street. (R. at 9). Because it was unable to sustain its burden of providing the existence of an express contract, in its post-trial Proposed Findings of Fact and Conclusions of Law, EVCO had no choice but to admit that at least a portion of EVCO and Cedar Street's alleged contractual relationship was implied.[2] Moreover, prior to trial, the district court held in its summary judgment ruling that EVCO did not have a express contract with Cedar Street, stating "[u]ndisputed facts reveal that there was never an express contract between EVCO and Cedar Street." (R. at 245). Accordingly, the trial should have been, at best for EVCO, limited to evaluating whether EVCO established any implied contractual damages. Instead, the district court *created* an express contract between EVCO and Cedar Street, absent any proof of a meeting of the minds, and contrary to EVCO's own admissions.

EVCO details a laundry list of "absent evidence" that allegedly supports its express contract claim. This analysis, however, turns the burden of proof upside down. EVCO had to prove the existence of an express contract, not the lack of evidence to refute the existence of an express contract. For example, EVCO claims that no one at Cedar Street ever informed EVCO it would not proceed without a written or signed contract. Such evidence does nothing to establish the existence

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[2] *See* Motion to Augment, Exhibit 2, p. 6. EVCO never provides any explanation as to which portion of the contract was allegedly expressed and which portion was implied.

of an express agreement. EVCO ignores that Cedar Street provided a written subcontract for the work that was blank as to the scope of the work and price, which directly contradicts a "meeting of the minds," and an express contract. (Ex. F). Further, Cedar Street expected a written contract and indicated its intention to enter into a written contract. (Tr. Vol. II, p. 64, l. 2-7; p. 78, l. 22-25; Ex. 14). EVCO similarly looked to contract by a written purchase order or written subcontract. (Tr. Vol. II, p. 20, l. 15 - p. 21, l. 2).

EVCO repeats the district court's finding that "the conduct of the parties shows a meeting of the minds occurred and a contract was formed. . . ." (R. at 262). In addition, EVCO cites the following from the Court's Order:

> The "scope of work" was delineated in Exhibit 18. EVCO was told to begin work in Exhibit 14. Exhibit 18 establishes the contract price. EVCO did the work called for in Exhibit 18. Accordingly, Cedar Street, Ormond Builders, and the School District **received the benefit of EVCO's work,** and those exhibits establish the contract price.

(R. at 270) (emphasis added). These statements illustrates the fundamental error in the district court's application of contract law. An express contract is not found by the "conduct of the parties," or valued by a "receipt of the benefit" of work, but by an actual expression of assent. The court only looks to the conduct of the parties when there is no express contract. If there is no express contract, the court then must resort to a review of the evidence to determine if the conduct of the parties reflected a contractual relationship that is implied by the parties' conduct. As this Court has made clear, when no express contract exists, the conduct of the parties may illustrate an implied contract. *See Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 767, 979 P.2d 627, 640

(1999) (citing *Continental Forest Prods., Inc. v. Chandler Supply Co.*, 95 Idaho 739, 518 P.2d 1201 (1974) ("[T]here is the ***implied in fact contract*** wherein there is no express agreement but the ***conduct of the parties*** implies an agreement from which an obligation in contract exists.")(emphasis added). EVCO makes no effort to illustrate how the "conduct of the parties" demonstrates the existence of an express agreement or "receiv[ing] the benefit of EVCO's work" allows it to recover expectation damages.

Even if the district court properly concluded that it needed to review the conduct of the parties to determine if there was a "meeting of the minds," to prove the existence of an express contract, the evidence does not support such a finding. EVCO relies on *Barry v. Pacific West Const., Inc.*, 140 Idaho 827, 103 P.3d 440 (2004), to demonstrate there was a "meeting of the minds" to support an express agreement, but fails to demonstrate how *Barry* supports such a finding. As this Court has previously set forth, the requirements for a meeting of the minds is exacting:

> The minds of the parties must meet as to all of its terms, and, if any portion of the proposed terms is unsettled and unprovided for, there is no contract. An offer to enter into a contractual relation must be so complete that upon acceptance an agreement is formed which contains all of the terms necessary to determine whether the contract has been performed or not. An acceptance of an offer, to be effectual, must be identical with the offer and unconditional, and must not modify or introduce any new terms into the offer. An acceptance which varies from the terms of the offer is a rejection of the offer and is a counter proposition, which must in turn be accepted by the offerer in order to constitute a binding contract.

