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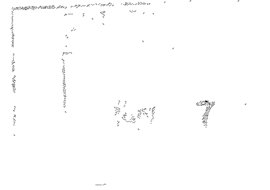
IN THE SUPREME COURT OF THE STATE OF IDAHO

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT, Plaintiff-Appellant, vs. CLYDE FILLMORE, an individual and JOHN FILLMORE, an individual, Defendants-Respondents.	Supreme Court Docket No. 38480-2011 

APPELLANT'S BRIEF

Appeal from the District Court of the Third Judicial District for Canyon County
Honorable Thomas J. Ryan, District Judge, Presiding

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is a breach of contract case in which Appellant Gary Duspiva ("Duspiva") seeks payment for services rendered to Respondents Clyde Fillmore and John Fillmore ("Fillmores") for well drilling services. Fillmores filed counterclaims claiming that there was no contract between the parties, that Fillmores are entitled to equitable relief, and that Duspiva violated the Idaho Consumer Protection Act while performing well drilling services for the Fillmores.

II. COURSE OF PROCEEDINGS

A three-day trial was held on August 23-25, 2010. After closing arguments, the district court entered Findings of Fact and Conclusions of Law on October 18, 2010, in which it did not determine whether there was an agreement between Mr. Duspiva and Fillmores. Instead, the court concluded that the Fillmores were entitled to consider the agreement void under I.C. § 48-608 because Mr. Duspiva's failure to discuss the practice of screening wells to prevent sand from entering the water constituted an "unfair practice in violation of subsections (16), (17) & (18) of I.C. § 48-603" of the Idaho Consumer Protection Act. Record on Appeal ("ROA") at 299.

III. STATEMENT OF THE FACTS

Mr. Duspiva, is a licensed well driller and owner of Gary Duspiva Well Drilling and Development. Record on Appeal ("AR"), Vol. II at 289, ¶2. Mr. Duspiva has drilled and completed 342 wells. *Id.* Mr. Duspiva is the only Idaho well driller certified as a Master Ground Water Contractor ("MGWC"). *Id.* Mr. Duspiva's business comes from repeat customers and customer

referrals. Transcript on Appeal ("Tr.") Vol. 1, p. 34, lns. 9-11.[1] Mr. Duspiva has been a director and president of the Idaho Ground Water Association and a member of its continuing education committee. *Id.*, p. 35. lns. 12-16. Since 2001, Mr. Duspiva has completed 392 hours of continuing education. *Id.*, lns. 17-20.

Clyde Fillmore and John Fillmore are father and son, respectively. Tr. Vol. 1a, p. 8. lns. 23-24. The Fillmores live next to one another in Wilder, Idaho. John wanted a domestic well drilled for his new home. Clyde had prior experience hiring a well driller to drill on his property. AR Vol. II., p. 289, ¶5. Clyde undertook to hire a driller to drill a well for John. John left the decision as to whom to hire up to Clyde. Tr., Vol 1a, p. 9. lns. 6-8. The understanding between Clyde and John was that Clyde would make payments for well construction. and John would repay him at a future time. *Id.*, 3-5.

Mr. Duspiva and Clyde have known each other for many years. Tr. Vol. 1. p. 29. lns. 15-17. Clyde had seen Mr. Duspiva drill wells at sites where Clyde worked, and knew that he uses a cable tool drilling method. Tr., Vol. 1a, p. 7, lns. 8-15. Clyde obtained a recommendation to hire Mr. Duspiva because he is a good well driller. Tr. Vol. 1, p. 7, lns. 8-25.

Clyde contacted Mr. Duspiva in April of 2007 to ask him to drill a domestic well. Tr., Vol. 1. p. 29. lns. 20-25. p. 36. lns. 1-9. Clyde and Mr. Duspiva met on June 11. 2007 to discuss well location and terms and conditions of drilling services. AR, Vol. II at 289, ¶6. At this meeting, Clyde

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[1]The original reporter's transcript lodged with the District Court consisted of three volumes. one for each of the three days of trial. referred to herein as Vol. 1., Vol. 2. and Vol. 3. Transcription of the proceedings and testimony on the morning of the first day of trial was not included in the original transcript. The reporter subsequently prepared and lodged a transcript for the morning of the first day of trial, referred to herein as Vol. 1a.

and Mr. Duspiva verbally agreed that Mr. Duspiva would drill a well for the Fillmores. Tr., Vol. 1a, p. 10, lns 11-12.

John Fillmore was not present during the meeting. Tr., Vol 3, p. 10, ln. 20 - p. 11, ln. 1. Having deferred to Clyde to hire a driller, John did not have any discussions with Mr. Duspiva regarding the terms and conditions of drilling services (i.e. how the drilling would proceed. when it would begin, or the cost or type of the well.) *Id.*, p. 11, ln. 22 - p. 12, ln. 11. John testified that it was Clyde's role to communicate with Mr. Duspiva, oversee things, and bring information to John. *Id.*, p. 22, lns. 23-25.

During the July 11, 2007 meeting, Clyde informed Mr. Duspiva that he and his son wanted a domestic well to be drilled on son's property. Tr., Vol. 1, p. 37, lns. 2-3. Clyde informed Mr Duspiva of the well location he had chosen based on his review of county guidelines. *Id.*. p. 30, lns. 1-6. Clyde informed Mr. Duspiva that he was concerned about sand in his son's well, because his own well pumped sand, requiring him to replace his well pump every four years. *Id.*. p. 37. lns. 4-8. Clyde advised Mr. Duspiva that he would pay for well construction, but that the well would be owned by his son John. *Id.*, lns. 9-15. They did not discuss a specific depth for the well. *Id.*. p. 31, lns. 2-13.

