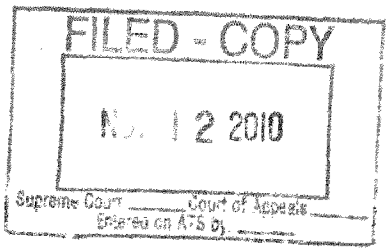
11-12-2010

Farrell v. Whiteman Appellant's Brief Dckt. 37712

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAMIAN FARRELL,	)	**Supreme Court No. 37712**
Plaintiff/Counterdefendant – Respondent	)	**Blaine County Case No.: CV-05-960**
vs.	)	
KENT WHITEMAN, in his individual capacity, and WHITEHORSE PROPERTIES, LLC, a Michigan limited liability company,	)	
Defendants/Counterclaimants – Appellants	)	



APPELLANTS' BRIEF

Appeal from the District Court of the Fifth Judicial District for Blaine County

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Honorable Robert J. Elgee, District Judge presiding

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I.

STATEMENT OF THE CASE

A. The Nature of the Case and Course of Proceedings.

This is the second appeal of this case to this Court. In the original bench trial (the "First Proceeding"), Respondent Damian Farrell ("Farrell") sued Appellants Kent Whiteman and his wholly-owned Michigan limited liability company, Whitehorse Properties, LLC (collectively "Whiteman") for architect services Farrell rendered between 2002 and 2004 on Whiteman's West View Condominium project (the "Project") in Ketchum, Idaho. The district court found an implied-in-fact contract between Farrell and Whiteman and awarded Farrell damages in quantum meruit of $120,983 for all services he rendered, reimbursement for expenses of $13,408.58 Farrell incurred on Whiteman's behalf, attorney fees of $38,740 under Idaho Code § 12-120(3) and costs of $7,547.20.

On appeal, this Court vacated the district court's award of damages and attorney fees and remanded for further consideration. (*Farrell v. Whiteman et al.*, 146 Idaho 604, 613, 610 200 P.3d 1153 (2009)). This Court found that because Farrell was not licensed to practice architecture in Idaho until February 17, 2004, architectural services he rendered before that date were performed pursuant to an illegal contract and that any damages awarded up to that date must be measured by unjust enrichment, not quantum meruit. The district court was directed to determine whether or not Farrell had sustained damages in unjust enrichment for the illegal services and if so, in what amount. (*Id.*, at 612-613). Since Farrell's legal and illegal services were "chronologically separable", this Court also directed the district court to determine the reasonable value of services provided by Farrell in quantum meruit on and after February 17, 2004. (*Id.* at 611). This Court also found the district court erred in awarding attorney fees on an implied-in-fact contract which was, at least until February 17, 2004, illegal and left it to the district court to determine the fee issue on remand.

References in this brief to the reporter's transcript and the clerk's record in the first appeal will be designated as "Tr. I" and R. I", respectively. References to the reporter's transcript and the

clerk's record in the current appeal will be designated "Tr. II" and R. II", respectively.

On remand, the district court reopened this case for additional evidence on the issue of damages and permitted additional discovery. (R. Vol. II, pp. 10-11). On September 15, 2009, the district court held an evidentiary hearing at which further evidence was presented for the district court's consideration.

On January 6, 2010, the district court issued its Decision on Remand finding Farrell was not entitled to *any* architect's fee under an unjust enrichment theory prior to obtaining his Idaho license, but that he was entitled to reimbursement in unjust enrichment for pre-licensure out of pocket expenses paid on Whiteman's behalf of $13,408.56 plus pre-judgment interest. (R. Vol. II, pp. 89-90). The district court also found Farrell was entitled to a fee of $130,000 in quantum meruit for architectural services he rendered after receiving his Idaho license, some $9,000 *more* than he was awarded in the First Proceeding for *all* architectural services rendered both before and after he was licensed.

Farrell then filed a claim for attorneys' fees and costs requesting re-award of all of the $38,740 in fees vacated by this Court in the first appeal. (R. Vol. II, p. 98). Farrell also claimed post-remand attorneys' fees of an additional $14,025 together with costs of $7,735. (R. Vol. II, p. 98). Whiteman timely objected to Farrell's requests for fees and costs (R. Vol. II, pp. 118-125) and filed a Motion to Alter or Amend the Judgment and To Stay Enforcement Proceedings. (R. Vol. II, pp. 132-135).

On April 30, 2010, the district court issued its Decision on Motions for Stay of Execution, To Alter and Amend Judgment, For Costs, and For Attorney Fees denying Whiteman's Motion to Alter and Amend Judgment and awarding Farrell $130,000 in architect's fees, $13,408.58 as reimbursement of expenses paid by Farrell, pre-judgment interest of $8,806.77 on those expenses, costs of $7,734.70, a "re-award" of attorneys' fees of $38,740 for legal services performed in the First Proceeding, and $10,000 for post-remand attorneys' fees for a total judgment of $208,690.05. (R. Vol. II, pp. 146-156). In May, 2010, the district court issued its First Amended Judgment on Remand. (R. Vol. II, p. 157-158). Also in May, 2010, Whiteman filed a timely appeal of that

Judgment. (R. Vol. II, pp. 160-164).

B. **Statement of Facts:**

1. Phases. The district court's task on remand was to chronologically separate services rendered by Farrell before and after he was licensed in Idaho, determine whether or not Farrell sustained damages in unjust enrichment for services rendered prior to February 17, 2004, and, if so, in what amount, and determine the quantum meruit recovery due for services rendered by Farrell after he received his February 17, 2004, licensure. (*Id.*, at 613).

Farrell testified he did not keep track of how many hours he worked on the Project, that there were no documents or data from which he could calculate the hours he spent on the Project and that it would be impossible for him to estimate the number of those hours. (Tr. Vol. I, p. 369, LL. 12-15; p. 370, LL. 6-12). He also testified that the only way he could compute the reasonable value of his services was to determine the percentage of the cost of the Project to which he was entitled and ascertain the work he did in each"phase" of the Project. (Tr. Vol. I, p. 370, LL. 13-19).

