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In the Supreme Court of the State of Idaho

Supreme Court Case No. 38480-2011

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT,

Plaintiff-Appellant,

v.

CLYDE FILLMORE, an Individual, and JOHN FILLMORE, an Individual,

Defendants-Respondents.

RESPONDENTS' BRIEF

Appeal from the District Court of the Third Judicial District for Canyon County

Case No. CV 2008-10463

Hon. Thomas J. Ryan, 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") sued the Respondents Clyde Fillmore and John Fillmore ("Fillmores") over an agreement to drill a domestic well. The Fillmores counterclaimed alleging that Mr. Duspiva violated various provisions of Idaho Consumer Protection Act. Idaho Code (I.C.)§46-601 *et seq.*

II. COURSE OF THE PROCEEDINGS

The matter was tried in a court trial on August 23-25, 2010, in Canyon County District Court before the Honorable Thomas J. Ryan. Closing arguments were submitted through post trial briefs. R. Vol. II, p. 223-270 (Fillmore) and R. Vol. II, p. 204-222 (Duspiva). The district court entered Findings of Fact and Conclusions of Law on October 18, 2010, holding that Mr. Duspiva had violated Sections 16, 17, and 18 of the Idaho Consumer Protection Act. R. Vol. II, p. 288-300.

The court awarded the Fillmores damages in the amount of $27,500. *Id.* The district court subsequently awarded the Fillmores' their costs and attorney fees. R. Vol. II, p. 319-323. Mr. Duspiva has not appealed or otherwise challenged the award of costs and attorney fees by the district court.

III. STATEMENT OF FACTS

Mr. Duspiva is a licensed well driller in Idaho. As such, he is required to understand and comply with laws and rules in the state regarding well drilling. Tr. Vol. 1, p. 98, L. 1-1. He holds himself out as a Master Ground Water Contractor. R. Vol. I, p.34, L. 19-21, R. Vol. II, p.

289. Clyde Fillmore is a retired ironworker, farmer, construction worker and builder. Tr. Vol. 1a, p. 44, L. 24-25.[1]

In April 2007, Clyde Fillmore contacted Mr. Duspiva about drilling a domestic well for Clyde's son John Fillmore. At the time of the events leading to the drilling of the well by Mr. Duspiva, Clyde's understanding of well drilling was extremely limited with his only experience being related to another domestic well that was drilled on his property. R. Vol. II, p. 289. The Fillmores and Mr. Duspiva all agree the discussion and eventual agreement was for a domestic well. In fact, Mr. Duspiva acknowledged at trial the "sum total" of the agreement was for nothing more than a domestic well. Tr. Vol. II, p. 6, L. 11. As documented in a Start Card Permit for drilling that Mr. Duspiva obtained from the Idaho Department of Water Resources, ("IDWR") the proposed maximum depth of the well was to be 200 feet.[2] The Fillmores and Mr. Duspiva also agree the price for the 200 foot well was to be $32.50 per foot plus some incidental costs. Tr. Vol. 1, p.7, L. 2-3, Tr. Vol. Ia, p.15, L. 17-19. The agreement for Mr. Duspiva to drill the 200 foot domestic well was not written.

After Clyde Fillmore identified a location for the well, Mr. Duspiva started drilling on or about June 12, 2007, completing drilling activities on or about October 10, 2007. As Mr. Duspiva drilled, he encountered sand. In well drilling, it is a well established industry standard to use a screen and filter pack to address sand in a well. Tr. Vol. 2, p. 192, L. 8-14; Tr. Vol. 2, p.

[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.

[2] A Start Card Permit is a self-issued permit for a single family domestic well available through the Idaho Department of Water Resources. It is available for use only by licensed well drillers. It has 13 designated conditions for its use and can only be used for cold water domestic wells with water less than 85° F. Condition 8 requires the driller to stop drilling and contact the IDWR if the well temperature reaches 85° F. The Start Card Permit used by Duspiva for the Fillmore well is included in the Record as Exhibit C and at R. Vol. I, p. 074.

168, L. 3-9. For reasons never disclosed at trial, Mr. Duspiva refuses to use screens and filter packs to address sand. Notwithstanding the Start Card Permit limiting the well to a depth of 200 feet, Mr. Duspiva continued drilling past the 200 foot maximum depth. As he drilled beyond 200 feet, Mr. Duspiva never contacted the IDWR, which is the state agency that regulates well drilling and well drillers. However, Mr. Duspiva repeatedly told Clyde Fillmore that there was "sand" in the well and recommended that he continue to drill deeper. Tr. Vol. 1a, p. 23, L. 7-8. Mr. Fillmore, with no experience with well drilling and relying on Mr. Duspiva's recommendation, never told Mr. Duspiva to stop drilling. R. Vol. 1a, p. 36, L. 10-15; Tr. Vol. 3, p. 24, L. 1-6.