Mr. Duspiva provided Clyde a written quote and verbal explanation of $32.50 per foot of well depth, plus various incidental parts, materials, permit and development costs. The quote states that there would be an increase of $2.00 per foot for every foot over 400 feet of drilling depth. Tr., Vol. 1, p 37, ln. 16 - p. 38, ln. 7; Tr., Vol. 1a. p. 18, lns. 3-13. Clyde made no comments to Mr. Duspiva regarding the quote. Tr., Vol. 1, p. 38, lns. 8-10. Mr. Duspiva advised Clyde that he did not guarantee the quality or quantity of water produced by the well. AR, Vol. II, p. 290, §8. Mr.

Duspiva explained that: "The footage price was whether it was a well or a dry hole, because my prices are for the service of drilling the well." Tr., Vol. 1, p. 39, lns. 17-19.

Mr. Duspiva's objective for the Fillmore well was to provide a reasonably sand-free well that would produce the volume of a normal domestic well. Tr. Vol. 1, p. 38, lns. 11-13. During the June 11, 2007 meeting, Mr. Duspiva explained to Clyde that his standard for a reasonably sand-free well is no more than a pinch of sand in a five gallon bucket of water. *Id.*, p. 10, ln. 20 - p. 11, ln. 3, p. 38, lns. 14-19.; AR, Vol. II, p. 289, §8. Mr. Duspiva explained to Clyde that he did not use screens when drilling wells to reduce sand in the water. Tr., Vol. 1, p. 38, lns. 20-22. Clyde testified that he recalled this discussion, but did not recall the extent of Mr. Duspiva's explanation. Tr., Vol. 1a, p. 11, lns. 4-7. The district court found that, although Mr. Duspiva informed Clyde that he did not use screens, he did not further explain this practice. AR, Vol. II, pp. 289-290, §16. Neither Mr. Duspiva nor Clyde testified that Mr. Duspiva did not provide any further explanation for his practice of not using screens (i.e. explaining why he did not use screens). Mr. Duspiva was not asked during trial to explain why he did not use screens. Accordingly, the record does not support the district court's finding that Mr. Duspiva provided no such explanation during the June 11, 2007 meeting.

On June 11, 2007, after reaching agreement with Clyde Fillmore. Mr. Duspiva met with John Fillmore to obtain his signature on a "start card," a short form drilling permit application to submit to the Idaho Department of Water Resources ("IDWR"). AR, Vol. II, p. 290, ¶¶10-15,; Ex. 1. The start card lists the proposed start date as June 12, 2007, and the proposed maximum depth as 200 feet. It is not uncommon for wells to exceed maximum depth proposed on a start card. IDWR has no hard and fast rule requiring that well drillers not exceed the proposed maximum depth. Tr., Vol. 2, p. 149, ln. 22 - p. 151, ln. 21. The start card requires well construction to cease if the temperature

at the bottom of the well ("bottom hole temperature") reaches 85 decrees. *Id.* Mr. Duspiva faxed the start card to IDWR June 11th. Tr., Vol. 1, p. 43, lns. 5-8.

Mr. Duspiva began drilling the Fillmore well on June 12, 2007. AR, Vol. II. p. 290, ¶16. Mr. Duspiva encountered water at various depths. *Id.* at p. 291, ¶18. The water he encountered at depths less than 200 feet contained too much fine brown sand and/or did not produce sufficient water volume. *Id.*; Tr., Vol. 1, p. 44, ln. 1 - p. 45, ln. 13. When Mr. Duspiva reached 200 feet, he found no water, and informed Clyde that there was no water. Tr., Vol. 1, p. 45. lns. 14-23.

The next water-bearing layer that Mr. Duspiva encountered was at 320 feet. This was the first water-bearing layer he attempted to develop. *Id.*, at p. 45, ln. 24 - p. 46. ln. 1; AR, Vol. II, p. 291, ¶18. At this level he found three tablespoons of sand in a five gallon bucket, exceeding the criteria he discussed with Clyde. AR, Vol. II, p. 291. ¶18. As he continued to drill, he encountered water with sand exceeding the criteria at various depths. *Id.* While conducting development at 642-650 feet Mr. Duspiva used a thermometer to measure bottom hole water temperature of 72 decrees Fahrenheit. Tr., Vol. 1, p. 100, ln. 17 - p. 101, ln. 9. At each of these stages of development, Mr. Duspiva advised Clyde of the results, including drilling depth, rate flow, volume of sand in the water, and made a recommendation as to whether to complete the well or continue drilling. Tr. Vol. 1. p. 48, ln. 19 - p. 50, ln. 7, p. 101, lns. 18-22, p. 100, lns. 2-9; AR, Vol. II, p. 291, ¶19. Having advised Mr. Clyde that he did not use screens, during these updates Mr. Duspiva did not advise Clyde of the possibility of using screens to reduce sand in the water. AR. Vol. II, p. 291, ¶20.

At the conclusion of each update, Mr. Duspiva asked Clyde whether he wanted him to continue drilling. Tr., Vol. 1, p. 48, ln. 19 - p. 50, ln. 7, p. 101, lns. 18-22, p. 100, lns. 2-9. Mr. Duspiva always left the decision whether to continue up to Clyde. Tr., Vol. 1, p. 55, ln. 23 - p. 56,

ln. 6. Based on Duspiva's updates and recommendations, each time Clyde instructed Mr. Duspiva to continue drilling. *Id.*, AR, Vol. II, p. 291, ¶20.

Clyde made his first payment of $10,000 to Mr. Duspiva on August 3, 2007. Tr. Vol. 1a, p. 23, ln. 13 - p. 24, ln. 3; Ex. 2.

