8-14-2017

Davison v. Debest Plumbing, Inc. Appellant's Reply Brief Dckt. 44625

IN THE SUPREME COURT OF THE STATE OF IDAHO

SCOTT DAVISON, et al.,	)	
	)	
Plaintiff/Appellant	)	SUPREME COURT NO. 44625
	)	
vs.	)	Fourth Dist. Valley Co. Case No. CV-2015-178-C
	)	
DEBEST PLUMBING,	)	
	)	
Defendant/Respondent.	)	
	)	
	)	
	)	

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District
for the County of Valley

Honorable Jason Scott, District Judge, Presiding

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REPLY ARGUMENT

In further reply to the response arguments made to Davisons' Opening Brief In this appeal, and to the Respondent DeBests' characterization of those arguments, Davison Appellants offer the following Reply Argument. The Idaho Appellate Rules allow an appellant to submit by way of reply, "additional argument in rebuttal to the contentions of the respondent." *See*, I.A.R. 35(c); *Weisel v. Beaver Springs Owners Ass'n, Inc.*, 152 Idaho 519, 525, 272 P.3d 491, 497 (2012).

A. The Facts Underlying This Appeal Support The Conclusion That As A Consequence Of Entering Into The Remediation Agreement On July 26, 2013, The Respondent DeBest Necessarily Abandoned The Time-Specific NORA Procedural Remedies Provided In Subsections (2), (3), (4), & (5) Of I.C. § 6-2503

A complete understanding of the factual circumstances that confronted the parties on July 26, 2013, when an agreement was reached to remediate/restore the Davisons' cabin and to resolve their claim, which agreement thereby triggered any remaining applicable statutory

provisions of NORA, is key to this Court's rendering a decision in this appeal. Twice on page 26 of the Respondent's Brief DeBest has declared that: "The undisputed evidence shows that prior to this litigation, DeBest was not aware of its pre-lawsuit notice rights under NORA." and "In this case, the uncontroverted evidence shows that DeBest was not aware of its rights under NORA until after litigation commenced." This same declaration is also made on page 7 of Respondent's Brief. Notwithstanding such declarations by DeBest, the controlling principle of law was summarized by the Idaho Court of Appeals in *Wilson v. State*, 133 Idaho 874, 993 P.2d 1205 (Ct.App.2000) that all persons are presumed to know the law which applies:

> Finally, it is axiomatic that citizens are presumptively charged with knowledge of the law once such laws are passed. *Atkins v. Parker*, 472 U.S. 115, 130, 105 S.Ct. 2520, 2529, 86 L.Ed.2d 81, 93 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283, 45 S.Ct. 491, 494, 69 L.Ed. 953, 957 (1925). Ignorance of the law is not a defense. *Smith v. Zero Defects, Inc.*, 132 Idaho 881, 887, 980 P.2d 545, 551 (1999); *State v. Fox*, 124 Idaho 924, 926, 866 P.2d 181, 183 (1993). "The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny." *Atkins*, 472 U.S. at 131, 105 S.Ct. at 2530, 86 L.Ed.2d at 94. 133 Idaho at 880, 993 P.2d at 1211.

DeBest has persisted throughout its Respondent's Brief with arguments it did not receive required pre-litigation notices from Davisons to which it was entitled under NORA, which it is certainly entitled to argue since that was the controlling law to which both parties may be bound. Nonetheless, it appears DeBest was actually unaware it was entitled to any notices under NORA at the time any notices were statutorily required to be submitted to a construction professional, whuch act was thought to have been accomplished by the Davisons.

