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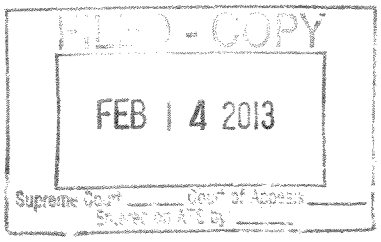
DeGroot v. Standley Trenching, Inc. Appellant's Brief 1 Dckt. 39406

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHARLES DeGROOT, and DeGROOT FARMS, LLC, Plaintiffs/Appellants, -vs- STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO., Defendant/Respondent.	)	**DOCKET NO. 39406-2011**



APPELLANTS' BRIEF

Appeal from the District Court of the Third Judicial District for Canyon County
Honorable Gregory M. Culet, District Judge presiding.

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I.
STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case arises out of the improper and defective installation of manure handling equipment by Defendants Standley Trenching, Inc., d/b/a Standley & Co. (hereinafter "Standley") and J. Houle & Fils, Inc. (hereinafter "Houle") at the 2,000 head dairy operated by Plaintiffs Charles DeGroot and DeGroot Farms, LLC, (hereinafter collectively "DeGroot").

B. COURSE OF PROCEEDINGS

In connection with the improper design and construction of the manure system, DeGroot filed its *Complaint and Demand for Jury Trial* on September 12, 2001 and its *First Amended Complaint and Demand for Jury Trial* on December 21, 2001.[1] Standley filed its *Verified Answer and Counterclaim* on February 22, 2002.[2]

DeGroot filed its *Complaint and Demand for Jury Trial* against Beltman Construction, Inc. d/b/a Beltman Welding and Construction ("Beltman") in the Third Judicial District of Idaho in and for the County of Canyon, Case No. CV05-2277.[3] Beltman filed its *Third Party Complaint and Demand for Jury Trial* against Standley on March 22, 2005. The Court entered an order consolidating the Beltman litigation with the case against Standley on April 19, 2005. Thereafter, on May 11, 2005, Beltman filed its *First Amended Third Party Complaint and*

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[1] R. Vol. I, pp. 23-46.
[2] *Id.*, pp. 47-52.
[3] DeGroot filed its *First Amended Complaint and Demand for Jury Trial* on March 21, 2005.

Demand for Jury Trial against Standley.[4] The Beltman action was consolidated with the Standley action.[5]

DeGroot and Beltman eventually settled. As part of the settlement, DeGroot took an assignment of Beltman's claims against Standley. Thereafter, on September 11, 2006, DeGroot moved for an order pursuant to Rule 25(c) of the Idaho Rules of Civil Procedure substituting it as the Third Party Plaintiff. The trial court granted the motion for substitution and entered an order to that effect on October 25, 2006.

On March 22, 2005, the trial court granted Standley's Motion for Summary Judgment on both the claims asserted by DeGroot, and on Standley's counterclaim.[6] The trial court affirmed that decision on March 28, 2005.[7] DeGroot sought reconsideration of the trial court's ruling on April 27, 2007.[8]

Standley subsequently moved for summary judgment on the claims asserted by DeGroot as an assignee of Beltman.[9] The trial court denied that motion on April 30, 2007.[10] Standley thereafter sought partial summary judgment of the claims assigned to DeGroot.[11] On November 8, 2011, the trial court granted Standley summary judgment as to all claims asserted in Beltman's Third Party Complaint.[12] Standley moved for its attorney fees and costs and the trial court

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[4] Supp. R., pp. 43-52.
[5] *Id.*, pp. 67-71.
[6] R. Vol. II, pp. 374-76.
[7] *Id.*, pp. 377-379.
[8] R. Vol. III, pp. 556-62.
[9] R. Vol. II, pp. 389-450.
[10] R. Vol. IV, pp. 612-15.
[11] R. Vol. V, pp. 768-783.
[12] *Id.*, pp. 907-10.

awarded fees and costs on or about December 29, 2011.[13]

C. STATEMENT OF FACTS

In 1998, DeGroot purchased a parcel of property in Melba, Idaho for the purpose of establishing a 2,000 plus cow dairy.[14] In February 1999, DeGroot spoke with Kurt Standley at a trade show in California about installing a manure handling system at his new dairy.[15] DeGroot was also aware of Standley and its services by virtue of advertisements Standley placed in dairy trade magazines.[16] Standley was displaying "Houle" equipment at the trade show as a dealer of Houle equipment.[17] Although Standley had only recently become a dealer for Houle, it had been concentrating on doing dairy construction work since 1994.[18]

In June 1999, Beltman was hired as the general contractor for the construction of DeGroot's 2,000 plus cow dairy outside of Melba, Idaho.[19] Thereafter, Beltman contracted with Standley to design and install manure handling equipment for DeGroot's dairy.[20] Although DeGroot was not a party to the contract between Beltman and Standley, it was the intended beneficiary of that contract.[21] Further, following Standley's installation of the manure handling equipment, DeGroot worked directly with Standley to try and correct numerous defects in the manure handling system.[22]

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[13] R. Vol.VI, 1120-27.
[14] R. Vol. II, p. 208.
[15] *Id.*, p. 213.
[16] R. Vol. III, p. 472
[17] R. Vol. II, p. 213.
[18] *Id.*, p. 255.
[19] *Id.*, p. 209; p. 214.
[20] *Id.*, pp. 209-10.
[21] *Id.*, pp. 209-10; 212.
[22] *Id.*, p. 216.

From August through November 1999, Standley designed and selected the materials and equipment for, and subsequently installed, the manure handling equipment at the DeGroot dairy.[23] The contract between Standley and Beltman called for Standley to install a flood system, drain system and manure handling equipment.[24] In connection with the contract, Standley selected the number of slope screens, pumps and pump valves to be used, as well as the pipe sizing and type of pump to be used.[25] Standley helped design the flush system based on its own experience and with the help of engineers from Houle.[26]

In connection with the manure handling system, Beltman relied upon Standley's experience and expertise in identifying the specifications for and installing the manure handling system.[27] DeGroot, too, relied upon Standley's expertise and representations regarding the Houle equipment that would be installed at the dairy during the construction of the dairy.[28]

Although the manure handling system installed by Standley worked briefly after DeGroot began operation of the dairy, shortly thereafter it failed and DeGroot was "always repairing it."[29] Further, following Standley's design and installation of the manure handling system, DeGroot worked directly with Standley to try and correct numerous defects in the manure handling system.[30]

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[23] *Id.*, pp. 209-10; pp. 265-266. A true and correct copy of the bid contract is found at R. Vol. II, pp. 233-35.
[24] R. Vol. III, p. 462; p. 464; pp. 467-70.
[25] *Id.*, pp. 461-65.
[26] *Id.*, p. 466.
[27] *Id.*, p. 475; p. 477; p. 478; p. 480.
[28] *Id.*, p. 457; 473; 482.
[29] R. Vol. II, p. 219.
[30] *Id.*, pp. 265-267; R. Vol. I, pp. 86-91.

