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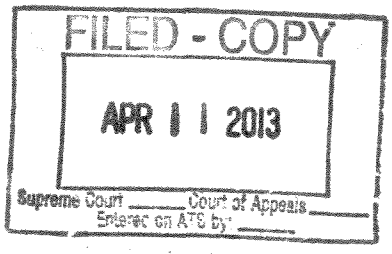
IN THE SUPREME COURT OF THE STATE OF IDAHO

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



RESPONDENT'S 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 appeal is taken from consolidated litigation arising from the construction and installation of a manure handling system at a Canyon County dairy operated by the Plaintiffs/Appellants Charles DeGroot and DeGroot Farms, LLC (hereinafter referred to as "DeGroot"). Beltman Construction, Inc., d/b/a Beltman Welding and Construction (hereinafter referred to as "Beltman") was the general contractor for the job. Beltman subcontracted with Standley Trenching, Inc., d/b/a Standley & Co. (hereinafter referred to as "Standley") and Standley installed the manure handling equipment. J. Houle & Fils, Inc. (hereinafter referred to as "Houle") manufactured the manure handling equipment which was installed at the DeGroot dairy. The manure handling equipment worked initially upon start-up but maintenance problems arose thereafter. As a result, DeGroot initiated litigation against Standley and Houle. DeGroot then initiated litigation against Beltman and Beltman brought a third party complaint against Standley. The later filed actions were consolidated into the initial litigation.

B. PROCEEDINGS BELOW.

The initial litigation, or DeGroots' direct litigation against Standley, (hereafter referred to as the "DeGroot case,") involved DeGroots' filing of a Complaint and Demand for Jury Trial on September 12, 2001 against Standley and Houle, alleging claims and causes of action for breach of contract, breach of express and implied warranties, rescission of contract, violation of the

Idaho Consumer Protection Act, and damages.[1] Thereafter, DeGroot filed a First Amended Complaint and Demand for Jury Trial on December 21, 2001, and a Second Amended Complaint and Demand for Jury Trial on May 2, 2003, against Standley and Houle.[2]

Standley moved for summary judgment on the claims and causes of action alleged by DeGroot in their Second Amended Complaint and Demand for Jury Trial on January 31, 2005.[3] Standley was granted summary judgment on all claims and causes of action asserted against it pursuant to an Order entered March 22, 2005.[4] The Order granting summary judgment to Standley was further confirmed pursuant to entry of an Order Confirming Summary Judgment entered on March 28, 2005.[5] Thereafter, on April 27, 2007, DeGroot moved for reconsideration of the Order granting summary judgment to Standley.[6] DeGroot's motion to reconsider was denied.[7]

Subsequent to the district court's granting of summary judgment to Standley on DeGroot's claims, but before Standley obtained summary judgment on its Counterclaim,[8] DeGroot initiated a separate action against Beltman, which litigation was consolidated with the DeGroot case after Standley obtained summary judgment on its Counterclaim.[9] DeGroot's litigation against Beltman consisted of claims and causes of action for breach of contract, breach

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1 R. Vol. 1, pp. 23-32.
2 R. Vol. 1, pp. 33 – 46; 65-76.
3 R. Vol. 1, pp. 111-179
4 R. Vol. 2, pp. 374-376
5 R. Vol. 2, pp. 377-379
6 R. Vol. 3, pp. 556-562; R. Vol. 4, pp. 563-607
7 R. Vol. 4, pp.765-767
8 Standley's Counterclaim was handled by different legal counsel than the attorneys who defended Standley against DeGroot's claims. Standley has submitted a separate Respondent's Brief regarding the Counterclaim issues on appeal.
9 Supp. R., pp. 43-52; 53-55; 67-71

of the implied covenant of good faith and fair dealing, breach of implied warranties, rescission of contract, and negligence. Beltman, in turn, filed a Third Party Complaint and Demand for Jury Trial against Third Party Defendants Standley and Houle.[10] Beltman alleged claims and causes of action against Standley for breach of contract, rescission, breach of warranties, breach of the implied covenant of good faith and fair dealing and violation of the Idaho Consumer Protection Act.[11] Beltman next filed its First Amended Third Party Complaint adding a claim of negligence against Standley. Ultimately, Standley obtained summary judgment on the claims DeGroot obtained by an assignment from Beltman due to the district court's ruling that DeGroot was not a third party beneficiary of the contract between Standley and Beltman.[12]

After Beltman filed its third party action against Standley, DeGroot settled the litigation with Beltman and took an assignment from Beltman of its third party claims and causes of action against Standley. Standley then filed its third party motion for summary judgment on February 21, 2007.[13] Standley's third party motion for summary judgment was denied on April 30, 2007, however, the district court noted in its Order that DeGroot, as assignee of the Beltman third party claims, voluntarily withdrew the negligence and violation of the Idaho Consumer Protection Act claims as to all Defendants.[14] Standley next moved for partial summary judgment on the claims assigned to DeGroot, except for those claims previously voluntarily withdrawn by

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[10] Supp. R., pp. 56 – 66.
[11] *Id.*
[12] Beltman asserted several of the same causes of action against Houle in its Third-Party Complaint that it asserted against Standley. On March 21, 2007, Houle moved for summary judgment as to Beltman's claims asserted against it arguing as did Standley, that summary judgment was proper given that, as a matter of law, DeGroot was not a third party beneficiary of the contract between Standley and Beltman. The district court entered an Order granting summary judgment in Houle's favor on July 24, 2007. See R., Vol. 4, pp.740-742
[13] R. Vol. 2, pp. 389-391; R. Vol. 3, pp. 392-482
[14] R. Vol. 4, pp. 612-615

DeGroot.[15] At oral argument, Standley moved to convert its partial summary judgment to a full summary judgment and thereafter an Order Granting Standley Trenching, Inc.'s Complete Motion for Summary Judgment As to All Claims and Causes of Action Stated In Beltman Construction Inc.'s Third Party Complaint was entered on November 8, 2011.[16]

C. STATEMENT OF FACTS.

DeGroot closed on a purchase of real property located in Melba, Idaho, in 1998 that they intended to use for a dairy operation milking up to 2,250 cows.[17] DeGroot obtained a design for his dairy and entered into a written contract with Beltman to build the dairy.[18] Standley subcontracted with Beltman for the manure handling system, which was to be installed as part of the dairy construction process. DeGroot did not have any contractual relationship with any vendors performing subcontract work on the dairy project, including Standley.[19]

Beltman subcontracted with Standley at the direction of DeGroot. The selection of the manure handling equipment manufactured by Houle was made by DeGroot.[20] The total bid Standley submitted to Beltman was $233,604.80, of which $174,004.80 was for the equipment and $59,600.00 was for the construction of the manure handling system.[21] Standley's bid, referred to as the "bid contract," was verbally accepted by Beltman and constitutes the primary document defining and outlining the work Standley was to perform on the dairy project.[22]

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[15] R. Vol. 5, pp. 768-763
[16] R. Vol. 5, pp. 907-910
[17] R. Vol. 2, p. 208
[18] *Id.*, at p. 209
[19] *Id.*, at pp. 209-210
[20] R. Vol. 5, pp. 789
[21] *Id.*, at pp. 803-806
[22] R., Vol. 5, p. 793