As Mr. Duspiva drilled, he encountered water at various levels. According to a diagram eventually submitted to IDWR after the well had been drilled, Mr. Duspiva found water at 128-131 feet and at 148-153 feet. Mr. Duspiva hit water at 320-348 feet and then at 360-362 feet. He hit water at 580-585 feet, at 642-650 feet, at 670 feet, at 691 feet, at 701 feet. He hit water at 836 feet on August 6, 2007. R. Exhibit A; R. Vol. I, p. 181. (Note: Exhibit A is a detailed report by the IDWR dated November 6, 2008, on the drilling of the Fillmore well and the events that led to the present suit. Exhibit A contains four pages plus several attachments and exhibits. The diagram showing where and when Mr. Duspiva encountered water is Exhibit B to the report.) Eventually Mr. Duspiva would drill the 200 foot well to over 1100 feet. R. Exhibit A, Tr. Vol. 1, p. 71, L. 4. When Mr. Duspiva finished drilling, the water was 102°F and smelled of sulphur. *Id.*

Aside from the depth of the well, there were other issues. As the well was drilled deeper, the temperature of the water increased. R. Exhibit A. Ground water with a temperature between 85°F and 212°F is classified as Low Temperature Geothermal water (LTG). I.C. §42-233. LTG

water is restricted in its use and development. *Id.* It must be used for its heat value unless exempted. *Id.* According to the report sent by Mr. Duspiva to the IDWR, the temperature increased from 70°F at 320-348 feet to 77½°F at 3690-362 feet, to 81°F at 500 feet, and to 85°F at 600 feet. R. Exhibit A. On or about August 8, 2007, when Mr. Duspiva had drilled to 836 feet, the well was 91½°F. *Id.*

On August 8, 2007, Mr. Duspiva finally talked to the Fillmores about the "problems" with the well. Tr. Vol. 1a, p. 27, L. 3-8. The well was obviously over the 200 foot depth indicated in the Start Card Permit, and the water over the 85°F limitation contained in the Start Card Permit. In fact, on August 8, 2007, the well was officially a LTG well and had been since it was 600 feet deep. R. Exhibit A. Such a well is subject to special construction design and other regulatory requirements, including additional financial obligations for the owner. IDAPA 37.03.09.030. Unfortunately, since the well was designed as a domestic well, it had not been designed or drilled in accordance with LTG well requirements. Further, since Mr. Duspiva had not been adequately monitoring the well bottom hole temperature, he had not complied with the Start Card Permit Condition No. 8 that required him to stop drilling and contact the IDWR if the well temperature hits 85°F. R. Vol. 1, p. 074. The well had actually hit the LTG standard of 85°F at 600 feet. R. Exhibit A. Yet, Mr. Duspiva never told the Fillmores about hitting 85°F, about LTG wells, or their special requirements. But on August 8, 2007, he told the Fillmores that he needed to contact IDWR because of the temperature situation.

During the entire time he had been drilling, Mr. Duspiva only provided limited information to the Fillmores. TR. Vol. 1, p. 8, L. 21-22; TR. Vol. 1, p. 22, L. 13-17. He never told them about when he encountered LTG water, nor did he tell them there was a probability he would hit LTG conditions if he continued to drill deeper than the 200 feet as specified in the

permit. TR. Vol. 1, p. 7, L. 19-23; Tr. Vol. 1a, p. 34, L. 19-22; Tr. Vol. 1a, p. 57, L. 11-19. Instead, Mr. Duspiva remained silent except for recommending drilling deeper because of "sand" even as he was constantly encountering layers of cold water. Mr. Duspiva never mentioned to the Fillmores anything about the industry practice for installation of screens and filter packs to address sand or that using a screen and filter pack would allow the well to be completed at a shallower depth. TR. Vol. 3, p. 26, L. 16-21.

It was not until August 8, 2007, that Mr. Duspiva gave Clyde Fillmore any hint of the temperature issue. However, Mr. Duspiva told Mr. Fillmore not to worry because Mr. Duspiva could "fix" the problem. Tr. Vol. 1, p. 10, L. 3-7. Mr. Duspiva's "fix" was to ask IDWR for a "variance" from the regulations for construction of a LTG well. R. Exhibit A. However, Mr. Duspiva already had another problem that he did not disclose to Clyde Fillmore. Mr. Duspiva had been repeatedly warned by the IDWR about using a Start Card Permit to start shallow, cold water domestic wells, then drilling deeper until he encountered LTG conditions. *Id.* Throughout his relationship with the Fillmores, Mr. Duspiva never told the Fillmores about the regulatory and financial requirements associated with a LTG well. Tr. Vol. 1a, p. 55, L. 15-20.

Mr. Rob Whitney is the IDWR employee who regulates well construction in southwest Idaho. Tr. Vol. 2, p. 122, L. 1-4. The Fillmore's Exhibit A is a detailed report by Mr. Whitney on the drilling of the Fillmore well. The report details Mr. Duspiva's past problems with complying with the IDWR well drilling rules, IDWR's warnings to Mr. Duspiva, and Mr. Duspiva's actual knowledge of the existence of LTG conditions in the area of the Fillmore well. According to the report, Mr. Duspiva had just completed fixing another LTG well that had been improperly drilled only a few days prior to starting the Fillmore well. *Id.* The improperly drilled well had only been fixed by Mr. Duspiva after he was given a "final opportunity" by IDWR to

comply with IDWR rules or face a formal enforcement action. *Id.* Mr. Duspiva never told Mr. Fillmore about these problems.