The problems with the system installed by Standley were numerous, and were brought to Standley's attention.[31] First, the lagoon pump which supplied water for flushing the free stalls was inadequate and required many modifications and upgrades.[32] As originally designed, Standley installed a forty-horse power pump.[33] The initial forty horsepower pump was replaced with a fifty horsepower and again with a seventy-five horsepower pump.[34] These attempts to increase the volume of water from the lagoon pump were not effective, and instead caused serious electrical problems.[35] Specifically, Idaho Power had to replace the transformer because the pump(s) were blowing bayonet fuses due to failure of the breaker box installed at the south end of the lagoon.[36] DeGroot incurred over $5,000 in expenses for electrical repairs to the pump and breaker box at the lagoon.[37] It also is significant that despite Standley's various attempts to increase water volume for flushing, through increased horsepower, the free stalls still were not washed properly, instead requiring frequent manual scrapings that otherwise would not be necessary.[38]

Second, DeGroot expended sizeable sums in renovating the manure screening setup. Standley originally installed two roller presses and two slope screens to handle the dairy waste.[39] The roller presses moved the manure onto a conveyor which, in turn, moved the manure to a

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[31] *Id.*, p. 239; p. 243.
[32] *Id.*, p. 241; p. 243.
[33] *Id.*, p. 210; p. 262; p. 266; p. 243.
[34] *Id.*
[35] *Id.*
[36] *Id.*, pp. 266-67.
[37] *Id.* pp. 290-96.
[38] *Id.*, p. 242; p. 245.
[39] *Id.*, p. 212; 217; 219.

stacker.[40] The roller presses, conveyor and stacker, however, never functioned as designed, warranted or intended.[41] Both the conveyor and stacker belts continually broke, resulting in DeGroot paying unanticipated costs for replacements.[42] In fact, within months of installation, the roller presses, conveyor and stacker were removed and the slope screens were placed atop a concrete wall in an attempt to remedy the inadequate design, forcing DeGroot to incur additional expense.[43]

Third, the agitator pumps installed by Standley were not sufficient to keep up with the flow of 'green water' from the free stalls.[44] Pursuant to Standley's design, two agitator pumps were installed in the holding pond to pump the manure water through the slope screens.[45] However, the two pumps were inadequate to handle the waste created by the dairy cows.[46] Standley's design (two pumps) would be sufficient for a dairy milking between five and six hundred cows – not the number of cows DeGroot milked.[47] Notably, Standley was aware that the DeGroot dairy was designed to milk over 4,000 cows.[48] As a result, manure accumulated in the holding pond, which then had to be scraped with a tractor.[49] The manure scraped from the holding pond could not be run through the slope screens, thus reducing the amount of compost

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[40] *Id.*, p. 212; 215.
[41] *Id.*
[42] *Id*, p. 212; p. 215; p. 267.
[43] *Id.*, pp. 244-45.
[44] *Id.* p. 264; pp. 270-71.
[45] *Id.*, p. 215.
[46] *Id.*, p. 243.
[47] *Id.*, pp. 315-27.
[48] *Id.*, pp. 265.
[49] *Id.*, p. 242; p. 245

ultimately available for use in the free stalls, not to mention the difficulty associated with scraping out the holding pond.[50]

Thereafter, DeGroot continued to experience problems with various parts of the manure handling system, particularly its inability to adequately flush the lanes, the undersizing of the drain pipe, the collection pit which was too shallow, the inadequate roller presses and slope screens, and problems with the conveyor belts that transported the pressed manure to a stacker.[51]

Further, at no time did Houle or Standley ever provide DeGroot with Owner's Manuals for the equipment nor did they inform DeGroot of required maintenance on the equipment.[52] Rather, Standley's and Houle's representatives assured DeGroot the system would function as intended and would all but run itself with little if any involvement by DeGroot.[53]

Based upon the numerous design and installation flaws associated with the manure handling system installed at the dairy, DeGroot was forced to replace the manure handling equipment and install equipment capable of handling the needs of the dairy.[54] DeGroot revoked its acceptance of the manure handling equipment sold and installed by Standley.[55]

As a direct and proximate result of the numerous inadequacies with the manure handling system, DeGroot suffered damages in the form of lost milk production, increased labor costs, costs to correct the system, loss of feed in the free stalls, costs associated with repairing the

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[50] *Id.*
[51] *Id.*, p. 215; pp. 217-221.
[52] *Id.*, p. 263.
[53] *Id.*, p. 245.
[54] *Id.*, p. 244.
[55] *Id.*, pp. 344-48.

system as well as future costs to correct the system installed by Standley.[56] DeGroot hired Mr. Kenneth E. Hooper to calculate its economic loss caused by the improperly designed system.[57] Conservatively, Mr. Hooper estimated DeGroot's damages between $603,005 and $691,920 – exclusive of attorney fees and costs.[58]

II.
ISSUES ON APPEAL[59]

A. Whether the trial court erred in granting Standley summary judgment on DeGroot's Affirmative Claims as follows:

   a. Whether the trial court erred in finding that DeGroot was not a Third Party Beneficiary of the contract between Beltman and Standley;

   b. Whether the trial court erred in determining that DeGroot could not maintain warranty claims against Standley;

   c. Whether the trial court erred in granting Standley summary judgment on DeGroot's claim for breach of the covenant of good faith and fair dealing;

   d. Whether the trial court erred in granting Standley summary judgment on DeGroot's claim brought pursuant to the Idaho Consumer Protection Act;

   e. Whether the trial court erred in granting Standley summary judgment on DeGroot's claim of rescission against Standley.

B. Whether the trial court erred in granting summary judgment to Standley on its counterclaim and claim attorney fees.

C. Whether the trial court erred in dismissing DeGroot's claims as an assignee of Beltman against Standley.

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[56] *Id.*, pp. 290-328.
[57] *Id.*
[58] *Id.*
[59] The first two issues identified in Plaintiffs' Notice of Appeal relate to claims against Houle & Fils, Inc. As Plaintiff has since settled its claims against this party, those issues are no longer at hand.

D. Whether the trial court erred in awarding Standley attorney fees and costs in defending the claims asserted by DeGroot.

III.
ATTORNEY FEES ON APPEAL

DeGroot requests its attorney fees and costs associated with bringing this appeal pursuant to Idaho Code §§ 12-120, 12-121, Idaho Rules of Civil Procedure 54(d) and 54(e), I.A.R. 41, and all other applicable state law.

IV.
ARGUMENT

A. THE TRIAL COURT ERRED IN GRANTING STANDLEY SUMMARY JUDGMENT ON DEGROOT'S AFFIRMATIVE CLAIMS AGAINST STANDLEY

1. Standard of Review

Summary judgment under I.R.C.P. 56(c) is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. On appeal, this Court exercises free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law.[60] When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion.[61]

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[60] *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct.App. 1986).
[61] *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App. 1994).

