5-22-2013

Edged in Stone v. Northwest Power Systems, LLC Appellant's Brief Dckt. 40463

IN THE SUPREME COURT OF THE STATE OF IDAHO

EDGED IN STONE, INC.,

Plaintiff-Appellant,

v.

NORTHWEST POWER SYSTEMS, LLC,

Defendant-Respondent,

and

CATERPILLAR, INC. and PERKINS ENGINES, INC.,

Defendants.

Case No. CV-2010-4923-OC

Docket No. 40463-2012

APPELLANT'S BRIEF

Appeal from the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock

Honorable Mitchell Brown, District Judge

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case is one for breach of contract and unjust enrichment. All claims arise out of Appellee performing service on Appellant's skid steer and placing an engine in the skid steer without Appellant's agreement to have such done and to Appellant's pecuniary loss.

1. Standard on appeal.

In an appeal from an order of summary judgment, this Court's standard of review is the same as the standard used by the district court in ruling on a motion for summary judgment. Farm Credit Bank of Spokane v. Stevenson, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994). All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. Bonz v. Sudweeks, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if **reasonable people might reach different conclusions**. Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986); Ashby v. Hubbard, 100 Idaho 67, 593 P.2d 402 (1979) (emphasis added). Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); McCoy v. Lyons, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). The burden at all times is upon the moving party to prove the

absence of a genuine issue of material fact. Petricevich v. Salmon River Canal Company, 92 Idaho 865, 452 P.2d 362 (1969).

B. COURSE OF PROCEEDINGS AND DISPOSITION

This case was brought by Edged in Stone ("Edged"), through co-owners and spouses Preston and Danielle George, on November 30, 2010 against Caterpillar, Inc. and Perkins Engines, Inc. After conducting discovery and receiving a return on a subpoena *duces tecum* issued to Appellee, Northwest Power Systems, LLC (herein "Northwest"), Edged amended its complaint, filing its Second Amended Complaint on September 19, 2011. Edged thereafter voluntarily dismissed all counts against Caterpillar, Inc. and Perkins Engines, Inc., having determined to its satisfaction that the source of Edged damages was Northwest.

Northwest filed for summary judgment on July 6, 2012, seeking summary judgment on Edged's breach of contract claims, a breach of warranty claim, a negligence claim, a breach of implied covenant of good faith and fair dealing claim and a claim for unjust enrichment. Edged stipulated to dismiss as to Northwest all claims except the contract and unjust enrichment claims, as the majority of the other claims were primarily (or exclusively) directed toward Caterpillar and Perkins.

On August 3, 2012, the District Court heard oral arguments from Edged and Northwest in regards to Northwest's motion for summary judgment, and then on September 21, 2012 the District Court issued its Judgment for Dismissal in favor of Northwest.

The District Court ruled for summary judgment against Edged on its contract claim after finding that an employee of Edged's, Scott Webb (herein "Webb") was

clothed with apparent authority to authorize work and the purchase of an engine, fundamentally preventing Edged from prevailing on a breach of contract claim. As to the unjust enrichment claim, the District Court ruled that Edged did not confer a benefit on Northwest and thus Northwest could not appreciate a benefit and no inequity was to be seen.

C. STATEMENT OF FACTS

In October 2007, Edged purchased from Rocky Mountain Machinery in Blackfoot, Idaho, a Compact Power 500 Series Boxer 526 DX Mini Skid Loader ("Skid") with a Perkins diesel engine. (*R* at 41, ¶ 6). At about 600 hours of operation, in May 2009, the Skid lost power and began blowing smoke with accompanying knocking sounds. (*R* at 41, ¶ 22; *R* at 149, 150, 156, pp. 103, 104, 128, ll. 5-25, 1-3, 4-7). Preston George ("Preston"), the owner and president of Edged, had the Skid taken into Rocky Mountain Machinery for diagnoses and repair. (*R* at 150, p. 104, ll. 7-9).