C.H. Leavell v. Grafe & Assoc., Inc., 90 Idaho 502, 511, 414 P.2d 873, 877 (1966) (internal citations omitted). The "conduct of the parties" is not sufficient to establish a meeting of the minds necessary for an express agreement. Rather, "conduct of the parties" is by definition the evidence which, at

best, establishes an implied in fact contract. EVCO repeatedly states that Cedar Street never rejected Exhibit 18 as the contract, but can point to no evidence that Cedar Street expressly accepted Exhibit 18, or any other document, as the express contract. Further, Cedar Street manifestly rejected Exhibit 18 when it provided its own written subcontract that added a number of additional terms and left blank the parties' agreement as to the scope of work and price.

More important, *Barry* does not support a finding of an express agreement. What is required for an express contract to be created according to *Barry* is a preliminary *agreement* pursuant to which the parties acted. EVCO can demonstrate no express agreement, at any stage of the negotiations, preliminary or not. There is no evidence that Cedar Street ever "accepted" any of EVCO's bids orally or in writing. Cedar Street even refused to execute the proposed joint check agreement because it had not reached an agreement with EVCO as to the scope of the work. (Tr. Vol. II, p. 128, l. 19 - p. 131, l. 21). Cedar Street's actions are legally insufficient for mutual assent and formation of an express contract. Cedar Street's only commitment was an intent to enter into a written contract in the future, i.e., preliminary negotiations and a request for EVCO to provide back cans, which is legally insufficient to form an express contract. (Ex. 14). At best, EVCO and Cedar Street had an express agreement for EVCO to provide the back cans for the Project. Moreover, if Cedar Street had accepted EVCO's offer by its words on June 14, 2008, in Exhibit 14, it would have included the scope and price from Exhibit 14 in its proposed subcontract sent to EVCO on June 22, 2008. (Ex. F).

Further, Cedar Street's subcontract, which it provided to EVCO in response to receiving Exhibit 14, proposed substantially different terms than in Exhibit 14. Cedar Street's proposed agreement provided to EVCO on June 22, 2004, set forth payment requirements; changes, additions, and deductions limitations; timeliness and delay damages; indemnity provisions, workers compensation requirements, bonding requirements, insurance requirements, etc. (Ex. F., p. 2-5). These additional terms were never accepted by EVCO and were essential elements to Cedar Street's willingness to expressly contract with EVCO. *See C. H. Leavell & Co. v. Grafe & Assocs., Inc.*, 90 Idaho 502, 511, 414 P.2d 873, 876-77 (1966) (finding no meeting of the minds as to scope of work and requirement to furnish a performance bond). Cedar Street expected EVCO to be bound by the same terms Cedar Street had with Ormond Builders. (Tr. Vol. II, p. 43, l. 17 - p. 44, l. 25; Ex. M). The district court dismissed the proposed subcontract as a "form contract" (R., p. 240), but Cedar Street provided uncontested testimony that it rejected any form contracts it reviewed and specifically chose to copy Ormond Builders' contract as its contract with EVCO. (Tr. Vol. II, p. 43, l. 17 - p. 44, l. 25; Ex. F). Cedar Street went to extra-ordinary lengths to submit a draft written subcontract to EVCO.

In addition, EVCO attempts to suggest that the default judgment entered against Cedar Street somehow illustrates Cedar Street's agreement with an alleged express contract. The issue is both irrelevant and misrepresents the record. Cedar Street contested the entry of default, asserting EVCO never provided service of process.[3] Further, Cedar Street's default is irrelevant to EVCO's claim

[3] *See* Seaboard's Motion to Augment the Record, Exhibit 3, p. 1-2.

against the bond. 74 Am. Jur. *Suretyship* §§ 20 and 88 (2008). Cedar Street provided testimony that it never reached an express agreement with EVCO. (Tr. Vol. II, p. 64, l. 2-7; p. 78, l. 22-25).

The district court erred because the facts failed to support a legal conclusion of an express agreement when there was no evidence of mutual assent or a meeting of the minds.