When Mr. Duspiva finally contacted the IDWR about the Fillmore well, the agency, having repeatedly warned Mr. Duspiva about improperly drilling LTG wells, refused to grant Mr. Duspiva a variance from the standards. R. Exhibit A, p. 2. Instead, the agency required him to come up with a proposal to bring the Fillmore well into compliance with IDWR requirements for construction of a LTG well. Even though he had drilled the Fillmore well into LTG conditions and had not constructed the well in accordance with IDWR standards, Mr. Duspiva demanded that the Fillmores pay all the costs to bring the well into compliance including hiring additional contractors from north Idaho and elsewhere to help Mr. Duspiva with the work. Even though he demanded the Fillmores pay all the costs to bring the well into compliance, Mr. Duspiva refused to tell the Fillmores the details of the proposed fix, who would do the work, and what it would cost. Tr. Vol. 2, p. 91-92.

IDWR eventually required the LTG well to be closed, and the agency hired another well driller, Down Rite Well Drilling, to do the work. Because IDWR rules impose responsibilities on the well driller and the land owner, the Fillmores had to pay in excess of $7,000 to close the well. Tr. Vol. 1, p. 20, L. 23. As a result of Mr. Duspiva's failure to stop drilling and contact the IDWR when the well reached 85°F, as required by the permit, IDWR issued a Notice of Violation to Mr. Duspiva. Tr. Vol. 1, P. 91, L. 16-20; Tr. Vol. 2, p. 190, L. 9-21. To resolve the Notice of Violation, Mr. Duspiva agreed to a suspension of his Start Card Permit privileges. Tr. Vol. 1, p. 93, L. 15-20.

At trial, Mr. Duspiva admitted that the well had not been drilled in compliance with IDWR rules, that the drilling permit had not been complied with, and the well did not meet

IDWR requirements. Tr. Vol. 1, p. 94, L. 6-9. Idaho Code §42-238 requires all wells to be constructed to IDWR standards. IDWR well drilling rules likewise require a driller to complete a well in compliance with IDWR standards. IDAPA 37.03.060.01(b). Mr. Duspiva also admitted he had never told the Fillmores about all the responsibilities and costs associated with a LTG well. In fact, it was only at a meeting with IDWR on October 23, 2007, long after completion of the well, that the Fillmores learned of the ramifications of LTG wells. R. Exhibit A; Tr. Vol. 1a, p. 55, L. 2-5. Unfortunately, they learned them from IDWR, not Mr. Duspiva. *Id.* Until the October 23, 2007, meeting with IDWR, Mr. Duspiva had led the Fillmores to believe there was no problem with the well. Tr. Vol. 1a, p. 55, L. 15-20.

Mr. Duspiva also never told the Fillmores about his immediate past problems with IDWR or the likelihood that the well would encounter LTG water if it was drilled deeper than the 200 feet. Instead, Mr. Duspiva just kept recommending that the well be deeper. After all, he was charging $32.50 a foot. Despite the fact the well had been drilled in violation of the permit and was not constructed in accordance with IDWR rules, Mr. Duspiva sued the Fillmores for the cost of drilling the illegal well.[3]

In sum, Mr. Duspiva's had drilled an 1130 foot deep, improperly designed and constructed LTG well producing 102°F water and smelling of sulphur. He had done so after repeatedly encountering available cold water multiple times at shallower depths. The well was not what the Fillmores had sought or what the parties had agreed upon.[4] After the Fillmores were forced to pay IDWR to close the LTG well, that did not end the saga because John Fillmore still needed a domestic well for his house. The Fillmores subsequently hired Down Rite Drilling

[3] The Fillmores had already paid Mr. Duspiva $20,000, however Mr. Duspiva sued for another $30,665.

[4] Although Mr. Duspiva refused to disclose the actual cost to bring the well into compliance, the cost would have been well over $100,000.00.

to construct a domestic well like they had requested from Mr. Duspiva. Down Rite was the same driller who had closed the illegal well. Down Rite moved over 40 feet from the illegal well, drilled to only 320 feet, installed a screen and filter pack and produced 40 gallons per minute of cold water at a cost of $18,000. Tr. Vol. 1, p. 22, L. 1-12.

ISSUES ON APPEAL

1. Did the District Court Err in Finding that Mr. Duspiva Violated the Idaho Consumer Protection Act?

2. Did the District Court Abuse its Discretion in Allowing Edward Squires to Testify as an Expert Witness?

3. Did the District Court Misapply the Idaho Consumer Protection Act?

ATTORNEYS FEES ON APPEAL

The Fillmores request attorney fees and costs on appeal pursuant to the Idaho Consumer Protection Act I.C. §48-608(4), I.R.C.P. 54(d)(1)(B), I.C. §12-120(3) and I.C. §12-121.