Preston was directed to take the Skid to Northwest, an authorized Perkins' repair center in Boise, Idaho, for warranty repair work. (*R* at 43, ¶ 26). Preston called ahead to Northwest and directed Scott Webb ("Webb") to bring the Skid to Northwest for diagnosis. (*R* at 151, 152, pp. 111, 112, ll. 23–25, 1–10). Northwest diagnosed the Skid's problem as dirt entry into the air manifold and dusting of the engine's cylinders. (*R* at 297). This diagnosis came from Northwest despite Edged's performance of daily, staunch maintenance on the engine. (*R* at 144–146, pp. 80–90; *R* at 200; R at 109, p. 31, ll. 9–19).

According to Preston, Northwest contacted him to let him know the engine was bad and that it would need to be replaced. (*R* at 155, pp. 125, 126, ll. 2–25, 1). Without receiving any authorization from Preston for the engine replacement, Northwest

proceeded to replace the engine. (*Dep. of Mark Adams* at 26, 30, ll. 12–14, 10–13, taken 5/23/2012, augmented 3/15/2013). Adams claims to have gotten authorization from Webb for the replacement of the engine. (*Id.* at 24, 25, ll. 7–25, 1–5, taken 5/23/2012, augmented 3/15/2013). Webb was not authorized to deal with Northwest. (*R* at 152, 172, pp. 115, 194, ll. 17–22, 13–15). Adams admits that he received nothing in writing granting him authorization to replace the engine. (*Dep. of Mark Adams.* at 25, ll. 6–9, taken 5/23/2012, augmented 3/15/2013). Adams also admits that he had no way of knowing whether Webb had authority to deal with him directly in making a decision to replace the engine. (*Id.* at 26, ll. 1–11, taken 5/23/2012, augmented 3/15/2013). Adams further states, contrary to Preston's testimony, that at no point in the process did he speak with Preston directly. (*Id.* at 26, ll. 12–14, taken 5/23/2012, augmented 3/15/2013). Yet Adams acknowledges that he knew Webb was not the "boss" and that Webb purported to have gotten approval from Preston, his boss. (*Id.* at 26, ll. 1–11, taken 5/23/2012, augmented 3/15/2013).

Edged did not want Northwest to replace the engine. (*R* at 43, ¶ 32; *R* at 157, pp. 132, 133, ll. 20–25, 1–15). If Northwest and Adams had informed Edged of the non-warranty nature of the engine replacement, Edged would have had the engine rebuilt by its in-house mechanic at a substantial savings. (*Id.*). Instead, Northwest replaced the engine without authorization. (*R* at 173, p. 199, ll. 11–16). No written memorandum exists to show an agreement or authorization to replace the engine. (*Dep. of Mark Adams* at 25, ll. 6–9, taken 5/23/2012, augmented 3/15/2013).

When Northwest informed Edged of the replacement, that it was not covered under warranty and that it had a $6,000 bill for the replacement, Edged was surprised, at

the very least having believed that, had a replacement occurred, it would be covered under warranty. (*R* at 158, pp. 136, 137, ll. 21–25, 1–14). Edged was unable to pay for the replacement. (*R* at 158, p. 137, ll. 15–21). Edged, just wanting the Skid back to have the engine rebuilt and to put the Skid to work, asked that the new engine be removed. (*R* at 174, p. 202, ll. 10–11). Accordingly, Northwest removed the engine, but insisted that it be paid for its labor in replacing and then removing the engine. (*Dep. of Mark Adams* at 44, 45, ll. 18–25, 1, taken 5/23/2012, augmented 3/15/2013). Edged was still unable to pay this bill. (*R* at 43, ¶ 37). Edged looked to Perkins Engines, Inc. and Compact Power, Inc. for some relief, but both manufacturers placed the blame on each other. (*Id.*).

