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Benz v. D.L. Evans Bank Appellant's Brief Dckt. 37814

IN THE SUPREME COURT OF THE STATE OF IDAHO

LESLIE BENZ, Plaintiff/Respondent vs. D.L. EVANS BANK, Defendant/Appellant	)	SUPREME COURT NO. 37814

APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District for Blaine County.
Honorable Robert J. Elgee, District Judge, Presiding.

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I. Statement of the Case

A. Nature of the Case.

Leslie Benz filed an action seeking to enforce her vendee's lien arising from a failed real estate transaction. She asked that her vendee's lien be declared valid and superior to the liens of the other named parties and that money judgment enter against the Seller, East Avenue Bluff, LLC. D.L. Evans Bank was joined as a secured creditor. A significant number of mechanics and materialmen lienholders were joined.

B. Course of Proceedings Below.

The complaint was filed on August 12, 2009. R Vol. I, p. 1, D.L. Evans Bank answered on August 25, 2009. R Vol. I, p. 31. Default judgment entered against certain defendants on November 5th, 2009 and January 26th, 2010. R Vol. I, p. 36; p. 39. On April 5th 2010 Ms. Benz filed a motion for summary judgment against D.L. Evans Bank. R. Vol. I, p. 43.

The motion for summary judgment was argued to the court May 3rd, 2010 following which the court entered its opinion from the bench. Tr Vol. I, p. 69, L. 19. On May 19th, 2010 the court entered its "Order of Summary Judgment" R Vol. II, p. 350. D.L. Evans Bank filed an objection to the Plaintiff's form of the order of summary judgment on May 20th, 2010 R Vol. II, p. 354.

Ms. Benz filed an affidavit of interest calculations on May 14, 2010 Supp. R Vol. I, p. 16. It was objected to on May 27, 2010 Supp. R Vol. I, p. 42.

On July 12, 2010, Ms. Benz filed a "Motion for Attorneys Fees Pursuant to I.R.C.P. Rule 37(c) and a notice of hearing thereon. Supp. R Vol. I, p. 61.

Ms. Benz's motion relating to interest was heard on June 29th, 2010 following which the court entered a partial oral ruling. Supp. Tr p. 62. L. 8.

The hearing on Ms. Benz's Rule 37(c) motion took place on August 2nd, 2010. The court entered an oral ruling reserving some issues. Supp. Tr Vol. I, p. 93 L. 20. On July 12, 2010 the court entered its order awarding prejudgment interest. Supp. R Vol. I, p. 82. The court issued a decision on the motion for Rule 37(c) on October 4th, 2010 making an award of attorneys fees. Supp. R Vol. I, p. 118. An amended judgment entered on July 12, 2010. R Vol. II, p. 366. A second amended judgment entered on February 8th, 2011. Supp. R Vol. I, p. 130.

C. Statement of Facts.

The Plaintiff, Leslie Benz, was personal friends with Stacy Rutherford and her husband, John. In 2007, she had a casual conversation with Rutherford about how much she would like to live in Ketchum. R Vol. I, p. 143. A few weeks later, in May of 2007, Rutherford called Benz and told her that Rutherford and her husband were considering developing a four-unit project. They met and went over the plans. R Vol. I, p. 143. After further discussions, and a visit to the property, Benz agreed to purchase one of the properties. Benz signed the contract to purchase the property on June 7, 2007 and deposited $100,000.00 earnest money into a trust account. R Vol. I, p. 144. The contract identified "Rutherford" as the Seller, but provided for assignment to East Avenue Bluff, LLC of

which they were the only members. Eventually East Avenue became the developer and the assignments were completed. Under the terms of the contract, Benz was to deposit $100,000.00 as earnest money in the Sun Valley Broker's, LLC trust account on or before June 8 and an additional $400,000.00 earnest money was to be deposited later, but a date is not specified. The $500,000.00 was to be released to the Seller on or before June 21, 2007. R Vol. I, p. 51.

On the same date, Benz signed an addendum which required Benz to make an additional payment of $250,000.00 earnest money on or before November 1, 2007. The addendum provided that the first $500,000.00 would be released to the Seller when the property acquisition was closed. The third deposit would immediately be released to the Seller. R Vol. I, p. 58.

Benz signed another addendum on August 29, 2007. It was signed by East Avenue Bluff, LLC on August 30, 2007. It authorized disbursal of the $500,000.00 to Seller on or before August 30, 2007. R Vol. I, p. 185. The record does not establish when the money was actually disbursed.

To summarize Benz's payment history, she deposited $100,000.00 on June 7, 2007, and $400,000.00 on August 25, 2007. This money was disbursed upon her written instruction presumably on or after August 30, 2007. She paid $250,000.00 on November 13, 2007 directly to East Avenue Bluff, LLC. R Vol. I, p. 147 – p. 148.

East Avenue Bluff, LLC approached D.L. Evans Bank for a loan to finance the construction. Early in the loan approval process, D.L. Evans Bank was made aware of the Benz contract to purchase the property and some of its terms. R Vol. I, p. 90. The bank's senior loan committee

required a copy of the contract but it was never included in the loan file and it wasn't available to the committee in approving the loan. R Vol. I, p. 89; p. 79. The committee also required the loan officer, Ken Nelson, to acquire confirmation that Ms. Benz's financial condition was adequate to complete the purchase. In July, he contacted Ms. Benz and advised her D.L. Evans Bank was working to put together a loan to finance the construction. Ms. Benz arranged for a statement to be sent to D.L. Evans Bank from Castle Rock Mortgage, which was considered in reviewing the loan. R Vol. II, p. 308; p. 287. The senior loan committee mistakenly believed that the fact that the property had been pre-sold, and that Ms. Benz would have a substantial cash investment, significantly decreased the risk factors associated with the loan. They were unaware of the statutory vendee's lien and its potential ramifications should the vendor default. R Vol. II, p. 308. The loan was approved and D.L. Evans Bank funded a loan of $2,650,000.00 on August 29, 2007. R Vol. II, p. 308. The deed of trust was recorded August 30, 2007. R Vol. II, p. 313.

When Ms. Benz gave Ms. Rutherford the $100,000.00 check on June 7, 2007, she told Benz that she was going to walk the check around the corner to D.L. Evans Bank. At that point, Benz assumed they were getting a loan from D.L. Evans Bank. She also assumed that the Bank would be requiring a copy of the agreement. R Vol. I, p. 80.

