4-19-2012

Duspiva v. Fillmore Appellant's Reply Brief Dckt. 38480

IN THE SUPREME COURT OF THE STATE OF IDAHO

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT,

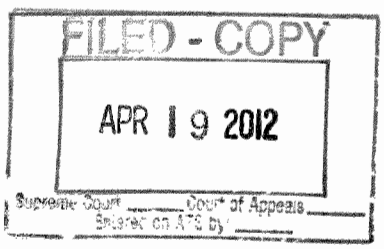
Plaintiff-Appellant,

vs.

CLYDE FILLMORE, an individual and JOHN FILLMORE, an individual,

Defendants-Respondents.

Supreme Court Docket No. 38480-2011



APPELLANT'S REPLY BRIEF

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

Daniel V. Steenson
RINGERT LAW CHARTERED
455 S. Third Street
P.O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
Attorney for Plaintiff-Appellant

Bruce M. Smith
MOORE SMITH BUXTON & TURCKE, CHARTERED
950 W. Bannock Street, Ste. 520
Boise, Idaho 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202
Attorneys for Defendants-Respondent

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I. The Well Drilling Agreement

The Fillmores acknowledge that they entered an agreement with Mr. Duspiva for Mr. Duspiva to drill a well for the home of Clyde Fillmore's son John Fillmore. They assert that it was "an agreement to drill a cold water, domestic well of 200 feet at $32.50 per foot." RB at 19. They dispute that they agreed, either initially or after drilling commenced, to drill any deeper. They do not acknowledge any other terms or conditions of the well drilling agreement.

Fillmores argue that they are not obligated to pay Mr. Duspiva for the drilling service he provided because: (1) the depth of the well exceeded 200 feet; (2) the well was completed as a low temperature geothermal (LTG, 85° F) well, and they had agreed only to the drilling of a cold water well; (3) Mr. Duspiva drilled the well illegally, in violation of the LTG condition of the drilling permit, resulting in an "illegal LTG well"; (4) the well drilling agreement was for acts forbidden by law, and (5) Mr. Duspiva "hid the details" of the LTG conditions in the well from the Fillmores until after it had become an "illegal LTG well." RB at 16-19.

These arguments ignore the actual terms and conditions of the well drilling agreement, disregard this Court's interpretation of well drilling contracts, misrepresent Mr. Duspiva's drilling conduct as "illegal", and misrepresent Mr. Duspiva's communications with the Fillmores regarding LTG conditions of the well.

A. The Terms and Conditions of the Well Drilling Agreement

Although the district court stated that its finding that Mr. Duspiva violated the Idaho Consumer Protection Act rendered "an analysis of whether or not a contract was formed between

the parties unnecessary as it may be treated as voidable" (AR, Vol. II, p. 297), it nonetheless made the following findings and conclusions regarding the well drilling agreement:

> 6. On June 11, 2007, Clyde Fillmore and Gary Duspiva met at Clyde Fillmore's shop to discuss the well location and the terms and conditions of drilling services.
>
> 7. The location of the well was decided by Clyde Fillmore.
>
> 8. Clyde Fillmore was informed that the well would cost $32.50 per foot plus incidentals defined as the cost of a drive shoe, well cap, and permit. The cost of the permit was $80.00. No other costs were defined or discussed. Gary Duspiva stated that his allowance for sand in the water was a pinch of sand per five (5) gallons of water. ***Gary Duspiva informed Clyde Fillmore that he did not use screens in his wells.*** No further explanation for this practice was provided to Clyde Fillmore. ***No guarantee of quantity or quality was provided.***
>
> 9. The parties did not enter into a written agreement for the drilling of the well.

AR, Vol. II, pp. 289-290 (emphasis added).

> In this case, the agreement that was reached between the parties was that Mr. Duspiva was to drill and develop a domestic well for the Fillmores. ***There was no discussion of water temperature***; however, the Fillmores had no reason to expect that they were bargaining for anything other than a cold water domestic well. The cost agreed to by the parties was $32.50 per foot of depth of the well. ***There was no specific discussion about depth at the outset of this transaction except that the Start Card that Mr. Duspiva had John Fillmore sign indicated that the well would not exceed 200 feet in depth***. Clearly, the greater the depth of the well, the greater the price that would be billed by Mr. Duspiva.

Id., p. 297-298 (emphasis added).

The district court's description of the discussion between Mr. Duspiva and Clyde and the well drilling agreement they entered on June 11, 2007 is largely correct and complete, with a few important exceptions. *See* Appellants' Brief ("AB"), at 3-4, 9-10. In addition to the base price of $32.50 per foot, there would be an increase in price 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.

While water temperature was not discussed on June 11, 2007, the only water quality issue discussed was Clyde's concern about preventing sand from entering the proposed well, because his own well pumped sand, requiring him to replace his well pump every four years. Tr., Vol. 1, p. 37, lns. 4-8. As explained by the district court, Mr. Duspiva addressed this concern by advising Clyde of his standard of allowance for sand in the water. The district court correctly found that 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. However, the district court improperly inferred that Mr. Duspiva gave no further explanation of this practice to Clyde. 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). 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. Accordingly, the record does not support the district court's finding that Mr. Duspiva provided no such explanation during the June 11, 2007 meeting.

In addition to advising Clyde that he didn't guarantee quantity or quality of water produced by the well, 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. This aspect of the agreement is consistent with this Court's recognition 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, 380 P.2d 898 (1963).