With Edged unable to pay the underlying bill for labor on the replacement and removal of the engine in its Skid, Northwest kept possession of the Skid, preventing Edged from rebuilding the Skid's engine and using the Skid in its peak summer season of landscaping contracts. (*R* at 43, ¶¶ 39-41; *Dep. of Mark Adams* at 45, ll. 13–23, taken 5/23/2012, augmented 3/15/2013).). As a direct result, Edged suffered tremendous financial losses. (*R* at 44, ¶¶ 39-41).

II. ISSUES PRESENTED ON APPEAL

1. Whether the District Court erred in finding that the pleadings, depositions, and admission on file show that there is no genuine issue as to any material fact and that Appellee is entitled to judgment as a matter of law on the issue of Breach of Contract.

    i. Whether the District Court erred as a matter of law in finding that an agency relationship existed between Scott Webb and Appellant, where such determinations are for the trier of fact.

ii. Whether the District Court erred as a matter of law in holding that Appellant's employee, Webb, had apparent authority to enter into the additional oral contract alleged by Appellee.

iii. Whether the District Court erred as a matter of law in *not* finding that the Statute of Frauds prevents Appellee from presenting evidence of the additional oral contract alleged by Appellee.

III. ATTORNEY FEES ON APPEAL

Appellant Edged in Stone, Inc. requests attorney fees on appeal on the bases of Idaho Appellate Rule 41, IDAHO CODE §§ 12-120(3) & 121. The underlying action is on a contract relating to the purchase or sale of services and/or a commercial transaction. The further basis for Appellant's request for attorney fees on appeal is that, should Appellant be the prevailing party on this appeal, IDAHO CODE §12-120(3) makes mandatory the allowance of reasonable attorney fees.

IV. ARGUMENT

A. EXISTANCE OF AN AGENCY RELATIONSHIP IS A QUESTION FOR THE TRIER OF FACT

In response to the breach of contract claim brought by Edged, Northwest has raised the defense that Edged, through its employee, Webb, contracted to have the Skid engine replaced, suggesting that Northwest performed according to the contract. The District Court correctly ruled that Webb had no actual (express/implied) authority. (*R* at 593). However, the District Court also ruled that apparent authority existed sufficient to defeat Edged's contract claim on summary judgment. (*R* at 598). This ruling as a matter of law on the issue of apparent authority on summary judgment was in error.

Simply stated, the complaint in this case came with a demand for jury trial (*R* at 48). As such, in this case, the jury would be the ultimate trier of fact. This Court has held that the "existence or lack of authority of an agent is a question of fact." Idaho Title Co. v. American States Ins. Co., 96 Idaho 465, 468 (1975), citing Clark v. Gneiting, 95 Idaho 10 (1972). Specifically, this Court has held that "whether or not there is apparent authority on the agent's part to act as he acted—it is a question for the trier of fact to resolve from the evidence." Bailey v. Ness, 109 Idaho 495, 498 (1985), citing Clark v. Gneiting, 95 Idaho at 12; John Scowcroft & Sons Co. v. Roselle, 77 Idaho 142, 146 (1955); Thornton v. Budge, 74 Idaho 103, 108 (1953) (emphasis in the original). Where there is any reasonable factual dispute as to whether an agent, such as Webb, has apparent authority, a ruling as a matter of law is improper, as the trier of fact (the jury) is to resolve this dispute.

As shown herein, there is a factual dispute as to whether Webb had apparent authority beyond bringing the Skid to Northwest. In essence, however, Adams claims to have gotten permission from Webb to replace the engine, relying on an apparent authority argument. (*Dep. of Mark Adams* at 25, ll. 2–5, taken 5/23/2012, augmented 3/15/2013). Meanwhile, Preston states very bluntly that Webb's authority extended only to his bringing the Skid to Northwest for diagnosis and that he had no authority to authorize repairs. (*R* at 152, 153, pp. 115, 116, ll. 17–25, 1–7).

In presenting this factual dispute, Northwest has the burden of proving to a jury, the trier of fact, that Webb had apparent authority to approve of the engine replacement because the party alleging the existence of an agency relationship carries the burden of

proof. Gissel v. State, 111 Idaho 725, 729 (1986), citing Transamerica Leasing Corp. v. Van's Realty Co., 91 Idaho 510 (1967); Hayward v. Yost, 72 Idaho 415 (1952).