In both the First Proceeding and on remand, the district court found 5% ($212,950) of the cost of construction, reduced by certain expenses which were Farrell's responsibility but which had been paid by Whiteman, was an appropriate gross fee to use as a starting point in calculating Farrell's award. (R. Vol. II, p. 93). To determine the actual fee to which Farrell was entitled on remand, the district court was required to figure out when Farrell earned his fee by determining what work Farrell did in the various phases of the Project.

Farrell described the phases of the Project as: (1) a design phase, made up of a "schematic design" sub-phase (consisting of designing and sketching) and a "design development" sub-phase (in which schematic design sketches are converted to detailed drawings from which actual construction drawings are produced), (2) a construction documents and bidding phase, where design development drawings are converted to construction drawings used to bid and build the Project, and (3) a construction observation phase consisting of site visits where the architect determines that work

is being completed in accordance with the construction documents.[1] (Tr. Vol. I, p. 371, LL. 17-25; p. 372, LL. 1-25; p. 373, LL. 1-25; p. 374, LL. 1-12).

Farrell testified that in this particular Project, the "schematic design" sub-phase and the "design development" sub-phase were not separate and distinct but rather rolled into one "design phase" which began in the Spring of 2003 when Farrell did a feasibility study on the Project, researched Ketchum's building regulations, calculated grades and heights of buildings, made and refined preliminary sketches and drawings and compiled the November, 2003, application for the first stage of the Ketchum Planning and Zoning Department's design review process for the Project. (Tr. Vol. I, p. 250, LL. 18-25; p. 251, LL. 1-10; p. 244, L. 25; p. 245, LL. 1-25; p. 246, LL. 1-25; p. 247, LL. 1-25; p. 248, LL. 1-25; p. 249, LL. 1-8; p. 380, LL. 21-25; p. 381, LL. 1-10; p. 374, LL. 22-25; p. 375, LL. 12-25; p. 376, LL. 1-9; p. 380, LL. 1-25; p. 381, LL. 1-10; p. 376, LL. 3-25; p. 264, LL. 1-13). After preparing and submitting the November, 2003, application, Farrell met with Ketchum officials, contractors and engineers and developed additional elevations and revised plans which were submitted to the Ketchum Planning and Zoning Department in February, 2004, for final approval of the Project. (Tr. Vol. I, p. 403, LL. 9-12; p. 404, LL. 18-25; p. 405, LL. 21-25; p. 406, LL. 1-19; p. 386, LL. 13-21; p. 385, LL. 1-14; p. 382, LL. 4-9). Farrell testified that there "was a lot of work that went on [in the schematic design phase] that you're not seeing" in the documents and plans submitted to the Planning and Zoning Department – that he was "trying the jigsaw puzzle" as he went. (Tr. Vol. I, p. 388, LL. 14-22). All of these services were rendered by Farrell before he was licensed in Idaho. (Tr. Vol. I, p. 384, LL. 1-25; p. 385, LL. 1-25; p. 386, LL. 1-25; p. 387, LL. 1-4). Therefore, on remand, the district court found that all Farrell's work in the "schematic design" and "design development" phases of the Project occurred before Farrell had his Idaho license. (R. Vol. II, p. 93).

The construction documents and bidding phase was the second phase of the Project. It began

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[1] Farrell's original architect services proposal to Whiteman (Ex. W505) described a fourth phase – "interior design" – but he later testified that it was "not really a phase as such". (Tr. Vol. I, p. 372, LL. 11-18)

when the drawings and plans submitted with the November, 2003, and February, 2004, Planning and Zoning applications were given to CDS, the drafting service retained by Farrell at his expense to produce the plans for the Project, and SDI, the Project's structural engineers, who then began preparing the actual documents used to obtain a building permit and build the Project. (Tr. Vol. I, p. 279, LL. 18-20; p. 280, LL. 18-25; p. 281, LL. 1-4; p. 389, LL. 8-17; p. 390, LL. 11-21; p. 391, LL. 5-25; p. 392, LL. 1-10). CDS immediately started generating the actual construction drawings and, although CDS was not making actual construction decisions on how the building goes together, it was the entity in control of generating the plans themselves. (Tr. Vol. I, p. 391, LL. 5-25; p. 392, LL. 1-21). The actual plans submitted to the Ketchum Building Department (the "Plans") for a building permit and given to the contractor for construction purposes were therefore prepared by CDS at its office in Ketchum, Idaho. (Tr. Vol. I, p. 288, LL. 1-5, LL. 19-21). In preparing the Plans, CDS made electronic copies and emailed them to Farrell's Michigan office so Farrell could review them and email them back with any changes. (Tr. Vol. I, p. 294, LL. 17-19).

The construction documents and bidding phase was not completed by Farrell. (Tr. Vol. I, p. 408, LL. 23-25; p. 409, LL. 1-5). Both Farrell and the architect who testified on Farrell's behalf, Ned Hamlin ("Hamlin"), agreed that approximately 10% of the construction documents and bidding phase was never completed. (Tr. Vol. I, p. 603, LL. 10-16; Exhibit W569).

The construction observation phase was the third phase of the Project. Farrell performed no construction observation on the Project. (Tr. Vol. I, p. 408, LL. 9-11).

2. Percentage of Fee Earned in Each Phase. According to Farrell, determination of the *amount* of architectural fees attributed to each phase is crucial to calculation of his fee. (Tr. I, p. 370, LL. 13-19). Indeed, the percentage of fees earned in each phase and when work in each phase was performed are the two most important factors in determining the amount to which Farrell is entitled. Farrell's own testimony in this regard is most instructive.