In summary, the following are the terms and conditions of the well drilling agreement entered on June 11, 2007:

(1) $32.50 per foot of well depth, plus various incidental parts, materials, permit and development costs;
(2) price increase of $2.00 per foot for every foot over 400 feet of drilling depth;
(3) Mr. Duspiva's allowance for sand in the well was a pinch of sand per five (5) gallons of water;
(4) Mr. Duspiva did not use screens to prevent sand from entering wells;
(5) Mr. Duspiva did not guarantee the quality or quantity of water produced by the well;
(6) "[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."

B. The Start Card 200 Foot "Proposed Maximum Depth" Was Not a Term or Condition of the Well Drilling Agreement

The Fillmores attempt to impute to the agreement a condition that the well would not exceed 200 feet in depth because the "Start Card/Permit" signed by Mr. Duspiva and John Fillmore (Plaintiff's Ex. 1, Defendants' Ex. C) stated that the "proposed maximum depth" would be 200 feet. In an apparent effort to add weight to this argument, the Fillmores imply that exceeding the 200 foot depth violated the conditions of the Start Card and IDWR rules. RB at 3, 10 fn. 5.

Fillmores' argument contradicts the district court's finding that: " There was no specific discussion about depth at the outset of this transaction except that the Start Card that Mr. Duspiva had John Fillmore sign indicated that the well would not exceed 200 feet in depth."[1] The Fillmores' argument is also contradicted by the provision for additional charges if the well depth exceeded 400 feet, and by his instruction to Mr. Duspiva to keep drilling when Mr. Duspiva found no water at 200 feet and at subsequent depths. Tr., Vol. 1, p. 45, lns. 14-23; Tr. Vol. 1a, p. 21, ln. 23 - p. 22, ln. 5.

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[1]The district court's implication that Mr. Duspiva established the 200 foot proposed maximum depth is misleading. In response to the court's questions, Clyde testified that he came up with the 200 foot depth, not Mr. Duspiva, based on Clyde's 180-foot, sand-laden well. Tr., Vol. 1, p. 30, ln. 13 - p. 31, ln. 14.

The Start Card itself does not limit well depth, prohibit drilling below the "proposed maximum depth, or require a well driller to cease drilling once the driller reaches the proposed maximum depth. Plaintiff's Ex. 1, Defendants' Ex. C. The line for identifying "proposed maximum depth" appears in the informational section of the Start Card under "Well Construction Information." Below that informational section is the section entitled "Conditions For Use of a Start Card," which includes 13 conditions. The Fillmores have not identified any statute that prohibits a well driller from exceeding the maximum proposed depth identified in a drilling permit, or requires a driller to stop drilling and inform IDWR when that depth is exceeded. IDWR's Well Construction Standards do not address proposed depths in drilling permits or compliance with well drilling permit conditions. IDAPA 37.03.09. IDWR's Well Driller Licensing Rules require that a well driller comply with IDWR's "well construction standards and drilling permit conditions." IDAPA 37.03.10.50.01.b.[2] Since "proposed maximum depth" is neither a well construction standard nor a permit condition, it cannot be argued that continuing to drill past 200 feet in depth was impermissible.

Robert Whitney, the Senior Water Resource Agent for the Idaho Department of Water Resources("IDWR") in charge of regulation of well construction in southwest Idaho, testified that: it is not uncommon for wells to exceed maximum depths proposed on Start Cards; that IDWR has not viewed the proposed maximum depth information as a condition of the permit; that he is not aware of an IDWR enforcement action for exceeding maximum depth, and that IDWR has no hard and fast rule requiring that well drillers not exceed the proposed maximum depth. Tr., Vol. 2, p.

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[2]At page 7 of their brief, Fillmores appear to paraphrase and incorrectly cite this rule as IDAPA 37.03.060.01(b). IDAPA 37.03.06 is the citation for IDWR's Safety of Dams Rules.

149, ln. 22 - p. 151, ln. 21. The other IDWR witness called by Fillmores, Tom Neace, testified that there is no IDWR policy that states that exceeding the maximum depth without prior approval is a violation of the Start Card. Tr. Vol. 2, p. 202, lns. 10-25.

C. Water Temperature Was Not a Term or Condition of the Well Drilling Agreement

The Fillmores argue that they intended for the well to produce cold water and that "[t]here was never any agreement to drill a LTG well." RB at 17. The district court found that on June 11, 2007 there was no discussion of water temperature. AR, Vol. II at 297. Mr. Duspiva made it clear that he did not guarantee the quality or the quantity of the water that the well would produce. "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." *See Durfee v. Parker, supra.*

The Fillmores did not define their cold water expectations. They did not explain what temperature water they expected the well to produce. They did not testify that the temperature of the water at the bottom of the well mattered to their intended use. They did not produce any evidence to show the actual temperature of the water that would discharge from the well when Mr. Duspiva finished drilling. In other words, they did not produce any evidence to show that the water that the well would produce would not meet their cold water expectations. The evidence indicates that, at levels where the well encountered LTG temperature strata (600 feet and lower as indicated by clay cuttings), the water discharging from the well was closer to 70° F. Plaintiffs Ex. 4.