I. ARGUMENT

A. Standard of Review

Review of a ruling that a party has violated the Idaho Consumer Protection Act focuses on the factual findings by the trial court.

> Findings of fact by a trial court will not be disturbed on appeal unless they are clearly erroneous. I.R.C.P. 52 (a). Clear error, in turn, will not be deemed to exist if the findings are supported by substantial and competent, though conflicting, evidence. *Rasmussen v. Martin,* 104 Idaho 401, 659 P.2d 155 (Ct.App. 1983) (citing *J.E.T. Development v. Dorsey Const. Co., Inc.,* 102 Idaho 863, 642 P.2d 954 (Ct.App. 1982)).
>
> *Barber v. Honorof,* 116 Idaho 767, 780 P.2d 89 (1989).

Where there is conflicting evidence, it is the trial court that has the opportunity to judge the credibility of the witnesses. *Id.*

B. The District Court's Findings are Supported by the Record

The district court found that Duspiva's actions violated sub-sections 16, 17, and 18 of the Idaho Consumer Protection Act ("ICPA"). The general thrust of the court's findings relate to Mr. Duspiva's failure to inform the Fillmores about the industry standard for use of screens and filters and needlessly drilling a deep LTG well when available cold water had been found at shallower depths. The ICPA specifies certain unfair methods and practices. I.C. §42-603. Section 16 of the ICPA prohibits representing that services are needed if they are not needed. *Id.* Section 17 makes unlawful false and deceptive practices. *Id.* Section 18 includes instances where the violator knowingly or with reason to know induces a consumer to enter into one-sided transactions favoring the violator. *Id.*

The court made numerous findings related to the violations of the ICPA. First, because Mr. Duspiva encountered cold water at multiple depths short of the 1130 foot LTG well, there was no need to drill deeper and into LTG conditions. Mr. Duspiva knew there was a high likelihood of encountering LTG conditions if he drilled deeper because he had already done that in three other wells in the immediate vicinity of the Fillmore well. Yet, he never told the Fillmores about the LTG situation or even gave them the opportunity to install a screen and filter pack to address sand. Mr. Duspiva never told the Fillmores it was a well established standard industry practice to install screens and filter packs to address sand. Importantly, Mr. Duspiva never told the Fillmores about the costs and liabilities of a LTG well. Mr. Duspiva drilled the LTG well, then presented it to the Fillmores in lieu of a 200 foot, cold water domestic well. In short, Mr. Duspiva hid critical information from the Fillmores because it was in Mr. Duspiva's pecuniary interest to drill deeper.

C. Mr. Duspiva Failed to Disclose Industry Standards for Using Screens to Address Sand and to Give the Fillmores the Opportunity to Consider Use of a Screen.

The district court made a specific finding that Mr. Duspiva violated the Idaho Consumer Protection Act when he failed to disclose the standard industry practice of using screens, thereby depriving the Fillmores of the opportunity to have a cold water domestic well at a reasonable depth. The record reflects that Mr. Duspiva's sole statement to the Fillmores was that he didn't use screens. Tr. Vol. 1, p. 38, L. 20-22. Clyde Fillmore testified that when Mr. Duspiva said this, Clyde did not even know what a screen was. Tr. Vol. 1, p. 26, L. 1-8. Mr. Duspiva never explained what a screen was, its purpose, or why he did not use them.

Duspiva argues on appeal that there is no evidence that he misled the Fillmores or withheld any information. Duspiva Br. at 16. This assertion flies in the face of the court's findings as to Mr. Duspiva's failure to inform the Fillmores about the industry standard, and Mr. Duspiva's recommendations to keep drilling deeper, even though he had encountered cold water at several levels far short of the 1130 feet the well was eventually drilled. The argument also ignores the critically important IDWR report (R. Exhibit A) that documented that: (1) Mr. Duspiva knew of LTG conditions in the area, (2) he knew about the likelihood LTG conditions would be encountered at depths, and (3) Mr. Duspiva should have told the Fillmores of this situation.[5] Instead, Mr. Duspiva remained silent and kept recommending to drill deeper, even though the Fillmores had wanted only a cold water domestic well. The presence of cold water at shallower depths was based on Mr. Duspiva's own testimony. Mr. Duspiva likewise failed to tell the Fillmores about the ramifications associated with a LTG well. There is no logical reason why Mr. Duspiva, who holds himself out as a "Master Groundwater Contractor", would not tell a

[5] In fact, Mr. Duspiva's brief never mentions the IDWR report or that Mr. Duspiva received a Notice of Violation for violating the Start Card Permit that limited the well to 200 feet and temperatures less than 85°F.

customer about these facts. The only logical conclusion is that Mr. Duspiva did not disclose them because they interfered with his pecuniary interest associated with his by-the-foot billing.