Ultimately, what is significant concerning the actual facts underlying this appeal, is that

the performance all of NORA's statutorily-required written notices concerning claims, responses, rights of inspection, offers of cure, settlement, and the potential for a rejection of any of those offers, as to be made within NORA's statutorily-set time frames of 21 days, 14 days, and 30 days – were in this case – all compressed and collapsed into a single day – July 26, 2013. All of those time-specific settlement procedures declared in subsections (2), (3), (4), & (5) of I.C. § 6-2503 of NORA, concerning required pre-litigation notices, offers, and responses, were essentially rendered unnecessary and a nullity by the immediate agreement reached between Davisons, Gould Custom Buliders Inc. (GCBI) and DeBest, whereby GCBI was to remediate/restore the damage that had been caused to the Davisons' cabin by DeBest, and for DeBest to then pay for the cost of that remediation/restoration. As was pointed out at pp. 20-21 of Appellant's Opening Brief, paragraphs 10-13 of DeBest's Proposed Third Party Complaint provided its own succinct summary of the events that occurred at that time (R., pp. 238-239).

From that date forward – July 26, 2013, there was no longer any reason under NORA for Davisons to provide any further forms of "notice" to DeBest, inasmuch as the matter had been resolved by the remediation/restoration agreement. Nor would any purpose be served by further notice in terms of affording DeBest an opportunity to further inspect, propose a plan, further offer to compromise, or to simply reject the Davisons' further assertion that it was responsible for the defect. The matter had been resolved by the July 26, 2013 remediation/restoration agreement. All that remained to be done was for GCBI to undertake the remediation/restoration of the Davisons' cabin, and for DeBest to tender the required payment to GCBI.

This key operative fact – that the parties' remediation/restoration agreement arose in a single day, the very same day that the leak was first discovered – brings into sharp focus several of the questions raised in Davisons' Opening Brief on appeal, especially the very specific question raised *sua sponte* by the district court below, concerning whether an action to enforce a remediation/restoration agreement is even covered by NORA? And the related question, that in the absence of a statutory remedy provided by NORA, whether the district court was correct in then applying *Spencer v. Jameson*, 147 Idaho 497, 211 P.3d 106 (2009) on the basis that equitable remedies are barred when a statute provides a complete legal remedy? If in fact NORA provides no remedy to this controversy, then perhaps the only remedy available to Davisons is an equitable remedy? Both of these questions are more fully and separately addressed in the reply argument on those questions that is presented below.

Ultimately, the district court dismissed Davison's action against DeBest due to the absence of written notice purportedly not submitted to DeBest prior to filing a civil action, as required by I.C. § 6-2503(1). (R., pg. 608).[1] Although in accordance with the actual agreement

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[1] The district court concluded: "It is undisputed that the Davisons never sent a NORA-compliant notice to DeBest." (R., pg. 607). The Davisons have argued on this appeal that the initial email notifying Gould of the leak was forwarded to DeBest. *See*, Appellant's Brief at pg. 14 (R. pp. 113-114, 530, ¶ 8); DeBest denies receiving any written notice. *See*, Respondent's Brief at pp. 7, 21. Yet, as based upon the remediation agreement, it appears equally undisputed that written notice of the remediation claim was provided to DeBest by means of written invoices prior to the commencement of the litigation, as recited by the district court in its summary judgment decision. (R., pg. 604). Notice prior to the commencement of an action is all that NORA requires in order to avoid dismissal. I.C. § 6-2503(1). Disputed issues of fact should not be determined on a motion for summary judgment. *La Bella Vita, LLC v. Shuler*, 158 Idaho 799, 816, 353 P.3d 420, 437 (2015).

that had been reached on July 26, 2013, in which DeBest deferred undertaking any repairs itself, but instead had agreed to pay for the cost of remediation/restoration, the district court's own memorandum decision at pg. 3 (R.,, pg. 604) reflects the actual receipt of a pre-litigation written notice by DeBest in terms similar to those upheld as being a sufficient pre-litigation notice by the Court in *Mendenhall v. Aldous*, 146 Idaho 434, 436, 196 P.3d 352, 354 (2008). That notice in this matter, as recited by the district court, consisted of the following:

> DeBest was not notified of this additional damage until February 2014, when it received an invoice from Gould for the cost of both the July 2013 repair and the later, more extensive repair begun in December 2013. (Neidigh Aff. filed Aug. 8, 2016, ¶ 9.)
>
> The record reflects some effort by the parties, after DeBest received the invoice, to agree on an amount DeBest would pay for the damage to the Davisons' cabin. That effort was not, however, successful. Consequently, on July 21, 2015, the Davisons filed this action, alleging claims for breach of contract, breach of express warranty, breach of implied warranty, and negligence. (Compl. ¶ 8)
>
> (R. pg. 604).

Therefore, DeBest raises a completely specious argument under NORA when it states that a failure of notice as to Davisons' alleged later claims had deprived it of the opportunity to remedy those defects. *See*, Respondent's Brief at pp. 22-23. The record substantiates that the only posture DeBest ever took with respect to the provision of a remedy/restoration was to agree to pay the costs incurred, as undertaken by GCBI, as it had originally agreed on July 26, 2013. DeBest never intended to undertake any direct cure of any defects as otherwise permitted by NORA. As the record reflects it was only when DeBests' insurer, through their adjuster came up

with a damage estimate approximately $100,000 lower (R. pp. 115-116, 120-121, 534 ¶19, 540, 543, 547-550) than the Davisons' actual costs incurred for the labor and materials actually required to complete the remediation and repair of the cabin (R. pp. 115-116, 120-121, 534 ¶19, 540, 543, 547-550), that this dispute then turned to civil litigation.

Twice in Appellant's Opening Brief Davisons raised arguments arising out of the fact that this matter had been settled in a single-day making any further pursuit of notices, inspections, opportunities to cure, and everything else that is provided under NORA **simply futile**. *See*, Appellant's Opening Brief at pp.27-28, 32. The underlying principle that applies in this situation is that the law does not require the performance of useless and futile acts from litigants who are seeking relief from the courts. *Ware v. Idaho State Tax Comm'n*, 98 Idaho 477, 483, 567 P.2d 423, 429 (1977). Once NORA-settlement attempts have failed, then evidence of the existence of "notice," is at a minimum nothing more than a *pro-forma* statutory requirement to be satisfied prior to filing a civil action. That statutory requirement was certainly satisfied by any number of written communications which passed between the parties in this case, including the initial e-mail and then the invoice concerning the sum due on the July 26, 2013 remediation/ restoration agreement. Unfortunately, the parties ended up about $100,000 apart in their respective determinations/analysis as to what the cost of that agreed remediation/restoration cost should actually be, leading to the filing of the action underlying this appeal.

Paragraph 13 of DeBest's own proposed Third Party Complaint summarizes the essence of their remediation agreement:

> 13. After about three hours, Gould no longer needed assistance from the DeBest employee and dismissed him. Before they parted, Gould agreed with the DeBest employee that Gould would complete the water damage remediation, and agreed with DeBest that he would complete the water damage repairs. Gould agreed to send a bill for its work to DeBest.
>
> Proposed Third Party Complaint (R., pg. 239).

DeBest is a plumbing contractor. The persistence of a water leak that remains unabated for 40 days had thoroughly soaked and penetrated sheetrock, insulation, wood trim, floors, furnishings and other materials within Davisons' cabin and made it obvious clean up and restoration would entail more than was, or could have been, seen and accomplished in that first three hours of work. DeBest, itself, lacked the required expertise to actually perform any, and for sure not all, of the required remediation/restoration work required on Davisons' cabin.