The dairy opened in approximately April of 2000.[23] DeGroot paid Beltman in full for all the work performed on the dairy, including the work by Standley.[24] As more cows were moved onto the dairy, a dispute arose as to the installation and functionality of the manure handling system.[25] DeGroot attempted to "revoke its acceptance" of the contract between Beltman and Standley in June of 2001.[26] Regarding lack of privity of contract between DeGroot and Standley, Charles DeGroot admitted that he did not have a contractual relationship with Standley, nor did he provide any plans or specifications directly to Standley.[27] Kurt Standley also testified that he understood that he was contracting with Beltman, not DeGroot.[28] The only contract DeGroot entered into for the construction of the dairy was with the general contractor, Beltman.[29] Other than Beltman's acceptance of Standley's bid on the DeGroot dairy project, there is no written or oral contract between Standley and Beltman concerning the work Standley was to perform pursuant to its bid submitted to Beltman on the project.[30] Charles DeGroot also understood that Standley was a subcontractor to Beltman on the project.[31] Standley's work on the project installing the manure disposal system started in the summer of 1999 and continued through the start-up of the dairy in April, 2000.[32] A fundamental component of Standley's bid was the use of compost for bedding in the free stalls of the dairy barn.[33] However, when the

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[23] *Id.*, at p.788
[24] *Id.*, at p. 795
[25] *Id.*, at p. 788
[26] *Id.*, at p. 809
[27] *Id.*, at p. 210
[28] R. Vol. 1, p. 116.
[29] *Id.*, at pp. 172, 177-178
[30] *Id.*, at p. 145
[31] *Id.*, at p. 172
[32] *Id.*, at pp. 174, 177
[33] *Id.*, at p. 150

dairy began operation in April, 2000 a pit-run mixture of sand and gravel, not compost, was used for bedding in the free stalls.[34] The sand and gravel was flushed out with the manure and interfered with the proper operation of the manure handling system.[35] In the first case filed by DeGroot, even though there was no contract between DeGroot and Standley, DeGroot sought remedies for breach of contract or rescission and other claims against Standley (and Houle as the manufacturer of the manure handling equipment) rather than against the general contractor, Beltman.

DeGroot argued that it was a third party beneficiary of the Standley bid contract to Beltman in an attempt to overcome the lack of privity of contract.[36] Standley's bid contract was made to Beltman and does not contain any language showing an intention by Standley or Beltman that DeGroot was to expressly benefit from Standley's bid submitted to Beltman. DeGroot filed a second lawsuit against Beltman 18 days before the district court granted Standley summary judgment on all of DeGroot's claims alleged against Standley in the initial litigation.[37]

Beltman settled the lawsuit DeGroot filed against it by stipulating to a judgment in favor of DeGroot in the amount of $964,255.36; however, as Stanley Beltman testified, Beltman did not pay any money in relation to the stipulated judgment resolving that lawsuit. Beltman simply assigned its rights under its Third Party Complaint against Standley and Houle to DeGroot.[38] Beltman's Third Party Complaint states the exact same claims and causes of action as DeGroot's

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[34] *Id.*, at p. 154
[35] *Id.*, at pp. 146, 154
[36] R. Vol. 3, pp. 556-562
[37] R. Vol. 2, p. 374; Supp. R., p. 43
[38] R., Vol. 5, pp. 796; 879 - 888

Second Amended Complaint.[39] DeGroot's' position is that its damages and Beltman's damages are the same.[40] Beltman however, is a construction company, not a dairyman operating a dairy. Beltman does not have special damages derivative of lost milk production, increased veterinarian bills, increased mastitis in the herd, increased mortality rates of cows due to unsanitary conditions, or increased labor costs due to operation of the system installed by Standley.[41] Nor did Beltman incur costs associated with repairing or replacing the system installed by Standley. These are all alleged damages that could only be incurred by DeGroot.

II.

ISSUES ON APPEAL[42]

A. On DeGroot's affirmative claims against Standley:

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

2. Whether the district court erred in holding that DeGroot could not maintain warranty claims against Standley.

3. Whether the district court erred in granting summary judgment to Standley on DeGroot's claims claim for breach of the covenant of good faith and fair dealing.

4. Whether the district court erred in granting summary judgment to Standley on DeGroot's claim alleging violation of the Idaho Consumer Protection Act.

5. Whether the district court erred in granting summary judgment to Standley on DeGroot's claim of rescission of contract against Standley.

B. On DeGroot's assigned claims from Beltman:

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[39] Supp. Rec., pp. 56 - 66
[40] R. Vol. 5, p. 839, p. 898
[41] *Id.*, at pp. 858-859
[42] The issue of whether the district court erred in granting summary judgment to Standley on its Counterclaim and claim for attorney fees therein is being addressed in a separate Respondent's brief by Standley's attorney who handled that aspect of the litigation before the district court.

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

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

III.

ADDITIONAL ISSUES ON APPEAL

Whether attorney fees on appeal should be awarded to Standley.

Standley respectfully submits that DeGroot's statement of Issues on Appeal are insufficient, incomplete or raise additional issues as it fails to address recovery by Standley of its attorney fees on appeal. Standley therefore requests its attorney fees and costs associated with defending against this appeal pursuant to Idaho Code §§ 12-120, 12-121, Idaho Rules of Civil Procedure 54(d) and 54(e), I.A.R. 35(b)(5) and 41, and all other applicable state law.

IV.

ARGUMENT

A. STANDLEY IS ENTITLED TO SUMMARY JUDGMENT ON DEGROOT'S AFFIRMATIVE CLAIMS AGAINST STANDLEY STATED IN THE SECOND AMENDED COMPLAINT.

1. Standard of Review.

On a motion for summary judgment "[a]ll 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." *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 65 P.3d 184, 186 (2003) *citing Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (2002). If the record contains any conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied. *McCoy v. Lyons*, 120

Idaho 765, 769, 820 P.2d 360, 364 (1991). 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." *Id.* If "the evidence reveals no disputed issues of material fact, then only a question of law remains, over which [the court] exercises free review." *Id.*

If the defendant moves for summary judgment on the basis that no genuine issue of material fact exists with regard to an element of the plaintiff's case, the plaintiff must establish the existence of an issue of fact regarding that element. *Farm Credit Bank of Spokane v. Stevenson,* 125 Idaho 270, 272-73, 869 P.2d 1365 (1994). In order to forestall summary judgment in that case, the plaintiff must do more than present a scintilla of evidence; the plaintiff must submit evidence sufficient to demonstrate that there is a genuine issue of material fact and that judgment as a matter of law is inappropriate. *Petricevich v. Salmon River Canal Co.,* 92 Idaho 865, 871, 452 P.2d 362 (1969); *G & M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 517, 808 P.2d 851 (1991).

Summary judgment must be entered when a nonmoving party 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." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552 (1986); *Jarman v. Hale,* 122 Idaho 952, 956, 842 P.2d 288 (Ct.App. 1992).

2. DeGroot is not a third-party beneficiary of Standley's bid to Beltman.

Standley prevailed against DeGroot's claims in the initial litigation due to the lack of contractual privity between DeGroot and Standley. DeGroot, as owner of the dairy project contracted with Beltman, the general contractor for the project. DeGroot agrees that he did not have a direct contractual relationship with Standley.[43] Absent direct contractual privity, DeGroot looks to the bid contract between Standley and Beltman as the source document for which DeGroot was to be an intended beneficiary. DeGroot cites statutory law in support of his proposition, which provides:

> **Enforcement by 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.

I.C. §29-102.