Mr. Duspiva admits, and the Fillmores agree, that the agreement Mr. Duspiva had with the Fillmores was for a cold water domestic well. Tr. Vol. 2, p. 6, L. 9-11. Mr. Duspiva admitted the Fillmores did not authorize him to drill illegally, yet he sued to collect for his illegal drilling. Mr. Duspiva admitted he did not comply with the permit, and that the well did not comply with IDWR standards. Tr. Vol. 2, p. 10. L. 12-15. Mr. Duspiva admitted that when the well hit 85°F at 600 feet, he was not even monitoring the temperature as required by IDWR rules. Tr. Vol. 2, p. 17, L. 13-14. He admitted he did not tell the Fillmores when the well hit 85°F. Tr. Vol. 2, p. 19, L. 5-7. He admitted he did not stop drilling and contact IDWR as required by condition 8 of the Start Card Permit. Tr. Vol. 2, p. 21, L. 16-20. At trial, Mr. Duspiva admitted he did not tell the Fillmores about the ramifications and liabilities of a LTG well. Tr. Vol. 2, p. 27, L. 1-4. He admitted the well was not constructed consistent with IDWR requirements. Tr. Vol. 2, p. 29, L. 1-4. He admitted IDWR issued a Notice of Violation for violating condition 8 of the Start Card Permit. Tr. Vol. 2, p. 55, L. 17-20. Mr. Duspiva admitted the Fillmores never authorized him to do illegal drilling, never authorized him to drill without complying with IDWR rules, and never agreed to pay for Mr. Duspiva to hire other contractors to try to bring the well into compliance. Tr. Vol. 2, p. 83. He admitted he did not tell the Fillmores about the option to use a screen and filter pack. Tr. Vol. 2, p. 85-86. He admitted he could not bring himself to even tell the Fillmores about the option to install a filter pack and screen so they would have the opportunity for a cold water well. Tr. Vol. 2, p. 86, L. 16-25. He did not tell the Fillmores about the risks of hitting LTG conditions. R. Exhibit A. When he proposed to bring in contractors from north Idaho to try to bring the well into compliance, he

refused to tell the Fillmores any of the details such as who the contractors were or what it would cost to fix the well, even though the Fillmores asked for the information. Tr. Vol. 2, p. 91, L. 3-15. Throughout the well drilling process, Mr. Duspiva's only recommendation to the Fillmores was to keep drilling deeper. Tr. Vol. 3, p. 24, L. 12-13. The Fillmores acknowledged at trial they did not tell Mr. Duspiva to stop drilling based on the recommendations of Mr. Duspiva. Tr. Vol. 3, p. 24, L. 5-6. The Fillmores knew little about well drilling, nothing about LTG wells, and Mr. Duspiva never told them. Tr. Vol. 3, p. 23, L. 1-13; Tr. Vol. 1a, p. 58, L. 20-25. Mr. Duspiva never described what a screen was, how it worked, or why he did not use a screen even though they are the well established industry standard. Tr. Vol. 3, p. 26, L. 16-21. Further, Mr. Duspiva knew about the LTG situation in the area, the ramifications of the costs and obligations of a LTG well, and that screens and filters are an industry standard. The record is replete with evidence to support the district court's findings about Mr. Duspiva's actions. Mr. Duspiva advances on appeal the very same arguments that he did at trial. One big difference between the trial and this appellate proceeding is that the district court had a first hand opportunity to consider the credibility of Mr. Duspiva as a witness.

D. Mr. Ed Squire's Testimony was Consistent with the District Court's Pre-Trial Ruling, and his Testimony was Helpful to the Court's Understanding of Issues Related to Well Drilling.

Admission or exclusion of evidence, including expert witness testimony, is reviewed for abuse of discretion. *White v. Mock,* 140 Idaho 882, 104 P.3d 356 (2004). The test for determining whether the district court abused its discretion is: (1) whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer

bounds of its discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason. *Id.*

Mr. Duspiva argues on appeal that Mr. Ed Squires' testimony should have been excluded. However, Mr. Duspiva fails to explain the complete background behind Mr. Squires' testimony. Mr. Squires was not a paid expert retained by the Fillmores. Mr. Squires appeared as a witness to explain in general about well drilling and hydrogeology. Mr. Duspiva objected to Mr. Squires offering any opinion as to Mr. Duspiva's drilling or Mr. Duspiva's negligence. At a motion in limine hearing prior to trial, the court indicated it would not allow Mr. Squires to testify about Mr. Duspiva or offer any opinions as to Mr. Duspiva's negligence. Tr. vol. 3, p. 60, L. 23-25. However, the court indicated Mr. Squires would be helpful to the court in understanding well drilling testimony and information. Tr. Vol. 3, p. 6, L. 5-9. The court indicated that it was likely Mr. Squires could offer information helpful to both Mr. Duspiva and the Fillmores. Tr. Vol. 3, p. 29, L. 15-17. Counsel for Mr. Duspiva was told to make "...specific objections in trial if you believe there is some opinion testimony coming in that relates to issues that were not disclosed to you." Tr. Vol. 3, p. 37, L. 22-25, p. 38, L. 1. Counsel for Mr. Duspiva acknowledged his agreement with this process:

> "...I'll make my objection and you'll rule, and then the case will move on."
>
> Tr. Vol. 3, p. 60, L. 18-21.