In some of the most important testimony before the district court, Farrell unequivocally stated that he would weight the time spent on the design phase (consisting of both the "schematic design"

and the "design development" sub-phases) "about the same" as that spent on the construction documents and bidding phase, noting *specifically* that on this Project they would be of similar weight:

> **Q:** (Mr. Aanestad) Now, I understand from your prior testimony that you would weight the time spent on the design phase about the same as that put into the documents phase?
>
> **A:** (Mr. Farrell) Yes. It varies from project to project, but if you were to average it, they are of similar weight.
>
> **Q:** (Mr. Aanestad) They would be of similar weight in this project?
>
> **A:** (Mr. Farrell) Yes. (Tr. Vol. I, p. 407, LL. 17-25).

He further testified that the final construction observation phase is between 15% and 20% of the total architectural effort put into the Project and that if it were 20%, then 40% of his time on the Project would have been spent in the design phase and 40% in the construction documents and bidding phase:

> **Q:** (Mr. Aanestad) And I also understand that the construction observation phase is generally about 20 percent of the total effort put into the project?
>
> **A:** (Mr. Farrell) Between 15 and 20 percent.
>
> **Q:** (Mr. Aanestad) So if it were 20 percent, then 40 percent of the time would be in the design phase and 40 percent of the time would be in the construction documents phase, roughly?
>
> **A:** (Mr. Farrell) Approximately. (Tr. Vol. I, p. 408, LL. 1-8).

Farrell confirmed the range of these phase percentages by testifying that the construction documents phase represented "anywhere from 40 to 50 percent of the work of an architect on a

project" and that because of the time requirement of this phase he hired CDS to physically do the construction drawings while he oversaw their work. (Tr. Vol. I, p. 367, LL. 22-25).

Farrell's witness Hamlin also testified about these percentages, but his testimony was far different and much less certain than that of Farrell. Concerning the percentages allocable to each phase, he testified that "[t]here really are no standards in our [architectural] practice." (Tr. Vol. I, p. 593, L. 9). He also testified that every architect "develops their own percentages" and that *his* (Hamlin's) percentage of the design phase was typically 15% of the overall fee. (Tr. Vol. I, p. 593, LL. 11-14). He further testified that he could not attribute a percentage to the design development portion of the design phase in this Project because "[t]here are no real definitions to it." (Tr. Vol. I, p. 599, LL. 18-25; p. 600, L. 1). He stated that *although Farrell was able to specifically define the design development sub-phase in this Project*, he, Hamlin, could not tell how much "design development" was done on the Project (Tr. Vol. I, p. 635, LL. 1-8). Hamlin thought "design development" probably started as early as November of 2003, but he really did not know because he just did not "know how [Farrell] does his business" and "[e]veryone does it differently". (Tr. Vol. I, p. 634, L. 25; p. 635, LL. 1-21). Hamlin *was* able to testify that "design development" was done before the construction documents phase because "you really cannot develop your construction documents unless you perform design development". (Tr. Vol. I, p. 603, LL.1-2).

Hamlin also attributed 70% of Farrell's fee to the construction documents and bidding phase. He admitted this was "a rough estimate"and that it was just what *he* (Hamlin) used in percentage fee projects. (Tr. Vol. I, p. 662, LL. 17-21). He unequivocally stated that based on his 70% allocation to this phase and the time it took CDS to complete the Plans, Farrell would be entitled to approximately $70,000 per month for his work reviewing CDS's electronic drafting from his Michigan office. (Tr. Vol. I, p. 662, LL. 1-16) He also testified that the construction documents appeared to him to be only 90% complete "on just a very cursory look" and based on discussions with Farrell, and that therefore Farrell's fee for this phase should be reduced by 10% of the 70% he allocated to it, qualifying his response by reiterating that "[t]here are no standards in architecture". (Tr. Vol. I, p. 667, LL. 23-25; p. 668, LL. 1-14).

Note that Hamlin, commenting on the impact of the *quality* of Farrell's work on the fee to which he was entitled, testified that whether Farrell performed "a good job or a bad job" he was "absolutely" entitled to the same percentage fee on the Project. (Tr. Vol. I, p. 671, LL. 16-25; p. 672, LL. 1-25; p. 673, LL. 1-8).

Finally, Hamlin testified that he estimated approximately 15% of Farrell's total fee was earned in the construction observation phase. (Tr. Vol. I, p. 665, LL. 20-23). In connection with this testimony he admitted that the amount allocated to construction observation can vary from job to job and that he didn't know whether his 15% estimate was a standard used by other architects, since the *only* other architect he discussed percentages with was his partner and that he did not "have any idea what Mr. Farrell's billing propensities (were)". (Tr. Vol. I, p. 665, LL. 24-25; p. 666, LL. 1-15).

Hamlin's testimony concerning phase percentages is summarized on Defendants' Exhibit W569 attached hereto as **Exhibit A**. The typed portions of that exhibit were prepared by Whiteman's expert witness, architect Janet Jarvis ("Jarvis"), who testified to the accuracy of her entries. [2] (Tr. Vol. I, pp. 690-703). Jarvis is licensed to practice architecture in six different states: Florida, Connecticut, Illinois, Wyoming, Montana and Idaho, served on the Ketchum Planning and Zoning Board for 2-3 years, and is a member of the American Institute of Architects. (Tr. Vol. I, p. 686, LL. 12-19). The handwritten percentages, numbers and cross-outs on **Exhibit A** were made by Hamlin to indicate how he believed the percentages should be "redistributed". (Tr. Vol. I, p. 600, LL. 22-25; p. 601, LL. 1-15; p. 602, LL. 18-21). For example, where Ms. Jarvis attributed 40% of the total fee to the construction documents and bidding phase, Hamlin attributed 70%; where Ms. Jarvis estimated 20% to the construction observation phase, Hamlin attributed 15%.

Hamlin testified that Farrell should be entitled to a gross fee of 5% on the Project. (Tr. Vol. I, p. 598, LL. 21-22). He also testified that at that percentage, the cost of CDS's drafting services and SDI's structural engineering fee would be the architect's responsibility and, since these were

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[2] It should be noted that Jarvis' phase percentages are almost identical to those of Farrell. In pointing this out, Whiteman is not arguing that the district court should have adopted Jarvis' percentages over Hamlin's – only that there is additional support for Farrell's phase percentages.

paid by Whiteman, they should be deducted from Farrell's fee. (Tr. Vol. I, p. 604, LL. 13-24; p. 606, LL. 8-18).