However, interpretation of the contract must by necessity occur before leaping to a conclusion as to whether or not a third party was intended to benefit from the contract. Standley's bid contract to Beltman should be reviewed within the familiar rules of contract interpretation, i.e., if the contract is clear and unambiguous, the determination of the contract's meaning and legal effect are questions of law and the intent of the parties is to be determined from the plain meaning of the contract's wording. *City of Idaho Falls v. Home Indemnity*, 126 Idaho 604, 888 P.2d 383 (1995). A question of fact over the interpretation of the contract only arises when the contract is deemed ambiguous. *Id.* The bid contract is not ambiguous. The bid contract clearly outlines the job, materials and pricing that Standley "bid" to Beltman. The only reference whatsoever to the name "DeGroot" occurs on the first page of the bid contract as a

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[43] R. Vol. 1, p. 172

reference to the project name.[44] The bid contract contains no wording whatsoever to the effect that Charles DeGroot, Earnest DeGroot, or DeGroot Farms, LLC are to be deemed as beneficiaries of Standley's bid to Beltman.[45]

In order for DeGroot to recover on a third party beneficiary claim, it must be shown that the bid contract was made for DeGroot's direct benefit and no recover can be made if DeGroot is merely an incidental beneficiary. *Dawson v. Eldredge*, 84 Idaho 331, 372 P.2d 414 (1962). Because the bid contract is relied upon by DeGroot for authority to recover as a third party beneficiary, the bid contract must be strictly construed in favor of Standley, i.e., the person against whom liability is asserted. *Id.*, at pp. 337, 418 This Court has held that, "the test for determining a party's status as a third-party beneficiary is whether the agreement reflects an intent to benefit the third party." *Partout v. Harper*, 145 Idaho 683, 183 P.3d 771 (2008); *citing*, *Idaho Power Co. v. Hulet*, 140 Idaho 110, 112, 90 P.3d 335, 337 (2004).

A plain reading of the bid contract fails to show any intent to benefit DeGroot. The mere indication stated on the bid contract that the bid is being made in regard to the "DeGroot Dairy" identifies the job and does not expressly state any intent by Standley or Beltman that DeGroot is to expressly benefit from the sub-contractor's bid contract to the general contractor. Despite DeGroot's assertions to the contrary, "the intent to benefit the third party must be expressed in the contract itself. *Idaho Power Co.* 140 Idaho at 112, 90 P.3d at 337; *quoting Adkison Corp. v. American Bldg. Co.*, 107 Idaho 406, 409, 690 P.2d 341,344 (1984). In *Partout*, this Court noted that, "Partout fails to point to any specific written contract or to set forth the terms of an oral

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[44] R. Vol. 4, pp. 604-607
[45] *Id.*

contract showing an intent that the contract benefit Partout." *Id*, at pp. 687, 775. Here, DeGroot can only point to identification of the "DeGroot Dairy" being written on Standley's bid contract. There is no other wording within the bid contract upon which DeGroot can ground his third party beneficiary claim. In *Blickenstaff v. Clegg*, 140 Idaho 572, 97 P.3d 439 (2004), a lender involved with parties developing real property required personal guarantees by the principals for the developers. The contract stated that the personal guarantees were to "... pay off M&D Trust ...." *Id.* at pp. 446, 579. Despite the party being expressly identified and a purpose given for the personal guarantees to pay off that party, this Court denied the allegation of third party beneficiary status stating, "... under the clear terms of the agreement M&D was not an intended beneficiary of any promise on the part of Thomas and Clegg." *Id.*

Further, the Idaho Court of Appeals has squarely addressed the issue of whether a project owner directly benefits from a contract, or merely has an incidental benefit in the contract between a sub contractor and the general contractor. *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004). References to the "DeGroot Dairy" on the bid contract or on invoicing from the job show nothing more than DeGroot being an incidental beneficiary of the Standley – Beltman contract. Similarly, the fact that materials purchased by the subcontractor that went into construction of a cabin on land owned by Nelson, did not create a direct third party beneficial interest for the owner, Nelson, in the contract between the subcontractor and the general contractor. *Id.* Identifying the owner by name in the bid contract or on invoicing documents for the job fails to meet the requirements of Idaho law for establishment of a third party beneficiary interest for DeGroot. The district court found the *Nelson* decision citations to 9 Corbin on Contracts §779D (1979) and to the Restatement (Second) of Contracts §302 , illus. 19

(1981) dispositive on the point of law that a project owner has no direct cause of action against a sub-contractor, "... in the absence of clear words to the contrary."[46] Further, DeGroot cites no authority for the proposition that the manure handling equipment was under warranty and Standley's performing warranty work somehow creates a third party beneficiary interest for DeGroot in the Standley–Beltman contract. Therefore, the granting of summary judgment to Standley on the third party beneficiary claim should be upheld.

3. DeGroot cannot maintain warranty claims against Standley as the parties were never in a contractual relationship.

Express Warranties.

Idaho's version of the Uniform Commercial Code provides:

> 28-2-313. Express Warranties by Affirmation, Promise, Description, Sample. – (1) Express warranties 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 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.
>
> (c) Any sample or model which is made party 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

[46] March 1, 2005 hearing, pp. 66 – 68; *citing*, *Nelson* at pp. 709, 1099 for the propositions that: (1) The owner is neither a creditor beneficiary nor a donee beneficiary; the benefit that he receives from performance must be regarded as merely incidental, 9 Corbin on Contracts §779D (1979) and (2) A contracts to erect a building for C. B then contracts with A to supply lumber needed for the building. C is an incidental beneficiary of B's promise, and B is an incidental beneficiary of C's promise to pay A for the building, Restatement (Second) of Contracts §302, illus. 19 (1981).

> 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.

Despite affirmation that no contract existed between DeGroot and Standley, DeGroot argues that Standley made express warranties to DeGroot regarding the manure handling system. Paragraph 41 of DeGroot's Second Amended Complaint is the only allegation set forth in the pleadings suggesting the creation of an express warranty. The further suggestion that no contract need be required in order to create an express warranty is contradicted by the statutory language requiring that an express warranty under Idaho's codification of the UCC must be "part of the basis of the bargain." In the context of personal injury damages, "UCC warranties apply only to those in privity of contract with the manufacturer and those who qualify as third party beneficiaries of the underlying sales contract, as defined by I.C. §28-2-318." *Puckett v. Oakfabco, Inc.* 132 Idaho 816, 979 P.2d 1174 (1998); *citing*, *Oats v. Nissan Motor Corp. in USA*, 126 Idaho 162, 169, 879 P.2d 1095, 1102 (1999).

Although DeGroot does not seek personal injury damages, the statute is explicit regarding how a seller creates an express warranties. It would make little commercial sense to permit a cause of action by a buyer against a seller for an express warranty in the absence of a contract. Further, the comments to I.C. §28-2-313 would not discuss the policy considerations between allowing for the creation of express warranties versus the ability to contractually disclaim said warranties, if privity of contract between buyer and seller were not a prerequisite for assertion of an express warranty. *Jensen v. Seigel Mobile Homes Group*, 105 Idaho 189, 668

P.2d 65 (1983); *citing*, Official Comment 4 to I.C. §28-2-313. If there is no contract, there can be no "basis of the bargain" upon which the alleged express warranty was created.