The court ended the motion in limine hearing with specific direction to both parties that the court would not allow testimony as to Mr. Duspiva's negligence, but that Mr. Squires could describe the well drilling process and educate the court on the technicalities of well drilling. Tr. Vol. 3, p. 61, L. 5-9.

In Mr. Duspiva's brief, he points to not a single statement by Mr. Squires at trial that was contrary to the court's direction. As Mr. Squires started to testify, counsel for the Fillmores reminded him that he could not testify as to Mr. Duspiva's negligence. Tr. Vol. 3, p. 57, L. 8-11. Mr. Squires verbally acknowledged that he would not do so. Tr. Vol. 3, p. 57, L. 16. Mr. Squires testified as to well drilling in general and his own experiences in drilling and hydrogeology. He explained that LTG water is not desirable for a domestic well. Tr. Vol. 3, p. 95, L. 11-16. He explained the use of screens and filter packs and explained that they are not difficult to install. Tr. Vol. 3, p. 88, L. 17-19. Mr. Squires was never asked any questions nor offered any testimony about Mr. Duspiva. Mr. Squires never uttered Mr. Duspiva's name. In fact, the only time Mr. Duspiva's name even came up in Mr. Squires' testimony was when Mr. Duspiva's counsel asked about Mr. Duspiva. Tr. Vol. 3, p. 98, L. 19-22.

Most telling about the appropriateness of Mr. Squires' testimony is that Mr. Duspiva's counsel only objected one time during Mr. Squires' testimony. Tr. Vol. 3, p. 97, L. 10. That objection was directed to a question about a well drilled by another driller. *Id.* When Mr. Duspiva's counsel objected, the court reminded Mr. Squires about avoiding any opinion testimony about Mr. Duspiva, and Mr. Squires followed that direction. Tr. Vol. 3, p. 97, L. 14-18. Mr. Squires' testimony was absolutely consistent with the court's ruling, and Mr. Duspiva acknowledged this by not raising a single objection at trial except for the one objection regarding another well that Mr. Duspiva did not drill. The court's Findings of Fact and Conclusions of Law related to Mr. Squires' testimony do not even mention Mr. Duspiva. R. Vol. 2, p. 295-297. Mr. Squires' testimony related solely to his experience and expertise with well drilling, the use of screens and filter packs, and hydrogeology.

Nor was Mr. Squire's testimony the only evidence at trial about these subjects. Mr. Squires' testimony was consistent with much of Mr. Whitney's testimony and his report, as well as the testimony of Tom Neace, another IDWR employee. Mr. Whitney and Mr. Neace are both employees of the IDWR who were involved in the issues surrounding the Fillmore well. R. Exhibit A. Mr. Whitney is a senior water resource agent whose duties include regulation of well construction. Tr. Vol. 2, p. 122, L. 1-4. Mr. Neace is the manager of the IDWR Ground Water Protection Program and supervises well drilling, geothermal resources, and well driller licensing. Tr. Vol. 2, p. 186, L. 17-21. Mr. Neace testified that it was standard industry practice to install filter packs and screens to address sand. Tr. Vol. Vol. 2, p. 192, L. 8-18. Mr. Squires confirmed it was not difficult to install screens, and that he almost always did so. Tr. Vol. 3, p. 88, L. 17-29. Interestingly, not only did Mr. Duspiva not object to the testimony of Mr. Squires, Mr. Whitney, or Mr. Neace, Mr. Duspiva, who testified that he was a "Master Groundwater Contractor" with extensive experience, did not contradict or offer any rebuttal to the testimony of Mr. Squires, Mr. Whitney or Mr. Neace as to drilling techniques, hydrogeology, or industry standards related to the use of screens and filter packs to address sand. In fact, it was Mr. Duspiva's own testimony that established the fact that there was an abundance of cold water at much less depth than the 1130 feet Mr. Duspiva drilled to and hit 102°F water.

The record is clear that the district court gave careful attention to the issue of Mr. Squire's testimony before trial. The court limited Mr. Squires' testimony by precluding any testimony about Mr. Duspiva. The court made every effort to ensure the court understood the technical issues surrounding well drilling. The court instructed Mr. Duspiva's counsel to object if any testimony was an opinion that had not been disclosed, and Mr. Duspiva's counsel agreed. Mr. Duspiva's counsel raised only a single objection at trial. Further, Mr. Duspiva offered no

rebuttal testimony to Mr. Squires' testimony. Mr. Squires' testimony was consistent with testimony by IDWR witnesses Rob Whitney and Tom Neace as to well drilling information including the industry standard for screens and filters. His testimony aobut the presence of LTG conditions was consistent with Mr. Duspiva's own testimony that he encountered an abundance of cold water at depths much less than the 1130 feet Mr. Duspiva drilled. The district court noted the benefit of Mr. Squires' testimony to both parties and the court. There was simply no error in admitting the limited testimony of Mr. Squires. Raising the issue of Mr. Squires' testimony on appeal is frivolous, unreasonable, and lacks any foundation.