B. THE DISTRICT COURT ERRED IN AWARDING EVCO EXPECTATION DAMAGES.

Assuming a contract existed, the district court's findings of fact could only support a legal conclusion that at best, there was an implied in fact contract between Cedar Street and EVCO. Even EVCO admitted that its contract with Cedar Street was part express and part implied.[4] (Motion to Augment, Ex. 2, p. 6). As there was no evidence of an express contract, any damages that could be awarded pursuant to that theory were improperly awarded and should be reversed on appeal. An implied in fact contract only supports "payment at reasonable rates for [EVCO's] time and expenses," *Fox v. Mountain West Elec., Inc.*, 137 Idaho 703, 708, 52 P.3d 848, 854 (2002), also referred to as quantum meruit damages. *See Peavey v. Pellandini,* 97 Idaho 655, 659-61, 551 P.2d 610, 614-16 (1976).[5] If an implied contract is found to exist, at best EVCO would only be able to recover reasonable rates for its time and expenses, as demonstrated by the evidence at trial. EVCO was unable to provide any evidence to support a recovery under an implied contract, other than its accounting report admitted as Exhibit 22, which set forth EVCO's costs and labor charges, i.e.,

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[4] *See* Seaboard's Motion to Augment the Record, Exhibit 11, p. 6.

[5] Appellants previously referred to EVCO's alleged damages under an implied in fact contract as "reliance damages." Based on *Peavey,* those damages are more appropriately referred to as quantum meruit damages.

quantum meruit damages, for an implied contract. Mr. Bauer admitted Exhibit 22 included all of the materials and labor tracked on the Project, a total of $51,108.63. (Tr. Vol. II, p. 25, l. 24 - p. 26, l. 2; p. 27, l. 11-24). EVCO was paid more than this amount. (Ex. 24; Tr. Vol. II, p. 137, l. 21 - p. 140, l. 19; p. 205, l. 1 - p. 207, l. 1). Consequently, Cedar Street was paid in excess of its quantum meruit recovery. The Court should reverse the district court's grant of expectation damages awarded to EVCO. EVCO's recovery, if any, should be limited to its implied in fact contract damages, i.e., quantum meruit damages, as set forth in Exhibit 22.

C. EVCO'S NOTICE OF CLAIM AND ACTION WERE UNTIMELY UNDER THE IDAHO PUBLIC CONTRACT BOND ACT.

EVCO cannot demonstrate it timely filed its notice of claim with Seaboard, a condition precedent to recovery under the bond. In its brief, EVCO cites to *United States ex rel. Interstate Mechanical v. International Fidelity Insurance Co.*, 200 F.3d 456 (6th Cir. 2000), arguing that the district court appears to have adopted the rule from that case that "the correction-or-repair versus original-contract test presents a useful framework to determine when the Miller Act's statute of limitations begins to run." (Respondent's Brief, p. 24).[6] However, it is unclear from the district court's Order what standard the court applied, as it provided no legal explanation or support for its conclusion that the training on April 15, 2005, the installation of the television system on April 26, 2005, and the completion of as-built drawings on June 15, 2005, were all original scope work, the completion of which triggered the running of the statute of limitation. (R., p. 271). Further, EVCO's

[6] The law in Idaho is well-settled that consideration of federal decisions under the Miller Act is appropriate in interpreting the Idaho Public Contracts Bond Act. *See Beco Corp. v. Roberts & Sons Const. Co., Inc.*, 114 Idaho 704, 712, 760 P.2d 1120, 1128 (1988).

reference to the rule in *International Fidelity* ignores the court's explanation of the "correction-or-repair versus original-contract" test, and misses the point, as explained below, that not every item in the original contract is "original contract work" for the purposes of the Miller Act.[7] Interestingly, even if the district court *had* applied the *International Fidelity* standard, the training, television fine-tuning and submission of the as-built drawings would *not* have been considered part of the original contract work. As set out in its initial brief, a thorough explanation by *International Fidelity* of what constitutes "when the last labor was performed or material supplied" makes this point clear:

> We agree with the majority of courts that have interpreted the phrase and have concluded it connotes more than mere substantial completion or substantial performance of the plaintiff's obligations under its contract. *See United States es rel. Austin v. Western Elec. Co.*, 337 F.2d 568, 572 (9th Cir. 1964). Furthermore, we agree that work done at the request of the government and pursuant to a warranty, subsequent to final inspection and acceptance of the project, falls outside the meaning of labor performed as set forth in § 270b(b). If post-completion work performed pursuant to a warranty could toll the Miller Act's statute of limitations, then the surety would have no repose until all such warranties expired. . . .
>
> **The majority of circuits that have addressed this issue have held that remedial or corrective work or materials, or inspection of work already completed, falls outside the meaning of "labor" or "materials" under § 270b(b). Hence, performing such work or supplying such materials will not toll the Miller Act's one-year statute of limitations.** *See, e.g., United States for the use of Billows Elec. Supply Co. v. E.J.T. Constr. Co., Inc.*, 517 Supp. 1178, 1181 (E.D.Pa. 1981), *aff'd.* 688 F.2d 827 (3d Cir.), *cert. denied.*, 459 U.S. 856, 103 S.Ct. 126, 74 L.Ed. 109 (1982); *United States for the use of Magna Masonry, Inc., v. R.T. Woodfield, Inc.*, 709 F.2d 249, 250 (4th Cir. 1983); *United States ex rel. Austin v. Western Elec.*, 337

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[7] Seaboard submits EVCO's simplistic analysis ignores the reality that warranty work and punch-list work are required typically by contract and thus, susceptible to the moniker "original contract" work. Clearly, however, warranty and punch-list work **do not** extend the time to provide the 90 day notice or commence the action within one year. *See International Fidelity*, 200 F.3d at 459-60 (6th Cir. 2000).

F.2d 568, 572 (9th Cir. 1964); *United States for the use of State Elec. Supply Co. v. Hesselden Constr. Co.*, 404 F.2d 774, 776 (10th Cir. 1968).

International Fidelity, 200 F.3d at 459-60 (6th Cir. 2000). Importantly, the *International Fidelity* Court went on to clarify: "**[a] contractor's duties under a contract may extend, by virtue of warrant or other obligation, to a point in time far beyond that date when the project has been completed and the 'last of the labor was performed or material was supplied' for purposes of the Miller Act.**" *Id.* (emphasis added). Such conduct does not change the date of last performance for purposes of the Miller Act.

EVCO's argument that the activities conducted on April 15, April 26 and June 15, 2005 are "labor" and "materials" for the purposes of the Miller Act takes the "correction-or-repair versus original contract test" far too literally and misinterprets the standard developed by the Court. As stated in *International Fidelity*, warranty or other obligations under a contract may extend beyond the date of completion of the project, but do not automatically extend the trigger date for the statute of limitations. *Id.* The training, the television system balancing, and submission of as-built drawings all fall into the "warranty or other obligations" category. The mere fact that these items and activities may have been included in the original contract does not transform them into "labor or materials" under the Miller Act. Upon closer examination of the contract and testimony at trial, it is clear that these particular items and activities are *not* the type of labor or materials to trigger the statute of limitations.

The fire alarms and intercom system training did not pertain to the actual construction of the project. It was conducted two and a half months after the School District took possession of the

building and began using it as a school. (Ex. 21). Further, the contract clause addressing the intercom training session reads as follows:

> The Contractor shall provide three training periods of four hours each. The first session shall be *immediately after occupancy*. The second session shall be *30-60 days after the first*. The last training period shall be scheduled *at the end of the 12 month warranty period*. A training plan shall be submitted in advance for approval, outline the topics to be covered, the publications to be used, and the training schedule. The training shall be conducted by personnel thoroughly familiar with the system and its features.

(Ex. O, Section 16760, ¶ 3.03(F)).

The training contemplated in the contract is exactly the type of work the Sixth Circuit excludes from "original contract work" in *International Fidelity*. The training was undertaken *after* the School District took possession and began conducting classes. For all intents and purposes, at that point the building was functionally complete. Pursuant to the contract, the intercom training was to be done only after occupancy and the final training was to be conducted at the end of the warranty period. Thus, the training constitutes an obligation that extends beyond the date the project was completed, and the dates upon which it occurred cannot be used to measure the last date upon which labor was supplied to the Project.

Similarly, the television balance work is not the type of work that can be used to establish the last date of work under the Miller Act. Although this work may have been contemplated in the original contract, it is important to note that the School District took occupancy of the building on January 28, 2005. (Tr. Vol. II, p. 227, l. 1-25). Thus, the building had been functionally complete and in use for roughly three months by the time EVCO undertook to balance the system. The

balancing was work done as a follow-up to completion of the electrical work on the Project. When the School District took possession of the building in January, it was already substantially complete (Tr. Vol. II, p. 227, l. 1-7) and the low-level electrical systems were tested, inspected and operational. (Tr. Vol. II, p. 231, l. 9-24; Ex. Q; Ex. 25). The incidental nature of the balancing work was the type of work that extended beyond the time EVCO had completed its work. Thus, the date on which EVCO performed the balancing of the television system should not be used to determine the date on which the statute of limitations began running on EVCO's notice and claim.