Further analysis of statements made by Standley employees, occurring at trade fairs years prior to construction of the dairy, or at the dairy after completion of construction and start-up of dairy operations, are not determinative of whether DeGroot can maintain a breach of express warranty against Standley. "The Illinois Supreme Court has explained that an express warranty arises only because the warrantor has willed it into being by making the requisite affirmation as part of the contract to which it is an adjunct." *Canadian Pacific Railway Co. v. Williams-Hayward Protective Coatings, Inc.*, 2005 WL782698, (N.D. Ill. Eastern Div.), 57 U.C.C. Rep. Serv.2d 136; *citing*, *Collins Co. v. Carboline Co.*, 125 Ill. 2d 498, 508-09, 127 Ill. Dec. 5, 532 N.E.2d 834 (Ill. 1988). As the Illinois court noted in *Canadian Pacific Railway Co.*, "in general, because an express warranty is a creature of contract, a party must have privity to the contract before bringing a breach of express warranty claim." *Id.* Here, because of the lack of evidence offered by DeGroot that Standley did anything that became a basis of a bargain, the proper analysis begins and ends with privity of contract. DeGroot admits that there was no contract with Standley and that Standley was a subcontractor for Beltman on the dairy project. For the reasons discussed *supra*, DeGroot is not a third party beneficiary of the Standley bid contract made to Beltman. Therefore, the granting of summary judgment to Standley on DeGroot's claim for breach of express warranty should be upheld.

Implied warranties.

DeGroot assigns as an issue on appeal whether summary judgment was property granted by the district court below on the claims made against Standley for breach of the implied

warranty of merchantability and fitness for a particular purpose. DeGroot cites to I.C. §28-2-314(1) for the proposition that an implied warranty of merchantability arises in a sale of goods unless excluded or modified by the parties to the sale. As to the implied warranty of fitness for a particular purpose, the statute provides:

> 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.

I.C. §28-2-315.

However, the correct analysis centers on whether DeGroot can make a proper claim directly against Standley upon the implied warranty or merchantability or fitness for a particular purpose. The answer is no. The reason is that Idaho law is clear that privity of contract is necessary to maintain a contract action to recover for economic loss arising from breach on an implied warranty. *Ramerth v. Hart*, 133 Idaho 194, 983 P.2d 848 (1999).

The facts of the *Ramerth* case are analogous to this appeal. Morris, the owner of an airplane, hired Hart to overhaul the aircraft's engine. *Id.* at p. 850, 196 Morris later sold the airplane to Ramerth. *Id.* Ramerth did not know Hart and never had any business connections or dealings with him. *Id.* at 851, 197. After Ramerth purchased the airplane he discovered that Hart's overhaul work was defective and caused damage to both the airplane's engine and air frame. *Id.* at p. 850, 196. Ramerth and Morris jointly agreed to pursue an action against Hart. *Id.* The trial court granted summary judgment to Hart because Ramerth's breach of contract claim lacked privity of contract. *Id.* Morris then assigned his claims against Hart to Ramerth.

Id. Hart eventually obtained complete summary judgment on all claims. *Id.* On appeal, Morris and Ramerth argued that the requirement of privity of contract in breach of implied warranty actions should be abolished. *Id.*

This court noted that Morris did not have any damages he could claim arising from Hart's overhaul of the engine, as the plane worked satisfactorily during his ownership and the malfunction occurred after he sold it to Ramerth. Similarly, Beltman has no damages to claim arising from Standley's work on the DeGroot dairy as Beltman was paid in full by DeGroot, including the work performed by Standley.[47] Even in settling the DeGroot action against it, Beltman did not have to pay any actual monetary amount.[48] Thus, analogous to *Ramerth*, even if Standley breached its bid contract with Beltman, Beltman incurred no actual damages and therefore, by assignment to DeGroot, Beltman conveyed no compensable loss to DeGroot. DeGroot has no contractual privity with Standley.

DeGroot, like *Ramerth*, argues that the requirement of contractual privity should be abolished in an action upon a contract to recover economic loss for breach of implied warranties. In *Ramerth*, the history of the contractual privity requirement in Idaho jurisprudence was set forth, complete with reference to those instances over the past 30+ years where the doctrine was questioned but never abolished. The doctrine remains part of Idaho's jurisprudence and its *stare decisis* value should not be set aside. Therefore, the granting of summary judgment to Standley on DeGroot's implied warranty theories should be upheld.

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[47] R., Vol. 5, pp. 796; 879 - 888
[48] *Id.*

4. DeGroot cannot maintain a claim for breach of the covenant of good faith and fair dealing against Standley.

The implied covenant of good faith and fair dealing is a covenant in contract, not tort, from which only contractual damages can be asserted. *Idaho First National Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 824 P.2d 841 (1991). In paragraph 60 of the Second Amended Complaint, DeGroot alleges that Standley violated, nullified, and/or significantly impaired the benefits provided to DeGroot under contractual relationship and thus materially breached its implied obligations to act in good faith towards DeGroot.[49] As argued *supra*, Charles DeGroot admitted that he did not have a contract with Standley. Thus, in the absence of contract, there can be no breach of the covenant of good faith and fair dealing. *Huyett v. Idaho State University*, 140 Idaho 904, 952, 104 P.3d 946, 910 (2004), holding, "the university could not have breached the covenant of good faith and fair dealing with respect to a non-existent contract."

DeGroot did not contest the fact that no contract between the parties existed, but asserted that as a third party beneficiary, DeGroot could recover under the implied covenant, yet cited to no authority for such a proposition.[50] However, third party beneficiaries are only bound to the extent contract terms apply to him. *Tolley v. Thi Co.*, 140 Idaho 253, 92 P.3d 503 (2004). Standley does not concede that its bid contract to Beltman was intended to directly benefit DeGroot, but merely analogizes to Idaho law illustrating how third party beneficiaries are limited when stating a claim for breach of the covenant of good faith and fair dealing. *Lewis v. CEDU Educational Services, Inc.*, 135 Idaho 139, 15 P.3d 1147 (2000). As argued *supra*, DeGroot, at best, was an incidental beneficiary of Standley's bid contract to Beltman. As an incidental

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[49] R. Vol. 1, p. 73
[50] *Id*, at p. 197

beneficiary only, DeGroot lacks third party beneficiary status and the claim for breach of the implied covenant of good faith and fair dealing fails. Therefore, the granting of summary judgment to Standley on DeGroot's claim for breach of the covenant of good faith and fair dealing should be upheld.

5. DeGroot cannot maintain a claim for violation of the Idaho Consumer Protection Act against Standley.

Standley's arguments set forth below in support of summary judgment on DeGroot's claim for violation of the Idaho Consumer Protection Act are two-fold. First, due to the lack of a contractual sales transaction between the parties there wasn't anything that occurred between the parties that would be subject to the Act. Standley's second argument is that paragraph 66 of DeGroot's Second Amended Complaint failed to state a claim for violation of the Idaho Consumer Protection Act, because the allegation contained therein did not meet the requisite element that the goods were of another quality of standard than represented.[51] A violation of the Act can only occur if "... goods and services are represented to be of a particular quality and standard and, they are of another." *In Re Edwards*, 233 B.R. 461, 471-76 (Bkrtcy. D. Ida. 1999).

DeGroot's response was to agree that a contract is necessary for a claim under the Act, *Haskin v. Glass*, 102 Idaho 785, 788, 640 P.2d 1186 (Ct. App. 1982), and again assert that it was a third party beneficiary of the Standley bid contract to Beltman and that there is no Idaho authority on point as to whether a third party beneficiary can state a cause of action under the Act.[52] On this issue, Standley continues to assert that DeGroot is not a third party beneficiary of its bid contract to Beltman, therefore DeGroot cannot state a claim for a violation of the Act.