The "sum total" of the well drilling agreement was to drill a domestic well. Tr. Vol. 2, p. 5, ln. 12 - p. 6, ln. 11. There was no testimony that a LTG well can't be use for domestic purposes. Clyde testified that no one told him that he could not use a LTG well for domestic use. Tr. Vol. 1,

p. 26, lns. 9-12. Mr. Duspiva testified that the three LTG wells he drilled before drilling the well for the Fillmores are all used for domestic purposes. *Id.*, p. 84, lns. 4-13.

Idaho statutory and regulatory definitions do not limit domestic use to cold water uses. Idaho Code section 42-111 provides:

> Domestic purposes defined. (1) For purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-243 and 42-1401A, Idaho Code, the phrase "domestic purposes" or "domestic uses" means:
> (a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or
> (b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.

Domestic use is not defined in IDWR's Well Construction Standards Rules (IDAPA 37.03.09) or its Well Drilling Licensing Rules (IDAPA 37.03.10).[3] Domestic purposes is defined in IDWR's Water Appropriation Rules:

> Single Family Domestic Purposes. Water for household use or livestock and water used for all other purposes including irrigation of up to one half (1/2) acre of land in connection with said household where total use is not in excess of thirteen thousand (13,000) gallons per day.

IDAPA 37.03.08.010.15.

Accordingly, the water temperature of the well was not an express or implied term or condition of the agreement.

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[3]Both sets of rules define "well" as: "An artificial excavation or opening in the ground more than eighteen (18) feet in vertical depth below land surface by which ground water ***of any temperature*** is sought or obtained." IDAPA 37.03.09.010.30; 37.03.10.010.26 (emphasis added).

D. Duspiva Did Not Violate Start Card Condition 8

The Fillmores erroneously assert that Mr. Duspiva violated condition 8 of the Start Card that he and the Filmores filed with IDWR, which provides: "If a bottom hole temperature of 85 F, or greater is encountered, well construction shall cease and the well driller shall contact the Department immediately." AR, Vol. II., p. 290, ¶14. They erroneously argue that penetrating LTG water is itself a violation, rendering the well itself an "illegal LTG well."

IDWR Well Construction Standards Rules define "bottom hole temperature of an existing or proposed well" as: "The temperature of the ground water encountered in the bottom of a well." IDAPA37.03.09.010.09. Obviously, a bottom hole temperature ("BHT") at or above LTG cannot be encountered until after a well has been drilled into strata containing LTG water. Thus, condition 8 does not prohibit or make "illegal" drilling into LTG conditions as argued by Fillmores. Condition 8 recognizes the possibility that a well driller will encounter LTG conditions, and directs the driller to immediately contact IDWR.

At trial, Robert Whitney corrected Fillmore's counsel when he mischaracterized his testimony regarding condition 8 of the Start Card:

> [MR. SMITH]: . . . Q. Okay. And you asked [Duspiva] to submit the long form application, you testified, because condition 8 in the start card had been ***violated***, correct?
>
> MR. GOULD: Objection --
>
> THE COURT: Overruled.
>
> The Witness: I believe my statement, Mr. Smith, was that since the low temperature geothermal condition had been encountered, ***that start card became invalid***, which is why we required the submittal of the long form application.

> Q. (By Mr. Smith) Thank you. That is a much better explanation. My question was not as precise. And I appreciate that clarification. And I think you are correct. As you said that, that's what I recall. So once the start card is no longer applicable, a new permit is required; is that correct?
>
> A. Correct.

Tr. Vol. 2, p. 148, ln. 9 - p. 149, ln. 4 (emphasis added).

Contrary to Fillmores' arguments, as required by condition 8 of the Start Card, when Mr. Duspiva discovered that the well had encountered LTG conditions on August 8, 2007, he immediately ceased drilling activities, and advised the Fillmores and IDWR.

E. Mr. Duspiva Did Not Drill an "Illegal Well" For the Fillmores

The Fillmores repeatedly (ten times) characterize Mr. Duspiva's well drilling and the well as "illegal," apparently believing that repetition makes it so. In fact, no witness testified that either Mr. Duspiva's well drilling activities or the well he drilled for the Fillmores were "illegal." To buttress this argument, Fillmores' repeatedly (four times) refer to allegations related to LTG conditions that were encountered in 3 of the 342 wells Mr. Duspiva drilled for others before he and the Fillmores entered the well drilling agreement at issue in this case. RB at 5, 7, 10 fn. 5.

The Fillmores' claim that the well was not drilled in accordance with LTG standards is misleading. After encountering LTG conditions and contacting IDWR as required by the Start Card, Mr. Duspiva complied with IDWR staff instruction by submitting to IDWR a prospectus for completing the well and a long form drilling permit application. After IDWR approved the prospectus and the permit, Mr. Duspiva continued and completed drilling in accordance with the prospectus and the approved permit, as well as the Fillmores' instruction. The well was never completed as proposed because the Fillmores did not authorize completion. Ultimately, the well was

abandoned. It is true that, because the well was not completed, it does not meet the well completion requirements of Rule 30 of IDWR's Well Construction Standards. This does not mean that the well was "illegal" or that Mr. Duspiva's drilling work violated that rule or any other IDWR requirement.

F. The Well Drilling Agreement Was Not For Acts Forbidden By Law

Obviously, well drilling is not forbidden by law. Fillmores have not argued that any of the terms or conditions of the well drilling agreement (summarized *supra* at 4) are forbidden by law.