Below 701 feet, Mr. Duspiva did not encounter water until he reached 836 feet on August 8, 2007. AR, Vol. II, p. 291, ¶18. Ex. 4, p. 2. When he reached 836 feet, he felt that clay cuttings he removed from the well were warm, and used a thermometer to find that the temperature of the cuttings was above 85 degrees Fahrenheit, telling him that he was close to low temperature geothermal conditions. Tr., Vol. 1, p. 56, ln. 17 - p. 57, ln. 4, p. 102, lns. 6-22. At that point he discontinued drilling and used a probe to confirm that the temperature of the strata at that level was above 85 degrees. *Id.*, p. 58, ln. 23 - p. 59, ln. 8, p. 60, lns. 15-20. He also used the probe to measure strata temperatures 100 foot intervals in the well from 300 feet down to 800 feet. *Id.*, p. 105, ln. 10 - p. 106, ln. 10 - p. 107, ln. 1. These were not direct water temperature measurements or bottom hole measurements. *Id.*

Mr. Duspiva then set up to develop the water bearing layer at the 701 foot depth, where he found excessive sand and took a direct water temperature measurement showing a bottom hole temperature of 73 degrees Fahrenheit. *Id.*, p. 58, lns. 13-17, p. 102, ln. 24 - p. 103, ln. 17. He then provided Clyde with the results of the development and advised him that he could either obtain a permit for a low temperature geothermal well and drill down further, or attempt develop the well at the higher, 642 foot depth by perforating the casing, with a risk that the well could collapse and be ruined. *Id.*, p. 60, ln. 20 - p. 61, ln. 6, p. 103, ln. 19 - p. 104, ln. 1. Clyde then instructed Mr. Duspiva to contact IDWR to pursue drilling deeper. Id., p. 61, ln. 7; AR, Vol. II, pp. 292-293, ¶28.

The next day, August 9, 2007, Mr. Duspiva contacted IDWR agent Rob Whitney to inform IDWR that LTG conditions were encountered and that Mr. Duspiva wanted to continue drilling to complete the well. Mr. Whitney asked Mr. Duspiva to submit information on the conditions of the well in order to develop a plan to properly complete the well. Mr. Duspiva complied with that request by submitting an as-built drawing of the plan to Mr. Whitney the same day. Tr., Vol. 2, p. 122, ln. 18 - p. 125, ln. 14; Ex. 4; AR, Vol. II, p. 293, ¶30. After receiving the as-built, Mr. Whitney advised Mr. Duspiva to submit a prospectus as to how the well would be completed and a long form permit for approval to drill a low temperature geothermal (LTG) well. Tr., Vol. 1, p. 63, lns. 8-14, Vol. 2, p. 127, ln. 20 - p. 128, ln. 4.

That same day, August 9th, Mr. Duspiva met with Clyde and discussed the need to obtain a low temperature geothermal permit from IDWR in order to continue drilling. Tr., Vol. 32, lns. 4-7, p. 33, lns. 17-24. Pursuant to Clyde's request, Mr. Duspiva provided Clyde with an itemized invoice for Mr. Duspiva's services to date totaling $32,191.00. Tr., Vol. 1a, p. 27, ln. 11 - p. 28, ln. 5; Ex. 3; AR, Vol. II, p. 292, ¶24. Clyde never questioned or contested the charges on invoice to Mr. Duspiva. Tr., Vol. 1a, p. 30, lns. 9-16, p. 34, lns. 3-10. After talking with Mr. Duspiva and receiving the invoice, Clyde instructed Mr. Duspiva to continue drilling. Tr., Vol. 1a, p. 33, ln. 25 - p. 34, ln. 2; Tr. Vol. 1, p. 26, ln. 16 - p. 27, ln. 2.

On August 15, 2007, Mr. Duspiva provided IDWR a prospectus showing how he would complete the well. Tr., Vol. 1, p. 61, lns. 17-19, p. 63, lns. 6-11.

On August 16, 2007, Mr. Duspiva provided John Fillmore with a long form permit for a LTG well with a proposed maximum depth of 1,000 feet, which John signed. *Id.*, p. 63, ln. 12 - p. 65, ln. 24; Ex. 6; AR, Vol. II, p. 293, ¶31. IDWR received and approved the permit application on August

20, 2007. Tr., Vol. II, p. 134, lns. 1-9. Ex. 6. Rob Whitney informed Mr. Duspiva that he could continue drilling. *Id.*, p. 138, lns. 4-6.

Mr. Duspiva then resumed drilling, updating Clyde as he encountered additional water-bearing layers, as he had previously. Tr., p. 68, lns. 7-25; AR, Vol. II, pp. 293-294, ¶34.

On September 13, 2007, Clyde hand delivered to Mr. Duspiva a second payment of $10,000. Tr., Vol. 1a, p. 35, ln. 19 - p. 36, ln. 5, p. 43, ln. 22 - p. 44, ln. 7; AR, Vol. II, p. 294, ¶36. He did not at that time tell Mr. Duspiva to stop drilling. Tr., Vol. 1a, p. 36, lns. 10-13.

Mr. Duspiva finished drilling on September 26, 2007. AR, Vol. II, p. 294, ¶37. After additional development work, Mr. Duspiva recommended, and Clyde agreed, to have a pump test performed, which was completed on October 10, 2007. Upon completion, the well was 1130 feet deep, produced 17 gallons per minute, and produced water that was 102 decrees with a slight sulfur smell. *Id.* IDWR approved a completion plan submitted by Mr. Duspiva. Tr., Vol. 1, p. 72, lns. 13-16.

The final amount due for Mr. Duspiva's services, after Clyde's two $10,000 payments, was $30,665. *Id.*, p. 72, lns. 19 - 25; Ex. 15.

From June 12 until October 10, 2007, Mr. Duspiva was on the Fillmore property nearly every day either drilling or developing. At no time did Mr. Duspiva ever refuse to provide the Fillmores with information. At no time did the Fillmores ever complain about Mr. Duspiva's service or instruct Mr. Duspiva to stop working. Neither of the Fillmores ever informed Mr. Duspiva that a LTG well would not meet his John's needs. To the contrary, they both authorized Mr. Duspiva to pursue completion of the well as a LTG well.