Finally, the as-built drawings were post-Project work, and can not be used as the date upon which the statute of limitations begins to run for claims under the Miller Act. Production of as-built drawings require by their very nature that the project be complete. They are not used to construct the project. Like the television balancing and training, production of as-built drawings constituted incidental work done after the completion of the Project. Therefore, the submission of the as-built drawings on June 15, 2005 cannot serve as the last date labor or materials were provided by EVCO on the project.

Based on EVCO's billing statements, the last "labor" EVCO performed on the project for the purposes of the Idaho Public Contracts Bond Act was on February 11, 2005. Trial testimony was unequivocal that EVCO did not bill for any labor not yet performed. Stated otherwise, the work included in EVCO's February 11th invoice was work that was completed at the time of billing.[8] (Tr.

[8] Glaringly absent from EVCO's Brief is any explanation as to its obvious alterations of its billing invoices. EVCO's original final billing (Invoice No. 6710) submitted with its Proof of Claim was dated February 11, 2005 (*see* Exhibit 2, Bates No. 298). EVCO's notice to Ormond Builders under Idaho Code § 54-1927 was sent June 8, 2005, or 117 days after its "Final Billing."

Vol. II, p. 24, l.3-22). As stated above, the School District took possession of the building and began conducting classes on January 28, 2005. All of the electrical systems, including those for which EVCO supplied material and some labor, were completed and functional. (Tr. Vol. II, p. 231, l. 9-24). The electrical systems were certified as 100% complete by March 1, 2005. (Ex. Q). Any work EVCO claims it performed after that date was merely incidental to completion of its role in the Project on the electrical system.

Additionally, because the Idaho Public Bonds Act is the public works equivalent of the Idaho Mechanics and Materialmans Lien statute, it is appropriate to examine cases construing the lien statute to determine the parameters of the Bond Act. *See LeGrand Steel Prods., Co. v. A.S. Constructors, Inc.*, 108 Idaho 817, 819, 702 P.2d 855, 857 (Ct. App. 1985). Moreover, in this case, the bond itself defines the item a claimant can assert a claim for in terms of what may be covered by a mechanic's lien:

> Claimant: An individual or entity having a direct contract with the Contractor or with a subcontractor of the Contractor to furnish labor, materials or equipment for use in the performance of the Contract. The intent of this Bond shall be to include without limitation in the terms "labor, materials or equipment" that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental equipment used in the Construction Contract, architectural and engineering services required for performance of the work of the Contractor and the Contractor's subcontractors, and ***all other items for which a mechanic's lien may be asserted in the jurisdiction where the labor, materials or equipment were furnished.***

(Ex. 1, Payment Bond, ¶ 15.1). Thus, it is proper to evaluate EVCO's claim based upon Idaho law pertaining to Idaho's Mechanics and Materialmans Lien statute.

At trial, EVCO submitted an altered final Invoice No. 6710 dated March 22, 2005 (*see* Exhibit 20, Bates No. 120), which would make its June 8, 2005, notice timely under the Idaho Public Bonds Act. Incidentally, the alteration of EVCO Invoice No. 6710 also makes its complaint timely or untimely under Idaho Code § 54-1927. *See* Complaint filed March 10, 2006.

Under Idaho's Mechanics and Materialmans Lien statute, a party could not obtain a mechanic's lien for training on fire alarms and intercom systems, television systems balancing, or as-built drawings submissions. *See* Idaho Code § 45-501.[9] Additionally, under Idaho law substantial completion is when the statute of limitations begins to run in a private works project. *See H.W. Johns-Mannville Co. v. Allen*, 37 Idaho 153, 215 P. 840 (1923) and *Mitchell v. Flandro*, 95 Idaho 228, 506 P.2d 455 (1972). "Trivial work" or materials furnished after substantial completion will not extend the time in which a lien claim can be filed under the lien statute. *Mitchell*, 95 Idaho at 231-232, 506 P.2d at 458-459. Substantial completion on this Project was on January 28, 2005,

[9] Idaho Code § 45-501 reads as follows:

RIGHT TO LIEN. Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who grades, fills in, levels, surfaces or otherwise improves any land, or who performs labor in any mine or mining claim, and every professional engineer or licensed surveyor under contract who prepares or furnishes designs, plans, plats, maps, specifications, drawings, surveys, estimates of cost, on-site observation or supervision, or who renders any other professional service whatsoever for which he is legally authorized to perform in connection with any land or building development or improvement, or to establish boundaries, 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.