Fillmores argue that the well drilling agreement is "void and unenforceable" because Mr. Duspiva "drilled the well in contradiction of Condition 8 of the Start Card Permit and IDWR well drilling rules," and "the well was not constructed to IDWR LTG well construction standards." RB at 18-19. As previously explained, neither of these contentions regarding Mr. Duspiva's conduct is supported by the facts. Mr. Duspiva did not violate condition 8 of the Start Card Permit. Condition 8 does not prohibit a well driller from enountering LTG conditions, it simply requires the driller to stop and inform IDWR, as Mr. Duspiva did on August 8th and 9th of 2007. After IDWR approved the prospectus and long form permit application Mr. Duspiva submitted to IDWR to complete the well as a LTG well, he continued drilling in compliance with the prospectus and permit. There is no evidence to the contrary.

In any event, the Fillmores have not shown that the well drilling agreement was entered for the purpose or with the intention of violating any law. Arguments that Mr. Duspiva did not strictly comply with IDWR requirements while drilling the well do not establish that the well drilling agreement was for an illegal purpose or violates Idaho law.

G. Duspiva Did Not "Hide the Details" Regarding the Status of the Well

In Respondents' Brief, the Fillmores repeatedly assert that Mr. Duspiva ***"never"*** told the Fillmores that the well had encountered LTG conditions, and that he ***"never"*** told them about the costs and requirements associated with a LTG well. RB at 4, 5, 7, 9, 12. These assertions are simply untrue and are contradicted by the testimony and evidence presented at trial, and by statements in Respondents' Brief itself.

The Fillmores acknowledge that Mr. Duspiva told them on August 8, 2007 that the well had encountered LTG conditions and that they needed to contact IDWR because of the temperature situation." RB at 4, 5. It is undisputed that on August 9th, after discussing the well with IDWR staff, Mr. Duspiva informed the Fillmores of the need to obtain a LTG permit to continue drilling. John Fillmore completed and signed a long form LTG permit application on August 16, 2007. Plaintiffs Ex. 6. On that form, the anticipated bottom hole temperature is marked as "85 F to 212 F."

Fillmores' counsel elicited the following testimony from Mr. Duspiva:

> Q. (By Mr. Smith) Did you inform the Fillmores about the low temperature geothermal problem?
>
> A. Yes.
>
> Q. Okay. And you told them all the details of it and what they were going to be obligated to do?
>
> A. All that I knew.

Tr. Vol. 2, p. 88, lns. 1-8.

The Fillmores' arguments and the district court's Findings of Fact leave the erroneous impression that Mr. Duspiva became aware that the well encountered LTG bottom hole water temperatures when the well had reached a depth of 600 feet, and that he delayed telling the Fillmores

about that fact until the well reached a depth of 836 feet on August 8, 2007. It is undisputed that Mr. Duspiva discovered that the strata in which the well was drilled had reached LTG temperatures on August 8, 2007. Up to that point, the temperature of the water he measured from the well was closer to 70° F. It was his understanding that those water temperature measurements reflected BHT.

In this regard the Fillmores assert that Mr. Duspiva did not discover BHT at the 600 foot depth because he was not adequately monitoring BHT. RB at 4. This assertion misconstrues the evidence. The 600 foot depth was not a level at which Mr. Duspiva stopped while drilling to attempt water development. Consequently, there was no BHT to measure at that point. He did stop at 670 feet to attempt development and measured water temperature to be 72° F. He understood this water measurement to reflect BHT. When he reached 836 feet on August 8th and felt warm clay cuttings, he stopped drilling and measured the strata of the well at 100 foot increments from 300 feet to 800 feet, including 600 feet. *See* AB at 6. When he measured the temperatures of the strata in which the well was drilled at those 100 foot increments, they were not taken at the bottom of the well and they did not measure water temperature. Plaintiff's Ex. 4.

No witness testified that Mr. Duspiva was not adequately monitoring BHT in the Fillmore well. While IDWR's Well Construction Standards define BHT as the "temperature of the ground water encountered in the bottom of a well" (IDAPA37.03.09.010.09), there is no IDWR guidance stating how that temperature is to be measured. IDWR's Rob Whitney testified that IDWR has no rule prescribing a methodology for measuring BHT. Tr. Vol. 2, p. 123, lns. 14-22. The only IDWR rule that requires measuring BHT simply requires well drillers to maintain logs in which BHT is recorded, with no further instruction regarding the manner, methodology or frequency of the recording. IDAPA 37.03.10.050.i.

Mr. Dusiva was not the only source of information available to the Fillmores regarding the presence of LTG water in the well and the additional requirements IDWR imposes to complete such a well. IDWR Senior Water Resource Agent John Whitney also contacted the Fillmores to inform them that LTG conditions had been encountered and to see if they understood the implications of the LTG encounter. Tr. Vol. 2, p. 128, ln. 13 - p. 129, ln. 5.

II. Mr. Duspiva Did Not Violate the ICPA

Like the district court, the Fillmores assert that Mr. Duspiva violated the Idaho Consumer Protection Act (ICPA) by omission rather than by lying or misrepresenting facts. The district court's decision rests on Mr. Duspiva's assumed failure to more fully discuss with the Fillmores the use of screens and filter packs by other drillers as a means of developing water in strata that contains high quantities of sand. The district court also concluded that, because Mr. Duspiva doesn't use screens and filter packs to prevent sand from entering wells, his recommendations to the Fillmores to continue drilling as the well encountered water with excessive sand violated the ICPA's prohibition against recommending unnecessary services.