3. Fee Calculation in the First Proceeding. In the First Proceeding the district court essentially disregarded both Farrell's own testimony and the testimony of Jarvis concerning the percentages attributable to each phase and adopted Hamlin's approach. It used 5% of the cost of the Project ($212,950) as an appropriate gross fee. It then reduced that amount by the 15% ($31,943) Hamlin attributed to construction observation because Farrell did no work in this phase, and 10% ($14,905) of the 70% Hamlin attributed to the construction document and bidding phase, leaving an adjusted fee of $166,105. This amount was then reduced by CDS's drafting fee ($32,732) and SDI's structural engineering fee ($12,390) leaving a net fee payable to Farrell for all architectural services rendered *both before and after* his February 17, 2004, licensure date of $120,983. (R. Vol. I, p. 84). In the First Proceeding, there was no attempt by the district court to determine *when* Farrell became entitled to his fee.

4. Fee Calculation On Remand. On remand, the district court concluded Farrell was entitled to *no* damages in unjust enrichment for services rendered prior to the time he obtained his Idaho architect's license but that he was entitled to $13,408.58 in unreimbursed expenses during that period and pre-judgment interest thereon. (R. II, pp. 89, 91). The court then found that for his post-licensure quantum meruit recovery Farrell was entitled to *more* than he was awarded in the First Proceeding for all his services "because of the quality of his work" calculated as follows: (R. Vol. II, pp. 93-94)

5% gross fee $212,950
less 15% for both "schematic design"
and "design development" phases .....($31,942)
less CDS fee .....($32,732)

less SDI fee ..... ($12,390)

less second architect's fee ..... ($5,530)

Total Reductions ..... ($82,594)

Total Award ..... $130,356, rounded to $130,000

In its calculation on remand, the district court neglected to reduce the fee by the 15% allocated to the construction observation phase (which Farrell never performed) or by the 10% of the construction documents phase (which Farrell didn't complete) as it had in the First Proceeding. The sum of those two amounts, using Hamlin's percentages, is $31,943 plus $14,905 for a total of $46,848.

In awarding Farrell more on remand than in the First Proceeding, the district court found "[t]here is no requirement in the Supreme Court's decision that the award of damages goes lower simply because of the timing of the application of two equitable remedies" (Tr. Vol. II, p. 87).

5. Attorney Fees On Remand. This Court vacated the district court's award of attorney fees in the First Proceeding finding that neither party was entitled to fees under Idaho Code § 12-120(3) "[e]ven when a party is permitted some recovery on an illegal transaction." (*Farrell v. Whiteman*, *supra,* at 613). It found the district court erred in awarding attorneys' fees to Farrell based on an implied-in-fact contract which was, at least up until February 17, 2004, illegal. (*Id.*) Nonetheless, on remand, the district court awarded Farrell the full amount of all attorney fees awarded in the First Proceeding, $38,740, and $10,000 of the $14,025 in fees requested by Farrell for post-remand services, indicating it now based its fee award only upon "the legal portions of the contract". (R. Vol. II, p. 154). The court based its $4,025 reduction of Farrell's post-remand fees by finding them "excessive" rather than because they related to an illegal contract. (R. Vol. II, p. 154).

II.

ISSUES PRESENTED ON APPEAL

A. Whether the district court erred in calculating the amounts owed to Farrell on remand.

1. Whether Farrell's phase percentages should be used rather than Hamlin's.

2. Whether the district court should have reduced Farrell's award for work he did not do.

3. Whether the quantum meruit award to Farrell should be based on the reasonable value of his services, not on the speed and quality of his work.

B. Whether the district court erred in awarding attorneys' fees and costs to Farrell on remand.

C. Whether Whiteman is entitled to award of attorneys' fees and costs on appeal pursuant to I.R.C.P. 54(e)(1) and I.C. § 12-121.

III.

STANDARD OF REVIEW

This Court reviews the district court's rulings on equitable remedies for an abuse of discretion. (*Climax, LLC, v. Snake River Oncology of Eastern Idaho, P.L.L.C., et al,* 36613 (IDSCCI) (October 6, 2010); citing *O'Connor v. Harger*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008))

The standard of review for an abuse of discretion is "whether the court perceived the issue as one of discretion, acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it, and reached its decision by an exercise of reason." (*Id.*, citing *Read v. Harvey*, 147 Idaho 364, 369 209 P.3d 661, 666 (2009)).

This Court may examine the record to see if challenged findings of fact are supported by substantial and competent evidence. *Northwest Pipeline Corp. v. Luna*, 35469 (IDSCCI) (September

7, 2010), citing *Argosy Trust v. Winninger*, 141 Idaho 570, 572, 114 P.3d 128, 130 (2005). Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven. *Id.*

Determining the meaning of an attorney-fee statute and whether it applies to the facts are issues of law that this Court freely reviews. *Smith v. Washington County, Idaho*, 35851 (IDSCCI) (October 6, 2010), citing *J.R. Simplot Co. v. W. Heritage Ins. Co.*, 132 Idaho 582, 584, 977 P.2d 196, 198 (1999).

IV.