B. APPARENT AUTHORITY IS NOT CREATED BY THE ACTS OR STATEMENTS OF THE AGENT ALONE

Northwest, through its owner, Adams, stated that at no point in time pertinent to the underlying process did he speak with Preston directly. (*Dep. of Mark Adams* at 26, ll. 12–14, taken 5/23/2012, augmented 3/15/2013). He also acknowledges that he was aware that Webb was not the "boss" and that Webb purported to have gotten approval from Preston, the boss. (*Id.* at 26, ll. 1–11, taken 5/23/2012, augmented 3/15/2013).

This Court has held that "apparent authority of an agent cannot be created by the acts or statements of the agent alone." Idaho Title Co. v. American States Ins. Co., 96 Idaho 465, 468 (1975), citing Killinger v. Iest, 91 Idaho 571 (1967); Clements v. Jungert, 90 Idaho 143 (1965). Taking Adams at his word, Adams knew Webb was simply an agent yet never spoke with anyone but Webb. This although the "declarations of an alleged agent made outside the presence of the alleged principal are, of themselves, incompetent to prove agency." Clark v. Gneiting, 95 Idaho 10, 12 (1972), citing Cupples v. Stanfield, 35 Idaho 466 (1922). Adams now asks the courts to hold that Webb had apparent authority although such would necessarily be based solely on the "acts or statements of the agent." This is contrary to case law precedent and the common law precepts of agency.

C. NO APPARENT AUTHORITY EXISTED FOR THE AGENT TO CONTRACT WITH DEFENDANT

Edged argued below, and continues to argue, that, to establish apparent authority, there must be more than the subjective belief of the third party. *See* Hilt v. Draper, 122 Idaho 612, 618 (Ct. App. 1992). "One must use reasonable diligence to ascertain the agent's authority." Hausam v. Schanbl, 126 Idaho 569, 573 (Ct. App. 1994). "Reasonable diligence encompasses a ***duty to inquire with the principal*** about the agent's authority." *Id.* (emphasis added). "If no inquiry is made, ***the third party is chargeable with knowing what kind of authority the agent actually had, if any, and the fault cannot be thrown on the principal who never authorized the act or contract.***" Podolan v. Idaho Legal Aid Services, Inc., 123 Idaho 937, 944 (Ct. App. 1993) (emphasis added).

Northwest and Adams cannot show that they acted with reasonable diligence in relation to Webb and Edged. In fact, when asked if Webb "ever indicate[d] to [him] that he had authority to deal with [Northwest] directly in making these decisions," Adams stated as follows:

> A. I had no way of knowing if that was true or not. He brought the machine here. He represented Edged in Stone. He said he had talked to his boss, and he said that he got the approval to fix it.
>
> Q. But at no point in this process did you speak with Preston George or any of the bosses directly?
>
> A. No.

(*Dep. of Mark Adams* at 26, ll. 5–14, taken 5/23/2012, augmented 3/15/2013). Clearly, Adams did not act with reasonable diligence because, according to him, he made no inquiry of Preston or the principals at Edged as to Webb's authority. Therefore,

Adams is chargeable with knowing what kind of authority Webb actually had, and the fault cannot be thrown on Edged, who never authorized the alleged contract.

However, in its Memorandum Decision and Order the District Court concludes that "*Chamberlain* [v. Amalgamated Sugar Co., 42 Idaho 604 (1926)] has been implicitly overruled by subsequent pronouncements of the Idaho Supreme Court on apparent authority," declaring that it will adhere to *Bailey* and its progeny, as opposed to *Chamberlain* and the Idaho Court of Appeals cases cited immediately above. (*R* at 595). This the District Court stated as its legal basis for granting Northwest's motion for summary judgment as to the breach of contract claim. However, Bailey and its progeny still hold that "[a]pparent authority cannot be created by the acts and statements of the agent alone" and that "whether or not there is apparent authority on the agent's part to act as he acted—it is a *question for the trier of fact* to resolve from the evidence." Bailey v. Ness, 109 Idaho 495, 497–98 (1985).