The Fillmores also allege that Mr. Duspiva violated the ICPA by failing to discuss the potential for reaching LTG conditions, and "hiding" the details of the temperature status of the well as well as the implications of the well encountering LTG conditions. They infer from the mere fact that Mr. Duspiva charges by the foot, that Mr. Duspiva's recommendations to continue drilling and these alleged omissions were motivated by greed, despite Mr. Duspiva's undisputed testimony that shallower wells are more profitable than deeper wells because of the increased time and equipment required for deeper wells. Tr. Vol. 2, p. 114, ln. 11 - p. 115, ln. 11. And as previously discussed,

to make him sound even worse, they attempt to show that he drilled the Fillmores' well "illegally," and that IDWR staff disapproved of his drilling practices.

Finding a violation of the ICPA is not as simple an undertaking as the district court's two paragraph analysis of the issue suggests. AR Vol. II, pp. 298-299. This is especially true for a service such as well drilling, which involves inherent uncertainties as to the conditions that will be encountered underground.

A. ICPA Standard

Neither the district nor the Fillmores show that Mr. Duspiva's alleged omissions meet the ICPA deception standard. For an act or practice to be "unfair or deceptive" under the ICPA, it must be shown that the person committing the act or practice "***knows, or in the exercise of due care should know***" that he is committing one of the acts enumerated in I.C. § 48-603. As explained in Appellants Brief, the ICPA provides that "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 . . . ." I.C. § 48-604. Under federal law, 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*." *Southwest Sunsites v. FTC*, 785 F.2d 1431, 1435 (9th Cir. 1986). The Ninth Circuit Court of Appeals described the following three elements that must be shown:

> 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.

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).

There has been no showing, finding or conclusion of law that Mr. Duspiva knew or in the exercise of due care should have known that he was committing any of the acts enumerated in I.C. § 48-603. Neither the district nor the Fillmores have even considered the three elements of the deception standard identified by the Ninth Circuit Court of Appeals.

B. Screens

There has been no showing that Mr. Duspiva's practice of not using screens while drilling (including the 342 wells he has previously drilled) represents anything other than his honest opinion and best professional judgment. On cross-examination, counsel for the Fillmores referred Mr. Duspiva to his deposition testimony in which he described screens as a "hindrance." Tr. Vol. 2, p. 84, lns. 8-11. Mr. Duspiva rejected counsel's assertion that, by hindrance, Mr. Duspiva meant hindering him from drilling deeper and making more money. *Id.*, p. 87, lns. 1-4. In that same deposition testimony, filed by the Fillmores' counsel with the district court on summary judgment, Mr. Duspiva explained his understanding of the potential for minerals and iron in water to cause screens to "eventually encrust over," thereby hindering the flow of water into the well. AR Vol. I,

p. 156, deposition page 62, ln. 23 - p. 63, ln. 8. There is no basis for the Fillmores' inference that Mr. Duspiva did not use screens simply to make more money.

Application of standards for assessing whether conduct is deceptive under the ICPA is particularly important in situations such as this one, where the alleged violation of the act is not a lie, a factual misrepresentation, or a complete omission, but is instead a failure to fully explain a technical process to a self-described layman. Mr. Duspiva and Clyde both testified that, during their June 11, 2007 meeting, Clyde expressed his concern about sand because the amount of sand in his well damages his pumps, and Mr. Duspiva explained to Clyde that he did not use screens to prevent sand from entering wells. It is highly unlikely that there was no additional discussion of the purpose or use of screens during that meeting, but, because of Clyde's faulty memory and the fact that Mr. Duspiva was not asked to elaborate on the conversation during trial, the record does not establish, one way or the other, whether additional discussion occurred.

The district court simply concluded that Mr. Duspiva's alleged failure to more fully discuss with Clyde the well drilling industry practice of using screens and filter pacs violated I.C. § 48-603, subsections (16), (17) & (18), without any evidence that Mr. Duspiva knew the omission was misleading, false or deceptive, and no evidence or analysis to show that he should have known as much. The court made no finding and provided no analysis to explain how a well drilling customer such as Clyde, acting reasonably under the circumstances, or may have been mislead to his detriment. At a minimum, the June 11, 2007 meeting put Clyde on notice that screens exist, are used by other drillers to prevent sand from entering a well, and are not used by Mr. Duspiva.

Mr. Duspiva's representation to Clyde that he did not use screens was absolutely true. He advised Clyde up front that, where the well encountered sand in water, he would not be using screens

to develop that water. What more was Mr. Duspiva required to tell Clyde so as not be deceptive or misleading under the statute? Should a reasonable prospective well owner have inquired further of Mr. Duspiva regarding this information, especially given his concern about sand? Should he have inquired of others or sought a second opinion or bid? Clyde had hired a well driller to drill a well for himself and could reasonably be expected to know how to make such inquiries or obtain a second opinion.

C. Water Temperature

Neither the Fillmores nor the district court have identified which subdivision(s) of I.C. § 48-603 are implicated by Mr. Duspiva's alleged omissions regarding well temperature. There has been no showing or finding that Mr. Duspiva knew or should have known that his alleged omissions regarding well temperature deceived the Fillmores.