The party moving for summary judgment initially carries the burden to establish that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law.[62] The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial.[63] Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking.[64] Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56(f).[65]

The United States Supreme Court, in interpreting Federal Rule of Civil Procedure 56(c), which is identical in all relevant aspects to I.R.C.P. 56(c), stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.[66]

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[62] *Eliopulos v. Knox,* 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct.App. 1992).
[63] *Dunnick v. Elder,* 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct.App. 1994).
[64] *Heath v. Honker's Mini-Mart, Inc.,* 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct.App. 2000).
[65] *Sanders,* 125 Idaho at 874, 876 P.2d at 156.
[66] *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265, 273-74 (1986) (citations omitted).

The language and reasoning of *Celotex* has been adopted in Idaho.[67]

2. DeGroot is a third party beneficiary of the contract between Standley and Beltman

a. A genuine issue of material fact exists regarding whether DeGroot was a third party beneficiary to the contract between Beltman and Standley

Standley's primary challenge to DeGroot's claims is the assertion that DeGroot does not have contractual privity with Standley. As the intended beneficiary of the bid contract between Beltman and Standley, however, DeGroot is entitled to enforce the contract and obtain damages for Standley's breach. Idaho Code § 29-102 expressly provides that:

> **Enforcement by a beneficiary.**—A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.

The basic test for determining a party's status as a third party beneficiary is whether the agreement reflects an intent to directly benefit such third party.[68] Intent must be gleaned from the contract itself "unless that document is ambiguous, whereupon the circumstances surrounding its formation may be considered."[69] It is not necessary that the plaintiff be named and identified individually within the agreement.[70]

In this case, the contract executed by Standley to design and install a manure handling system for DeGroot's dairy was made for the direct and primary benefit of DeGroot. Prior to submitting its bid, Standley met with DeGroot, marketed Houle equipment, and spoke with him

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[67] *Dunnick,* 126 Idaho at 312, 882 P.2d at 479.
[68] *Seubert Excavators, Inc. v. Eucon Corp.*, 125 Idaho 744, 874 P.2d 555 (Ct. App. 1993), aff'd in part, rev'd in part, 125 Idaho 409, 871 P.2d 826 (1994).
[69] *Stewart v. Arrington Construction Co.*, 92 Idaho 526, 532, 446 P.2d 895 (1968).
[70] *Just's Inc. v. Arrington Construction Co.*, 99 Idaho 462, 464, 583 P.2d 997 (1978).

specifically about submitting a bid for installation of the manure handling system. At the time the contract was entered into, Standley knew that DeGroot would be paying for the construction of the dairy, including installation of the manure handling system. Thus, installation of the manure handling system would inure to the benefit of DeGroot upon completion.

Further, DeGroot was the specifically named "customer" on Standley's invoices, thus indicating the intent to directly benefit DeGroot with the installation of the manure handling system.[71] It must also be recognized that without payment from DeGroot to Standley, there would be no need to install the system. At the very least, these facts raise a genuine issue of material fact as to whether DeGroot was the intended beneficiary of the contract between Standley and Beltman.

It is also important to note the warranties on the system went to DeGroot. For example, the equipment came with a warranty registration form.[72] Kurt Standley testified that there was a warranty that he would have honored on the equipment at the DeGroot Dairy.[73] In fact, warranty work was performed on the dairy that DeGroot was not charged for, however, Standley did not keep specific records tracking that work.[74] This relationship evidences the fact that DeGroot was in fact a third party beneficiary of the contract.

In its *Motion for Summary Judgment*, Standley relied heavily upon the Court of Appeals decision in *Nelson v. Anderson Lumber Co.*[75] In that case, the plaintiff contracted for a building

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[71] R. Vol. II, p. 123; p. 231
[72] R. Vol. IV,p. 569.
[73] R. Vol. II, p. 266.
[74] *Id.*
[75] 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004).

package which included plans and materials for a cabin which was to be constructed.[76] The plaintiff completed construction of his cabin and was informed that the "structure of the cabin did not meet the snow load requirements for that location."[77] The plaintiff brought suit against the general contractor as well as the subcontractors involved in the project.[78] The trial court granted summary judgment as to the subcontractors finding that the plaintiff was not a third party beneficiary of the contract between the general contractor and the subcontractors and the plaintiff appealed.[79]

In affirming the trial court's ruling, the Court of Appeals relied upon a treatise as well as the restatement of contracts as follows:

> Such contracts [between a principal contractor and subcontractors] are made to enable the principal contractor to perform; and their performance by the subcontractor does not in itself discharge the principal contractor's duty to the owner with whom he has contracted. The installation of plumbing fixtures or the construction of cement floors by a subcontractor is not a discharge of the principal contractor's duty to the owner to deliver a finished building containing those items; and if after their installation the undelivered building is destroyed by fire, the principal contractor must replace them for the owner, even though he must pay the subcontractor in full and has no right that the latter shall replace them. It seems, therefore, that the owner has no right against the subcontractor, in the absence of clear words to the contrary. The owner is neither a creditor beneficiary nor a donee beneficiary; the benefit that he receives from performance must be regarded as merely incidental.[80]

The Court of Appeals also relied upon the following hypothetical scenario: "A contracts to erect a building for C. B then contracts with A to supply lumber needed for the building. C is

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[76] *Nelson*, 140 Idaho at 705.
[77] *Id.*, p. 705.
[78] *Id.*, pp. 705-06.
[79] *Id.*, p. 706.
[80] *Id.*, p. 709 (citing 9 CORBIN ON CONTRACTS § 779D (1979)).

an incidental beneficiary of B's promise, and B is an incidental beneficiary of C's promise to pay A for the building."[81]

This case is distinguishable from *Nelson*. In *Nelson*, all of the contracts were oral with no identification of plaintiff Nelson as a beneficiary.[82] Here, the contract at issue is the written bid prepared by Standley.[83] That written bid specifically identifies the "DeGroot Dairy."[84] This alone raises a question of material fact as to whether DeGroot was the intended beneficiary of the contract.

Second, the subcontractors identified in *Nelson* were merely suppliers of materials. In this case, it must be recognized that Standley is much more than a materials supplier. Standley was intimately involved in the design and installation of the manure handling system that was designed specifically for the DeGroot dairy. This was a custom designed dairy for DeGroot in which Standley was intimately involved with from the beginning. Additionally, DeGroot specifically instructed Beltman that it was to use Standley's bid. In other words, Beltman had no choice in accepted the bid prepared by Standley because of DeGroot's instruction.[85] These facts are clearly different than those presented in *Nelson*.