Even accepting the District Court's reasoning and conclusion in this respect as entirely valid and that the law encapsulated in *Chamberlain*, *Hilt*, *Hausam*, and *Podolan* is not an accurate reflection of Idaho law, the creation of apparent authority still requires that a "*principal* voluntarily places an agent in such as position that a person of ordinary prudence, conversant with the business usages and the nature of a particular business, is justified in believing that the agent is acting pursuant to existing authority." *Id.* at 497. Whether Northwest is justified in believing Webb was acting pursuant to existing authority is, at the very least, subject to conflicting reasonable inferences that should have precluded summary judgment.

First, the record contains conflicting inferences as to whether Edged entered into a contract with Northwest for the non-warranty replacement of the engine. Adams claims to have gotten permission from Webb to replace the engine. (*Dep. of Mark Adams* at 25, ll. 2–5, taken 5/23/2012, augmented 3/15/2013). Meanwhile, Preston states very bluntly that Webb's authority extended only to his bringing the Skid to Northwest for diagnosis and that he had no authority to authorize repairs. (*R* at 152, 153, pp. 115, 116, ll. 17–25, 1–7).

As for Webb, his statements that he had authority from Preston or Edged all come packaged with speculation and equivocation. First of all, Webb has a potentially large pecuniary interest at stake in his deposition testimony. Had he approved transactions that he was not authorized to approve, while admitting he never received such authorization, he would be open to a potential lawsuit from Edged. His testimony reflects this interest, which must be brought before a trier of fact to determine Webb's credibility. (*R* at 106, pp. 18, 19, ll. 11–25, 1–6). In his deposition it sounds as if Webb is attempting to convince everyone that he did no wrong, instead of merely testifying that Preston did or did not give him authority:

> Q: When you talked with Mr. Adams, you understood that the Boxer skid steer was going to be fixed, and there was going to be a charge associated with it?
>
> A: . . . I never blind-sided Preston. I was very honest. And I took several notes. And I wish I could find my notebooks as to our conversations, be it with Mark . . . I never ever blind-sided him. Every conversation I had on the telephone with anything that had anything to do with that business, I either took notes or spoke to him while he was in the room while I was on the phone. Never once did I ever try to just surprise him with a bill.

Id. Webb claims to have made notes of all his dealings, yet these notes have gone missing.

In addition, when asked whether Preston authorized him to approve the skid engine replacement, Webb states "I can safely say yes because I know that – I mean, it's not my decision. . . . Knowing how I am personally, I wouldn't have made that decision on my own." (*R* at 106, p. 19, ll. 13–18). Webb acknowledges that his "knowledge" of Preston's approval rests on pure speculation, based on the fact it would not have been his decision and "how [he is] personally." *Id.*

Further, when asked whether Adams, prior to the replacement work, informed Webb that Edged would have to pay for the replacement, Webb states:

> And then I ***think*** I presented Preston with that. He doesn't think he can fix it underneath any kind of umbrella warranty, you know. And then I was asked, you know, by Mark, do you want me to replace the engine. ***This is speculation***. Again, I don't – there was conversations that were held that ended up – the final determination was to have them replace the engine while it was there.
>
> And I know he had either faxed or e-emailed me a bid that I presented to Preston. And at that point the engine was fixed, and we got a call to come get it. ***And it's a little cloudy. I just—the progression of having something fixed is what I'm basing my memory off of.***

(*R* at 107, pp. 22, 23, ll. 25, 1–13) (emphasis added). Webb makes it abundantly clear that, not only is most of his recollection "speculation," but also it is entirely based off of "having something fixed." *Id.* It appears that Webb, starting with the knowledge that the engine was replaced, worked backwards and filled in his "cloudy" memory with what must have occurred to get the engine replaced. Thus his testimony when asked if Preston authorized him to approve the replacement: "I safely say yes because I know that

– I mean, it's not my decision. . . . Knowing how I am personally, I wouldn't have made that decision on my own." (*R* at 106, p. 19, ll. 13–18).