Regarding LTG wells, The district court observed that:

> At the time that the agreement was reached, Mr. Duspiva knew, and the Fillmores did not know, that:
> (1) there was a likelihood of reaching [LTG] conditions in this geographic area;
> (2) that a [LTG] well is inferior to a cold water domestic well for domestic purposes;
> (3) that a [LTG] well necessarily required increased cost and obligations fo the well owner and well driller.

AR. Vol. II. p. 298.

The district court does not explain how any of these observations relates to an alleged violation of the ICPA. The record does show that Mr. Duspiva had prior experience with wells encountering LTG conditions. It is not clear that the record established that Mr. Duspiva knew that reaching LTG conditions in the Fillmores' well was likely. The third observation is related, since its relevance to Mr. Duspiva and to the Fillmores depends upon the likelihood that there would be

LTG conditions in the Fillmores' well. There is no showing or finding that Mr. Duspiva knew or should have known that failing to apprise Clyde of such a possibility would mislead or deceive the Fillmores to their detriment.

There is no basis in the record for the district court's second observation that Mr. Duspiva knew or believed that "a low temperature geothermal well is inferior to a cold water domestic well for domestic purposes." Fillmores correctly cite Mr. Squires' testimony as the source of this finding, wherein Mr. Squires said "to me, low temperature geothermal water is not desirable for potable water supplies." RB at 5, citing Tr. Vol. 3, p. 95, lns. 11-12. In fact, neither Mr. Duspiva nor any other witness testified that Mr. Duspiva knew or believed that a LTG well is inferior to a cold water well for domestic purposes.

Was it reasonable for the Fillmores to believe or assume that there was no possibility that the well would encounter warm water simply because the issue of temperature was not discussed during the June 11, 2007 meeting, particularly when it was expressly understood that Mr. Duspiva provide no guarantee regarding temperature? Is the burden entirely upon Mr. Duspiva to inform customers such as the Fillmores of all of IDWR's requirements for LTG wells, or does the property owner have any independent obligation to know such requirements? None of these questions was addressed by the district court.

Similarly, the district court did not explain in what way Mr. Duspiva knew or should have known that he was misleading Clyde or recommending services that were not needed when he reported encountering excessive sand at various water bearing layers. Clyde had explained his concern about sand. Mr. Duspiva had explained his standard for sand in the water. They agreed. When the well encountered excessive sand, Mr. Duspiva fully apprised Clyde of the situation,

recommended continued drilling as the only way Mr. Duspive could achieve water that met the criteria, and each time, Clyde instructed Mr. Duspiva to continue.

As previously discussed, the Fillmores' assertions that Mr. Duspiva "hid the details" regarding the temperature status of the well and the implications of owning a LTG well are not true. Mr. Duspiva advised them as soon as he learned that the well had encountered LTG conditions, and explained the options for either continued drilling or attempting to seal and develop the well at a higher level. Well temperature had not been a term or condition of the agreement. Temperature was not discussed on June 11, 2007. Consistent with this Court's recognition of the uncertainties involved in drilling wells and its interpretation of well drilling agreements, it was expressly understood that Mr. Duspiva provided no guarantees regarding the quantity or quality of water the well would produce.

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

The Fillmores appear to agree with the legal principle that the existence of a contractual relationship is a prerequisite to finding a violation of the ICPA and choosing or awarding one of the remedies provided by I.C. § 48-608(1). *Haskin v. Glass*, 102 Idaho 785, 788, 640 P.2d 1186, 1189 (1982). This necessarily means that the district court erred in determining that finding a violation of the ICPA obviates the need to determine whether an contract was formed. AR, Vol. II, p. 297.

The plain language of the statute 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). Contrary to statute, the district court awarded and the Fillmores claim both remedies.

IV. Ed Squires' Expert Testimony Should Have Been Excluded

The Fillmores argue that Mr. Duspiva "waived any objection" to the testimony of Fillmores' expert Mr. Ed Squires because "Mr. Duspiva did not object to any of Mr. Squires' testimony at trial." This is not true. Fillmores fail to mention the following objection made by Mr. Duspiva's counsel as soon as Fillmores' called Mr. Squires during the third and final day of trial:

> MR. SMITH: Understood. Thank you. Defendants call as witness Mr. Edward Squires.
>
> MR. GOULD: And, Your Honor, I'm going to object to the testimony to preserve the record. Mr. Squires was not mentioned as an expert witness in a timely manner. He was only mentioned as an expert -- his opinion or potential opinion testimony was only provided to counsel two days prior to trial which is contrary to the rules and contrary to case law.
>
> THE COURT: Mr. Gould, we went through this.
>
> MR. GOULD: I'm just preserving the record. Thank you, Your Honor.
>
> THE COURT: Just so you understand, the record does include your objection and the two-hour hearing that we did on this last Thursday, and clearly you've got your objection on the record.

Tr. Vol. 3, p. 36, lns. 4-19.

As the district court observed, the basis of Mr. Duspiva's objection is clear in the record. The district court issued an order requiring the Fillmores to "disclose expert witnesses and comply with [IRCP] 26(b)(4)(a) no later than March 15, 2010." Tr. Vol. 3, p. 7, lns. 3-6. Pursuant to IRCP 26(b)(4)(a), Mr. Duspiva served the Fillmores with an interrogatory requesting the identity, subject matter, facts and opinions of each expert the Fillmores expected to testify at trial. *Id.*, lns. 11-21. In their initial response to this interrogatory, the Fillmores identified Mr. Squires, did not describe

any of his expected testimony, and reserved the right to supplement their response. *Id.*, p. 7, ln. 22 - p. 8, ln. 8.