ISSUES PRESENTED

a. Whether there was an agreement for the Fillmores to pay Mr. Duspiva for the drilling services he performed.

b. Whether the district court erred in finding that Mr. Duspiva's actions violated the Idaho Consumer Protection Act.

c. Whether the district court erroneously applied the remedial provisions of I.C. § 48-608(1).

d. Whether the district court erred in allowing Edward Squires to testify as an expert witness.

ARGUMENT

I. Agreement, Ratification and Breach

A. Fillmores Agreed to Pay Mr. Duspiva for his Drilling Services

"'Generally, the inquiry by the trier of fact into an alleged oral agreement is three-fold: first, determining whether the agreement exists; second, interpreting the terms of the agreement; and third, construing the agreement for its intended legal effect.'" *Elec. Wholesale Supply Co., supra,* 136 Idaho 814, 823, 41 P.3d 242, 250-251, citing *Bischoff v. Quong-Watkins Props.*, 113 Idaho 826, 828, 748 P.2d 410, 412 (Ct. App. 1987).

The existence of an agreement between the Fillmores and Mr. Duspiva is not disputed. Fillmores acknowledge that, on June 11, 2007, Clyde Fillmore and Mr. Duspiva entered a verbal agreement for Mr. Duspiva to drill a well for the home of Clyde's son John. Fillmores claim that Clyde authorized and agreed to pay Mr. Duspiva only to drill a cold water well that did not exceed a depth of 200 feet. The evidence clearly shows that the agreement was not so constrained.

The uncontroverted testimony at trial establishes that, on June 11, 2007, Clyde and Mr. Duspiva met to discuss the terms and conditions for drilling services. Clyde chose the location of the well. Clyde advised Mr. Duspiva that he would pay for well construction, but that it would be

owned by his son John. Clyde said nothing about a maximum depth for the well or expected water temperature. Clyde said he was concerned about the possibility of sand entering the well.

Mr. Duspiva clearly communicated the following terms and conditions for his services: (1) $32.50 per foot of well depth, plus various incidental parts, materials, permit and development costs; (2) an increase of $2.00 per foot for every foot over 400 feet of drilling depth; (3) Mr. Duspiva did not guarantee the quality or quantity of water produced by the well; (4) Mr. Duspiva did not use screens to prevent sand from entering the well, and (5) "[t]he footage price was whether it was a well or a dry hole, because my prices are for the service of drilling the well." Mr. Duspiva also explained that his standard for a reasonably sand-free well is a pinch of sand in a five-gallon bucket.

On June 11, 2007, Clyde Fillmore accepted these terms for Mr. Duspiva's drilling services and authorized Mr. Duspiva to proceed.

Long after the agreement was entered, in order to justify non-payment, the Fillmores contradict these terms and attempt to limit to the agreement based on Clyde's unexpressed expectation that the water from the well would be cold, and the proposed 200 foot maximum depth of the well identified on the "start card" that was prepared by Mr. Duspiva and signed by John Fillmore. Clyde's unexpressed expectation cannot form the basis for the agreement, particularly when it is completely inconsistent with the expressed condition that Mr. Duspiva did not guarantee either the quality or quantity of water that would be produced.

This Court has recognized that, due to the uncertainties inherent in drilling underground for water: "In a contract for drilling a water well, there is no implied undertaking that water will be obtained or that the well will be a success as to the quantity or quality of the water obtained, but only that the work shall be done in a workmanlike manner with the ordinary skill of those who undertake

such work." *Durfee v. Parker*, 90 Idaho 118, 121, 10 P.2d 962, 963 (1965), quoting *Knoblock v. Arenguena*, 85 Idaho 503 (1963).

B. Mr. Duspiva Performed the Agreed-Upon Well Drilling Services.

Mr. Duspiva drilled the well for the Fillmores in accordance with terms and conditions of the agreement reached between himself and Clyde on June 11, 2007, and he did so in a workmanlike manner. Mr. Duspiva showed up on time, completed his work in a timely and diligent manner, provided the Fillmores with frequent updates, obtained their authorization prior to proceeding at multiple stages of the work, always responded to questions and requests, and was readily accessible and responsive to the Fillmores and to IDWR throughout the process.

The existence of the well is itself evidence that the Fillmores received the drilling service they bargained for from Mr. Duspiva. Mr. Duspiva used the cable tool drilling method as the Fillmores expected he would. He drilled the well without structural defects. He advised Clyde Fillmore when there was no water at 200 foot depth identified in the start card. He checked for sand content at every water-bearing layer he encountered to determine whether it met the agreed-upon criteria. He consulted with Clyde Fillmore after each development, reporting what he had found and making a recommendation, and did not proceed without instruction from Clyde to do so. He measured water temperature as soon as he encountered clay cuttings that indicated the water temperature might be approaching the 85 degree low temperature geothermal level (LTG). He stopped drilling, verified the increasing temperature conditions, and immediately reported what he had encountered to Clyde, and made recommendations to either attempt to develop at a higher level, or continue drilling to develop an LTG well. After receiving instruction from Clyde to continue drilling, he immediately contacted IDWR and timely followed the procedures they proscribed.

Although his agreement with Fillmore did not guarantee water quality or quantity, Mr. Duspiva did successfully complete the well to deliver usable LTG water.

As he informed Clyde on June 11th, Mr. Duspiva did not use screens. This was an express understanding regarding Mr. Duspiva's drilling services from the get-go. There was no testimony that Mr. Duspiva's practice of drilling without screens did not meet his duty to drill in a workmanlike manner.

Finally, Mr. Duspiva charged for his services and for incidentals in accordance with the agreement entered on July 11, 2007.

C. Fillmores Ratified the Terms of the Agreement

Ratification results where the party entering into the contract intentionally accepts its benefits, remains silent, or acquiesces in it after an opportunity to avoid it, or recognizes its validity by acting upon it. *Clearwater Constr. & Eng'g v. Wickes Forest Indus.*, 108 Idaho 132, 135 (1985); *see* Annot., 77 A.L.R.2d 426, 428 (1961) and cases cited therein. *See also* Restatement (Second) of Contracts §§ 380, 381 (1981).