When the bills for the cost of the remediation/restoration were actually sent to DeBest in February 2014, DeBest did not protest any aspect of the scope of the work, or that it had exceeded what had been agreed upon, nor did it even raise any objection to the effect it was not bound by the agreement entered into by its employees-agents, Tom Peterson and Laurie Brede on July 26, 2013, but instead DeBest simply turned the "entire claim," as then submitted by the incoming invoice(s), over to its insurer carrier, who then contacted and hired a local claims adjuster, Intermountain Claims of Idaho, for further adjustment. (R. pp. 115, 533-534, ¶¶ 15, 18, 19). This conduct hardly seems consistent with the arguments now raised by DeBest in its Respondent's Brief at pp. 22-23. As to these arguments, DeBest's earlier conduct with respect to what it actually did, in response to the receipt of the work invoices should be construed as

"waiver by conduct." *Knipe Land Co. v. Robertson*, 151 Idaho 449, 458, 259 P.3d 595, 604 (2011) ("Waiver will not be inferred except from a clear and unequivocal act manifesting an intent to waiver, or from conduct amounting to an estoppel." (Emphasis added)).

If DeBest had actually objected to the scope of the remediation/repair work that had been undertaken by GCBI, or objected on the basis that it had not been given fair notice of the scope of that work, or that it had not been afforded an adequate opportunity, to itself, engage in the actual remediation/ repairs required at Davisons' residence, then those objections should have been so-stated at the time the invoices were presented. Those objections were not so-stated at that time. DeBest is presumed to be a knowledgeable and competent plumbing contractor, well of aware of the consequences that will foreseeably arise throughout a residence as the result of a water leak that has occurred in an upstairs bathroom when that leak persists unabated for a period 40 days and soaked the residence throughout!

In this matter, because the settlement by means of the remediation/restoration agreement was reached on the same day that the plumbing water leak itself was discovered on July 26, 2013, DeBest essentially abandoned any further need or right to receive any further or other notice of that defect from Davisons under I.C. § 6-2503(1), along with the concomitant right to thereafter inspect, submit a plan to remedy, or to further offer to compromise and settle the damages, or to actually remedy the defect themselves, all of which are encompassed within subsections (2), (3), (4) & (5) of I.C. § 6-2503. And in a Corresponding manner, any attempt to further perform under those same subsections by Davisons was also rendered futile by the

remediation/restoration agreement that Davisons, DeBest and GCBI entered into on July 26, 2013 to cure the consequences of this plumbing water leak which occurred at Davisons' cabin as a "construction defect" caused defective work performed by DeBest for which it never denied having caused, but affirmatively admitted was their responsibility and liability to repair/restore.

In the face of DeBest's repeated declarations that it was completely unaware of NORA's notice requirements prior to filing the litigation underlying this appeal (Respondent's Brief, pp. 7, 26), DeBest's arguments, as now made that it was deprived of adequate notice and an opportunity to repair, are nothing but a fable/fairytale in the face of its actual actions in immediately entering into the remediation/restoration agreement with Davisons/GCBI on July 26, 2013. To the extent that NORA does require a further *pro forma* written notice prior to the filing of an action, sufficient written notice related to the ultimate failure in the payment required under the remediation/restoration settlement, has been provided by the written invoices submitted to DeBest, such that summary judgment should not have been entered on that basis.

B. An Issue Is Preserved For Review On A Subsequent Appeal, If That Issue Was Raised Below, Or Was Subject To An Adverse Ruling By The Court Below

This case was dismissed on procedural grounds at summary judgment due to a privity bar to Davisons' contract claims, and due to the perceived lack of required pre-litigation notice under NORA as to their remaining negligence claims. (R., pp. 602-614). The district court nonetheless went to some effort to signal its position, that even if this case had continued, that court was of the opinion that NORA ***would not have applied to a claim alleging a breach of the remediation agreement.*** (R., pp. 610-11), an issue which Davisons raised in their Opening Brief in this

appeal. *See*, Appellant's Brief at pp. 21-23.