ARGUMENT

A. The District Court Erred in Calculating the Amounts Due to Farrell.

The district court only partially followed this Court's instructions on remand in computing the amount due Farrell. Its task was clear: Chronologically separate what architectural services were rendered by Farrell before and after he was licensed and determine (1) whether he is entitled to any unjust enrichment recovery for services rendered prior to licensure and (2) the quantum meruit recovery due for services rendered thereafter. The district court *did* chronologically separate the services, finding the entire design phase (including both "schematic design" and "design development" sub-phases) of the Project was completed by Farrell before licensure. (R. Vol. II, p. 93). It also found Farrell was entitled to no recovery in unjust enrichment for that work. (R. Vol. II, p. 90). But in determining the quantum meruit recovery to which Farrell was entitled for the legal portion of the implied-in-fact contract, the district court ignored Farrell's own testimony concerning the percentage of work he completed *on this Project* in favor of the uncertain, unsure testimony of Hamlin who testified only to the percentages he and his partner (but no other architects) did on *other* projects, that "everyone does [work in the design phase] differently", that he had no idea what Mr. Farrell's "billing propensities" were and that he just didn't "know how [Farrell] does his business". (Tr. Vol. I, p. 635, LL. 1-21; p. 666, LL. 13-15). In so doing, the district court awarded Farrell over

$9,000 in fees (and over $8,000 in pre-judgment interest) *more* for the legal portion of his contract than for the *entire* contract in the First Proceeding.

The district court also erred in its mathematical calculation of the award on remand because it did not reduce Farrell's fee by 15% for construction observation which Farrell did not perform ($31,942) and 10% of the construction documents and bidding phase not completed by Farrell ($14,950).

The district court based its quantum meruit award on the "positive results Farrell obtained because of the quality of his work" of which there is absolutely no evidence in the record and no basis in fact. (R. Vol. II, p. 93). The district court's failure in this regard was an abuse of its equitable discretion and is not supported by any substantial or competent evidence in this case.

1. Farrell's phase percentages should be used rather than Hamlin's. In calculating Farrell's fee, the district court used Hamlin's fee percentages of 15% for the design phase and 70% for the construction document phase. Farrell's own testimony concerning the percentages of his services attributable to each phase of this specific Project should easily trump Hamlin's uncertain estimates of how he attributed phase percentages in *his* practice. Time and time again Hamlin's testimony was qualified by his statements that he did not know how much work Farrell performed in each phase, and could only testify as to *his* (Hamlin's) practices. Farrell unequivocally testified that he would weight the time spent on the design phase (*i.e.* the combined schematic design and design development sub-phases) "about the same" as that spent on the construction documents phase, specifically and emphatically noting that *on this particular Project* they would be of similar weight. (Tr. Vol. I, p. 407, LL. 17-25). He also testified that the schematic design and design development sub-phases were really rolled into one integrated design phase (Tr. Vol. I, p. 388, LL. 3-25), and that all design documents were prepared by him prior to licensure. (Tr. Vol. I, p. 384, LL. 1-25; p. 385, LL. 1-25; p. 386, LL. 1-25; p. 387, LL. 1-4). He testified that his construction observation phase was typically between 15-20% of the total architectural fee, and that if it were 20%, then approximately 40% of his time would have been spent on the design phase and

approximately 40% on the construction documents phase. (Tr. Vol. I, p. 408, LL. 1-8). He confirmed this estimate in separate testimony when he indicated the construction documents phase was "typically anywhere from 40 to 50 percent of the work of an architect on a project". (Tr. Vol. I, p. 368, LL. 1-4).

It is especially important to focus on Hamlin's view of Farrell's design development sub-phase on the Project. Hamlin was hesitant and unable to testify to the amount of design development performed by Farrell in the design phase because "it is very difficult to define" and "everyone does it differently". (Tr. Vol. I, p. 634, LL. 25; p. 635, LL. 1-13) He admits that *Farrell* was able to specifically define the design development sub-phase *in this Project*. (Tr. Vol. I, p. 635, LL. 1). But he indicated that in *his* practice design development didn't end until "somewhere in the construction documents phase [and is] overlapping" (Tr. Vol. I, p. 643, LL. 10-15). This is directly contrary to Farrell's testimony and noteworthy because Hamlin's allocation of design development to the "construction documents" phase explains his 70% allocation to this phase as opposed to the 40% to 50% allocated by Farrell. The work Farrell performed after receiving his license was all done in the construction documents phase: He is entitled to an award in quantum meruit for that work only. That is why an accurate analysis of this phase is absolutely crucial to an accurate award.

The district court unequivocally found all work Farrell did in the design phase – the "schematic design" and "design development" subphases – occurred before Farrell was licensed. (R. Vol. II, p. 93). This is in accord with Farrell's own testimony that both "schematic design" and "design development" were essentially rolled into one phase. (Tr. Vol. I, p. 388, LL. 12-13, 23). But the district court then applied Hamlin's 15% allocation to the design phase, not appreciating that in Hamlin's practice this did not include all the design development which Hamlin found so difficult to define. Applying Hamlin's allocation is in direct conflict with Farrell's testimony that the percentage of architect's work in the construction documents phase of this Project was about the same as the percentage of work in the design phase. The district court erred in using Hamlin's 70% allocation because it didn't understand that he got there because he attributed *his* design development efforts largely to the construction documents phase. It should have used the percentage to which

Farrell unwaveringly testified.

On remand, the district court should have reduced the 5% gross fee ($212,950) by 15% ($31,943) to reflect that Farrell rendered no services in the final "construction observation phase" resulting in an adjusted fee of $181,007 to be allocated between the design phase and the construction documents and bidding phase, or $90,504 each. Since the district court found Farrell is entitled to no award in unjust enrichment for his pre-licensure work in the design phase, Farrell is left with $90,504 in fees for his "construction documents and bidding phase". This amount is properly reduced by 10% ($9,050) for work which Farrell did not perform in this phase, leaving a fee of $81,454. This amount should be further reduced by the CDS fee ($32,732) and the SDI structural engineer's fee ($12,390), just as the district court did in the First Proceeding, since these costs would be the architect's responsibility in a 5% fee but were paid by Whiteman. This results in an award to Farrell of $36,332 as the reasonable value of the architectural services he rendered during the "construction documents phase" on and after February 17, 2004. *It bears emphasizing that this amount is based upon the unequivocal, undisputed testimony of Farrell himself in these proceedings.* There is no better evidence available to this Court to chronologically separate the quantum meruit recovery due Farrell for services rendered after he became licensed from the services rendered prior to licensure for which the district court found no unjust enrichment recovery.