The benefit obtained by Fillmores as a result of the June 11, 2007 agreement was Mr. Duspiva's drilling service in accordance with the agreed-upon terms and conditions. Clyde Fillmore repeatedly ratified the June 11, 2007 Agreement each time he instructed Mr. Duspiva to continue drilling without seeking to change any of the terms and conditions of the agreement. And Mr. Duspiva continued to drill and assess charges in accordance with the agreement, checking sand content and volume, and without using screens.

On August 9, 2007, Mr. Duspiva provided Clyde with a detailed invoice of all charges for Gary's services to date. The invoice also made it clear that Clyde was being charged for

development and that the drilling rate increased with depth. Clyde never disputed the charges on the invoice. Clyde ratified the costs and fees charged by Duspiva when he (1) received an invoice he requested without disputing or questioning the charges, (2) subsequently authorized and instructed Mr. Duspiva to continue drilling, (3) made a subsequent payment of $10,000.00 for Duspiva's drilling services, and (4) lastly, upon Mr. Duspiva's request, procured a power source for an extended pump test on the well and retained a pump man to assist Mr. Duspiva with the pump test. From August 9, 2007 until Mr. Duspiva completed work on October 10, 2007, Mr. Fillmore had full knowledge of the services for which Mr. Duspiva was charging him and the costs of those services.

As a result of meeting with Mr. Duspiva on August 8 and 9, 2007, Clyde Fillmore knew that, if drilling continued, the well would be a low temperture geothermal well. John Fillmore had knowledge that the well would be a LTG when he executed the drilling permit application on August 16, 2007. This knowledge was confirmed when IDWR called the Fillmores to provide them with information on the consequences and responsibilities of owning a LTG well. Still, at no point did the Fillmores ever tell Mr. Duspiva to stop performing under the agreement.

Any possible dispute about the costs for Mr. Duspiva's services or the type of well being completed was extinguished through the Fillmores' acknowledgment, acquiescence and ratification of costs that Mr. Duspiva is now seeking, and instructing Mr. Duspiva to proceed on drilling a LTG well.

D. Fillmores Breached the Agreement by Not Paying Mr. Duspiva

It is undisputed that Mr. Duspiva provided well drilling services as agreed, and that the cost of his services was $50,665.00. The Fillmores paid Mr. Duspiva $20,000.00, leaving a balance of $30,665.00 due and owing.

II. Mr. Duspiva Did Not Violate the ICPA

The district court concluded that Mr. Duspiva violated I.C. § 48-603 (16), (17) and (18) of the Idaho Consumer Protection Act (ICPA) by "fail[ing] to disclose information about the use of screening techniques and its common practice in the industry." AR, Vol. II, p. 299. The relevant portion of I.C. § 48-603 states:

> The following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful, ***where a person knows, or in the exercise of due care should know***, that he has in the past, or is:
>
> . . .
>
> (16) Representing that services, replacements or repairs are needed if they are not needed, or providing services, replacements or repairs that are not needed;
>
> (17) Engaging in any act or practice which is otherwise misleading, false, or deceptive to the consumer;
>
> (18) Engaging in any unconscionable method, act or practice in the conduct of trade or commerce, as provided in *section 48-603C, Idaho Code*, provided, however, that the provisions of this subsection shall not apply to a regulated lender as that term is defined in subsection (37) of *section 28-41-301, Idaho Code.*

Emphasis added.

I.C. § 48-604 expresses legislative intent that "in construing [the ICPA] due consideration and great weight shall be given to the interpretation of the federal trade commission and the federal courts relating to section 5(a)(1) of the federal trade commission act (*15 U.S.C. 45(a)(1)*), as from time to time amended . . . ." The referenced federal law states that: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." Notably absent from the federal law is the knowledge component included in

the ICPA by above highlighted phrase: "***where a person knows, or in the exercise of due care should know.***

Following the instruction of I.C. § 48-604, in 1980 this Court observed that federal courts interpreting the Federal Trade Commission Act have found that "[a]n act or practice is unfair if it is shown to possess a tendency or capacity to deceive consumers," and that "proof of intention to deceive is not required." *State ex rel. Kidwell v. Master Distribs.*, 101 Idaho 447, 453-454, 615 P.2d 116, 122-123 (1980). However, after 1980, the Federal Trade Commission ("FTC") and the federal courts adopted a "deception standard" to replace the "tendency or capacity to deceive" standard. *Southwest Sunsites v. FTC*, 785 F.2d 1431, (9th Cir. 1986). Under the "new standard" the FTC "will find deception if there is a representation, omission or practice that is *likely* to mislead the consumer acting *reasonably* in the circumstances, to the consumer's *detriment*." *Id.*, (emphasis in original). *Id.*, at 1435. In *Southwest Sunsites*, the Ninth Circuit Court of Appeals explained that each of the three elements of the new standard imposes a greater burden of proof on the FTC to show a violation of section 5 of the federal act:

> First, the FTC must show probable, not possible, deception ('*likely* to mislead,' not '*tendency and capacity* to mislead'). Second, the FTC must show potential deception of 'consumers acting reasonably in the circumstances,' not just any consumers. Third, the new standard considers as material only deceptions that are likely to cause injury to a reasonable relying consumer, whereas the old standard reached deceptions that a consumer might have considered important, whether or not there was reliance.

Id., at 1436.

This standard was explicitly adopted by the Ninth Circuit of Appeals in *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994). Like the FTC, the Fillmores have to meet this burden of proof to sustain their claim that Mr. Duspiva violated the ICPA.

Generally, to find a violation under the federal act, there must be a misrepresentation of material fact. The expression of an honest opinion is not a basis to find a violation of the federal act, unless there is no reasonable basis for the opinion. *Sci. Mfg. Co. v. Fed. Trade Com*, 124 F.2d 640, 644-645 (3rd Cir. 1941).