When the construction was completed and the parties were in the process of closing the Benz purchase of the property, it was learned that East Avenue Bluff, LLC had failed to pay in excess of $213,000.00 in construction expenses which had been recorded as liens against the property. The

Bank was later presented with a draft settlement statement relative to closing the Benz purchase. The proposal was that D.L. Evans Bank be paid $1,772,220.53. R Vol. I, p. 87. At that time, the principle balance owing on the loan was $2,644,056.77 and the interest was in excess of $159,000.00. The payoff exceeded $2,803,000.00. R Vol. II, p. 319. Closing on that statement would have resulted in the Bank taking a loss in excess of $1,000,000.00. The parties were left in a very difficult position. Ms. Benz had entered into a contract to purchase the property for $2,743,500.00. She had paid $750,000.00 of that sum to the Seller. In order to close a transaction, either Ms. Benz would have to pay an extra $1,000,000.00, or D.L. Evans Bank would take a $1,000,000.00 loss. The closing date was February 6, 2009. R Vol. I, p. 187. The sale did not close. On July 7, 2009 Ms. Benz terminated the East Avenue Bluff, LLC contract by written notice, R Vol. I, p. 184.

Both parties entered into their respective transactions in good faith and fully performed in accordance with their obligations. Both were left holding the bag.

D. Issues Presented on Appeal.

1. Under what circumstances does a lien arise under Idaho Code § 45-804, when does it come into existence, and from what date does its priority run?

2. What is the meaning of the term "good faith" as used in Idaho Code § 45-803 and was D.L. Evans Bank acting good faith in this transaction such that it is not subject to the Idaho Code § 45-804 lien?

3. Is the priority of the Idaho Code §45-804 lien affected by the vendee continuing to make payments after being made aware of senior interests?

4. Is the common law vendee's lien recognized in Idaho or is it appropriate to use its principles in interpreting Idaho's statutory lien?

5. Was it appropriate to award Ms. Benz prejudgment interest and include it in the amount secured by a lien arising under Idaho Code § 45-804?

6. From what date does prejudgment interest run for Idaho Code § 45-804 liens generally, and for such liens where there are contractual limitations on remedy?

7. What significance does the exclusive and limited remedy provisions of the contract have to Ms. Benz's claims?

8. Are the prior appellate rulings relating to prejudgment interest applicable to the facts of this case or should they be overturned, distinguished, or limited?

9. Does establishing a fact by affidavit in a summary judgment proceeding constitute proof of a fact under I.R.C.P. 37(c)?

10. Did the trial court abuse its discretion in awarding attorney's fees under I.R.C.P. 37(c)?

11. Were there factual questions appearing in the record, or unsupported findings of fact, making entry of the summary judgment improper?

LAW AND ARGUMENT

II. Lien of a Purchaser of Real Property (Vendee's Lien)

A. Introduction

When a vendee enforces a lien against its vendor it is an action in the nature of rescission. *McMahon v. Cooper* 70 Idaho 139, 212 P.2d 657 (1949); *Graves v. Cupic*, 75 Idaho 451, 272 P.2d 1020 (1954). In determining the amount owing, the court acts to put each of the parties back in the position they held prior to the transaction. There is no net gain or loss by either party.

When a vendee asserts a lien claim against a third party, however, it is a completely different situation. The third party did not receive the payments made by the vendee. Often, as in this case, the third party's interest in the property arose from payments or loans made by the third party to the vendor. If the property does not have sufficient value to discharge the obligations of both the vendee and the third party and the vendee has priority, it is able to shift its loss to the third party. The vendee's gain is the third party's loss. In the present case, Leslie Benz seeks to shift her loss resulting from the failure of her transaction with East Avenue Bluff, LLC to D.L. Evans Bank.

1. Timeline

- June 7, 2007 Ms. Benz signed a contract to purchase property upon which a townhouse was to be built to her specifications. R Vol. I, p. 144.
- June 7, 2007 Ms. Benz made a nonrefundable earnest money deposit of $100,000.00 into an escrow. R Vol. I, p. 144.
- June 7, 2007 Ms. Benz was advised D.L. Evans Bank was involved and assumed it was making a loan. R Vol. I, p. 80.
- July, 2007 D.L. Evans Bank was aware of the Benz contract and its payment terms when it approved a construction loan to fund construction of the townhouse. R Vol. I, p. 90.
- July 2007 D.L. Evans Bank contacted Ms. Benz and advised her it was working on a loan. R Vol. II, p. 308.
- August 25, 2007 Ms. Benz made an additional nonrefundable earnest money deposit of $400,000.00 into the escrow.

- August 29, 2007 D.L. Evans Bank funded the loan. R Vol. II, p. 308
- August 29, 2007 Ms. Benz signed Addendum 1 authorizing the escrow to disburse the funds to East Avenue Bluff, LLC on or before August 30, 2007. R Vol. I, p. 185
- August 30, 2007 D.L. Evans recorded the deed of trust. R Vol. II, p. 313
- August 30 2007 East Avenue Bluff, LLC signed Addendum 1 authorizing the escrow to disburse the funds to East Avenue Bluff, LLC on or before August 30, 2007. R Vol. I, p. 185.
- It is unknown in the record when the escrow disbursed the funds.
- November 13, 2007 Ms Benz made an addition payment of $250,000.00 directly to the vendor. R Vol. I, p. 147 – p. 148.
- February 6, 2009 The closing date. R Vol. I, p. 187.
- July 7, 2009 Ms. Benz sent vendor a notice terminating the contract. R Vol. I, p. 184.
- May 19, 2010 Oral ruling on Summary Judgment. Tr Vol. I, p. 69, L. 19.

2. Overview

Ms. Benz claims a vendee's lien pursuant to Idaho Code § 45-804 and asks that it be given priority over the recorded deed of trust of D.L. Evans Bank. There is no question but that Ms. Benz has a right to a lien, the question is when did the lien come into existence and from what date does its priority run? Is it when the vendee signs the contract; when the vendee makes a payment; when there is a failure of consideration; or when there is a judicial determination

there has been a failure of consideration and of the amount the vendee is entitled to recover?

Idaho adopted R.S. § 3444 in 1887, providing for a lien of a purchaser of real property. Such a lien is commonly referred to as a vendee's lien. It is currently set forth at Idaho Code § 45-804. A related statute adopted the same year is Idaho Code § 45-803, providing priority.

Considering the statutes have been in place for over 123 years, there is a pronounced lack of authority relating to them. They fail to specifically answer the single most important issue in this case: When does the lien come into existence and from what date does the priority of the vendee's lien run? A second issue relates to the priority of payments made after the vendee becomes aware of another creditor.