2. The District Court Should Have Reduced Farrell's Award By Work He Did Not Do.

Even if the district court *were* correct in using Hamlin's percentages rather than Farrell's, the calculation of the $130,000 award to Farrell is incorrect. On remand, the district court awarded Farrell a quantum meruit fee calculated by reducing the gross fee of 5% ($212,950) only by the 15% attributable to services rendered by Farrell in the design phase before licensure ($31,942) and fees paid to CDS ($32,732), SDI ($12,390) and the second architect's fee ($5,530) to get to the $130,000 award. (R. Vol. II, p. 93-94).

Under any theory of recovery, Farrell should not be compensated in quantum meruit for work he did not do. Whiteman does not agree with the percentages used by the district court in computing

its award for the reasons stated above. However, *everyone* – Farrell's witness Hamlin, Jarvis and even the district court in the First Proceeding – indicated that the gross fee of 5% ($212,950) should be reduced by 15% ($31,942) for construction observation which Farrell did not perform and 10% ($14,950) of the construction documents phase which Farrell did not complete which would result in a total award of $88,993. To be consistent with the methodology used by the district court on remand, this award should be further reduced by the amount paid to the second architect ($5,530), for a total award of $83,463, although this reduction was not made in calculating the award in the First Proceeding.

3. The Quantum Meruit Award to Farrell Should Be Based on the Reasonable Value of His Services, Not on the Perceived "Quality of His Work". It is well settled in Idaho that the measure of recovery for a claim in quantum meruit is the reasonable value of services rendered, not the actual benefit realized and retained. (*Baker v. Boren,* 129 Idaho 885, 894, 934 P.2d 951 (Idaho App 1997), citing *Peavy v. Pellandini*, 97 Idaho 655, 660, 551 P.2d 610, 615 (1976)). This is supposed to be an *objective* measure proven by evidence demonstrating the nature of the work and the customary rate of pay for such work in the community at the time the work was performed. (*Id.*). Yet in calculating the $130,000 award to Farrell on remand, the district court emphasized that the greater award was due in large part to the speed and quality of Farrell's work (R. Vol. II, pp. 92, 93, 86, 148) based largely on the court's finding that the units in the Project "sold for prices reflecting both the quality of Farrell's work and the speed with which he gets his work done". (R. Vol. II, p. 148). Whiteman submits there is not a single shred of evidence that any unit in the Project sold because of Farrell's design or the speed at which he worked. There was absolutely no testimony whatsoever from *anyone* in support of that finding. Whether units sold because of their location, views, quality of construction and finish work, pricing, sun exposure, or any of a variety of other factors influencing a buyer's decision is pure speculation since there is nothing in the record to support any of these theories. Indeed, it is equally plausible that the units sold *in spite of* the design rather than *because* of it. Neither Hamlin nor Farrell argued that Farrell's fee should be increased

because of the speed or quality of his work. To the contrary, Hamlin testified that Farrell would be entitled to the same fee whether he performed a "good job or bad job or whether it was timely or not timely". (Tr. Vol. I, p. 671, LL. 7-25; p. 672, LL. 1-25; p. 673, LL. 1-8). The district court's findings run directly contrary to this testimony.

4. Calculations. To aid this Court in calculating the proper amount due Farrell, Whiteman offers the following summary of the calculations described above in chart form:

(see next page)

PERCENTAGE FEE SUMMARY

	Farrell's Testimony re: Phase Percentages		Hamlin's Testimony re: Phase Percentages		Dist. Ct.'s Award in the First Proceeding for All Work		Dist. Ct.'s Award On Remand (Hamlin's % without reduction for work Farrell did not do)		Math Correction to Dist. Ct.'s Award On Remand (Hamlin's % with reduction for work Farrell did not do)		Proposed Dist. Ct. Award (Farrell's % with reduction for work Farrell did not do)
	%	Amount	%	Amount	%	Amount	%	Amount	%	Amount	Amount
Design Phase (Schematic Design and Design Development)	40%-42.5% (equal to Constr. Docs Phase)	$85,180 - $90,504	15%	$31,943	15%	$31,943	15%	0	15%	0	0
Constr. Does Phase	40%-42.5% (equal to design phase); also "40-50%"	$85,180 - $90,504	70%	$149,065	70%	$149,065	70%	$149,065	70%	$149,065	$85,180 - $90,504
Constr. Observation Phase (never performed)	15%-20%	0	15%	0	15%	0	15%	$31,943	15%	0	0
Reductions											
10% of Const Does Phase not completed		($8,518 - $9,050)		($14,905)		($14,905)		0		($14,905)	($8,518-$9,050)
Drafting Service (CDS)		($32,732)		($32,732)		($32,732)		($32,732)		($32,732)	($32,732)
Structural Engineer (SDI)		($12,390)		($12,390)		($12,390)		($12,390)		($12,390)	($12,390)
2nd Architect (Barkley)		0		0		0		($5,530)		($5,530)	0
TOTAL NET FEE FOR ALL WORK		$116,720 - $126,836		$120,983		$120,983		$130,355		$83,508	$148,663-$169,426
Award After Licensure (No Design Phase)		**$31,540 - $36,332**		**$89,038**		**N/A**		**$130,000**		**$83,508**	**$31,540-$36,332**

B. Farrell is Not Entitled to Attorney Fees Under I.C. § 12-120(3). In the First Appeal of this case, this Court vacated the district court's award of $38,740 in attorney fees to Farrell under I.C. § 12-120(3), citing *Barry v. Pac. W. Constr., Inc.*, 140 Idaho 827, 835, 103 P.3d 440, 448 (2004). Under *Barry*, even when a party is permitted some recovery on an illegal transaction, the court cannot award attorney fees under I.C. § 12-120(3). Therefore, this Court found the district court erred in awarding attorneys fees to Farrell based on an implied-in-fact contract which was, at least until February 17, 2004, illegal.