Professional judgment is often a form of, based on or akin to opinion which, generally, ought not be subject to claims of deception under the Federal Trade Commission Act or the ICPA. Professionals such as lawyers, doctors, engineers, and even well drillers practice their trades by making judgments based on available information, experience and training. A subjective element is also often involved. Professionals honestly evaluating the same circumstance may reach different conclusions, render different opinions, employ different methods, and provide different advice or service (hence the practice of obtaining "second opinions"). A professional's honest judgment may be proved wrong under scrutiny or in hindsight, yet this does not make either the judgment, advice or service he provides deceptive under the law.

In this case, the district court did not identify or apply the deception standard in determining that Mr. Duspiva violated the ICPA. The district court did not mention the knowledge requirement of I.C. § 48-603, and made no finding that Mr. Duspiva knew or should have known that he was guilty of any of the deceptive acts enumerated in subsections 16-18 of the statute. Certainly, there was no evidence that Mr. Duspiva intentionally or knowingly deceived, misled or withheld any information from the Fillmores.

The district court's conclusion that Mr. Duspiva violated the ICPA was based on omission, "fail[ing] to disclose information about the use of screening techniques and its common practice in the industry", rather than affirmative representation or a practice. The evidence clearly shows,

however, that, on July 11, 2007 Mr. Duspiva explained to Clyde Fillmore that he did not use screens to prevent sand from entering the water in the wells he drilled. Thus the district court's criticism of Mr. Duspiva cannot be that he said nothing to Clyde about the practice of using screens, but that his disclosure of the screening practices used by other well drillers was insufficient. The district court gave no indication of what content or extent of additional discussion was required to meet its additional disclosure standard.

The testimony does not indicate whether Mr. Duspiva explained his drilling practice further or expressed to Clyde his reasons for not using screens, as the district court suggests in its findings of fact. Even if the testimony demonstrated that Mr. Duspiva said only "I don't use screens," without further explanation or context, this would not constitute a misrepresentation of any fact. And, having notice from Mr. Duspiva of the practice of using screens, Mr. Fillmore was free to obtain a second opinion about the use of screens.

There is no evidence to suggest that Mr. Duspiva's practice of not using screens represented anything other than his professional judgment based on his experience and training. He had, after all, successfully completed 342 wells over the course of his 40 year career as a well driller. Other drillers may use screens and hydrologists such as Ed Squires may believe they are effective and easy to use. They are, of course, entitled to have and to base their advice and service on their professional opinions, as is Mr. Duspiva, without being found guilty of deception under the ICPA, with the penalties and awful stigma associated with such finding.

The district court found that Mr. Duspiva's failure to further discuss the screening practices of other well drillers violated subsections 16-18 of I.C. § 48-608 without explaining how his omission violated each one. It is not clear what drilling services the district court believed that Mr.

Duspiva represented were needed that were infact not needed under subsection 16. Obviously, if the Fillmores wanted a well, drilling was a required. Perhaps the district court intended to say that Mr. Duspiva unnecessarily recommended continued drilling to Clyde Fillmore after encountering excessive sand in the water at various depths. Those recommendations were neither deceptive nor misleading, given Mr. Duspiva's drilling methods. For him to develop water that met the agreed-upon sand criteria, continued drilling was a reasonable recommendation. Clyde had the option to follow, or not to follow, Mr. Duspiva's recommendations, obtain a second opinion, or retain another driller at any time. He chose not to do so.

As previously discussed, Mr. Duspiva did not engage in "misleading, false or deceptive" conduct under subsection 17 of the statute. Contrary to the district court's conclusion, Mr. Duspiva did disclose the practice of using screens by telling Clyde Fillmore that he did not use them. The testimony does not show that Mr. Duspiva did not elaborate as to why he didn't use screens. The more likely inference is that he said more than simply "I don't use screens." The district court gives no indication of the extent of content of the additional disclosure it deems necessary to rise above the level of deception.

Subsection 18 of I.C. § 48- 603 declares unlawful any "unconscionable method, act or practice in the conduct of trade or commerce, as provided in section 48-603C, Idaho Code. I.C. § 48-603C provides:

> (2) In determining whether a method, act or practice is unconscionable, the following circumstances shall be taken into consideration by the court:
>
> (a) Whether the alleged violator knowingly or with reason to know, took advantage of a consumer reasonably unable to protect his interest because of physical infirmity, ignorance, illiteracy, inability to understand the language of the agreement or similar factor;

(b) Whether, at the time the consumer transaction was entered into, the alleged violator knew or had reason to know that the price grossly exceeded the price at which similar goods or services were readily available in similar transactions by similar persons, although price alone is insufficient to prove an unconscionable method, act or practice;

(c) Whether the alleged violator knowingly or with reason to know, induced the consumer to enter into a transaction that was excessively one-sided in favor of the alleged violator;

(d) Whether the sales conduct or pattern of sales conduct would outrage or offend the public conscience, as determined by the court.

The district court made no findings that any of these circumstances existed in this case. No evidence was presented to suggest that either of the Fillmores were physically infirm, ignorant, illiterate, or unable to understand the language of the agreement, that Mr. Duspiva knew or had reason to know of such a condition, or that he acted to take advantage of such a condition. No evidence was presented to suggest that Mr. Duspiva knew or had reason to know that his drilling rates and incidental charges exceeded other well drillers' prices. No evidence was presented to suggest that the June 11, 2007 well drilling agreement was one-sided. Subsection (d) does not apply. Clyde Fillmore contacted Mr. Duspiva based on a recommendation that he is a good well driller. Mr. Duspiva was not engaged in sales or a pattern of sales conduct.

III. The District Court Incorrectly Applied I.C. § 48-608(1)

In I.C. § 48-608(1), the ICPA provides a party who suffers injury as a result of an ICPA violation a choice of remedies:

> Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by this chapter, may treat any agreement incident thereto as voidable ***or, in the alternative,*** may bring an action to recover actual damages or one thousand dollars ($ 1,000), whichever is the greater . . .