3. Standard of Review

The standard of review for summary judgment is as follows:

> In an appeal from a summary judgment, we apply the same standard of review utilized by the district court when ruling on the motion. *Scona, Inc. v. Green Willow Trust*, 133 Idaho 283, 286, 985 P.2d 1145, 1148 (1999); *Drew v. Sorensen*, 133 Idaho 534, 537, 989 P.2d 276, 279 (1999). Summary judgment may be entered only if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Idaho Rule of Civil Procedure 56(c). In this case, the parties stipulated to the pertinent facts, and it is not contended that there are any material factual issues. Therefore, the sole issue presented by the motion is one of law upon which we exercise free review. *Roell v. Boise City*, 130 Idaho 199, 200-01, 938 P.2d 1237, 1238-39 (1997); *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994); *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365 (1994).

Kenneth F. White, Chtd. V. St Alphonses Regional Medical Center, 136 Idaho 238, 240, 31 P.3d 926, 928 (Ct.. App. 2001)

The issue raised on the I.R.C.P. 37(c) ruling is an abuse of discretion standard. *Desfosses v.*

Desfosses 122 Idaho 634, 836 P.2d 1095 (Ct. App. 1992) and *Tomich v. City of Pocatello*, 127 Idaho 394, 901 P.2d 501 (1995).

B. Idaho Code § 45-804, Vendee's Lien.

The trial court found that Leslie Benz had a vendee's lien which had priority over the deed of trust recorded by D.L. Evans Bank. Tr Vol. I, p. 69. D.L. Evans Bank requests that this ruling, and judgment entered thereon, be reversed based upon the following alternative grounds:

1. The vendee's lien priority runs from the date of the filing of a notice of pendency of action in a lawsuit brought to establish that there is an amount owing to the vendee upon a failure of consideration.

2. If the priority of a vendee's lien runs from the date payments were made, in this case there is either an absence of proof establishing a date a payment was made, or payments were clearly made after the recording of D.L. Evans Bank deed of trust.

3. D.L. Evans Bank was an encumbrancer in good faith and for value, and therefore not subject to the vendee's lien of Ms. Benz.

4. There are unresolved factual questions which preclude entry of summary judgment.

§ 45-804. Lien of purchaser of real property

> One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration.

The following rule of statutory construction has been adopted in Idaho.

> "The interpretation of a statute is a question of law, over which this Court exercises free review." *State v. Hensley,* 145 Idaho 852, 855, 187 P.3d 1227, 1230 (2008). The statute is viewed as a whole, and the analysis begins with the language of the statute, which is given its plain, usual and ordinary meaning. *Id.* In determining the plain meaning of the statute, "effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant." *State v. Mercer,* 143 Idaho 108, 109, 138 P.3d 308, 309 (2006) (quoting *In re Winton Lumber Co.,* 57 Idaho 131, 136, 63 P.2d 664, 666 (1936). The plain meaning of a statute will prevail unless the clearly expressed legislative intent is to the contrary or unless the plain meaning leads to absurd results. *Gillihan v. Gump,* 140 Idaho 264, 266, 92 P.3d 514, 516 (2004), *abrogated on other grounds by Gonzalez v. Thacker,* 148 Idaho 879, 231 P.3d 524 (2009). "If the language of the statute is capable of more than one reasonable construction it is ambiguous," and a statute that is ambiguous must be construed with legislative intent in mind, which is ascertained by examining "not only the literal words of the statute, but the reasonableness of the proposed interpretations, the policy behind the statute, and its legislative history."

State v. Yzaguirre, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007).

A review at the Idaho Legislative Research Library established that Idaho Code § 45-804 predates available legislative history materials by several decades. All that is available is the text of the statute as it was adopted, which is the same as it is today. While the statute was reenacted a number of times, it has not been amended.

The statute provides initially that "one who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property..." That sounds as though the lien arises upon payment as opposed to when the contract was signed. On the other hand, the statute later limits this language. It goes on to state that the vendee has a special lien upon the property, "independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration." The lien is not for all amounts paid by the

vendee, only that "part of the amount paid as he may be entitled to recover back" and it is tied to "failure of consideration." This seems to indicate the lien comes into existence, and the priority runs from the date the amount owing is determined following a failure of consideration in a proceeding brought for that purpose.

Most liens are predicated on an amount owing from the outset. Consider the liens of mechanics and materialmen arising under Idaho Code § 45-501 where work has been done, or materials have been provided but not paid for. It is the creation of the debt with an amount actually due and owing, that establishes the existence and the priority date of the lien. This is a common thread in the lien statutes. In the case of the vendee's lien, there is no amount owing until there is a failure of consideration and a court determines both that there has been a failure of consideration and the amount owing. This should be the date when the lien is created.

1. Priority of the Vendee's Lien

Idaho Code § 45-803 provides:

45-803.Vendor's Lien – Extent. The liens of vendors and purchasers of real property are valid against every one claiming under the debtor, except a purchaser or encumbrancer in good faith and for value.

This statute establishes priority, but does not establish when the lien comes into existence, nor the date from which priority runs. These must be determined under Idaho Code § 45-804. Section 803 also uses the term "good faith and for value" in defining the exception for an encumbrancer". Black's Law Dictionary revised fourth edition 1968 defines good faith as

follows:

> Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. *Siano v. Helvering*, D.C.N.J., 13 F. Supp. 776, 780. An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious. *Warfield Natural Gas Co. v. Allen*, 248 Ky. 646, 59 S. W.2d 534, 91 A.L.R. 890; *Crouch v. First Nat. Bank*, 156 Ill. 342, 40 N.E. 974; *Waugh v. Prince*, 121 Me. 67, 115 A. 612, 614.