On July 27, 2010, Mr. Duspiva filed a motion in limine to exclude the Fillmores' proposed experts because the 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. On August 18, 2010, the day before hearing on Mr. Duspiva's motion in limine and just three business days before the start of trial, the Fillmores delivered supplemental responses stating Mr. Squires' opinions and expected testimony.

During the August 19, 2010 hearing on Mr. Duspiva's motion in limine, counsel for Mr. Duspiva explained the Fillmores' failure to seasonably supplement their responses to Mr. Duspiva's interrogatory no. 3, and the legal basis for excluding Mr. Squires' testimony pursuant to IRCP 26(e). *Id.*, pp. 7-13.

> MR GOULD: . . . So that kind of takes us where we are. You know, basically three days before trial I received opinions that the defendants would like to use, and I'm not able to depose those experts at this time. I'm not able to obtain experts to counter the opinions that I just received.
>
> I made a timely request. And at no time after March did the defendant state that these people would be testifying as experts. And to the contrary, on June 9th defendants identified these people as fact or lay witnesses.
>
> So it would be incredibly inefficient and costly for my client to attempt to depose someone with a wealth of knowledge over many subjects to try to identify what they may or may not be testifying to.
>
> And as I stated, it's not my client's burden, and it's completely impractical and nearly impossible to depose an expert when you have no idea what they're testifying to.

Id., p. 13, lns. 3-21.

After counsel for the Fillmores explained the opinions he expected Mr. Squires to offer, the district court acknowledged that Fillmores did not meet their duty under IRCP 26(e) to seasonably supplement their discovery responses regarding Mr. Squires:

> THE COURT: Mr. Gould, it would seem to me that that's precisely what you're objecting to. Is that right?
>
> MR. GOULD: It is completely speculative, and it's all opinion, And it's information I didn't receive until this morning. . . .
>
> THE COURT: Hang on, Mr. Gould. The court is of the opinion that this does violate the requirement for a disclosure. And had it been disclosed to you much earlier, I can certainly see, Mr. Gould, you deciding to either depose Mr. Squires to inquire further as to what this opinion is or request permission to contact him to discuss this matter yourself.

Id., p. 28, ln. 21 - p. 29, ln. 14.

> THE COURT: 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, I think that the court most likely will have to exclude that testimony because as you've cited in the - I think it's the Radmer case – it could be reversible error.

Id., p. 31, ln. 21 0 p. 32, ln. 5.

Notwithstanding the prejudicial effect of the Fillmores' failure comply with IRCP 26(e), the district court allowed Mr. Squires to testify in order to "educate the court," recognizing only that Mr. Duspiva's objections to Mr. Squires' opinions regarding the Fillmores' allegations that Mr. Duspiva was negligent in drilling the Fillmores' well "may be well taken." *Id.*, p. 37, lns. 13-17. In order to have it both ways (acknowledging Fillmores' violation of IRCP 26(e) and yet allowing Mr. Squires to testify), the district court announced the following approach:

> THE COURT: . . . So, again, I guess Mr. Gould, "I'm going to rely on you to set forth specific objections in the trial if you believe there is some opinion testimony coming in that relates to issues that were not disclosed to you.

MR. SMITH: This is Bruce Smith. Understood.

Id., p. 37, ln. 22 - p. 38, ln. 2.

In their Response Brief, Fillmores state that Mr. Duspiva's counsel agreed with the court's approach by quoting, out of context, a statement he made much later during the hearing (23 pages later in the transcript). RB at 13, 15. It is clear from the above quote that it was Fillmores' counsel, not Mr. Duspiva's counsel, that agreed with the court's approach. The quoted statement of Mr. Duspiva's counsel occurred at the end of the August 19th hearing:

> THE COURT: Any other preliminary matters anybody wants to discuss?
>
> MR. GOULD: I guess I am getting more concerned with Ed Squires' testimony. But I'll just make my objection, and the case will move on.

Id., p. 60, lns. 16-21.

The court then concluded the hearing with these statements:

> THE COURT: I intend to exclude testimony that would be regarding opinions that he may hold relating to negligence on the part of your client that maybe you didn't have any awareness of until yesterday or this morning. I think that is probably an objection that is well taken.
>
> But by the same token, for his ability to describe well drilling process and educate the court, I'm kind of interested in hearing that testimony just to give the court assistance in understanding the evidence that will be presented.

Id., p. 60, ln. 24 - p. 61, ln. 9.

As explained above, consistent with his statement to court on August 19th, Mr. Duspiva's counsel objected to Mr. Squires' testimony during trial as soon as Mr. Squires was called as a witness, and the case moved on. This objection obviated the need to make multiple specific objections as suggested by the district court during the hearing on Mr. Duspiva's motion in limine, and ensured that Mr. Duspiva's objection based in IRCP 26(e) was preserved in the record.

Fillmores argue that permitting Mr. Squires to testify was appropriate because his testimony was consistent with the court's ruling on Mr. Duspiva's motion to exclude. RB at 14. This argument misses the fundamental reason Mr. Squires' testimony should have been excluded. Fillmores did not supplement their discovery response to Mr. Duspiva's interrogatory no. 3 to identify the subject matter, facts or opinions about which Mr. Squires would testify until three days before trial. Because of this extremely late disclosure, which did not comply with IRCP 26(e), Mr. Duspiva was unable to properly understand or evaluate this expert's testimony, depose Mr. Squires, or prepare and present a rebuttal witness. This is why Mr. Squires' testimony should have been excluded, not merely to prevent Mr. Squires from offering opinions to support the Fillmores' negligence allegations.