Nelson is further distinguishable because the plaintiffs in *Nelson* did not predicate their claims on a third-party beneficiary theory in their complaint.[86] In fact, it was not until the hearing on the defendant's motion for summary judgment that the plaintiffs argued this theory. Even at

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[81] *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 302, illus. 19 (1981)).
[82] *Id.*, p. 708 (recognizing that "there is no written contract between any of the parties.").
[83] R. Vol. II., pp. 233-235.
[84] *Id.*
[85] R. Vol. III, p. 446.
[86] *Nelson*, 140 Idaho at 709.

that point, however, the plaintiffs failed to adduce any evidence to support such a theory.[87] In contrast, the *Second Amended Complaint* plainly alleges a third party beneficiary theory and DeGroot has adduced substantial evidence, as detailed above, of his status as an intended beneficiary.

The decision in *Nelson* notwithstanding, a finding that DeGroot is not entitled to recover from Standley is not in the best interest of judicial economy and would lead to an absurd result. The following example, cited by the Idaho Supreme Court in *Tusch Enterprises v. Coffin*, illustrates this point:

> ...suppose an unscrupulous builder constructed a home of inferior quality and sold it to another. Suppose further, that for whatever reason, the buyer after three months sold the home to a second purchaser. And one month later the foundation of the house split apart rendering the home valueless. Should the common law deny the subsequent purchaser a remedy against the builder merely because there is no privity of contract and because the damages happen to be purely economic, when it was the conduct of the builder which created the latent defect in the first place?[88]

Although the question presented in *Coffin* was whether subsequent purchasers of residential dwellings, not in privity with the builder, could recover from the builder for latent defects based upon an implied warranty of habitability, its rationale is no less compelling in this case.

Based on the foregoing, the trial court erred in determining that DeGroot was not a third party beneficiary of the contract between Beltman and Standley.

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[87] *Id.*
[88] 113 Idaho 37, 51, 740 P.2d 1022 (1987).

3. DeGroot is entitled to seek damages against Standley for breach of warranty

As discussed above, the evidence establishes that DeGroot was a third-party beneficiary of the bid contract between Standley and Beltman. As such, DeGroot can recover damages for Standley's breach of warranties.

a. Express Warranties

Idaho Code § 28-2-313(1) indicates when express warranties are created by a seller:

> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

Express warranties may be created by the manufacturer, seller or builder by way of contract, advertising materials, oral representations or descriptions regarding the condition or performance of the product.[89] The buyer of goods need not rely on the affirmation of fact, promise or description for the same to become part of the basis of the bargain.[90] An affirmation of fact is assumed to become the basis of the bargain.[91]

In this case, Standley argues that there is no evidence that Standley made any express warranties to DeGroot. The only evidence Standley relies on to support this argument, however, is Charles DeGroot's testimony that he had no direct contract with Standley. However, a direct contractual relationship does not appear to be required by the statute itself or the case law

[89] *Jensen v. Seigel Homes Group*, 105 Idaho 189, 194-95, 668 P.2d 65 (1983).
[90] *Id.* at 195.
[91] *Tolmie Farms, Inc. v. J.R. Simplot Co., Inc.*, 124 Idaho 607, 611, 862 P.2d 299 (1993).

interpreting the statute. Moreover, Charles DeGroot's testimony notwithstanding, there is ample evidence showing that Standley did, in fact, make certain affirmations of fact that amount to express warranties. For example, Ernest DeGroot testified in his deposition that he recalled Jeff Griggs, a Standley employee, telling him (with respect to whether DeGroot should be performing any maintenance on the manure handling system), "You won't have to worry about it."[92] Moreover, Standley spoke with Charles DeGroot in February 1999 about Houle equipment and about installing such equipment in DeGroot's dairy. Indeed, Standley held itself out as having specific expertise in Houle's manure handling equipment, which is why DeGroot ultimately decided to have Standley involved in the project. Given these factors, it is clear that Standley did provide express warranties to DeGroot.

b. Implied Warranties

DeGroot also seeks recovery for Standley's breach of the implied warranties of merchantability and fitness for a particular purpose. Idaho Code § 28-2-314(1) provides that "unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." To be merchantable, the goods must be at least such as (1) pass without objection in the trade under the contract description; (2) are fit for the ordinary purposes for which such goods are sued; and (3) conform to the promises or affirmations made on the container or label, if any. Idaho Code § 28-2-314(2). Similarly, Idaho Code § 28-2-315 provides:

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[92] R. Vol. II, p. 238.

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Standley relied on *Nelson, supra*, and *Salmon River Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 544 P.2d 306 (1975) to support its argument that without privity of contract, DeGroot cannot recover from Standley for breach of implied warranties. While *Nelson* relied on *Salmon Rivers* as a starting point in reaching its decision that homeowners cannot recover from materials suppliers for breach of warranties unless there is a contract that expresses an intent to benefit the homeowner, the *Nelson* court failed to consider the continued validity of the *Salmon Rivers* decision. Indeed, following its decision in *Salmon Rivers*, the Idaho Supreme Court on two separate occasions questioned its holding in that case.

First, in *State v. Mitchell Construction Co.*, two members of the Court expressed disapproval of the privity requirement expressed in *Salmon Rivers*.[93] For example, in his concurring opinion, Chief Justice Donaldson advocated the following approach adopted by the Alaska Supreme Court in *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976):[94]

> Courts and scholars alike have recognized that the typical consumer does not deal at arms length with the party whose product he buys. Rather, he buys from a retail merchant who is usually little more than an economic conduit. It is not the merchant who has defectively manufactured the product. Nor is it usually the merchant who advertises the product on such a large scale as to

[93] 108 Idaho 335, 699 P.2d 1349 (1984).

[94] In spite of his disapproval of the *Salmon Rivers* holding, Chief Justice Donaldson concurred in the result because Mitchell presented no evidence to support its claims that express warranties were given by the subcontractor. Justice Huntley offered a dissenting opinion that likewise questioned the continued validity of the *Salmon Rivers* decision.

> attract customers. We have in our society literally scores of large, financially responsible manufacturers who place their wares in the stream of commerce not only with the realization, but with the avowed purpose, that these goods will find their way into the hands of the consumer. Only the consumer will use these products; and only the consumer will be injured by them should they prove defective.[95]

In advocating the abolition of the privity requirement, the *Morrow* court noted that limiting consumers to an implied warranty action under the UCC against their immediate sellers "in those instances where the products defect is attributable to the manufacturer would effectively promote circularity of litigation and waste of judicial resources."[96] Although the *Mitchell* court called into doubt the validity of *Salmon Rivers*, a majority of the court found that the evidence was insufficient to establish the existence of warranties; therefore, *Salmon Rivers* was not expressly overruled. On rehearing, however, Justice Bistline changed his position and voted to overrule *Salmon Rivers*.[97]

Later, in *Tusch Enterprises, supra*, the Court again voiced its concern with *Salmon Rivers*. As discussed previously, the *Tusch* court held that privity of contract was not required in order for a subsequent purchaser of a residential dwelling to recover against the builder (or builder-developer) based upon the implied warranty of habitability.[98] In so holding, the Court specifically declined to extend the privity requirement enunciated in *Salmon Rivers*, noting:

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[95] *Mitchell Construction*, 108 Idaho at 338 (Donaldson, C.J., concurring)(internal citations and quotations omitted).
[96] *Id.*
[97] As recognized by Justice Bistline, *Salmon Rivers* remains viable only because Chief Justice Donaldson concurred in the result in *Mitchell*. Thus, the judgment affirming the district court stood up on rehearing even though *Salmon Rivers*, the backbone of the district court's decision granting summary judgment, was overruled.
[98] 113 Idaho at 50-51.