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[51] R. Vol. 1, pp.73-74; 129
[52] *Id.*, at pp. 198-199

However, DeGroot also argues that, even if it is not a third party beneficiary, it is still permissible to state a claim for violation of the Act because Standley attended trade shows and held itself out as having particular expertise and knowledge of Houle equipment.[53]

DeGroot cites no authority for its proposition that, absent a contract, a prospective buyer's attendance at a trade show and speaking to a vendor about equipment gives rise to an action under the Act. As argued by Standley, the problem with this assertion lies in the lack of proof as to what exactly was discussed between DeGroot and Standley at the trade show. Here, DeGroot failed to provide more than a mere scintilla of evidence in support of his opposition to Standley's summary judgment. Therefore, the granting of summary judgment to Standley on DeGroot's claim for violation of the Idaho Consumer Protection Act should be upheld.

6. DeGroot has no contract upon which a claim of rescission against Standley can be made.

The remedy of rescission under the U.C.C. is only available to a party to a contract. Here again, DeGroot's admission of no contract with Standley precludes recovery on this claim. Even the statutory definitions of "buyer" and "seller" under I.C. §28-2-201(1) contemplate a contractual relationship.[54] DeGroot then resorts to the assertion that it purchased the manure handling equipment from Standley, an authorized dealer of Houle equipment.[55] This argument is analogous to DeGroot's third party beneficiary theory, as it is offered as a means to avoid the basic requirement that a contract exist between the parties before a proper claim is stated. As Standley argued before the district court, there is simply no evidence in the record establishing

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[53] *Id.*, at p. 199
[54] *Id.*, at p. 123; *citing*, I.C. §28-2-201(1)
[55] *Id.*, at p. 191

that DeGroot made direct purchases of Houle equipment from Standley, *i.e.*, no purchase invoice and no proof of direct payment.[56]

Further missing from DeGroot's argument is the fact that the claim for rescission is subject to the U.C.C.'s statute of frauds which provides:

> 28-2-201. Formal requirements – Statute of Frauds. – (1) 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. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

I.C. §28-2-201(1), *emphasis added.*

As argued by Standley before the district court, DeGroot can't be a buyer in order to assert a right of rescission because there is no direct contract between them and in pursuing that line of reasoning, DeGroot contradicts its position taken on all other issues on appeal, i.e., that it is a third party beneficiary of the Standley bid contract to Beltman.

For these reasons, the granting of summary judgment to Standley on DeGroot's claim for rescission of contract should be upheld.

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[56] *Id.*, at p. 360

B. THE ASSIGNMENT FROM BELTMAN TO DEGROOT DOES NOT PROVIDE DEGROOT WITH THE SAME DAMAGES DEGROOT INITIALLY ALLEGED DIRECTLY AGAINST STANDLEY.

1. Standard of Review.

As Standley was granted complete summary judgment on the Beltman claims assigned to DeGroot, the standard of review set forth *supra* applies and need not be restated here.

2. Introduction.

After DeGroot failed to prevail on the claims directly asserted against Standley, DeGroot settled its litigation against Beltman, took an assignment of Beltman's third party claims against Standley, and substituted into the litigation as a Third Party Plaintiff.[57] It is important to note that the third party claims Beltman asserted against Standley and assigned to DeGroot are analogous to the original claims DeGroot attempted to directly assert against Standley. It is further important to note that in reaching settlement with DeGroot, Beltman (1) did not have to pay any monetary amount, and (2) DeGroot gave Beltman a Satisfaction of Judgment which was filed with the district court.[58] In terms of asserting damages, Beltman's damages cannot be the same as DeGroot's because Beltman operates a construction company and is not in the business of owning or operating a dairy; therefore, any special damages Beltman alleges to have incurred and passed to DeGroot by assignment, are not the same special damages DeGroot allegedly incurred.[59] Lastly, in regard to indemnity, Beltman never stated such a claim against Stanley in its Third Party Complaint or First Amended Third Party Complaint.

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[57] R. Vol. 4, pp. 612-613; footnote #1, Order on Summary Judgment

[58] R. Vol. 5, p. 796; R. Vol. 3, pp. 525-526

[59] Regarding implied warranties, Beltman has not made a claim for the implied warranty of workmanlike performance against Standley for its work installing the manure handling equipment. Idaho has recognized this implied warranty. *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 36, 539 P.2d 584,

3. Summary judgment was properly granted to Standley on DeGroot's third party claim for breach of express warranty.

The same statutory framework for creation of an express warranty, namely, I.C. §28-2-313 discussed *supra* applies, the only distinction being that DeGroot is no longer attempting to assert a claim for breach of express warranty directly against Standley, but through assignment, steps into Beltman's shoes and asserts Beltman's claim, if any, for breach of express warranty against Standley. Standley argued before the district court that the purpose of the third party action was to allow the defendant (Beltman) in the first-party action to attempt to transfer its alleged liability to the plaintiff (DeGroot) on to the third-party defendant (Standley). The impact of the filing of a Satisfaction of Judgment arising from the settlement of the DeGroot claims against Beltman is dispositive because the Satisfaction of Judgment acts to satisfy any rights assigned by Beltman to DeGroot.[60] A contract made prior to judgment and then ruled on is reduced to the judgment, i.e., "when a contract has become merged in a valid judgment, all possibility of its revival is irretrievably lost." *Woods v. Locke et al.*, 49 Idaho 486, 491-92, 289 P.610, 611 (1930). The filing of the Satisfaction of Judgment demonstrates that there are no damages in the third party case assigned from Beltman to DeGroot.

Assuming *arguendo*, that the assignment from Beltman to DeGroot and subsequent Satisfaction of Judgment fail to establish that there are no damages in the third party case for DeGroot to pursue, the facts and law discussed herein regarding express warranty still fail to accommodate the third party action. DeGroot, through assignment from Beltman, must demonstrate that Standley made affirmations of fact or promise to Beltman that became a basis

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588 (1975). As Beltman did not state this claim, DeGroot did not acquire a claim for breach of the implied warranty of workmanlike performance through the assignment of Beltman's claims.

[60] R. Vol. 3, p. 510

of the bargain between Standley and Beltman. A seller's commendation of the goods or statements as to value of the goods, as well as statements of puffery, are not express warranties. *Jensen v. Siegel Mobile Homes Group*, 105 Idaho 189, 668 P.2d 65 (1983); I.C. §28-2-313(2).

DeGroot, standing in Beltman's shoes, can only reference two items in support of the contention that Standley made express warranties about the manure handling equipment and installation. First are statements attributed to a Standley employee made to Earnest DeGroot concerning maintenance of the system, but these statements occurred after the bid contract had been accepted and after the equipment had been installed at the dairy.[61] Second are statements attributed to Kurt Standley made to Charles DeGroot at a trade show in Tulare, California in 1999.[62] These statements did not become a basis of the bargain because neither were made by Standley to Beltman, were not made at or around the time of contracting, and were made after completion of installation of the equipment. Even if DeGroot had established that the statements were in fact made, there is no evidence that the statements were more than mere puffery.

A buyer carries the burden of proof to establish the existence of facts that give rise to an express warranty; a buyer also must carry the burden of proof that there was a breach of an express warranty.[63] Beltman lacks facts to establish that Standley made express warranties about the manure handling equipment or the installation of the equipment. Through assignment, DeGroot received nothing better factually than what existed when DeGroot directly asserted a breach of express warranties against Standley. Therefore, the granting of summary judgment to

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[61] R. Vol. 5, p. 798
[62] *Id.*, at p. 799; *see also*, R. Vol. 2, p. 213
[63] I.C. §28-2-313; *see also* 3 Anderson U.C.C. §2-313:222, §2-313:265 (3rd Ed.)