For purposes of this chapter the term "furnishing material" shall also include, notwithstanding any other provision of law to the contrary, supplying, renting or leasing equipment, materials or fixtures as defined in section 28-12-309, Idaho Code.

"Furnishing material" shall also include renting, leasing or otherwise supplying any equipment, materials, fixtures or machinery to any mine or mining claim.

when the building could be used for the purpose for which it was intended. (Tr. Vol. II, p. 227, l. 1-25). Under Idaho law, any work EVCO performed after the point of substantial completion could not toll the statute of limitations for the filing of notice and claim, and EVCO's filing of notice on and claim were untimely.[10]

Alternatively, even if the Court does not apply the substantial completion standard, EVCO's February 11, 2005, invoice indicates that the last possible date EVCO provided labor or materials on the Project was February 11, 2005.[11] Both EVCO's notice and claim were untimely. The district court's judgment should be reversed and remanded. EVCO failed to comply with Idaho Code § 54-1927.

D. THE IDAHO STATUTE OF FRAUDS BARS EVCO'S CLAIM AGAINST SEABOARD.

EVCO has repeated the district court's conclusion regarding the statute of frauds, but has failed to explain how Idaho Code § 28-2-201 applies to Seaboard based on the plain language of the statute. Idaho Code § 28-2-201 requires any contract for the purchase and sale of goods in excess of $500.00 to be in writing and **signed by the party against whom the enforcement is sought** (i.e.,

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[10] Based upon the January 28, 2005 date of substantial completion, EVCO's notice was mailed 131 days late and received 135 days late, well past the 90 day statutory deadline. Furthermore, EVCO missed the deadline for filing suit by roughly a month and a half.

[11] As Mr. Bauer testified, EVCO bills for its work only after it has completed the work identified in the invoice, and therefore EVCO's invoices reflect labor or materials supplied as of the date of the invoice. (Tr. Vol. II, p. 24, 1. 3-22). It should be noted that after having submitted the February 11, 2005 invoice as part of its proof of claim and swearing to is accuracy under penalty fo perjury, EVCO submitted an altered invoice at trial dated March 22, 2005, seemingly in order to render the notice and filing of its suit timely. Apparently, at a loss to explain the discrepancy, EVCO simply ignores it on appeal.

Cedar Street). Moreover, the Project specifications required such contracts to be in writing. (Ex. N, p. 23). The district court held the exception set forth at § 28-2-201(2) took the transaction out of the statute of frauds because there was no written objection by Cedar Street and both parties were "merchants." Additionally, the district court held that § 28-2-201(3)(c) took the matter outside of the statute of frauds, because payment had been received.

1. <u>The Exception 28-2-201(2) Does Not Apply to Seaboard.</u>

Neither the district court nor EVCO in their analysis correctly applied the plain language of § 28-2-201(2). The statute of frauds exception found at subsection (2) states:

> Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) ***against such party*** unless written notice of objection to its contents is given within ten (10) days after it is received.

Idaho Statute of Frauds § 28-2-201(2). The plain text is clear and simple to apply. The exception does not apply as against a third party – Seaboard. Seaboard should be entitled to the protections of Idaho Code § 28-2-201(1) based on its clear and unambiguous meaning. Official comment No. 3 to the provision also supports Seaboard's construction.

2. <u>The I.C. § 28-2-201(3)(c) Exception for Payment.</u>

Likewise, the plain language of § 28-2-201(3)(c) indicates EVCO's claims are barred by the statute of frauds. EVCO claims its alleged contract was taken out of the statute of frauds because it has been paid for its performance. If such is the case, then its claims against Seaboard fails

because it has been paid for its performance. As with the previous exception, such may be valid as against a statute of frauds defense asserted by Cedar Street, but not Seaboard.