> Historically, therefore, the only tort action available to a disappointed purchaser suffering intangible commercial loss has been the tort action of deceit for fraud and the only contract action has been for breach of warranty, express or implied. This remains the generally accepted view. A few courts in recent years have permitted either a tort action for negligence or one in strict liability. Usually, the reason for so doing has been to escape the requirement of privity of contract as a prerequisite to recovery on a warranty theory. **But the elimination of this requirement for recovery on a contract-warranty theory would seem to constitute the more satisfactory technique.**[99]

In light of the questionable significance of the *Salmon Rivers* privity requirement, coupled with the overwhelming evidence that DeGroot was the intended third-party beneficiary of the bid contract, the trial court erred in determining that DeGroot was not entitled to assert warranty claims against Standley.

4. The trial court erred in dismissing DeGroot's claims for Breach of the Implied Covenant of Good Faith and Fair Dealing

As discussed previously, a third-party beneficiary of a contract may enforce the contract made expressly for his benefit.[100] As clearly set forth in the deposition testimony and exhibits relied upon by DeGroot (and discussed previously), the bid contract was made expressly for DeGroot's benefit. Therefore, DeGroot is entitled to enforce the bid contract, which includes claims for breach of the covenant of good faith and fair dealing. Because the evidence clearly establishes DeGroot is a third-party beneficiary of the bid contract, summary judgment is not appropriate on DeGroot's claims for breach of the covenant of good faith and fair dealing.

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[99] *Id.* at 50. (internal citations omitted) (emphasis added).
[100] Idaho Code § 29-102.

5. The trial court erred in dismissing DeGroot's claims brought pursuant to the Idaho Consumer Protection Act

Pursuant to the Idaho Consumer Protection Act,

> the following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful, where a person knows, or in the exercise of due care should know, that he has in the past, or is:
> ...
> (6) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;
> (7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of particular style or model, if they are of another;
> ...[101]

The acts or practices that are unlawful under the Act are only those that are "in the conduct of any trade or commerce."[102] "Trade" and "commerce" are defined by the Act to mean "the advertising, offering for sale, sale, or distribution of any goods or services, directly or indirectly affecting the people of this state."[103]

In interpreting the ICPA, Idaho courts have held that it is a sale that is the crucial event in determining whether a transaction is subject to the Act.[104] Likewise, a cause of action under the ICPA must be based on a contract.[105] A review of the cases reveals, however, that Idaho courts have not had occasion to determine whether a third-party beneficiary of a contract may bring an action under the ICPA. Even if DeGroot is found not to be a third-party beneficiary of the bid

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[101] Idaho Code § 48-603.
[102] *Id.*; *In re Western Acceptance Corp., Inc.*, 117 Idaho 399, 401, 788 P.2d 214 (1990).
[103] Idaho Code § 48-602(2).
[104] *Western Acceptance Corp.*, 117 Idaho at 401.
[105] *Haskin v. Glass*, 102 Idaho 785, 788, 640 P.2d 1186 (Ct. App. 1982).

contract entered into between Standley and Beltman, the factual circumstances of this case require that DeGroot be allowed to pursue his claims under the ICPA against Standley.

In this case, Standley is a dealer of Houle equipment.[106] As a dealer, Standley held itself out as having particular expertise and knowledge of Houle equipment by appearing at trade shows in Idaho and California.[107] It was at one of these trade shows that DeGroot spoke with Kurt Standley about using Houle equipment in DeGroot's dairy.[108]

In fact, the very equipment that Standley was displaying at its trade show in Nampa was the equipment that was ultimately installed at DeGroot's dairy.[109] As evidenced by the numerous defects in the manure handling system designed and installed by Standley, however, it is at least questionable whether Standley actually did have such expertise.

Because DeGroot has, at a minimum, raised genuine issues of material fact regarding the nature of Standley's representations about his expertise and/or the Houle equipment, the trial court erred in granting Standley's Motion for Summary Judgment.

6. The trial court erred in dismissing DeGroot's claim of rescission against Standley

Pursuant to Idaho Code § 28-2-608 a buyer may revoke acceptance of goods if the non-conformity of the goods substantially impairs their value, and if the buyer has accepted the goods on the reasonable assumption that the non-conformity would be cured and it has not seasonably been cured.[110] Under the Uniform Commercial Code, a "buyer" is one who "buys or contracts to

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[106] R. Vol. II, p. 257.
[107] *Id.*, p. 213; p. 241.
[108] *Id.*
[109] *Id.*, p. 241.
[110] Idaho Code § 28-2-608(1)(a); *Beal v. Griffin*, 123 Idaho 445, 449, 849 P.2d 118 (Ct. App. 1993).

buy goods;" a "seller" is one who "sells or contracts to sell goods."[111] Acceptance can only be revoked within a reasonable time after the buyer discovers or should have discovered the ground for the revocation.[112] A buyer rejects non-conforming goods by taking affirmative action to avoid acceptance and by notifying the seller of the rejection within a reasonable time.[113]

With respect to DeGroot's entitlement to rescission, it is notable what Standley does not argue. It does not argue, for example, that DeGroot did not effectively revoke acceptance by sending notice of the revocation. Likewise, Standley does not argue that DeGroot's notice of revocation was not given within a reasonable time. Indeed, the only argument Standley offers in support of its claim that DeGroot is not entitled to rescission is that there is no contractual relationship between Standley and DeGroot. Notably, however, Standley offers no support for its claim that a contractual relationship is required by the UCC. This is most likely because the UCC does not, in fact, require such a contractual relationship, as the definitions of "buyer" and "seller" make clear. By using the disjunctive "or" within the definition, it is clear that the legislature contemplated even the simplest sales transaction, which would include a contract to buy.

Consequently, the trial court erred in granting Standley's motion for summary judgment on DeGroot's rescission claim.

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[111] Idaho Code § 28-2-103(a), (d) (emphasis added).
[112] Idaho Code § 28-2-608(2).
[113] Idaho Code § 28-2-602.

B. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF STANDLEY ON ITS COUNTERCLAIM

1. Standard of Review

As the trial court ruled on Standley's counterclaim as a matter of law on a motion for summary judgment, the standard of review outlined *supra*, is applicable to these issues and will not be repeated here.