Good faith is defined in the context of banking by Idaho Code § 28-4-605(1)(f) which provides:

> 28-4-605. Other Definitions. (1) In this part:
> (f)"Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

When D.L. Evans Bank was negotiating and completing the loan to East Avenue Bluff, LLC it was well aware that Leslie Benz had signed a contract to purchase and would be making payments of earnest money totaling $750,000.00. D.L. Evans Bank role was to provide the financing, exceeding $2,600,000.00, for construction of the townhouse that Ms. Benz was purchasing. In other words, it was by virtue of D.L. Evans Bank's loan that East Avenue Bluff, LLC would be able to perform its contract with Ms. Benz. There is absolutely no evidence that D.L. Evans Bank made any effort to take an inconscientious advantage of Ms. Benz. There is no evidence that at the time the loan was being negotiated and closed that D.L. Evans Bank had any information which would lead to the conclusion there would be a failure of consideration. There is absolutely nothing in the record to establish that D.L. Evans Bank would benefit at Ms. Benz expense from an East Avenue Bluff, LLC default. Indeed, the record affirmatively establishes

that D.L. Evans Bank went to great lengths to assure not only that East Avenue Bluff, LLC would fully perform its obligations, but also that Ms. Benz would fully perform hers. Tr Vol. II, p. 286; p. 306. Tr Vol. I, p. 89; p. 90-94.

When D.L. Evans Bank funded the loan to East Avenue Bluff, LLC, it was to Ms. Benz's benefit not to her disadvantage. The loan would allow construction of the townhouse she wanted to purchase built to her specifications. She was aware that construction would be financed and she was aware it was being financed by D.L. Evans Bank. She entered into and performed her contract in good faith. D.L. Evans Bank entered into and performed its contract in good faith. Neither defaulted or engaged in inequitable conduct. Both suffered substantial losses as a result of the default. Ms. Benz wishes to shift her loss to D.L. Evans Bank.

Under the standard of good faith as defined above, it is clear that D.L. Evans Bank was an encumbrancer who acted "in good faith and for value" in acquiring its deed of trust securing its loan. Ms. Benz's lien is not valid as to D.L. Evans Bank.

C. Idaho Cases.

In *McMahon v. Cooper*, 70 Idaho 139, 212 P.2d 657 (1949) the parties entered into a contract for the sale of two building lots. McMahon took possession and began to place improvements on the property which were contemplated in the contract. McMahon brought this action seeking a return of the payments made, the reasonable value of improvements and to have a lien declared on the premises. A notice of pendency of action was filed for record on January 26, 1948.

Cooper sold the property to Eldridge in March of 1948, who granted a mortgage to Provident Federal Savings and Loan Association. Regarding the question of a vendee's lien and its priority, the Court had the following to say:

> Appellant is entitled to have the amount found due him declared a lien on the premises and to have such lien foreclosed. Section 45-804, I.C.; 66 C.J. 1497; 55 Am.Jur. 941. The sale to the respondents, Eldredge, and the mortgage to the respondent, Provident Federal Savings and Loan Association, were made after the notice of pendency of suit was filed, and are inferior to appellant's lien.

Id. at 70 Idaho 147, 212 P.2d 662. This language supports the conclusion the vendee's lien does not exist until it is declared to exist in an action to establish the right to recover payments and the amount found due the vendee. The priority runs from the date the notice of pendency of suit is filed. *McMahon* establishes both the date the lien comes into existence and the date from which priority runs. This is consistent with language of Idaho Code § 45-804.

In *Graves v. Cupic*, 75 Idaho 451, 272 P.2d 1020 (1954). The vendee brought an action against the vendor. There was no third party interest involved. The court expressly applied Idaho Code § 45-804.

> The judgment is reversed and the cause is remanded with directions to the trial court to enter judgment in favor of the plaintiff and against the defendants for the sum of $10,758.02 (being the amount paid on the contract less $3,741.98 damages for loss of rents and profits during the time plaintiff withheld possession of the property), with statutory interest on $3,000 thereof from November 1st, and on the balance from December 4, 1952, *Sorensen v. Larue*, 47 Idaho 772, 278 P. 1016; and providing a lien on the property involved to secure payment of the judgment, and for the foreclosure of such lien.

Id. at 75 Idaho 460, 272 P.2d 1026. The opinion determines the right to recover and the amount

owing as required by the statute. It directs the trial court to enter judgment "providing a lien on the property involved to secure payment of the judgment, and for the foreclosure of such lien."

This opinion is consistent with the *McMahon.* Both *McMahon* and *Graves* create the lien in the judgment determining the vendee's right to recover and the amount owing. *McMahon* bases its finding of priority as to third parties on the prior filing of the notice pendency of action. If these rules hold, the Benz lien did not exist until the court determined that "part of the amount paid" that she was "entitled to recover back" upon "a failure of consideration." The priority of the Benz lien as to D.L. Evans Bank is determined by the date she recorded her notice of pendency of action.

Neither *McMahon* nor *Graves* cites Idaho Code § 45-803. In the absence of its application, perhaps the rule expressed applies where the "good faith encumbrancer" exception to the statute does not apply. D.L. Evans Bank falls under both rules and its deed of trust is prior to Ms. Benz.

D. Erroneous Factual Findings

The trial court made the following findings of fact which were not established in the record or were substantially disputed:

1. $500,000.00 got paid and applied right to the bank's deed of trust. Tr Vol. I, p. 74 L. 24.

There is absolutely nothing in the record showing the $500,000.00 was applied to D.L. Evans Bank's deed of trust.

2. The bank knew how the arrangement between East Avenue Bluff, LLC and Ms. Benz was going to work. Tr Vol. I, p. 70, L. 9.

There is evidence in the record D.L. Evans Bank had knowledge of part of the arrangement but there is nothing showing that it knew the whole arrangement.

3. The bank knew East Avenue Bluff, LLC would have title to the property before their deed of trust would attach to the property. Tr Vol. I, p. 70, L. 9.

There is absolutely nothing in the record establishing this.

4. The bank knew of and benefited and expected to benefit from Ms. Benz making the last contractual payment.

While the contract called for the payment to be paid to D.L. Evans Bank. Tr Vol. I, p. 76. L. 2. It was uncontroverted that no $250,000.00 payment was made to D.L. Evans Bank. R Vol. II, p. 319 – p. 322.

5. That Plaintiff's payments were used to acquire or improve the subject property which was relied upon by the bank. R Vol. II, p. 351.

There is absolutely no evidence what happened to Ms. Benz's payments.

6. $400,000.00 of Ms. Benz's money was used to purchase the lot. Tr Vol. I, p. 70 L. 5.

There is absolutely nothing in the record establishing this fact.

7. The bank knew that East Avenue Bluff, LLC was using Ms. Benz's money to close on the sale from the party they were buying it from. Tr Vol. I, p. 70 L. 9.

There is absolutely nothing in the record establishing this.

8. The bank knew that East Avenue Bluff, LLC was using Ms. Benz's money to close on the sale from the party they were buying it from. Tr Vol. I, p. 70 L. 12.

There is absolutely nothing in the record establishing this.