The combined statements of Adams and Preston alone create a genuine issue of material fact in terms of credibility and raise conflicting inferences regarding the facts of the case. Webb's statements further muddy the water in that he seems to testify, on one hand, that Preston gave him authority while, on the other hand, stating that his testimony is "speculation" and based on the process and "progression of having something fixed." His testimony is suspect and itself creates a genuine issue of material fact sufficient to bring this issue before a trier of fact.

Second, even had Webb authorized the replacement of the engine in the Skid, the record contains conflicting inferences as to whether he had apparent authority to approve anything as to Northwest. As mentioned above, apparent authority exists "when a principal voluntarily places an agent in such a position that a person of ordinary prudence, conversant with the business usages and the nature of a particular business, is justified in believing that the agent is acting pursuant to existing authority." Clark v. Gneiting, 95 Idaho 10, 12 (1972). The evidence presented offers conflicting inferences as to, for example, whether Edged ***voluntarily placed*** Webb in a position to be mistaken as someone who was authorized to approve of a non-warranty engine replacement. The evidence further presents conflicting inferences as to whether Northwest and Adams were justified in believing that Webb was acting pursuant to existing authority.

This Court has held that a third party has "the duty of using reasonable diligence to ascertain if [a principle] and its employee [have] authority . . . ." Idaho Title Co. v. American States Ins. Co., 96 Idaho 465, 468 (1975). Webb was a low-level, temporary

worker, calling himself "just a body." (*R* at 103, pp. 6, 7, ll. 25, 1–23). Adams had a duty, at the very least, to use reasonable diligence to ascertain if Webb had any authority beyond delivering the Skid. However, he claims he never spoke with Edged's principle, Preston, and that he simply "thought he was dealing with a standup company," which was his justification for exercising absolutely no diligence to ascertain Webb's authority. (*Dep. of Mark Adams* at 25, ll. 17–24, taken 5/23/2012, augmented 3/15/2013).

D. THE DISTRICT COURT FAILED TO CONSIDER EDGED'S STATUTE OF FRAUDS ARGUMENT

The District Court seems to have failed to consider Edged's argument that the Statute of Frauds prevents Northwest from presenting its evidence of the alleged contract between Edged and Northwest for the replacement of the engine in the Skid, as such was not addressed in the District Court's Memorandum Decision and Order. The Statute of Frauds, as applied in Idaho, provides the following:

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or ***defense*** unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

IDAHO CODE § 28-2-201(1) (emphasis added).

Northwest utilizes as a defense to Edged's breach of contract claim that Edged, through its agent, Webb, made a contract with Northwest for the replacement of the engine in the Skid. The engine was a good for which Northwest attempted to bill Edged at $3,000, clearly exceeding the threshold for a "sale of goods for the price of $500 or more." (*R* at 193). Given the sale price for the engine of more than $500, Northwest is not

entitled to present the contract by way of defense unless there is "some writing to indicate that a contract for sale has been made between the parties and ***signed*** by the party against whom enforcement is sought or by his authorized agent or broker." IDAHO CODE § 28-2-201(1) (emphasis added).

As Adams, owner of Northwest, admits, Northwest received nothing in writing granting it authorization to replace the engine. (*Dep. of Mark Adams* at 25, ll. 6–9, taken 5/23/2012, augmented 3/15/2013). In addition, Northwest has not produced any writing purporting to fulfill the requirements of the Statute of Frauds. As such, Northwest simply cannot be allowed to present this purported contract as a defense to Edged's breach of contract claims. An exception may apply, under Idaho case law, if Edged had paid for or accepted the replacement engine. However, this is not the case, but rather Edged, through Preston, rejected the engine and asked that it be taken out. (*R* at 174, p. 202, ll. 10, 11).