2. The trial court erred in granting Standley summary judgment on its counterclaim

On May 12, 2003, Standley filed its *Answer to Second Amended Complaint and Counter Claim* asserting an affirmative claim for costs associated with "numerous service calls" to the DeGroot dairy.[114] Shortly thereafter on January 31, 2005, Standley moved for summary judgment, requesting $20,259.57.[115] DeGroot contested the motion for summary judgment, asserting that the questions of fact with respect to DeGroot's underlying claims prevented a finding on Standley's counterclaim.[116] DeGroot also asserted affirmative defenses such as breach of warranties, negligent installation of the manure system, statute of frauds, breach of the covenant of good faith, and offset.[117]

The trial court heard oral argument on the counterclaim on March 1, 2005. The trial court found that the counterclaim related to an open account and that summary judgment was appropriate.[118] On a *Motion for Reconsideration*, it was again argued that summary judgment

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[114] R. Vol. I, pp. 77-82.
[115] *Id*, pp. 83-113.
[116] *Id.*, pp. 180-201; R. Vol. II, pp. 202-349.
[117] R. Vol. I, pp. 53-57; March 1, 2005 hearing, p. 44.
[118] March 1, 2005 hearing, p. 73.

was not appropriate.[119] The trial court, however, denied DeGroot's *Motion for Reconsideration.*[120]

DeGroot pled the following affirmative defenses to Standley's counterclaim: Breach of warranties, breach of contract, failure of consideration, negligence, statute of frauds, breach of the implied covenant of good faith and fair dealing, and offset.[121] For the same reasons issues of material fact exist with respect to DeGroot's affirmative claims, issues of fact remain on the affirmative defenses to Standley's counterclaim.

It must also be recognized that the trial court's ruling that DeGroot cannot assert a claim against Standley for breach of contract but that Standley is entitled judgment on its claim for efforts to correct the problems with the faulty manure system is an inconsistent and inequitable result. In essence, the trial court found that while DeGroot did not have a contract with Standley, Standley had a contract with DeGroot which completely ignores the actual relationship between the parties.

Based on the foregoing, the trial court erred in granting judgment in favor of Standley on its asserted counterclaim.

3. The award of attorney's fees and prejudgment interest on the counterclaim should be reversed

In connection with granting Standley's *Motion for Summary Judgment*, the trial court awarded 12% prejudgment interest.[122] Thereafter, the trial court entered its *Order on Costs and*

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[119] May 31, 2005 Hearing, p. 85.
[120] *Id*, pp. 91-95.
[121] R. Vol. I, pp. 54-55.
[122] May 31, 2005 Hearing, p. 85.

Attorney Fees, awarding Standley attorney's fees and costs associated with the *Motion for Summary Judgment.*[123]

As outlined above, the granting of summary judgment on Standley's counterclaim was in error. Further, the impact of DeGroot's affirmative defense of 'offset' would factor into any amount of prejudgment interest. Additionally, the prospect of an 'offset' precludes a finding that the amount due was in fact, liquidated, at any given point. At the very least, issues of material fact surrounding DeGroot's affirmative defenses prevent a finding that Standley was entitled to judgment as a matter of law. Therefore, the trial court's ruling on attorney's fees and costs should be reversed.

C. THE TRIAL COURT ERRED IN DISMISSING DEGROOT'S CLAIMS AS ASSIGNEE OF BELTMAN

1. Standard of Review

As the assigned claims were dismissed by the trial court on a motion for summary judgment, the standard of review outlined *supra*, is applicable to these issues and will not be repeated here.

2. Introduction

The trial court heard argument on Standley's *Motion for Summary Judgment* on the claims that Beltman assigned to DeGroot, over the course of two days first on September 7, 2011 and then on October 21, 2011. In connection with that motion, Standley also filed a motion in limine regarding the issue of indemnity. On September 7, 2011, the trial court ruled on the issues

[123] R. Vol. VI, pp. 1120-27.

of express warranty and the claim of rescission in Standley's favor. The trial court found that the if the issues in the *Motion in Limine* were ruled in favor of Standley, the case would be "largely over."[124] The trial court requested additional briefing on the issue of indemnification, and set a hearing of October 21, 2011 for further oral argument.

At the hearing on October 21, 2011, the trial court dismissed the remaining claims at issue.[125] That ruling was premised on the finding that DeGroot's causes of action were never liquidated against Standley because there was never a finding made that Beltman was at fault.[126] For the following reasons, that finding should be reversed.

3. The trial court erred in granting Standley summary judgment on DeGroot's express warranty claims

On the issue of express warranty, the trial court found that there was "no indication that Beltman placed any reliance" on statements made by Standley. The trial court found therefore that such statements had no bearing on the contract and granted Standley's *Motion for Summary Judgment* on that issue.[127]

As confirmed by the trial court, the "predominant factor" of the transaction at issue in this case is for the sale of goods. *Order Determining Predominant Factor of Contract*, issued April 30, 2007.

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[124] September 7, 2011 hearing, p. 69.
[125] October 21, 2011 hearing, pp. 97-99.
[126] *Id.*, p. 98.
[127] September 7, 2011 hearing, p. 60.

Express warranties are governed by Idaho Code § 28-2-313:

> **Express warranties by affirmation, promise, description, sample.** – (1) Express warranties created by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes a basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.[128]

Further, Idaho Code § 28-2-315 governs the applicability of an implied warranty for a particular purpose:

> **Implied warranty – Fitness for particular purpose.** – Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section, an implied warranty that the goods shall be fit for such purpose.[129]

On its *Motion for Summary Judgment*, Standley contended that no affirmation or promise was made to Beltman to create any express warranties, and even if such statements did exist, they were not a basis of the bargain. First, whether the description of the goods in question become a basis of the bargain "are questions of fact sufficient to preclude summary

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[128] Idaho Code § 28-2-313.
[129] Idaho Code § 28-2-315.

judgment."[130] Comment 3 to I.C. § 28-2-313 states in part: "In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. **The issue normally is one of fact**." (emphasis added).

Further, Idaho case law is clear that there is a **presumption** that an affirmation of fact does become a basis of the bargain.[131] Here, Standley failed to introduce any evidence that the affirmations of fact did not become a basis of the bargain.

Moreover, Standley argued that because Beltman had no choice in accepting Standley's bid, the identified statements could not become the basis of the bargain.[132] However, there can be many terms that become the basis for the bargain, irrespective of whether Beltman was required to accept the bid. Therefore, Standley failed to meet its burden to show that no issues of material fact exist with respect to express warranties.

In addition to the statements identified by Standley in its *Motion for Summary Judgment*, Standley prepared its bid based upon a site plan that called for "roughly, about 2,500 cows..."[133] In other words, the bid itself is an express statement that it is sufficient for the size of dairy at issue in this case.