9. They (the bank) knew were the money was coming from Ms. Benz and how it was being used and how East Avenue Bluff, LLC was using it. Tr Vol. I, p. 70 L. 17.

There is absolutely nothing in the record establishing this.

10. They had the contract between East Avenue Bluff, LLC and Ms. Benz. Tr Vol. I, p. 70 L. 19.

There is nothing in the record establishing this at the time of the summary judgment motion. There was absolutely nothing in the record before the trial court relating to a copy of the contract being in the possession of D.L. Evans Bank at any time. This was first raised by Ms. Benz in the motion on the I.R.C.P. 37(c) motion. What she established at that point was that a copy of the contract had been discovered in a shadow file, but even at that Ms. Benz fails to establish when that contract came to be located in that shadow file which was created over a several year period most of which was after this transaction closed.

E. The Common Law Vendee's Lien

A vendee's lien is recognized at common law. There are two A.L.R. annotations on point:

W. R. Habeeb, Annotation, *Right of Vendee Under Executory Land Contract to Lien for Amount Paid on Purchase Price*, 33 A.L.R. 2d 1384. (1954)

John P. Ludington, LL.B., Annotation, *Right of Vendee under Executory Land Contract to Lien for Amount Paid on Purchase Price as against Subsequent Creditors of or Purchasers from*

Vendor. 82 A.L.R. 3d 1040. (1978)

The latter applies to claims asserted against third parties.

The common law vendee's lien has not been recognized in Idaho. Under such circumstances the statutory lien prevails.

> White next argues that even if he cannot satisfy the criteria for a statutory lien, he possesses a common law or equitable lien to secure his claim for fees and costs. Idaho law, however, is to the contrary. In *Frazee v. Frazee*, 104 Idaho 463, 464, 660 P.2d 928, 929 (1983), the Idaho Supreme Court observed that an attorney's charging lien "did not exist in Idaho at common law, " and in *Kerns v. Washington Water Power Co.*, 24 Idaho 525, 536, 135 P. 70, 73 (1913), the Court stated that prior to the enactment of the statute that is now codified as I.C. § 3-205, "there was no law in this state which provided for a lien for attorney's fees."

Kenneth F. White, Chtd. v. St Alphonses Regional Medical Center, 136 Idaho 238, 242, 31 P.3d 926, 930 (Ct. App. 2001).

Even though it is clear the common law lien does not apply in Idaho it may be of some interest to the Court. With respect to the general rule of priority the annotation states:

> 2[a] Summary and Comment – Generally a subsequent mortgagee of realty takes free of an earlier vendee's lien when the mortgagee lacked notice of the vendee's rights. A subsequent mortgagee's lien is inferior to an earlier vendee's lien where the mortgagee had notice of the vendee's rights before taking the mortgage. However, in states where a vendee's lien does not arise until the vendee makes a payment under the contract, a mortgage lien is superior if it arises before the vendee makes a payment, even thought he contract of sale predated the mortgage.

82 A.L.R. 3d 1040, 1043 (1978).

The annotation notes the following exception:

> 2[a] Summary and Comment – Generally. It has also been held that a vendee's lien

> is not superior to the claim of the vendor's subsequent creditor to the extent that the vendee continued to make payments to the vendor after learning of the subsequent creditor's rights. Although the vendee need not examine records for subsequent encumbrances such as mortgage, his payments after receiving actual notice of a mortgage do not give him a lien superior to the mortgage lien.

82 A.L.R. 3d 1040, 1044 (1978).

With respect to what constitutes knowledge the annotation notes in the context of the vendor's notice:

> 2[b] Summary and Comment – Practice Pointers. The knowledge need not extend to the vendee's claim. The third person has notice if he has knowledge of facts sufficient to excite the inquiry of a reasonably prudent man as to the existence of rights in others.

82 A.L.R. 3d 1040, 1045 (1978).

If the common law rules were applicable instead of the Idaho statute, it would be problematic for Benz's cause of action. A look at the timeline explains why. Ms. Benz first became aware of D.L. Evans Bank on June 8, 2007 when she paid the $100,000.00 earnest money deposit into a trust account. She also had a conversation with Ken Nelson sometime in July. Ms. Benz deposited $400,000.00 earnest money into the trust account on August 25, 2007. The East Avenue Bluff, LLC Promissory Note to D.L. Evans Bank was signed August 29, 2007, as is the Deed of Trust. The Deed of Trust was recorded on August 30, 2007. Ms. Benz gave written authorization to disburse the trust proceeds of $500,000.00 to East Avenue Bluff, LLC, signed by her on August 29, 2007 and by East Avenue Bluff, LLC on August 30, 2007. Ms. Benz paid $250,000.00 earnest money directly to East Avenue Bluff, LLC on November 13, 2007. All payments to East Avenue Bluff, LLC were made after Ms. Benz had knowledge of D.L. Evans Bank loan. The record does not establish whether the

payment authorized on August 30 was made before or after the deed of trust was recorded. The payment on November 13 was clearly after the deed of trust was recorded.

III. Prejudgment Interest

D.L. Evans Bank asks the court to review and either overrule or limit the rulings in *McMahon v. Cooper*, *Supra*, and *Graves v. Cupic*, *Supra*, for the following reasons:

1. Enforcement of a Vendee's lien is an equitable proceeding. [*Wilson v. Sunnyside Orchard Company*, 33 Idaho 501, 196 P. 302 (1921)]. Requiring a third party which did not receive the payments and did not enjoy the time value of money would be contrary to equity. It would require the third party to pay interest out of its equity on a debt it didn't owe.

2. Idaho Code § 45-804 does not include prejudgment interest within the amount secured.

3. Prejudgment interest is only payable when the vendee is granted rescission in an action against the vendor.

A. Entitlement to Prejudgment Interest

In *McMahon v. Cooper*, *Supra*, an action brought by the vendee against the vendor and subsequent purchasers and encumbrancers, the court directed that judgment be entered for the amount found due "with legal interest."

McMahon does not state whether the legal rate referred to is the rate applicable to the judgment or if it is the rate applicable to money due. It also does not state whether the interest

accrues from the date of the judgment, when the amount owing was determined and the lien created, or from some earlier time.

In *Graves v. Cupic*, *Supra*, an action brought by the vendee against the vendor, the trial court directed that judgment enter, including statutory interest from the date each payment was made.