Standley on Beltman's third party claim for breach of express warranty, assigned to DeGroot, should be upheld.

4. Summary judgment was properly granted to Standley on DeGroot's third party claim for breach of implied warranties.

It is problematic for DeGroot that the district court's ruling on summary judgment on the third party claims was premised on the finding that DeGroot's causes of action (received through assignment from Beltman) were never liquidated. Damages were never liquidated because there was never a finding of fault against Beltman on DeGroot's claims and causes of action. Nor was there any determination of apportionment of fault between Beltman and Standley on Beltman's claims and causes of action. The causes of action were never liquidated because there was never a finding apportioning fault between Beltman and Standley.[64] DeGroot steps in to Beltman's shoes through the assignment obtained from Beltman; however, if liquidated damages provide the soles for those shoes, DeGroot's bare feet are touching the ground.

DeGroot argues that Beltman relied upon Standley's expertise for installation of the manure handling system and that this reliance precludes summary judgment for Standley on the implied warranty of fitness for a particular purpose.[65] DeGroot does not devote any further authority or argument to the implied warranty of merchantability in the context of Beltman's assignment of that cause of action and DeGroot has therefore waived the implied warranty of merchantability. *State v. Zichko*, 129 Idaho 259, 923 P.2d 966 (1996). DeGroot also overlooks the fact that Charles DeGroot told Beltman to use Standley as the sub-contractor for the manure handling equipment, thus, Beltman did as instructed and did not unilaterally select Standley for

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[64] October 21, 2011 hearing, pp. 97-99; Appellant's Brief, p. 27
[65] Appellant's Brief, pp. 30-31

the job based upon Standley's experience or expertise. Beltman, as a buyer under the U.C.C., did not rely upon Standley, rather DeGroot told Beltman to use Standley. *Duffin v. Idaho Crop Improvement Association*, 126 Idaho 1002, 1011, 895 P.2d 1195 (1995) (no implied warranty of fitness for a particular purpose where there was no evidence that the buyer relied on the seller's judgment to select appropriate goods for a particular purpose).

DeGroot looks to the assigned claims from Beltman in an attempt to boot strap itself into an exception to the vertical privity rule when seeking economic loss on a breach of implied warranty. In *Caterpillar, Inc. v. Usinor Industeel*, 393 F.Supp.2d 659, (N.D. Ill. 2005), a similar argument was made by a buyer and addressed by the federal district court.[66] Caterpillar used steel manufactured by Usinor for heavy duty dump truck bodies, the steel proved to be defective for the specified use, and Caterpillar initiated litigation which, in part, alleged breaches of express and implied warranties regarding the steel.[67] Caterpillar lacked vertical contractual privity with Usinor.[68] Caterpillar argued that an exception to the contractual privity rule existed because it gave Usinor specifications for its truck bodies and because Usinor was aware of Caterpillar's uses and requirements for the steel.[69]

In addressing Caterpillar's arguments for exception to the rule of contractual privity the federal district court questioned whether such an exception even continued to exist under Illinois law and when addressing the merits of Caterpillar's argument noted that its Complaint failed to

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[66] The Illinois commercial code statute for implied warranties, 810 ILCS 5/2-315, (formerly cited as IL ST CH 26 ¶2-315) reads identically to I.C. §28-2-315.
[67] *Id.*, at p. 663
[68] *Id.*, at p. 676
[69] *Id.*

state that Usinor custom made the steel specifically for Caterpillar.[70] The court made this distinction because the line of authority relied upon by Caterpillar for exception to contractual privity contains a, "... common thread ... that the buyer told the manufacturer of its needs *before* the product was built."[71] The court noted, "here it was the other way around: Caterpillar told Usinor what it needed *after* Usinor told Caterpillar about the properties of the ... steel in the 1998 and 2000 sales presentations."[72] The court further noted that, "Caterpillar does not allege that after it gave Usinor the specifications, Usinor specifically designed the (steel) that it sold to CMSA and Westech for use in the truck bodies. ... Usinor appears to have provided a mere component to CMSA and Westech: it was CMSA and Westech who designed a finished product for Caterpillar, not Usinor."[73]

Applying the Caterpillar facts to Beltman's claims assigned to DeGroot, Beltman did not allege that Houle custom made the manure handling equipment for the DeGroot dairy project or even that Standley informed Houle of special custom requirements for the equipment to be installed at the DeGroot dairy. Nor does Beltman allege that it gave Standley specifications and that Standley specifically designed the manure handling system. Charles DeGroot testified that Beltman did not even provide the plans for the dairy because DeGroot had earlier obtained the plans from Vance Construction, the design-build contractor who did not get the job.[74] Standley, analogous to Usinor in the *Caterpillar* case, provided a mere component to Beltman in the form

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[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] R. Vol. 1, p. 101; R. Vol. 2, p. 209

of the equipment manufactured by Houle and the installation of that equipment at the DeGroot dairy.

Beltman's claim for breach of implied warranty, assigned to DeGroot, fails because (1) Beltman's damages were never liquidated, thus through the assignment DeGroot did not receive anything upon which to recover damages against Standley, and (2) Beltman has not come forward with any evidence more than a mere scintilla upon which to support its claim that it relied upon Standley's experience and expertise for the purchase and installation of the manure handling equipment at the DeGroot dairy. Therefore, the granting of summary judgment to Standley on Beltman's third party claim for breach of the implied covenant of fitness for a particular purpose, assigned to DeGroot, should be upheld.

5. Summary judgment was properly granted to Standley on DeGroot's third party claim for rescission of contract.

DeGroot's attempt to bring a direct claim against Standley for rescission failed due to lack of contractual privity. DeGroot then took an assignment from Beltman on Beltman's third party claim stated against Standley for rescission. Although DeGroot argues the law of rescission when addressing DeGroot's failed attempt to make a direct claim against Standley, in the assignment of the third party claim, DeGroot's argument focuses upon laches and does not attempt to apply the fact to the law regarding rescission.

Pursuant to I.C. §28-2-603 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.[75] Acceptance can only be revoked within a reasonable time after the buyer discovers or should have discovered the ground for the revocation.[76] 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.[77]

Through Standley's bid contract to Beltman, the parties contracted for the purchase/sale and installation of the manure handling equipment at the DeGroot dairy therefore meeting the definitional requirements under the U.C.C. for "buyer" and "seller." In the context of Beltman's third party claim for rescission against Standley, the district court held that the claim of rescission was not brought in a timely manner. The claim of rescission that is relevant is not DeGroot's notice to Standley in June, 2001, as the letter conveying that notice was for DeGroot's direct claim for rescission against Standley.[78] The basis for the district court's holding focuses upon notice, if any, given by Beltman to Standley for rescission of Standley's bid contract. DeGroot argues that "Beltman asserted its claim for rescission against Standley," but fails to cite to anything in the record substantiating this proposition.[79] It is dispositive that Beltman's Third Party Complaint was filed nearly five years after completion of the DeGroot dairy and Beltman made no attempt, in writing or otherwise, to notify Standley of a rescission of Standley's bid contract prior to filing its Third Party Complaint.