Emphasis added.

The district court misinterpreted I.C. § 48-608(1) in two respects. First, the district court incorrectly found that the statutory option to void an agreement made it unnecessary for the court to determine whether there was an agreement between Mr. Duspiva and the Fillmores. Second, the district court incorrectly treated the remedies provided by the statute as cumulative.

A. The District Erroneously Applied the ICPA Without Determining Whether There Was a Contract Between Duspiva and Fillmores

Relying upon I.C. § 48-608(1), the district court stated: "Thus, if the Court finds a violation of the act, an analysis of whether or not a contract was formed between these parties is unnecessary as it may be treated as voidable." AR, Vol. II, p. 297.

To assert a violation of the ICPA, and invoke a remedy provided by I.C. § 48-608(1), the existence of a contractual relationship must be shown. In *Haskin v. Glass*, 102 Idaho 785, 788, 640 P.2d 1186, 1189 (1982), this Court held that: "[A] claim under the ICPA must be based upon a contract." Similarly, in *Taylor v. McNichols*, 149 Idaho 826, 846, 243 P.3d 642, 662 (2010), this Court held that, to have standing under the ICPA, "the aggrieved party must have been in a contractual relationship with the party alleged to have acted unfairly or deceptively."

It seems self-evident that the existence of a contractual relationship is necessary to determine whether that relationship is voidable. Beyond the mere existence of a contractual relationship,

understanding the subject matter and material terms of the agreement is essential to determine whether a party to the agreement is guilty of unfair or deceptive conduct which violates the ICPA.

B. The District Court Erroneously Treated the I.C. § 48-608(1) Remedies as Cumulative

After finding that Duspiva violated the ICPA, the district court found that the Fillmores are entitled under I.C. § 48-608(1) to consider the undetermined agreement with Mr. Duspiva void and to their recover actual damages. This determination is contrary to the plain language of the statute, which provides that an injured party may treat the agreement between the parties "as voidable ***or, in the alternative***, may bring an action to recover actual damages." This Court confirmed this plain reading of the statute less than a year ago in *Knipe Land Co. v. Robertson*, in which this Court held that complainants who elected to treat an employment contract as void "chose their remedy under I.C. § 48-608(1) and cannot also sue to recover actual damages." 259 P.3d 595 at 606 (2011).

IV. Ed Squires' Expert Testimony Should Have Been Excluded

The district court issued a pretrial order requiring Fillmores to disclose expert witnesses and comply with IRCP 26(b)(4)(a) no later than March 15, 2010. On February 19, 2010, Mr. Duspiva served Fillmores with interrogatories, one of which asked the Fillmores to disclose the expert witnesses they expected to call at trial and state the subject matter of their testimony, including facts and opinions. Fillmores delivered responses to the interrogatories at the end of March, 2010, in which they identified Ed Squires and other experts, without identifying the facts or opinions to which they would testify. Tr., Vol. 3, pp. 7, 10.

On July 27, 2010, Mr. Duspiva filed a motion in limine to exclude Fillmores' experts because of Fillmores' failure to identify the facts and opinions to which they would testify. *Id.*, p. 11. Fillmores did not deliver supplemental responses to Mr. Duspiva's discovery responses identifying

the subject matter, facts and opinions, to which Fillmores' experts would testify until August 18, 2010, just 3 days before trial was scheduled to begin on August 23rd. *Id.*, at 8.

A hearing on Mr. Duspiva's motion in limine was held on August 19, 2010, during which counsel for Mr. Duspiva explained the circumstances and obvious prejudice resulting from Fillmores' disclosure of their experts' testimony on the eve of trial. *Id.*, pp. 3-37.

During the hearing, the Fillmores' counsel represented that, at trial, Mr. Squires would opine that "it wasn't necessary to drill into the low temperature geothermal aquifer and try to make a well." Id., p. 28, lns. 14-16.

The court understood Mr. Duspiva's concern and agreed with counsel that he was prejudiced by not being aware of Mr. Squires opinions.

> I understand your argument that if he's going to present opinions that your client was negligent and should have done something in terms of a well drilling operation, and that would have resulted in a much shallower well, and it wouldn't have been necessary to get into the geothermal area, I think maybe your objection is well taken.

Id., p. 30, lns. 12-19.

> But, Mr. Gould, I do share or understand your objection, and I think I tend to agree with you that to the extent you're prejudiced by not being aware of some of these opinions until today, think that the court most likely will have to exclude that testimony . . .

Id., p. 31, ln. 21 - p. 32, ln. 32.

> With regard to Ed Squires, the court is inclined to agree with Mr. Gould that as to opinions he may hold relating to negligence, if it existed, of Mr. Duspiva in drilling that well, those objections may be well taken.
> But to the extent Mr. Squires could provide the court with an ability to understand the evidence that's presented in this case, I think that that may very well be important for the court to hear.

Id., p. 37, lns. 13-21.

On the last day of trial, prior to Mr. Squires' scheduled testimony, Mr. Duspiva's counsel renewed his objection to Mr. Squires' testimony. *Id.*, p. 36, lns. 6-12. The court responded as follows:

> the court's ruling, however, is that pursuant to Rule of Evidence 702 the court is allowing this expert to testify with regard to issues of scientific knowledge that this witness may have which might assist this court, this judge as the trier of fact, in understanding what it is to drill a well and some of the – and, quite frankly, just to give me an education on well drilling in general.
>
> But as the court previously ruled, he will not be allowed to give opinions specifically as the conduct of Mr. Duspiva in this particular transaction with the – transaction, if there was one, with the Fillmores.

Id., p. 36, ln. 19 - p. 37, p. 6.

Mr. Squires, who is not a well driller and has never drilled a well, then gave lengthly testimony (38 transcript pages) regarding the use of screens in well drilling, opining on what happens when a screen is not used in a well, that they are commonly and easily used by well drillers, and that they are a reasonable drilling practice in the area where the Fillmores' well is located. *Id.*, p. 69-98.