In *Sorensen v. Larue* 47 Id. 772, 278 P. 1016 (1929), the vendee counterclaimed for rescission for failure of title. The trial court found for the vendee and granted rescission. With respect to the question of prejudgment interest the Supreme Court states:

"When rescission is granted the vendee, he is entitled, not only to a return of so much as a purchase price as he has paid, but the interest thereon from time of payment." "(citation omitted)" *Id.* at 278 P. 1018. *McMahon* and *Graves* also involved rescission. This case does not involve rescission.

Ms. Benz remedy was expressly limited under the terms of her contract with East Avenue Bluff, LLC. In a case of failure of title the exclusive remedy is termination. As to D.L. Evans Bank, Ms. Benz had no remedy at all and no right to either rescission or termination. R Vol. I, p. 51; 56. No contractual relationship existed between D.L. Evans Bank and Ms. Benz. Prejudgment interest is inappropriate.

The trial court applied the twelve percent rate applicable to money due under Idaho Code § 28-22-104(1). It also concluded that rate should be applied from the closing date, February 6,

2009, to May 3, 2010, the date of its oral ruling. The total interest award was $111,207.58. R Vol. II, p. 352.

D.L. Evans Bank asks the Court to limit interest under McMahon and Graves to actions for rescission between the vendee and vendor. This is consistent with Idaho Code § 28-22-104(1), Idaho Code § 45-804 and the cases cited above. The original vendor received the payments and enjoyed the time value of the money. That is an appropriate fact to consider in determining how to restore the parties to their original position in a rescission action. Where, as here, the lien is being asserted against a third party which did not receive payments from the vendee, the third party did not enjoy the time value of money. It is not a rescissionary remedy where both parties are being restored to their prior position with no net change in position. Interest awarded to the vendee is a direct loss to the third party.

Idaho Code § 28-22-104(1) provides in part that it applies to:

> 1. Money due by express contract.
>
> 4. Money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied.

Idaho Code § 28-22-104(1) applies to "Money due by express contract" or "Money after the same becomes due." This is the section applied by the trial court.

There was no contractual relationship between Ms. Benz and D.L. Evans Bank. No money was due from D.L. Evans Bank to Ms. Benz by express contract. No money was due from D.L. Evans Bank to Ms. Benz otherwise. The trial court made no finding of money due from East Avenue

Bluff, LLC to Ms. Benz based upon rescission. The Plaintiff is not entitled to a monetary judgment against D.L. Evans Bank, and did not obtain rescission against East Avenue Bluff, LLC.

Application of Idaho Code § 28-22-104(1) is proper in a rescission action when money is due, but no money is due here.

In *Farnsworth v. Pepper*, 27 Idaho 154, 148 P.48 (1915), the Supreme Court established the principle that unless the lien statute provided that it also covered attorneys fees, then attorneys fees were not recoverable as costs in an action to foreclose a lien. In addressing the claim of a vendor's lien, the Supreme Court states:

> A petition for rehearing has been filed in this case, and the first point made by the petitioner is that an attorney's fee of $400 was allowed for the foreclosure of said vendor's lien, while under the statute a vendor's lien is only permitted as security for the unpaid purchase price and not for any other indebtedness or liability, and 3 Pomeroy's Equity Jurisprudence, § 1251 and *Gard v. Gard*, 108 Cal. 19, 40 Pac. 1059, are cited.
>
> . . . .
>
> As a matter of fact the trial court did adjudge that the attorney's fee allowed should be a lien upon said premises. While section 3441, Rev. Codes, provides for a vendor's lien upon property sold "for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer," under the provisions of said statute an attorney's fee for foreclosing the lien is not made a lien upon the land sold. Therefore the judgment in this case must be modified to the extent of holding said attorney's fee not a lien upon the land in question.

Id. at 148 P. 50.

The Supreme Court also applied the same rule in a case involving a mechanic's lien.

I.C.A. § 44-705 makes no provision for attorney's fees which were therefore

> improperly included in the lien foreclosure, but we may eliminate from the proceeds of the sale to which respondent was entitled the attorney's fees, without vitiating the sale because any balance of the sale proceeds are to be paid to the owner, and in the absence of fraud and where the excess can be segregated as it can here claim of excessive amount does not vitiate the lien. *Wheatcroft v. Griffiths*, 42 Idaho, 231, 245 P. 71; *Eskestrand v. Wunder*, 94 Mont. 57, 20 P.(2d) 622; *Shumway v. Woolwine*, 84 Cal.App. 220, 257 P. 898 *Lucas v. Gobbi*, 10 Cal. App. 648, 103 P. 157; *Snell v. Payne*, 115 Cal. 218, 46 P. 1069 (second case). On the argument on rehearing, respondent virtually admitted the attorney's fees should be eliminated.

Seafoam Mines Corporation v. Vaughn, 56 Idaho 342, 53 P.2d 1166, 1170 (1936).

It would appear that the same rationale applicable to attorney's fees would also be applicable to prejudgment interest. The lien statute defines what is secured by the lien. If the statute does not identify interest it should not be included. Idaho Code § 45-804 provides a lien for "such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration." The vendee has not paid interest. The lien is limited to part of the amount paid. Prejudgment interest should not be included in the amount of the lien to be enforced against the third party interest of D.L. Evans Bank in the property.

B. The Exclusive Contractual Remedy

Idaho Code §28-22-104(1) provides for interest for, amongst other things, money due. It does not provide for interest on money not yet due. The Real Estate Purchase And Sale Agreement, R Vol. I, p. 51, has the following clause:

> Default by Seller – It is agreed that if the title of said property is not marketable, or cannot reasonably be made so within twenty (20) business days after notice containing a written statement of defects is delivered to the Seller, or if the Seller

> defaults in the performance of this Agreement including Seller's obligations (if any) to correct defects pursuant to Paragraph 8) C of the Inspection Contingency, the Buyer has the option of (1) having the Earnest Money returned to the Buyer and this Agreement shall terminate; or (2) pursuing any other lawful right or remedy to which the Buyer may be entitled, including specific performance. In the case of option (1), the Buyer shall make demand in writing upon the holder of the Earnest Money. Upon such demand, and provided there is no dispute as to the Seller's default, said holder shall refund the Earnest Money to the Buyer. Seller shall pay for the unpaid costs incurred of title insurance and escrow fees, if any, and any unpaid costs incurred by or on behalf of the Seller and the Buyer related to the transaction, as set forth in this Agreement. (emphasis added).