Lacking is any evidence of Beltman taking affirmative action to avoid acceptance, and by notifying the seller of the rejection within a reasonable time, as required by I.C. §28-2-618. This

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[75] I.C. §28-2-603(1)(a); *Beal v. Griffin*, 123 Idaho 445, 449, 849 P.2d 118 (Ct. App. 1993).
[76] I.C. §28-2-608(2)
[77] I.C. §28-2-608
[78] R. Vol. 2, pp. 343-349
[79] Appellant's Brief, p. 31

is the basis for the district court's holding that the claim for rescission was not brought within a reasonable time.[80] Contrary to Appellant's assertions, the laches argument initially advanced by Standley is not the same argument used later when Standley again sought summary judgment on Beltman's rescission claim assigned to DeGroot. Therefore, the granting of summary judgment to Standley on Beltman's third party claim for rescission of contract, assigned to DeGroot, should be upheld.

6. Summary judgment was properly granted to Standley on DeGroot's third party claim for breach of the implied covenant of good faith and fair dealing.

Beltman's third party action against Standley included a claim for breach of the implied covenant of good faith and fair dealing. The claim was assigned by Beltman to DeGroot, but the analysis requires application of facts to law concerning the dealings between Beltman and Standley in order to determine whether DeGroot obtained any viable claim through assignment. As Standley argued before the district court, a violation of the covenant occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract.[81] *Idaho First Nat'l. Bank v. Bliss Valley Food, Inc.*, 121 Idaho 266, 288, 824 P.2d 841 (1991). Beltman has presented no evidence on Standley's conduct which allegedly violated, nullified, or significantly impaired any benefit Beltman was to receive as a result of Standley's bid contract. *The undisputed facts show that Beltman was paid in full on its contract with DeGroot and that no benefit of the Beltman/Standley contract was nullified or significantly impaired.* In fact, Beltman was not required to return any money to DeGroot and DeGroot never requested that Beltman return any

[80] Appellant's Brief, p. 31; September 7, 2011 Motion for Summary Judgment, pp. 70-71
[81] R. Vol. 5, p. 779

monetary amount.[82] Nor did DeGroot retain any money from Beltman as a result of Standley's work installing the manure handling equipment.[83]

The stipulated judgment Beltman entered into with DeGroot resolving the litigation DeGroot brought against Beltman also fails to yield a basis upon which Beltman can claim that its contract with Standley was violated, nullified or significantly impaired due to the lack of any monetary amount being paid by Beltman to DeGroot. Beltman has testified that it is not out any money as a result of Standley's conduct, or as a result of the functioning of the manure handling equipment.[84] Beltman has failed to rebut Standley's motion for summary judgment due to the lack of evidence of violation, nullification or significant impairment of Beltman's expectations under the Standley bid contract. Further, on appeal, DeGroot has waived this issue by failing to provide authority or argument specifically supporting the validity of Beltman's third party claim for breach of the covenant of good faith and fair dealing which it took by way of assignment. *State v. Zichko*, 129 Idaho 259, 923 P.2d 966 (1996).

Therefore, the granting of summary judgment to Standley on Beltman's third party claim for breach of the covenant of good faith and fair dealing, assigned to DeGroot, should be upheld.

7. Summary judgment was properly granted to Standley on DeGroot's third party claim for indemnification.

On September 7, 2011, the district court heard oral argument on Standley's motion for partial summary judgment and motion in limine.[85] Standley's partial summary judgment addressed the DeGroot third party claims obtained from Beltman through assignment for breach

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[82] *Id.*, at p.792
[83] *Id.*, at p.795
[84] *Id.*, at p. 796
[85] September 7, 2011 hearing, pp. 1-80

of express warranty, breach of implied warranties of merchantability and fitness for a particular purpose, breach of the covenant of good faith and fair dealing, and a claim for rescission.[86] Beltman never stated a claim for indemnity against Standley. Standley's motion *in limine* was filed as a formality to confirm the district court's prior rulings that DeGroot could not maintain direct causes of action against Standley, thereby seeking to prohibit the introduction of any evidence irrelevant to the then remaining claims DeGroot obtained from Beltman through assignment.[87] During oral argument on the motion *in limine*, the issue arose as to whether Beltman's claims against Standley constituted a claim for indemnity arising from Beltman's relationship with DeGroot and the parties requested additional briefing on the indemnity issue.[88]

The remedy of indemnity can arise expressly by contract, be implied from contract, or arise through the common law. Here, Standley's bid contract to Beltman does not contain an express written provision for contractual indemnity. Nor can contractual indemnity be implied from Standley's bid contract to Beltman. If a claim for indemnity was possessed by Beltman, it must arise from the common law as an equitable remedy.

Indemnity between tortfeasors has been defined as:

> (1) **If two persons are liable in tort to a third for the same harm** and one of them discharges the liability of both, he is entitled to indemnity from the other for **if the other would be unjustly enriched at his expense** by the discharge of the liability ....

Restatement (Second) Torts §886B, Indemnity Between Tortfeasors, 1979, *emphasis added.*

Restitution is the basis for equitable indemnity. *Id.*, at Comment C; *see also*, *Chenery v. Agri-Lines Corp.*, 115 Idaho 281, 766 P.2d 751 (1988). The distinction between contribution

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[86] R. Vol. 5, p. 770
[87] *Id.*, at pp. 862-965
[88] *Id.*, at p. 891

and indemnity has also been clarified by the Idaho Supreme Court's characterization to think of indemnity as a claim for 100% reimbursement, while contribution is for partial reimbursement. *Chenery*, at p. 284, 754, *citing*, *Stephenson v. McClure*, 606 S.W.2d 208, 210-11 (Mo. App. 1980).[89] In order for equitable indemnity to apply, DeGroot must be able to show that both Beltman and Standley are liable in tort to DeGroot for the same harm. DeGroot can't make this threshold showing, as the law of the case has established that there are no direct (contract based) claims against Standley, nor has DeGroot stated a claim for negligence directly against Standley. In addition, DeGroot can't meet the showing of unjust enrichment. Beltman's discharge of the liability alleged by DeGroot against it did not unjustly enrich Standley, as DeGroot could not maintain any direct claims or causes of action against Standley for the reasons set forth *supra*.[90]

Even though DeGroot can't make the threshold showing, further argument and authority is provided on equitable indemnity. The prima facie elements are: (1) an indemnity relationship, (2) actual liability of an indemnitee to the third party, and (3) a reasonable settlement amount. *Chenery*, at 284, 754; *citing*, *Williams v. Johnson*, 92 Idaho 292, 442 P.2d 178 (1968). "An indemnity relationship between tortfeasors exists when the parties share a common liability for the same harm." *Mitchell v. Valerio*, 124 Idaho 283, 858 P.2d 822 (Ct. App. 1993); *citing*, Restatement (Second) Torts §886B, (1979). DeGroot must point to a common liability for the same harm that Beltman shared with Standley. The record is clear, Beltman does not assert any damages different from DeGroot's damages. The damages Beltman seeks derive directly from DeGroot's contractual damages against Beltman. Beltman does not have any damages in excess

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[89] Indemnity is also distinguished from subrogation, *see*, R. Vol 5, p. 895, *May Trucking v. International Harvester Co.*, 97 Idaho 319, 321, 543 P.2d 1159,1161 (1975).

[90] *See also* footnote #3, R. Vol. 5, p. 896

of DeGroot's and DeGroot's ability to make a direct claim against Standley fails due to the lack of privity of contract. Thus, the assignment to DeGroot of Beltman's claims against Standley fails to convey a common liability between Beltman and Standley arising from the dairy project.

The second element of actual liability of the indemnitee (Beltman) to the third party (DeGroot) does not exist, as Beltman never paid, nor will it ever pay, any monetary amount to DeGroot.[91] Beltman will never have to pay DeGroot, due to the satisfaction of judgment it received from DeGroot. Issuance of a satisfaction of judgment, "... ends the case and dismisses the parties from the jurisdiction of the court." *Dahlstrom v. Featherstone*, 18 Idaho 179, 110 P. 243 (1910).