E. EVCO IS NOT ENTITLED TO ATTORNEY'S FEES ON APPEAL UNDER ANY THEORY.

1. EVCO Is Not Entitled to Fees Under Idaho Code § 54-1929 (Bond Actions).

EVCO first requests an award of attorney's fees on appeal pursuant to Idaho Code § 54-1929. However, the statute makes no reference to the award of attorney's fees on appeal. The Idaho Court of Appeals has found that attorney's fees are not properly awarded on appeal under § 54-1929. *See LeGrand Steel Prods., Co. v. A.S. Constructors, Inc.*, 108 Idaho 817, 819, 702 P.2d 855, 857 (Ct. App. 1985) (fees on appeal denied to prevailing subcontractor); *EIMCO Div. of Envirotech Corp. v. United Pac. Ins. Co.*, 109 Idaho 762, 765, 710 P.2d 672, 675 (Ct. App. 1985) (fees on appeal denied to prevailing surety).[12] In *LeGrand*, the Court of Appeals stated that § 54-1929 is analogous to Idaho's mechanic's lien statute regarding attorney's fees, Idaho Code § 45-513. The lien statute is likewise silent on the issue of attorney's fees on appeal, and "has been held not to authorize fee awards on appeal." *LeGrand Steel Prods.*, 108 Idaho at 819. Therefore, where the question of fees on appeal was apparently a substantive issue before the Court, the Court of Appeals reasoned,

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[12] Seaboard acknowledges there are Idaho Supreme Court cases predating the above cases wherein the Court awarded attorney's fees under § 54-1929. *See, e.g., City of Weippe v. Yarno*, 96 Idaho 319, 528 P.2d 201 (1974); *Consolidated Concrete Co., v. Empire Masonry*, 100 Idaho 234, 596 P.2d 106 (1979); *H-K Contractors, Inc., v. City of Firth*, 101 Idaho 224, 611 P.2d 1009 (1979). However, none of these cases explain why the Court allowed for attorney's fees on appeal and it does not appear the issue of fees on appeal was a contested issue. Though these cases present conflicting precedent, the holdings in the more recent Court of Appeals cases explain why attorney's fees are not appropriate on appeal under § 54-1929.

attorney's fees on appeal are barred under § 54-1929. Thus, EVCO may not receive attorney's fees under that statute on appeal.

EVCO cites to *Oldcastle Precast, Inc. v. ParkTowne Const., Inc.*, 142 Idaho 376, 128 P.3d 913 (2005), for the proposition that attorney's fees are awardable under § 54-1929. *Oldcastle* does not address attorney's fees on appeal under § 54-1929, other than to deny them to both parties. In *Oldcastle*, the surety paid Oldcastle principal and interest owed under the subcontract on the first day of trial, leaving only a counterclaim for breach of contract. *See Oldcastle Precast, Inc., v. ParkTowne Const., Inc.*, 142 Idaho 376, 377, 128 P.3d 913, 914 (2005). Oldcastle was awarded attorney's fees by the district court for all attorney's fees incurred up to the date it was paid all sums due under the bond. Oldcastle then attempted to collect attorney's fees under § 54-1929 for successfully defending against the counterclaim. The district court held, and the Idaho Supreme Court affirmed, that once the bond company paid Oldcastle all sums owing under the subcontract, the action ceased to be an action upon the bond, thus removing an award of attorney's fees under § 54-1929 after the bond was paid.

The situation in *Oldcastle* is not only factually different from the case at hand, the holding of the case pertains to whether attorney's fees can be awarded under § 54-1929 when a cause of action on a bond no longer exists. All *Oldcastle* states that is remotely related to whether attorney's fees are allowable on appeal under § 54-1929 is the following:

> Both parties request attorneys' fees on appeal. Oldcastle requests attorney fees under Idaho Code § 54-1929. Because Oldcastle is not the prevailing party and this is not an appeal from a judgment upon the payment bond, Oldcastle is not entitled to an award of attorney fees under that statute.

Oldcastle, 142 Idaho at 379. Although the dissent in *Oldcastle* includes an extensive discussion concerning attorney's fees under § 54-1929 on appeal, the majority declined to award attorney's fees on appeal based upon the issues tried and appealed. Similar to the factual setting in *Oldcastle*, EVCO was paid all that it was entitled to under an implied in fact contract.

Because Idaho case law indicates that where the claim of attorney's fees on appeal was apparently a contested legal issue, Idaho courts have declined to award fees on appeal, EVCO is not entitled to an award of attorney's fees on appeal pursuant to § 54-1929.