Further, except for the noted one objection to a matter that did not relate to the Duspiva drilled well, Mr. Duspiva did not object to any of Mr. Squires' testimony at trial. Mr. Duspiva has waived any objection on appeal. It is long settled law that a party cannot remain silent at trial and later raise objections for the first time on appeal. Notwithstanding that the district court did not abuse its discretion, Mr. Duspiva cannot challenge Mr. Squires' testimony at this point. *Woods v. Sanders,* 150 Idaho 53, 59, 244 P.3d 197, 203 (2010).

E. The Fillmores Did Not "Ratify" the Terms of An Agreement to Drill a LTG Well.

Mr. Duspiva asserts that the Fillmores somehow ratified an agreement to drill an LTG well because they never told Mr. Duspiva to stop drilling. The assertion strains credulity and is inconsistent with testimony at trial. Mr. Duspiva's argument seems to be that his agreement with the Fillmores was nothing more than for him "to drill". According to his theory, he drilled, so he should be paid whether it was reasonable or not. The fact the well was a LTG well that did not meet IDWR well drilling standards is irrelevant to Mr. Duspiva, as is the fact the Fillmores never once indicated they sought an LTG well.

The record is clear that Mr. Duspiva and the Fillmores agreed Mr. Duspiva was retained to drill a domestic well. It was to be 200 feet maximum depth according to the permit Mr. Duspiva obtained and used to drill the well. There was never any agreement to drill a LTG well. In fact, the Fillmores did not even know what the term meant until after the well was drilled as a LTG well. Tr. Vol 3, p. 23, L. 1-6. They only learned about LTG and LTG wells because IDWR told them in October, 2007. R. Exhibit A. Mr. Duspiva hid the details until after he had drilled the illegal LTG well. The fact is that Mr. Duspiva's problem with having drilled into LTG conditions really became problematic when IDWR refused to grant him a variance from complying with IDWR rules and standards. The IDWR had had enough of Mr. Duspiva's violations of the rules. The agency ultimately issued a Notice of Violation. Yet Mr. Duspiva persists in arguing that regardless of the fact there was an agreement to drill a domestic well, regardless that the permit for the well was for 200 feet maximum depth, regardless of the fact that he did not bother to inform the Fillmores or IDWR until after the well was drilled into LTG conditions, and regardless of the fact that it was Mr. Duspiva, not the Fillmores, who drilled the illegal LTG well, the Fillmores somehow "ratified" an agreement to drill the LTG well simply because they did not tell him to stop.

The Fillmores explained that they did not tell him to stop because Mr. Duspiva kept recommending to drill deeper, and they had no reason not to accept his recommendations. However, the Fillmores testified that had Mr. Duspiva been truthful about the LTG situation, they would have instructed him to stop. Tr. Vol. 3, p. 25, L. 14-17. The fact is that there was never any agreement to drill a LTG well, and Mr. Duspiva's assertion there was an "agreement" to do so based on the fact the Fillmores did not tell him to stop drilling – based on Mr. Duspiva's recommendation – is frivolous.

Even if there had been such an agreement, it would be void and unenforceable.[6] Idaho scrupulously follows the rule that contracts for acts forbidden by law are void and unenforceable. *Kunz v. Lobo Lodge, Inc.*, 133 Idaho 608, 990 P.2d 1219 (Ct.App. 1999), (citing *Tiffany v. Boatman's Savings Inst.*, 85 U.S. (19 Wall) 375, 384, 21 L.Ed. 868, 869 (1973); *Harris v. Runnels*, 53 U.S. (12 Howard) 79, 83, 13 L.Ed. 901, 903 (1851)). Idaho law follows the trend that any contract made for the purpose of furthering any matter or thing prohibited by statute is void. *Porter v. Canyon County Mut. Fire Ins. Co.*, 45 Idaho 522, 525, 263 P. 632, 633 (1928). Moreover, Idaho case law does not allow courts to consider between whether an act was *mala in se* or *mala in prohibita* when confronted with an act that violates Idaho statute. In *Kunz*, the court noted that:

> ... so far as contracts in violation of statute are concerned, there is no distinction between acts *mala in se* and acts *mala in prohibita* .... [W]here a statute intends to prohibit an act, it must be held that its violation is illegal, *without regard for the reason of the inhibition ... or to the ignorance of the parties as to the prohibiting statute.* (Emphasis added).

Kunz at p. 611; *citing*, 17 Am. Jur. 2D Contracts §251 (1991). The *Kunz* court left no doubt regarding the application of this rule by holding that:

> No principal of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; ... the law in short will not aid either party to an illegal contract; it leaves the parties where it finds them. The general rule is the same at law and in equity and whether the contract is executory or executed.

Kunz at p. 611; citing, *Hancock v. Elkington*, 67 Idaho 542, 548, 186 P.2d 494, (1947).