Also, Standley contended that there could be no implied warranty for a particular purpose

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[130] *Duffin v. Idaho Crop Imp. Ass'n*, 126 Idaho 1002, 1011, 895 P.2d 1195, 1204 (1995).
[131] *Tolmie Farms, Inc. v. J.R. Simplot Co., Inc.*, 124 Idaho 613, 862 P.2d 305 (Ct. App. 1992).
[132] R. Vol. IV, p. 446.
[133] R. Vol. V, p. 820.

because Beltman did not rely upon the expertise of Standley. This argument completely ignores the deposition testimony of Stanley Beltman and Tom Beltman. As stated above, Beltman relied upon Standley's experience and expertise in identifying the specifications for and installing the manure handling system.[134]

For example, Stanley Beltman specifically testified as follows:

> Q. Did you ever discuss with Mr. Standley, Mr. DeGroot or anyone for that matter, retaining an engineer to actually do a design on any part of the dairy, including the manure system?
> A. I was instructed **to rely on his expertise on it, Mr. Standley's**.
> ...
> Q. And do you believe that your brother's duties were to oversee the work of both, Beltman Construction and the subcontractors at the site?
> A. Yes, but the subcontractor – yes, the subcontractor's expertise does not fall under ours. **You rely upon their expertise**. It's like building a house. The guy that puts the heating system in, you rely on his expertise. [135]

Similarly, Thomas Beltman testified as follows:

> Q. And that is a very good question. How were you overseeing the project when you didn't have the information at hand?
> A. That is a good question. **Because we relied on the expertise of Standley & Company to put in a manure system**.[136]

The deposition statements by representatives of Beltman clearly and unequivocally raise genuine issues of material fact as to the reliance of Beltman on the expertise of Standley. Whether or not DeGroot chose Standley is simply not relevant to the issue of whether or not Beltman relied upon Standley. As such, there was simply no basis for the trial court to dismiss

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[134] R. Vol. III, p. 475; 477; 478; 480.
[135] *Id*, p. 475.
[136] *Id.*, p. 480 (emphasis added).

the claim of breach of the implied warranty of fitness for a particular purpose.

4. The trial court erred in granting Standley summary judgment on the issue of rescission

Standley also moved for summary judgment on the issue of rescission arguing that notice of rescission was not communicated to Standley within a reasonable time. While not couched as a "laches" argument as it was in Standley's last unsuccessful motion for summary judgment, the issues are substantially the same. Standley basically argues that it was not notified in a timely manner of the claim of rescission. The trial court found that the claim of rescission was not brought within a reasonable time.[137]

The defense of laches is a creation of equity and is a species of equitable estoppel.[138] Whether a party is guilty of laches primarily is a question of fact.[139] In order for laches to apply, the trier of fact must find: (1) a lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.[140] In this case, it is undisputed that DeGroot notified Standley in June 2001 of its rescission of the manure handling system. DeGroot filed its initial complaint against Standley on September 12, 2001, which included a cause of action for rescission. Although DeGroot's claims against Standley were ultimately dismissed, DeGroot timely asserted its claims against Beltman. Subsequently, Beltman asserted its claim for rescission against Standley. The question for the jury to decide is whether, under the peculiar circumstances of this case, DeGroot and/or Beltman diligently pursued its rescission

[137] September 7, 2011 Motion for Summary Judgment, p. 70.
[138] *Huppert v. Wolford,* 91 Idaho 249, 420 P.2d 11 (1966).
[139] *Sword v. Sweet*, 140 Idaho 242, 249, 92 P.3d 492, 499 (2004).
[140] *Id.*

claim.

Courts that have applied the doctrine of laches to actions involving the sale of goods have done so where there has been a complete failure to prosecute an action for rescission. For example, in *Dicenso v. Bryant Air Conditioning Co., a Division of Carrier Corp.*, the Arizona Supreme Court applied the doctrine of laches to bar claims against the defendant where, although the defendant was named in the complaint, it was not served until three years after the complaint was filed.[141] In announcing its decision, the court relied upon the policy underlying the statute of limitations, which it described as follows:

> The policy underlying the statute of limitations is primarily for the protection of the defendant, and the courts, from litigation of stale claims where plaintiffs have slept on their rights and evidence may have been lost or witnesses' memories faded. This policy is sound and necessary for the orderly administration of justice.[142]

Similarly, in *John P. Saad & Sons, Inc. v. Nashville Thermal Transfer Corp.*,[143] the Tennessee Supreme Court applied the doctrine of laches to bar a claim against the defendant power plant operator where the plaintiff supplier had failed to provide any written demand or notice regarding the contract for nearly four years after delivery of the last batch of oil. The court discussed at length the policy underlying the doctrine of laches:

> The neglect of a person to make complaint, or bring suit in due season, he being sui juris and knowing the facts, or having the means of knowledge, is called laches; and where there has been gross laches in prosecuting rights, or long and unreasonable

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[141] 643 P.2d 701, 703 (Ariz., 1982).
[142] *Id.* at 703 (*quoting Brooks v. Southern Pacific Co.*, 105 Ariz. 442, 444, 466 P.2d 736, 738 (1970)).
[143] 715 S.W.2d 41, 46 (Tenn. 1986).

> acquiescence in adverse rights, Courts of Equity refuse to interfere, they act either by analogy to the statutes of limitations, or upon their own inherent doctrine of discouraging antiquated demands. The Court realizes the difficulty of doing entire justice, when the original transaction has become obscured by time and the evidence lost, and deems it good public policy to allow claims and titles long acquiesced in to remain in repose.[144]

Considered against these policies, it is clear that the doctrine of laches should not apply to bar Beltman's rescission claim. Standley was notified in June 2001 that DeGroot was unhappy with the manure handling system Standley provided and installed. It was only three months later that DeGroot filed suit against Standley for the defective manure handling system, which included a claim for rescission. By focusing on Beltman's actions, Standley conveniently overlooks these facts. Moreover, DeGroot immediately filed its complaint against Beltman following the Court's order granting Standley's first motion for summary judgment – certainly well within the six month period established by Idaho Code § 28-2-725(3). Neither DeGroot nor Beltman had "slept on its rights" or otherwise neglected to "make complaint" against Standley. At the very least, the question of reasonableness is one for the jury. Therefore, the trial court's order granting Standley summary judgment on this issue should be reversed.

[144] *Id.* (internal citations and quotations omitted).

5. The trial court erred in dismissing DeGroot's claim of indemnification, claim for breach of the implied covenant of good faith and fair dealing, and the remaining warranty claims for lack of damages

On October 7, 2011, the trial court analyzed the issue of indemnification. First, it found that the claim, through Beltman's *Third Party Complaint*, was properly pled.[145] Relying on the findings that "DeGroot's causes of action against Beltman were never liquidated" and that "[n]o finder of fact ever determined whether Beltman was at fault and/or whether it had any amount to DeGroot for – it had to pay any amount to DeGroot for damages," the trial court granted Standley's *Motion for Summary Judgment*.[146] The trial court used the same reasoning to dismiss DeGroot's remaining warranty claims as well as the claim for breach of the implied covenant of good faith and fair dealing.

Despite the trial court's ruling, the simple fact is that the damages at issue in this case have always been DeGroot's. Beltman did not own the dairy, nor did it ever intend on owning or operating the dairy. It is only through DeGroot that Beltman's damages even arise, i.e., Beltman had no damages until DeGroot sued it. Indeed, the very essence of third party pleading is that the third party defendant's liability be derivative of, or secondary to, that of the defendant in the main action.[147] Clearly, DeGroot's damages and Beltman's damages are one and the same. Therefore, it was error for the trial court to grant Standley summary judgment on this issue.