On remand, the district court again awarded the full $38,740 in attorneys fees incurred by Farrell in the First Proceeding and awarded him an additional $10,000 in attorneys fees incurred in connection with the rehearing proceedings on remand, all pursuant to I.C. 12-120(3). In making this award, the district court concluded that "the request for fees from Farrell is based upon his recovery of the 'legal' portions of his contract". (R. Vol. II, p. 152). There is nothing in the record to support that Farrell made such a request. Farrell's counsel's affidavit in support of his attorney fee request (R. Vol. II, pp. 101-114) makes no attempt to attribute fees to only the "legal" portion of the implied-in-fact contract. Rather, it simply requests payment of all fees incurred for the entire pre-appeal services and for all attorneys fees incurred on remand without any distinction between legal and illegal portions of the contract or any attempt at chronological separation. Nor is there anything in the record to support the district court's conclusion that all Farrell's fees were related only to the legal portions of his contract. Indeed, much of the discovery and testimony at the First Proceeding focused on what Farrell did prior to licensure in order to segregate the clearly illegal portion of the contract from the arguably legal. (See, *e.g.*, Exhibits W501-W538; W569 Ex. 1 and 2; Tr. Vol. I, pp. 223-438; pp. 590-684; pp. 62-149).

The district court also relied upon *Blimka v. My Web Wholesaler, LLC,* (143 Idaho 723, 152 P.3d 598 (2008)) in making its attorney fee award under I.C. § 12-120(3), emphasizing that it antedated all three cases cited by this Court in its vacation of the prior fee award. *Blimka* was decided in 2007 in an opinion written by Justice J. Jones, the same Justice who wrote the 2009 opinion in the first appeal of this case. It is hard to imagine that this Court and counsel would ignore

Blimka if it were in any way relevant to the issues in the first appeal. But it is not. *Blimka* stands for the proposition that a contract is not required for recovery of attorneys fees on the "commercial transaction" ground in Idaho Code § 12-120(3). It has nothing to do with recovery of fees under an implied-in-fact contract which is part legal and part illegal, and it offers absolutely no support for or against an award of attorneys fees in that situation. For the district court to conclude that the legal portion of Farrell's implied-in-fact contract qualifies as a "commercial transaction" is fine; to use that conclusion to justify an award of *all* Farrell's $48,740 in attorneys fees is not.

The district court concluded that under *Barry*, only if the contract is illegal in its entirety are the parties precluded from claiming attorneys fees under I.C. § 12-120(3). A strong argument can be made that Farrell is not entitled to any attorney fees at all under the *Barry* rationale because Farrell had no ability to contract or enter into an enforceable commercial transaction – he was unlicensed when the implied-in-fact contract commenced and therefore incapable of contracting for architect services. However, if attorney fees are disallowed under *Barry* only for the illegal portions of the contract, at the very most there should be a proration between the legal and illegal portions. In vacating the prior fee award, this Court left it to the district court to determine the fee issue on remand. (*Farrell v. Whiteman*, *supra*, at 613). To the extent this Court's decision calls for an allocation of fees between the legal and illegal portions of the contract, a reasonable formula should be applied. Using Farrell's percentages of design phase (40%), construction documents phase (40%) and construction observation phase (20%) would result in an award of 40% of fees claimed in the First Proceeding since services in the design phase were illegal and the construction observation phase was never performed. Using the proportion the maximum recovery Whiteman proposes ($36,332) bears to the gross fee ($212,950) results in an award of 17% of fees claimed in the First Proceeding.

Concerning the fee award for the post-remand proceedings, Whiteman contends Farrell is entitled to no fees because he did not prevail. The district court's charge on remand was to determine what, if any, unjust enrichment recovery was due Farrell for the illegal portion of his contract. *The district court found he was entitled to no unjust enrichment recovery.* (R. Vol. II, 90).

How can Farrell be the prevailing party on remand when he was denied recovery of any fees in unjust enrichment?

Farrell had full opportunity on remand to present whatever additional evidence he thought was consistent with the appellate opinion of this Court. (R. Vol. II, p. 10). He failed to present *any* evidence of unjust enrichment recovery or any evidence in support of an award of attorneys fees attributable to the legal portion of the contract. Farrell has had his second bite at the apple. Since he made no effort to justify an award of even a portion of the attorney fees vacated by this Court, the fee award by the district court should be vacated, or, in the alternative, prorated as discussed above.

C. **Whiteman is Entitled to Attorney Fees and Costs On Appeal**. Whiteman requests attorneys fees on appeal under I.C. § 12-121 and I.R.C.P. 54(e)(1). Under that statute and rule, reasonable attorneys fees will be awarded to a prevailing party when the Court is left with the abiding belief that the appeal was defended frivolously, unnecessarily and without foundation. (*Stewart v. Stewart*, 143 Idaho 673, 681, 152 P.3d 544, 552 (2007))

Whiteman's appeal is based in large part upon indisputable errors of omission in the district court's damages calculation. Farrell is not entitled to payment for work he did not do. This includes the approximately $31,942 portion of the fee attributable to the construction observation phase in which he rendered no services (Tr. Vol. I, p. 408, LL. 9-11) and the $14,950 portion of the fee attributable to the 10% of the construction documents phase he never completed. (Tr. Vol. I, p. 408, LL. 23-25; p. 409, LL. 1-5; p. 667, LL. 23-25; p. 668, LL. 1-14). Neither Farrell, Hamlin, nor any other witness at trial testified that Farrell was entitled to these amounts. These omissions are tantamount to arithmetic errors, and should not be included in a quantum meruit award based on the reasonable value of services rendered. Farrell *should* have come forward when this appeal was filed, agreed to the math error and stipulated that at least this approximately $65,000 issue be removed from dispute. Rather, Farrell insisted on defending this obvious error and the other decisions of the district court described above which are wholly unsupported by any substantial and competent evidence. Whiteman should therefore be awarded his attorneys' fees in bringing this

appeal because Farrell's defense is frivolous, unreasonable and wholly without foundation.