R Vol. I, p. 56. Addendum A, R Vol. I, p. 58, has the following clause:

> By Seller. If Seller defaults in the performance of this Agreement, Buyer's sole and exclusive remedy shall be the termination of this Agreement by written notice to Seller and escrow holder, and the return of all deposits made hereunder, excluding any interest thereon, and Seller shall pay the costs of cancellation of title insurance, if any, escrow fees, if any, and such attorneys' fees, expenses and costs as permitted in the Purchase and Sale Agreement, if any. Buyer shall not be entitled to seek damages or specific performance against Seller or escrow holder. (emphasis added)

R Vol, I, p. 63.

Under the terms of the contract and addendum, there is no amount due until a written notice of termination is sent. Benz sent her notice July 7, 2009. R Vol. I, p.184. The trial court computed interest from the closing date, which it found to be the date of default, February 6, 2009. Supp. R Vol. I, P. 83; P. 84. At that time no money was due from East Avenue Bluff, LLC to Ms. Benz. There is also the clause excluding interest to deal with. By contract Ms. Benz is not entitled to interest or damages.

The contractual remedy is not the same as the remedy under Idaho Code § 45-804. The

contractual remedy is for all earnest money deposited and some related costs. The money is due only when there is a notice of termination. There is to be no interest. The statutory lien is "for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration." The statutory lien may well be for an amount less than the contractual remedy. There is no amount due until that amount is determined. Where the exclusive statutory remedy contradicts the statute, the contract should control.

IV. I.R.C.P. 37(c) Award for Failure to Admit

The trial court awarded Ms. Benz attorneys fees pursuant to I.R.C.P. 37(c) for failure to admit. Supp. R Vol. I, p. 118. Ms. Benz served discovery on September 2, 2009. Supp. R Vol. I, p. 98. It included Request for Admission No. 2 which reads as follows:

> "REQUEST FOR ADMISSION NO. 2: Admit that D.L. Evans Bank knew, or should have known, the terms of the purchase and sale contract between East Avenue Bluff LLC and Leslie Benz, including the payment release provisions and dates, prior to closing on its loan to East Avenue Bluff, LLC."

The request for admission has three statements which require denial. First, it establishes a specific date for the state of knowledge, "prior to closing on its loan to East Avenue Bluff, LLC." Second, it utilizes broad language which would admit that D.L. Evans Bank knew or should have known all of the terms of the contract. Third it adds a "should have known" standard which invokes questions of underwriting standards as compared to constructive notice if it goes beyond what was in the Bank's records.

D.L. Evans Bank maintains an official loan file which contains all original documents and

materials officially submitted to the bank's senior loan committee in approving the loan and subsequent closing. This official file was copied and produced to Ms. Benz in its entirety on October 23, 2009. Supp. R Vol. I, p. 95. This production included the Loan Analyst Addendum submitted to the senior loan committee informing it of some of the provisions of the Benz agreement. R Vol. I, p. 90. It had the following:

> Primary source of repayment will be the proceeds from the sale of the home upon its completion. The home has been pre sold to Leslie Benz for $2.744MM, who has already committed $500M of non refundable earnest money to the project, with an additional $250M on or before November 1st.

It is the practice in the bank for loan officers, or others, involved with a loan to maintain their own files which often contain materials in addition to the official file. These are referred to as shadow files. D.L. Evans Bank also gathered all of the shadow files relating to the Benz transaction, copied them and provided them verbatim to Ms. Benz on February 17, 2010. . Supp. R Vol. I, p. 95. No materials from this production were presented to the trial court by Ms. Benz for consideration in the summary judgment proceeding. This second production was the bulk of the documents produced.

I.R.C.P. 36(a) requires that a denial shall fairly meet the substance of the requested admission. Ms. Benz immediately followed Request for Admission No. 2 with Interrogatory No. 7, in sequence. Supp. R Vol. I. p. 95.

> INTERROGATORY NO. 7: If your response to Request for Admission No. 2 is not a complete and unqualified admission, please state each and every fact, belief or opinion upon which you base your response and for each such fact provide the relevant date(s) and

participating individuals."

D.L. Evans Bank believed, and believes, that the response to this interrogatory met the requirements of Rule 36(a) for qualifying its answer. D.L. Evans Bank's response to Interrogatory No. 7 is as follows:

> "ANSWER TO INTERROGATORY NO. 7: Based upon D.L. Evans Bank's current document review, there is no basis for admitting that D.L. Evans Bank knew or should have known the terms of the Purchase and Sale Contract between East Avenue Bluff, LLC and Leslie Benz, including the payment release provisions and dates prior to closing on its loan to East Avenue Bluff, LLC. The senior loan committee was advised of the fact that a sale existed and some its terms, but the contract itself was not presented to the senior loan committee and the Bank's documentation, to this point of the review, has not established that the contract itself was received by the Bank prior to the closing of the loan. In this regard, the loan officers in the loan are no longer employed by D.L. Evans Bank and D.L. Evans Bank has been attempting, without success, to obtain information from them relating to this transaction."

R Vol. I, p. 78.

D.L. Evans Bank stands by its denial of Request for Admission No. 2 and its Response to Interrogatory No. 7 which accurately and precisely reflect the state of D.L. Evans Bank's file and knowledge. D.L. Evans Bank produced it's records setting forth the precise materials and information available to the senior loan committee. D.L. Evans Bank admitted that as of 7/31/2007 it knew Ms. Benz had purchased the property, had already committed $500,000.00 and was paying an additional $250,000.00 before November 1st.

I.R.C.P. 37(c) provides that:

> "If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves

> the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit."

The specific question under Rule 37(c) is whether Ms. Benz proved the truth of the matter as requested under Rule 36. The first question is whether establishing a fact by affidavit in a summary judgment proceeding is "proof" for the purposes of the rule?

> By its plain terms, Rule 37(c) authorizes sanctions only in favor of a party who, after a request for admission was denied, "thereafter *proves* ... the truth of the matter...." (Emphasis added.) Here, although Wallace's refusal to admit one or both of the Paynes' requests for admissions may have been unreasonable, he ultimately stipulated to liability, thereby removing the issue of his negligence or the Paynes' comparative negligence from the issues to be contested at trial. Applying the plain language of Rule 37(c), we conclude that in this circumstance, because the Paynes were not called upon to prove at trial the issues covered by the requests for admissions, Rule 37(c) sanctions were properly denied by the district court.

Payne v. Wallace, 136 Idaho 303, 309, 32 P.3d 695, 701 (Ct. App. 2001). Is submission of an affidavit in a summary judgment proceeding proof of the truth of the matter? Is it still proof of the matter if the only facts set forth in the affidavit are admissions of the opponent in discovery? These are questions for the Court.