The third element of a "reasonable settlement amount" is also missing, preventing DeGroot from obtaining equitable indemnity through assignment of Beltman's claims against Standley. The record shows DeGroot's position to be:

> Here, Beltman is not asserting it is entitled to damages in excess of DeGroot's damages and Standley cannot seriously argue otherwise. The damages Beltman seeks, including damages relating to repair costs, system improvement costs and future repair costs, derive directly from DeGroot's contractual claims against Beltman.

R. Vol. 5, p. 839; Plaintiffs' Objection to Defendant Standley Trenching, Inc.'s Motion in Limine, p.3.

As DeGroot admits that Beltman has no independent damage claims against Standley, the only reasonable settlement amount of Beltman's claims against Standley is $0. As Beltman did not pay, nor will ever pay any amount to DeGroot, the stipulated amount between the parties is

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[91] *Id.* at p. 897, for further references in the record supporting why Beltman has no actual liability as indemnitee to DeGroot as a third party.

fictitious. Beltman therefore was not acting in good faith making a settlement offer under a reasonable belief that it was necessary to its protection. This is another reason why equitable indemnity is unavailable to Beltman and why DeGroot did not receive a cognizable claim through the assignment of Beltman's claims against Standley.

Lastly, DeGroot looks to the third party practice in the litigation below as a means to justify the end result that Beltman has no damages in excess of DeGroot's damages, or that Beltman's risk of paying damages did not arise until DeGroot sued it.[92] I.R.C.P. 14(a) provides:

> 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.**

I.R.C.P. 14(a), *emphasis added.*

DeGroot further states that, "... 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.[93] DeGroot sued Beltman and Beltman brought a third party action against Standley. The reference to "the third party defendant's liability" can only mean Standley. Standley's liability must be derivative or secondary to Beltman's liability in the main action of *DeGroot v. Beltman.* However, Beltman's liability was never adjudicated to finality, nor did Beltman pursue its claims against Standley to finality. DeGroot seems to argue that I.R.C.P. 14(a) allows it to disregard that Beltman has no damages in excess of that claimed by DeGroot and the third party pleadings in effect become a conduit for another direct assertion by DeGroot of its damages claims against

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[92] Appellant's Brief, p. 34
[93] *Id.*

Standley. The definition of assignment has been the subject of review by the Idaho Supreme Court:

> "Assignment" is defined as "the transfer of rights or property." Black's Law Dictionary 115 (7th ed. 1999). American Jurisprudence, Second Edition, defines "assignment" as:
>
> ... a transfer of property or some other right from one person (the 'assignor') to another (the 'assignee'), which confers a complete and present right in the subject matter to the assignee. An assignment is a contract between the assignor and the assignee, and is interpreted or construed in accordance to rules of contract construction. Ordinarily, the word 'assignment' is limited in its application to a transfer of intangible rights, including contractual rights, choses in action, and rights in or connected with property, as distinguished from transfer of the property itself. According to the Restatement of Contracts, an assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.

Purco Fleet Services, Inc. v. Idaho State Dept. of Finance, 140 Idaho 121, 125-25, 90 P.3d 346, 351 (2007); *citing*, Black's Law Dictionary and 6 Am.Jur.2d Assignment § 1 (1999).

In order to determine the intent of the assignment a court looks to the contract between the assignor and assignee. *Id.* at pp. 126, 351 Beltman is designated as the assignor and DeGroot the assignee.[94] "An assignment of the chose in action transfers to the assignee and divests the assignor of all control and right to the cause of action, and the assignee becomes the real party in interest. " *Id.*, *citing*, *McCluskey v. Galland*, 95 Idaho 472, 474-75, 511 P.2d 289, 291-92 (1973). Thus, only DeGroot, as assignee, can prosecute Beltman's claims, as assignor, against Standley. I.R.C.P. 14(a) does not change the basic definitions or concept of assignment. The one-way

[94] R. Vol. 5, pp. 883 - 884

direction of the assignment that occurred in the litigation below is further supported by the following:

> To be effective, an assignment must be completed with a delivery, and the delivery must confer a complete and present right on the transferee. The assignor must not retain control over the property assigned, the authority to collect, or the power to revoke.

Id., *citing*, 6 Am.Jur.2d Assignment § 132 (1999).

The fact Beltman doesn't assert any damages in excess of DeGroot's, and that the damages have always been DeGroot's, conveys nothing to DeGroot to enforce against Standley pursuant to the assignment from Beltman. DeGroot, as assignee, can only assert Beltman's claims, as assignor. The assignment does not enable DeGroot to pursue its claims anew despite the lack of privity. For these reasons, the granting of summary judgment to Standley on DeGroot's third party claim for indemnification should be upheld.

8. DeGroot cannot recover incidental or consequential damages through assignment of Beltman's third party claims against Standley.

DeGroot cites to I.C. §28-2-712(2), §28-2-713(1) and §28-2-715 in support of the argument that incidental and consequential damages are recoverable against Standley.[95] However, the "buyer" in reference to these provisions of Idaho's statutory codification of the U.C.C. is Beltman, not DeGroot, as DeGroot has no direct contractual causes of action against Standley due to lack of privity. Thus, through assignment of Beltman's third party claims, DeGroot must establish that Beltman incurred incidental and consequential damages. The special damages originally identified by DeGroot against Standley are not the same damages that Beltman allegedly possessed against Standley. The incidental and consequential damages cited

[95] Appellant's Brief at pp. 36-37

by DeGroot arose from DeGroot's claims originally asserted against Standley, which Beltman never possessed nor asserted against Standley. Therefore, the assignment from Beltman to DeGroot did not breathe new life into DeGroot's attempt to claim these alleged damages against Standley.

C. STANDLEY WAS PROPERLY AWARDED ATTORNEY FEES AND COSTS IN THE LITIGATION BELOW.

DeGroot assigns error to the district court's awarding of attorney fees and costs to Standley, arguing that, if there is no privity of contract between DeGroot and Standley, it is patently unfair to then award Standley its fees and costs under I.C. §12-120(3).[96] However, this question has been addressed and there is authority upon which an award of attorney fees and costs under I.C. 12-120(3) can be made in the absence of a contract when the case involved a commercial transaction. *Blimka v. My Web Wholesaler*, 143 Idaho 723, 728, 152 P.3d 594,599 (2007). The lack of contractual privity does not prevent Standley, the prevailing party in the consolidated litigation below involving a commercial transaction, to be awarded its attorney fees pursuant to I.C. §12-120(3).[97]

D. STANDLEY IS ENTITLED TO ITS ATTORNEY FEES ON APPEAL.

Standley believes that it will prevail on the issues argued above and that it is entitled to its attorney's fees pursuant to I.C. §12-120(3) and I.A.R. 41. If summary judgment is upheld for Standley on (1) DeGroot's affirmative claims, (2) DeGroot's third party beneficiary claim, (3) DeGroot's third party claims against Standley received through assignment from Beltman,

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[96] Appellant's Brief at p. 38
[97] R. Vol. 6, pp. 1106 – 1115

and (4) no basis for indemnity exists, then Standley will have prevailed, which would permit it to recovery its attorney fees on appeal.

V.

CONCLUSION

Based upon the foregoing, Standley respectfully requests this Court uphold the decisions of the district court as argued above.

DATED this 11th day of April, 2013.

Respectfully submitted,

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By _____
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of April, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

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