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[145] October 7, 2011 Hearing on Motion for Summary Judgment, p. 91.
[146] *Id.*, p. 98.
[147] *See* 12 A.L.R. Fed. § 877 (1972) (*citing* Rule 14(a) of the Federal Rules of Civil Procedure, which is identical to Rule 14(a) of the Idaho Rules of Civil Procedure, and further citing *Gabriel Capital, L.P. v. Natwest Finance, Inc.*, 137 F.Supp.2d 251 (S.D. N.Y. 2000); *see also, Stewart v. American Intern. Oil & Gas Co.*, 845 F.2d 196, 200 (9th Cir. 1988) (noting that "The crucial characteristic of a Rule 14(a) claim is that defendant is attempting to transfer to the third-party defendant the liability asserted against him by the original plaintiff.").

Further, it makes no difference, as Standley so strongly urged and the trial court accepted, that Beltman did not pay money to DeGroot in satisfaction of the Stipulated Judgment, or that DeGroot filed a Satisfaction of Judgment relating to its claims against Beltman. Prior to granting summary judgment, the trial court had already determined that the Satisfaction does not affect Beltman's claims against Standley, and Standley's covert attempt to resurrect that issue should be disregarded by this Court.

Nor does Rule 14(a) require the Court to limit testimony of damages from experts Burke and Hooper, as Standley mistakenly suggested to the trial court. Rule 14(a) provides in pertinent part:

> At any time after commencement of the action a defendant as a third-party plaintiff may cause to be served a summons and complaint upon **a person not a party to the action who is or may be liable to such third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.**[148]

Although there are few Idaho appellate court decisions interpreting Rule 14(a), federal courts interpreting its federal counterpart have generally held that the rule is limited to secondary liability situations, and does not permit the third party plaintiff to claim from a third party defendant properly in the case damages in excess of, or different from, those sought by the original plaintiff from the third party plaintiff.[149] The determination of whether a third party "is or may be liable" is a threshold issue that is generally decided by courts when a defendant seeks

[148] I.R.C.P. 14(a) (emphasis added).
[149] *See* 12 A.L.R. Fed. § 877.

to implead a third party defendant.[150] Once that threshold determination is met, the "is or may be liable" language of Rule 14(a) is irrelevant. Thus, Standley's suggestion that Beltman's settlement with DeGroot somehow makes the issue of DeGroot's damages irrelevant should be rejected as too restrictive a reading of Rule 14(a).

In this case, DeGroot (through its assigned claims from Beltman) is not asserting it is entitled to damages in excess of DeGroot's damages. The damages sought, including damages relating to repair costs, system improvement costs and future repair costs, derive directly from DeGroot's claims and damages against Beltman. As such, evidence and expert testimony from Burke and Hooper on these items of damage are directly relevant to the claims asserted against Standley. Accordingly, the trial court committed reversible error by disregarding this evidence and granting summary judgment to Standley.

Evidence of DeGroot's incidental and consequential damages are also relevant in this case. Standley argued that DeGroot's claims for (1) equipment costs; (2) repair costs; (3) labor costs; (4) future repair and modification costs; (5) lost feed; and (6) loss of milk production are no longer relevant.

Idaho Code § 28-2-712(2) specifically states, "The buyer may recover from the seller as damages the difference between the cost of cover and the contract price **together with** any incidental or consequential damages as hereinafter defined (section 28-2-715), but less expenses saved in consequence of the seller's breach."[151] Further, Idaho Code § 28-2-713(1) also provides that incidental and consequential damages are recoverable in cases dealing with nondelivery or

[150] *See Barnard-Curtiss Co. v. Maehl*, 117 F.2d 7, 9 (9th Cir. 1941).
[151] Idaho Code § 28-2-712(2) (emphasis added).

repudiation by the seller. Finally, in providing the measure of damages with regard to acceptance of nonconforming goods, Idaho Code § 28-2-714(3) states, "In a proper case any incidental and consequential damages under the next section may also be recovered."[152]

It is evident that these damages are highly relevant to DeGroot's available damages regardless of whether they are addressed with regard to cover, nondelivery, repudiation, or breach of warranty.

Duff v. Bonner Bldg. Supply, Inc.,[153] provides an example of the grant of incidental damages for repair and replacement costs such as those of which Standley seeks to exclude testimony of in this case. In *Duff*, the defendant was found to have breached the implied warranty of merchantability in a sale of paneling.[154] In its damage analysis, the Court awarded costs for replacing the paneling as well as costs for removing the existing paneling and installing new paneling as incidental damages. As was the case in *Duff*, it is clear that DeGroot has suffered incidental and consequential damages with regard to repair costs, system improvement costs, and future costs to fully repair the manure handling system.

As demonstrated above, the trial court's decision to disregard this evidence is contrary to Idaho Code as well as established Idaho case law to exclude testimony and evidence regarding DeGroot's incidental and consequential damages. As such, this Court should reverse the decision of the trial court.

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[152] Idaho Code § 28-2-714(3).
[153] 105 Idaho 123, 666 P.2d 650 (1983).
[154] *Id.*

D. THE TRIAL COURT ERRED IN AWARDING STANDLEY'S ATTORNEY FEES AND COSTS

On December 29, 2011, the trial court entered its *Order on Costs and Attorney Fees* finding that Standley was the prevailing party in a lawsuit in which the gravamen was a commercial transaction.[155]

First, based on the arguments above, this Court should reverse the decision of the trial court granting Standley summary judgment. If it does so, Standley is no longer a prevailing party and is not entitled to attorney fees and costs.

Second, if the ruling on summary judgment is not reversed, Standley is still not entitled to fees and costs. Given a finding that there is no contractual privity between DeGroot and Standley, it is patently unfair to assess fees against DeGroot based on a finding of a commercial transaction. Therefore, Standley is not entitled to fees under Idaho Code § 12-120(3).

For the foregoing reasons, the trial court's decision granting Standley attorney fees and costs should be reversed.

E. DEGROOT IS ENTITLED TO ITS ATTORNEY'S FEES IN PURSUING THIS APPEAL

Because DeGroot believes that it will prevail on the issues argued above, DeGroot is entitled to its attorney's fees pursuant to Idaho Code 12-120(3) and I.A.R. 41. If it is found that DeGroot is a third-party beneficiary of the contract between Standley and Beltman, a clear contractual and commercial transaction has been identified, thereby giving rise to DeGroot's claim for attorney's fees.

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[155] R. Vol. VI, pp. 1120-27.

V.

CONCLUSION

Based on the foregoing, DeGroot respectfully requests this court reverse the decisions of the trial court, as argued above, vacate the judgment, and remand the case for trial.

DATED this 14th day of February, 2013.

DINIUS LAW

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2013, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

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