V.

CONCLUSION

The district court engaged in sleight-of-hand in finding that although Farrell was entitled to *no* pre-licensure unjust enrichment recovery, he was entitled to a greater overall fee than that awarded to him in the First Proceeding for all his work. The percentages the district court attributed to the various architectural phases ignore Farrell's own testimony as to what he did on *this Project* in favor of Hamlin's uncertain, hedging testimony of what *he* would do in a percentage-of-cost contract. Hamlin's testimony hardly rises to the standard of substantial and competent evidence in light of Farrell's undisputed testimony.

The district court's calculation also awards Farrell quantum meruit recovery for the construction observation phase which he did not perform and for 10% of the construction documents phase which he did not complete. Under *any* theory of recovery Farrell is not entitled to compensation for work he did not do. Farrell himself and his witness, Hamlin, testified that Farrell rendered no services in these areas; there was no evidence – none – that Farrell was entitled to compensation for this work.

The district court indicates that because "[t]his is, after all, an award made in equity" it is free to cut Farrell's award out of whole cloth without regard to whether there is substantial, competent or any other evidence to support the award. (Tr. Vol. II, p. 149). Its finding that Farrell is entitled to more money because of the speed and quality of his work is wholly unsupported by any evidence. The measure of recovery required for a claim in quantum meruit is the reasonable value of services rendered – this is an objective standard to be proven by evidence demonstrating the customary pay for such work in a similar community. The district court's judgment is erroneous and should be vacated with explicit instructions from the Court as to the exact amount of any award to Farrell without further determination by the district court. Based on Farrell's own testimony, that award

would be $36,332.

The attorney fee award to Farrell in the First Proceeding under I.C. 12-120(3) should be vacated because the fees resulted from an implied-in-fact contract that was illegal at the time it was entered into. In the alternative, this Court should prorate any such fees based on the percentage of work for which an award is made as discussed above. This Court should vacate the fees awarded for post-remand proceedings since Farrell did not succeed in proving entitlement to any unjust enrichment award.

Farrell's defense of the district court's judgment, especially its erroneous award to Farrell for the work he did not perform in the construction observation phase and the construction documents phase was unreasonable and without foundation, and Whiteman should be awarded attorneys' fees on appeal under I.C. § 12-121 and I.R.C.P. 54(e)(1).

DATED this 10th day of November, 2010.

SPECK & AANESTAD
A Professional Corporation
Attorneys for Appellants

By _____
Douglas J. Aanestad

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2010, I served a true and correct copy of the within and foregoing document upon the attorney named below in the manner noted:

Mr. Edward Simon
Attorney at Law
P. O. Box 540
Ketchum, Idaho 83340
Fax: (208) 726-7313

- ☐ United States Mail, Postage Prepaid
- ☑ Hand Delivery
- ☐ Facsimile
- ☐ Email

Douglas J. Aanestad

JARVIS PERCENTAGE FEE SUMMARY

FARRELL'S PLANS

PROJECT COST: $4,259,000	% Completion		4%	Hours	Weeks		5%	Hours	Weeks		6%	Hours	Weeks
ARCHITECTURAL PHASES													
1. Design Phase	~~35%~~	15%											
a) Schematic design - 15%			$ 25,554.00	213	5.3		$ 31,943.00	266	6.6		$ 38,331.00	320	8
b) Design Development - 20%			$ 34,072.00	284	7.1		$ ~~42,590.00~~	~~355~~	~~8.9~~		$ 51,108.00	426	10.7
2. ~~Interior Design~~	~~5%~~		$ ~~8,518.00~~	~~74~~	~~1.8~~		$ 10,648.00	89	2.2		$ 12,777.00	106	2.6
							149,065						
3. Construction Doc/Bidding Phase	~~40%~~	70%	$ 68,144.00	568	14.2		$ ~~85,180.00~~	710	17.7		$ 102,216.00	852	21.3
							31,945						
4. Construction Observation Phase	~~20%~~	15%	$ 34,072.00	284	7.1		$ ~~42,590.00~~	355	8.8		$ 51,108.00	426	10.7
								1,577					
TOTAL	100%		$ 170,360.00	1420	35.5		$ 212,950.00	~~1,775~~	44.4		$ 255,540.00	2,130	53.3
REDUCTIONS:													
No Design Development (20%)		$ (34,072.00)				$ ~~(42,590.00)~~				$ (51,108.00)			
50% Interior Design: not completed		$ (4,259.00)				$ ~~(5,324.00)~~				$ (6,389.00)			
10% 20% of Const. Doc: not completed		$ (13,628.00)				$ ~~(17,036.00)~~	(1,965)			$ (20,443.00)			
No ~~Design Development~~ (20%)		$ (34,072.00)				$ (42,590.00)	(31,945) -			$ (51,108.00)			
PHASE REDUCTIONS			$ (85,031.00)				$ ~~(107,548.00)~~	(76,249)			$(129,048.00)		
SUBTOTAL WITH PHASE REDUCTIONS:			$ 84,329.00				$ ~~105,402.00~~				$ 126,492.00		
Computer Asst'd Design							166,105						
(CDS):		$ (32,732.00)				($32,732.00)				$32,732.00			
Structural Engineer (SDI):						($12,390.00)				$12,390.00			
Electrical Engineer:		$ (1,848.00)		58		~~$1,848.00~~				$1,848.00			
Landscape Design		$ (1,126.00)		(5,530.00)		~~$1,126.00~~				$1,126.00			
Additional Architectural Services:		$ (5,530.00)				~~$55,530.00~~	45,122			$5,530.00			
COST REDUCTIONS			$ (41,236.00)				$ ~~(53,526.00)~~				$ (63,626.00)		
TOTAL FEE WITH PHASE AND COST REDUCTIONS:			$ 55,483.00				120,985 $ ~~81,704.00~~				$ 72,366.00		

EXHIBIT A

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DEFENDANT'S EXHIBIT W 569