In its Findings of Fact and Conclusions of Law, the district court referred extensively to Mr. Squires' testimony immediately prior to concluding that Mr. Duspiva violated the ICPA. AR, Vol. II, pp. 8-10, ¶¶47-52. Based on Mr. Squires' testimony, the district court found and concluded that using a screen and filter pack in well drilling in the area surrounding the Fillmore well is "a reasonable drilling practice," that there was "no reason that the Fillmore well drilled by Mr. Duspiva needed to reach low temperature geothermal conditions," and that "[t]he uncontroverted evidence in this case is that screening could have been done at relatively low cost at depths much less than Mr. Duspiva was recommending." AR, Vol. II, p. 298. These are the opinions the Fillmores' counsel telegraphed to the court during the hearing on Mr. Duspiva's motion in limine that Mr. Squires

would provide. In fact, no witness testified that there was no reason for the Fillmores to reach LTG conditions, or that the Fillmore well could have been screened at lower cost at much lower depths.

These conclusions, suggesting that Mr. Duspiva was negligent and did not drill the Fillmore well in a workmanlike manner, were inferred from Mr. Squires' testimony. Allowing Mr. Squires to provide such testimony and drawing these conclusions from it contradicted the district court's prior determinations that Mr. Squires would not be allowed to provide opinions related to negligence.

As counsel for Mr. Duspiva argued to the district court prior to trial during the hearing on the motion in limine to exclude the Fillmores' experts, allowing Mr. Squires to testify was highly prejudicial. because Mr. Duspiva had no opportunity to timely learn and conduct discovery as to those facts and opinions before trial. As counsel argued, IRCP 26(e) imposes on parties "a duty seasonably to amend a prior response" to interrogatories, and provides that failure to meet this duty is grounds to "exclude the testimony of witnesses or the admission of evidence not disclosed by the required supplementation of the response of the party."

In *Radmer v. Ford Motor Co.*, this court explained:

> [Rule 26(e)] unambiguously imposes a continuing duty to supplement responses to discovery with respect to the substance and subject matter of an expert's testimony where the initial responses have been rejected, modified, expanded upon, or otherwise altered in some manner.
>
> . . .
>
> Typically, failure to meet the requirements of *Rule 26* results in exclusion of the proffered evidence. *Coleco Industries, Inc. v. Berman, 567 F.2d 569 (3d Cir.1977).* Moreover, while trial courts are given broad discretion in ruling on pretrial discovery matters, reversible error has been found in allowing testimony where *Rule 26* has not been complied with. *Smith v. Ford Motor Co., 626 F.2d 784 (10th Cir.1980).*

120 Idaho 86, 89-91, 813 P.2d 897, 900-902 (1991).

The circumstances in *Radmer* are strikingly similar to this case. Shortly before trial, Radmers' expert prepared a new report which they intended to use at trial, but did not disclose that fact until the first day of trial.

> At a motion *in limine*, Ford objected to the presentation of evidence that it claimed had not been disclosed through updated responses to discovery. The trial court deferred its ruling until Pool testified. As the trial progressed, prior to Mr. Pool's testimony, Ford again renewed its objection, and the court recognized that failure to supplement the answers to interrogatories might support exclusion of the testimony, but refused to rule in advance that Pool could not testify.

Id., 120 Idaho at 88, 813 P.2d at 899.

Radmers' expert testified at trial, over Ford's objection. This Court held that "Radmers' failure to supplement their discovery responses with respect to this new analysis violated both the spirit and the letter of *Rule 26(e)*," and held that the district court's allowing the testimony was reversible error. *Id.*, 120 Idaho at 88, 90-91, 813 P.2d at 899, 901-902.

As in *Radmer*, the Fillmores' failure to supplement their discovery responses to identify the subject matter of their expert's testimony violates the spirit and letter of IRCP 26(e). Accordingly, the district court's allowing Mr. Squires testimony over Mr. Duspiva's objection is reversible error.

CONCLUSION

It is undisputed that Mr. Duspiva and the Fillmores entered an agreement on June 11, 2007 for Mr. Duspiva to provide the Fillmores well drilling services. That agreement was repeatedly ratified by Clyde Fillmore each time he instructed Mr. Duspiva to continue drilling, when he received Mr. Duspiva's invoice without objection, and each time he paid Mr. Duspiva. Mr. Duspiva performed well drilling services as agreed in a workmanlike manner, and the Fillmores did not complain about Mr. Duspiva's work until after it was complete. The district court erred in failing

to find that the agreement existed, and that Mr. Duspiva's work and charges were in accordance with the agreement.

Fillmores breached the agreement by not making full payment for Mr. Duspiva's work. To avoid payment, Fillmores wrongfully assert that Mr. Duspiva violated the Idaho Consumer Protection Act (ICPA). The Fillmores did not meet their burden to show that Mr. Duspiva deceived them. The district court erred in concluding that Mr. Duspiva violated the ICPA by inadequately educating Clyde Fillmore on the screening practices of other well drillers. The district erred further by determining that it was not required to determine the existence, terms and conditions of the agreement in order to apply the ICPA, and by awarding the Fillmores both of the alternative remedies of voiding the agreement and seeking damages provided by I.C. § 48-608(1).

Finally, the district court erred by allowing Fillmores expert witness, Ed Squires, to testify. Squires should have been excluded under IRCP 26(e) due the extremely late and prejudicial disclosure on the eve of trial of the facts and opinions to which he would testify.

DATED this 27th day of January, 2012.

RINGERT LAW CHARTERED

By
Daniel V. Steenson
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of January, 2012, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

Bruce Smith Moore Smith Buxton & Turcke, Chtd. 950 W. Bannock Street, Suite 520 Boise, Idaho 83702	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivery ( ) Overnight Mail ( ) Facsimile

Daniel V. Steenson