Northwest could conceivably argue a further statutory exception to the Statute of Frauds by claiming that it sent a confirmatory writing of the alleged contract within a reasonable time, in accordance with Idaho Code § 28-2-201(2), which provides the following:

> Between merchants if within a ***reasonable time*** a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten (10) days after it is received.

IDAHO CODE § 28-2-201(2) (emphasis added).

Northwest has presented a document dated May 28, 2009, purporting to be an invoice and which it may claim was sent to Edged as a "confirmatory writing." (*R* at

300). However, this exception fails for Northwest for at least two reasons: (1) Preston, owner of Edged, testified that he never received an invoice. (*R* at 172, p. 194, ll. 21–23); and (2) the purported invoice was not sent or received, if at all, within a reasonable time as required in the statute. The purported invoice appears not to have been generated, let alone sent or received, until May 28, 2009, which eight days ***after*** Adams and Northwest report having done the engine replacement. (*R* at 297; *Dep. of Mark Adams* at 21, ll. 8–11, taken 5/23/2012, augmented 3/15/2013).

Idaho Code § 28-1-205 defines "reasonable time," stating that "[w]hether a time for taking an action required by the uniform commercial code is reasonable depends on the nature, purpose, and circumstances of the action." IDAHO CODE § 28-1-205(a). Further, the official comment to the Uniform Commercial Code, as adopted by Idaho, states that "[s]ubsection (a) makes it clear that requirements that actions be taken within a 'reasonable' time are to be applied in the transactional context of the particular action." *Id.*, at cmt. 1. In *Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc.*, the Supreme Court stated that, in determining the issue of reasonability, "courts have considered such factors as the nature of the goods to be delivered, the extent of the seller's knowledge of the buyer's intention, transportation conditions, and the nature of the market." 98 Idaho 495, 504 (1977).

Given the circumstances of this alleged commercial transaction for replacement of the engine, mailing or receipt of an invoice for such replacement cannot be considered received "within a reasonable time" when before the receipt of the "confirmatory writing" the work is already complete and the good has been made a part of Edged's Skid to Edged's significant detriment. To hold otherwise would be to encourage shops, such as

Northwest, to green-light its own work and hold customers ransom for services they did not approve. Not only did the nature of the good (the engine specially ordered from Perkins) make this alleged transaction one that would require a confirmatory writing before incurring such expense and firmly installing it into Edged's Skid, but also Northwest should have been keenly aware of Edged's intention to have the engine repaired under warranty and its further intention to use the repaired Skid for substantial income-producing activities.

Certainly, if Northwest had desired to protect itself and preserve any such defenses, it should have been more circumspect in either having a standard work order/contract signed by customers like Edged or sending a confirmatory fax ***before*** the work was commenced and completed. Although the record contains conflicting inferences as to whether an invoice was sent to Edged at all, it is clear and undisputed that an invoice was, at best, sent *after* the work was completed to Edged's detriment.

For these myriad conflicting inferences, Webb's lack of authority to authorize the replacement and the Statute of Frauds, Northwest's motion for summary judgment as to Edged's second breach of contract claim should not have been granted.

V. CONCLUSION

Based on the record and pleadings filed in this case, Appellant has met his minimal burden of producing facts that demonstrate material disputes of fact as to each challenged element of his claims. As such, the District Court's decision is in error, and must be reversed so that the issue of apparent authority make be determined by the trier of fact—the jury Edged has demanded.

DATED this 20th day of May, 2013.

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CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing *Appellate Brief* was served on the following named persons at the addresses shown an in the matter indicated.

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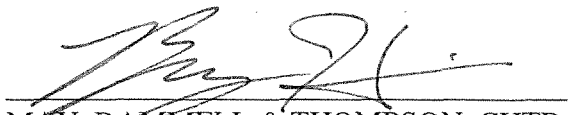
DATED this 20th day of May, 2013.



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