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[6] Mr. Duspiva's breach of contract assertions are based on his illegal drilling activities. It is also well settled law that consideration given in violation of the law or public policy is not valid consideration. *State v. Clark,* 102 Idaho 693, 638 P.2d 890 (1981).

According to Rob Whitney's report, testimony by Mr. Whitney, by Tom Neace, and based on Mr. Duspiva's own submittals and testimony, the well was not constructed to IDWR LTG well construction standards. Even Mr. Duspiva admitted he drilled the well in contradiction of Condition 8 of the Start Card Permit and IDWR well drilling rules. Even if Mr. Duspiva thinks there was a contract allowing him to recover for these illegal actions, such a contract would not be enforceable.

F. The Court Did Not Misapply the Idaho Consumer Protection Act.

Mr. Duspiva argues the court misapplied the Idaho Consumer Protection Act ("ICPA") by: (1) not determining that there was an agreement between the Fillmores and Mr. Duspiva, and (2) treating remedies under I.C. §48-608(1) as "cumulative". Neither argument reflects the court's findings or ruling.

Contrary to Mr. Duspiva's argument, the court did find an agreement between the Fillmores and Mr. Duspiva. It was an agreement to drill a cold water, domestic well of 200 feet at $32.50 per foot. The court likewise made findings that there were three specific facts dealing with LTG issues and one related to screen and filters, that Mr. Duspiva knew about at the time of the agreement to drill the domestic well that the Fillmores did not know about. Fact one was that there was a likelihood of reaching LTG conditions. R. Exhibit A, R. Vol. 1, p. 291; Tr. Vol. 2, p. 155, L. 18-21. Fact two was that a LTG well is inferior to a cold water domestic well for domestic purposes. Tr. Vol. 3, p. 95, L. 11-12. Fact three is that a LTG well requires increased costs and obligations. Tr. Vol. 2, p. 130, L. 1-4. Fact four is that the common industry practice is to use screens and filter packs to address sand in a well. Tr. Vol. 2, p. 192, L. 8-18; Tr. Vol. 3, p. 12, L. 8-14. This further confirms that there was no "agreement" for a LTG well because, by

definition, if the Fillmores did not know about these facts, they could not have agreed to them. This clearly rebuts any assertion there was an agreement to drill a LTG well.

Mr. Duspiva's second argument is that the court treated ICPA remedies as cumulative. This is incorrect. The court's ruling simply acknowledges that the Fillmores would be entitled under the statute to treat any agreement with Mr. Duspiva as void. The court's ruling also acknowledged that the Fillmores were entitled to sue for actual damages, which they did. The court awarded the Fillmores their actual damages. There was nothing cumulative about the court's application of the ICPA. Mr. Duspiva's argument leads to the illogical result that a party could violate the ICPA by deception and dishonest practices such as Mr. Duspiva's, but keep any ill-gotten gains resulting from the deception. The option of voiding a contract that violates the ICPA would typically apply where a deceived party has not yet been damaged, but would be if the contract were allowed to stand or alternatively, where a party sought specific performance of a contract that violated the ICPA. Here, the Fillmores incurred $27,500 in actual damages, and the court correctly applied the remedial provisions of the ICPA by awarding the Fillmores their actual damages.

G. The Court Should Award the Fillmores their Attorney Fees and Costs on Appeal.

In his appeal, Mr. Duspiva has advanced nothing more than the same arguments he did below. He simply asks this court to second-guess the district court as to factual matters. Mr. Duspiva points to not a single finding of fact by the district court that is clearly erroneous and is not supported by substantial and competent evidence. Moreover, Mr. Duspiva's assertion that the district court failed to apply a deception standard derived from the Federal Trade Commission (FTC) flies in the face of the factual findings made by the court. The assertion of a

FTC deception standard is also raised for the first time on appeal. This court does not consider substantive matters raised for the first time on appeal. *Michalk v. Michalk,* 148 Idaho 224, 220 P.3d 580 (2009).

Mr. Duspiva argues on appeal that Mr. Squires should not have been allowed to testify at all. The district court limited Mr. Squires' testimony and precluded any testimony about Mr. Duspiva. Except for one time, Mr. Duspiva's counsel never objected to Mr. Squires' testimony at trial. The issue of whether Mr. Squires should have been allowed to testify at all is being raised for the first time on appeal. The assertion also contradicts the very procedure agreed to by Mr. Duspiva's counsel in the district court proceedings.

All of these point to the fact that there is no basis for this appeal. In addition to awarding fees and costs on appeal under the applicable statutes, the Fillmores should be awarded their fees and costs because this appeal has no valid foundation and is unreasonable.

II. CONCLUSION

The record below supports the district court's finding that Mr. Duspiva violated the ICPA. This court should affirm the district court and award the Fillmores attorney fees and costs on appeal.

Dated this 22 day of March, 2012.

MOORE SMITH BUXTON & TURCKE, CHTD.

Bruce M. Smith
Attorney for the Defendants/Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent's Brief was this 22nd day of March, 2012 served upon the following individuals and in the corresponding manner:

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