The Fillmores point out that Mr. Squires did not mention Mr. Duspiva's name. Mr. Squires did not describe Mr. Duspiva's drilling methods as improper or unreasonable, or testify that Mr. Duspiva did anything wrong in drilling the Fillmores' well. Nonetheless, Mr. Squires, who is not a well driller and has never drilled a well, gave lengthly testimony 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 of the Fillmores' well. *Id.*, p. 69-98.

The prejudicial impact of Mr. Squires' testimony on the district court's decision is evident from the court's Findings of Fact and Conclusions of Law. AR, Vol. II, pp. 8-10, ¶¶47-52. The Fillmores and the district court rely upon Mr. Squires testimony for more than merely "educational" purposes, to reach inappropriate conclusions about Mr. Duspiva's conduct in drilling the Fillmores' well.

For example, Fillmores refer to the district court's finding that, at the time the well drilling agreement was entered, "Mr. Duspiva knew, and the Fillmores did not know, that . . . a low temperature geothermal well is inferior to a cold water domestic well for domestic purposes." AR, Vol. II. p. 298. Fillmores cite Mr. Squires' testimony as the source of this finding, wherein Mr. Squires said "to me, low temperature geothermal water is not desirable for potable water supplies." RB at 5, citing Tr. Vol. 3, p. 95, lns. 11-12. In fact, neither Mr. Duspiva nor any other witness testified that Mr. Duspiva knew or believed that a LTG well is inferior to a cold water well for domestic purposes. This erroneous finding highlights the district court's inappropriate reliance upon Mr. Squires' opinion testimony, used, in this particular instance, to establish Mr. Duspiva's knowledge or state of mind at the time he and the Fillmores entered the well drilling agreement. It is difficult to imagine a more prejudicial use of Mr. Squires' testimony, particularly one that was ostensibly testifying generally about well drilling methods.

Without citing the record, the Fillmores state that Mr. Squires' testimony is "consistent with much of Mr. Whitney's testimony and his report, as well as the testimony of Tom Neace, another IDWR employee." RB at 15. In fact, most of the testimony of those witnesses relates to their interactions with Mr. Duspiva on the Fillmore well and on prior wells, which the Fillmores introduced in an effort to substantiate their erroneous allegations that Mr. Duspiva drilled the Fillmore well "illegally" (discussed *supra* at 8-10). Mr. Squires provided no testimony as to whether Mr. Duspiva met IDWR well drilling standards.

The district court did not rely upon the testimony of any other witness to support its findings regarding drilling methods. Based on Mr. Squires' testimony alone, the district court 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. The district court inferred from Mr. Squires' testimony a duty of care by which to evaluate Mr. Duspiva's well drilling conduct. 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. 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.

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." The Fillmores have failed to explain their failure to comply with IRCP 26(e) or to address the previously-cited cases in which this Court has found that district courts abused their discretion by allowing expert testimony under circumstances very similar to this case. *Clark v. Klein*, 137 Idaho 154, 45 P.3d 810 (2002); *Radmer v. Ford Motor Co.*, 120 Idaho 86, 813 P.2d 897 (1991). The rationale for the rule, as explained in *Radmer* and in *Clark*, is directly applicable to this case:

> In general, *Rule 26* of the Idaho rules, like its federal analogue, was designed to promote candor and fairness in the pre-trial discovery process. Speaking with reference to *Rule 26(b)(4)(A)(i)* [2] of the federal rules, the Advisory Committee on Civil Rules which promulgated the original draft of *Rule 26* stated:

> In cases of this character [involving expert testimony], a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation . . . Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

Advisory Committee Notes, *rule 26, Fed. Rules Civ.Proc.*, 28 U.S.C.A. Further illustrating the critical nature of complete and accurate responses regarding expert witnesses in the discovery process, one scholar notes:

> It is fundamental that opportunity be had for full cross-examination, and this cannot be done properly in many cases without resort to pretrial discovery, particularly when expert witnesses are involved . . . - Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the data relied upon. If the attorney is required to await examination at trial to get this information, he often will have too little time to recognize and expose vulnerable spots in the testimony.

137 Idaho at 157, 45 P.3d at 813; 120 Idaho at 89, 813 P.2d 900.

As in *Clark* and *Radmer*, the Fillmores' failure to timely supplement their discovery responses to identify the subject matter of Mr. Squire's testimony violates the spirit and letter of IRCP 26(e). Accordingly, the district court abused its discretion by allowing Mr. Squires testimony over Mr. Duspiva's objection.

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

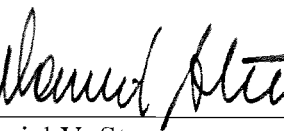
performed well drilling services as agreed in a workmanlike manner, and the Fillmores did not complain about Mr. Duspiva's work until after it was complete. The district court erred in failing to find that the agreement existed, and that Mr. Duspiva's work and charges were in accordance with the agreement.

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 court 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 19th day of April, 2012.

RINGERT LAW CHARTERED

By 

Daniel V. Steenson
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of April, 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