There was absolutely nothing in the record before the trial court for the summary judgment establishing D.L. Evans Bank knew all of the terms of the purchase and sale contract before it closed the loan. The only way you could reach such a conclusion is to draw an

inference from the fact the senior loan committee was provided some of the contract terms in the Loan Analyst Addendum . In a summary judgment proceeding all inferences are to be drawn if favor of the nonmoving party. *Bonz v. Sudweeks*, 119 Idaho 539, 808 P.2d 876 (1991) There is absolutely nothing in the record showing appropriate underwriting standards required knowledge of all of the contract terms.

In this case the only affidavit supporting the motion for summary judgment was that of Janet C. Wygle dated the 2nd day of April, 2010. R Vol. I, p. 46. The affidavit establishes a series of excerpts from the depositions of Leslie Benz and Bruce Hunsaker together with exhibits to the depositions. The only reference to D.L. Evans Banks' state of knowledge in Wygle's affidavit is in her paragraph 8 and the attached exhibit G which shows excerpts of pages 92-96 of the deposition of Bruce Hunsaker. It also attaches Exhibit 9, the Loan Analyst Addendum and Exhibit 10, the Commercial Loan Memorandum which D.L. Evans Bank produced to Mrs. Benz in its first production. This excerpt and the exhibits are consistent with, and in the case of Exhibit 9, the basis for, the response to interrogatory 7. They established the following:

1. The Loan Analyst Addendum, Exhibit 9, was prepared by C.J. Weaver who was a D.L. Evans Bank loan analyst.

2. The Loan Analyst Addendum was provided to Ken Nelson as part of his loan package then went to his manager, then regional and then up to senior loan committee.

3. The second paragraph of Exhibit 9 states as set forth in the quote above.

4. Bruce Hunsaker believes that of July 31st 2007 D.L. Evans Bank knew the terms of the contract between East Avenue Bluff, LLC and Ms. Benz as set forth on Exhibit 9. R Vol. 1 p. 89. This constitutes the "proof" upon which the trial court relied in making the I.R.C.P. 37(c) award. It is the only evidence in the record.

What the Wygle affidavit fails to establish is any proof beyond the response to interrogatory 7. There was no evidence which would allow the trial court to find that the facts set forth in Request for Admission No. 2 had been proven in their entirety for the purposes of the summary judgment motion. It would be pure speculation to make a finding of what D.L. Evans Banks' state of knowledge was beyond that specifically set forth in the Wygle affidavit. Failure to offer proof does not meet the requirement of I.R.C.P. 37(c).

I.R.C.P. 37 (c) provides four exceptions to an award of fees. Three are applicable here. The primary reason that the I.R.C.P. 37 (c) award was inappropriate arises in exception no. "2": "the admission sought was of no substantial importance". Ms. Benz argued the need to prove knowledge. D.L. Evans Bank admitted knowledge of the contract and of the fact that there would be prepayments, the amount of the prepayments, and when they had been or would be made. These admissions were the only things presented to the court and relied upon by the court in making its determination on a summary judgment. There was absolutely no benefit to Ms. Benz whatsoever, or to the court, from an admission that D.L. Evans Bank knew all of the other terms of the contract.

Exception number three allows a party to not admit where it has reasonable grounds to believe that the party might prevail on the matter. For the purposes of the summary judgment, D.L. Evans Bank did prevail because no proof was offered it knew all of the terms of the contract prior to closing the loan.

Exception number four applies where there is a good reason for the failure to admit. There was a good reason. Based on the bank's file it wasn't true. D.L. Evans Bank went further. It responded to Interrogatory No. 7 by specifically setting forth why it was denied and by providing its records showing what it did know. It also provided all of the evidence in its records tending or actually showing its state of knowledge. It expressly admitted that the senior loan committee was aware of the Benz transaction and some of its terms and provided the documents showing precisely the terms known. Under the circumstances that response fully met the intent and policy of properly responding to a request for admission.

It is very important to note that not all of the materials produced by D.L. Evans Bank were presented to the trial court for consideration on the summary judgment. The record created by Ms. Benz for the purpose of her I.R.C.P. 37(c) motion relied on Hunsaker deposition excerpts not presented to the trial court for the summary judgment. R Vol. I, p. 81. Beyond that, Ms. Benz began to argue D.L. Evans Bank did have a copy of the contract in its files. Supp. R Vol. I, p. 90. This is a fact not presented to the trial court for consideration on the summary judgment and therefore not part of the "proof." D.L. Evans Bank acknowledged in its briefing on the I.R.C.P.

37(c) motion that a copy of the contract had been found in a shadow file and was part of the second production of documents to Ms. Benz. It also pointed out it was unable to determine when it was placed in the shadow file which had been accumulated over a two year period. Supp. R Vol. I, p. 111. None of this was available to the trial court at the time the summary judgment entered.

The trial court's decision on the I.R.C.P. 37(c) motion takes some interesting positions, but it fails to recognize and address the fact that the only facts proven by Ms. Benz were those admitted by D.L. Evans Bank by its production of the records showing the state of knowledge and which was consistent with its response is interrogatory no. 7. This is a circumstance where D.L. Evans Bank was attempting to be very precise and thorough in responding to discovery: Even the trial court recognized D.L. Evans Bank efforts in that regard.

"I think the Bank has been forthright in their admission saying here's specific facts that we'll admit". Supp. Tr Vol. II, p. 97, L. 12.

V. Conclusion

D.L. Evans Bank requests that the Court reverse the Second Amended Judgment. R Supp. R Vol. I, p. 130 and all related orders; and/or reverse the Order on Application for Costs and on Objections to Attorney's Fees and Interest. Supp. R Vol. I, p. 82; and/or set aside the award of I.R.C.P. 37(c) sanctions as set forth in the Decision on Attorney Fees for Failure to Admit Pursuant to Rule 37(c). Supp. R Vol. I, p. 118; and remand with appropriate instructions to the trial court.

DATED this 30 day of March, 2011.

PARSONS, SMITH, STONE,
LOVELAND & SHIRLEY, LLP

R.C. Stone
Attorneys for Plaintiff

CERTIFICATE OF DELIVERY

I hereby certify that on the 31 day of March, 2011, I served a copy of the foregoing APPELLANT'S BRIEF upon the following named person(s) in the manner listed below:

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__ Via United States Mail
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