2. <u>EVCO Is Not Entitled to Fees on Appeal under Idaho Code § 12-120(3).</u>

EVCO also seeks attorney's fees under Idaho Code § 12-120(3) which provides:

> 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.

Idaho Code § 12-120(3). EVCO argues that this provision is applicable because this case is "an appeal from a civil action to recover on Seaboard's guaranty relating to EVCO's sale of goods and services." (Respondent's Brief, p.13). What EVCO ignores is that it had no contractual relationship with Seaboard. The Idaho Supreme Court has interpreted § 120(3) to require a contract or commercial transaction as between the parties in order to trigger the right to fees under § 120(3). *See BECO Const. Co. v. J-U-B Eng'rs, Inc.*, 145 Idaho 719, __, 184 P.3d 844, 851 (2008) (denying the claim for fees under § 12-120(3) because there was no "commercial transaction" as between the parties); *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 472, 36 P.3d 218,

224 (2001) (same). Moreover, the Idaho Supreme Court has found that "attorneys' fees under § 12-120(3) are unavailable when the claim is controlled by a statutory provision." *Willie v. Board of Trustees*, 138 Idaho 131, 136, 59 P.3d 302, 307 (2002) (internal citations omitted). "[A]ttorney fees are unavailable under § 12-120(3) for statutory claims only when the statute upon which the claim is brought includes its own attorney fees provision." *Id.* Idaho Code § 54-1929 specifically addresses attorney's fees in a bond action. Therefore, EVCO is not entitled to attorney's fees under § 12-120(3).

3. <u>EVCO Is Not Entitled to Fees Under Idaho Code § 12-121.</u>

EVCO also asserts that it is entitled to attorney's fees under Idaho Code § 12-121 because "Seaboard's appeal is brought and pursued unreasonably and without foundation." (Respondent's Brief, p. 14). EVCO states that Seaboard is asking the Court to second guess the district court's decisions regarding conflicting evidence. (Respondent's Brief, p. 14). That assertion is simply incorrect. Seaboard seeks to have the Court clarify areas of law because the district court incorrectly applied the law to this case and contrary to EVCO's own admissions. The Court will not award attorney's fees where, as here, "the losing party brought the appeal in good faith and where a genuine issue of law was presented." *Merrill v. Gibson*, 139 Idaho 840, 846, 97 P.3d 949, 955 (2004) (citing *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979)). Additionally, "an appeal is frivolous when the underlying law upon which it relies is well settled and the appellant makes no substantial showing the district court misapplied the law." *Cox v. Cox*, 138 Idaho 881, 887, 71 P.3d 1028, 1034 (2003) (citing *King v. Lang*, 136 Idaho 905, 912, 42 P.3d 698,

705 (2002)). This appeal is not frivolous, as the issues Seaboard has presented on appeal all pertain to whether the law was correctly applied.

All of the issues raised on appeal pertain to matters of law. Contrary to EVCO's claim, Seaboard has asked the Court to "clarify . . . existing standards," (Respondent's Brief, citing *Scott v. Castle*, 104 Idaho 719, 726-27, 662 P.2d 1163, 1170-71 (1983)) as there is a conflict between existing Idaho case law and the law applied by the district court. Thus, Seaboard's appeal is not frivolous, and EVCO is not entitled to attorney's fees under Idaho Code § 12-121.

III. CONCLUSION

Based on the foregoing, Seaboard respectfully requests that the case be reversed and remanded for an Order to be entered setting forth that EVCO's notice and claim are untimely and that no contract was formed between EVCO and Cedar Street. If this Court finds that notice and claim was timely and that an implied contract existed between EVCO and Cedar Street, Seaboard respectfully requests that the Court finds that EVCO has already been paid its quantum meruit measure of damages, and that it is entitled to no further recovery from Seaboard. Finally, Seaboard also respectfully requests that this Court find that EVCO is not entitled to recover any attorney's fees.

RESPECTFULLY SUBMITTED this 14th day of November, 2008.

Frederick J. Hahn, III
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Appellant Seaboard Surety Company

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Appellant Seaboard Surety Company

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, that I served a true and correct copy of the following described pleading or document on the attorney listed below by hand delivering, mailing or by facsimile, as indicated below, with the correct postage thereon, on this 14th day of November, 2008.

DOCUMENT SERVED: APPELLANT'S REPLY BRIEF

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