DeBest has argued in Response that Davisons have impermissibly raised this issue for the first time on appeal that this Court is barred from considering it on that basis, and because Davisons have not cited authority in support of their argument. *See*, Respondent's Brief at pp. 10-14. Davisons began the argument in their Opening Brief on this question with a citation to *Kolar v. Cassia County, Idaho*, 142 Idaho 346, 354, 127 P.3d 962, 970 (2005) for the proposition that in order to preserve an issue for appeal, it either must have been raised in the court below, or been subject to an adverse ruling by the court below. This is a common principle of appellate review recently stated in *Skinner v. U.S. Home Bank Mortgage*, 159 Idaho 642, 650, 365 P.3d 398, 406 (2016); and *Bank of Commerce v. Jefferson Enters., LLC*, 154 Idaho 824, 828, 303 P.3d 183, 187 (2013).

While it may be debatable whether the district court's summary judgement decision constitutes an "adverse ruling," it nonetheless is reviewable in this appeal within the scope of I.A.R. 17(e)(1), this question is also raised within the common rule of practice that district judges are presumed to know the law, *Bradbury v. Idaho Judicial Council*, 149 Idaho 107, 117, 233 P.3d 38, 48 (2009). Therefore, it simply seems to be a matter of logic and reason that Judge Scott was not just engaging in an idle exercise by *sua sponte* raising and addressing this very specific question that goes to the very heart of the parties' then-pending dispute when having issued his summary judgment decision.

Perhaps the district court may be correct in its determination that the NORA statutes do

not have any application to remediation/restoration agreements such as that which was entered into between Davisons, DeBest and GCBI on July 26, 2013!

Recall from the underlying facts that Davisons have actually paid to GCBI the full amount of the cost of the remediation/restoration at issue – $123,345.64 – so as to avoid complications related to the state lease where their cabin is located. (R., pg. 121). *See*, Appellant's Opening Brief at pg. 16. As defined in NORA, Davisons' "action," while based in both contract and negligence, as defined in I.C. § 6-2502(1) has essentially been a lawsuit in ***indemnity*** against DeBest as the construction professional who caused the defect during the remodel of their cabin.

The "action" which may be commenced, as described throughout NORA's statutory provisions is referenced by, "the claim described in the notice of claim." *See e.g.*, I.C. § 6-2503(3)(a) & (b); 6-2503(4)(c) & (d). Section 6-2503(2)(b) references an "Offer to compromise and settle the claim by monetary payment without inspection;" and section 6-2503(4)(b)(ii) references, "A written offer to compromise and settle the claim by monetary payment pursuant to 2(b) of this section; . . . ." Subsection (7) of § 6-2503 then identifies three contingencies in which an action can be commenced if the described settlement procedures fail:

> (7) Nothing in this section shall be construed to prevent a claimant from commencing an action on the construction defect claim described in the notice of claim if the construction professional fails to perform the construction agreed upon, fails to remedy the defect or fails to perform by the timetable agreed upon pursuant to subsection (4)(b) or (5)(b) of this section. (Emphasis added).

So while NORA does contain references to settlement by monetary payment, it is silent

as to any form of enforcement in the circumstances presented by this matter, whereby the parties entered into a remediation/restoration agreement, in which one party agrees to perform the needed work, and the construction professional responsible for the construction defect (DeBest) agrees to pay for the entire cost of the labor and materials. What happens when the cost of the remediation/restoration is placed in subsequent controversy as to the incurred costs at dispute?

Somewhat ironically, both Davison Appellants and Respondent DeBest appear to be in agreement on the fundamental underlying question presented here, which is that NORA should apply to the resolution of the facts of this appeal as arising out of the parties' agreement in which GCBI undertook the remediation/restoration on behalf of DeBest, with Debest agreeing to pay for the costs. In many situations when a construction defect leads to collateral damage requiring repairs unrelated to the field of expertise for which the construction professional causing that defect is neither licensed or competent to remedy, the decision to hire competent professionals or tradesmen id the only logical approach to provide an adequate remedy. Here, the district court has expressed its intention to follow a much narrower interpretation of NORA, which would limit the application of that Act to only those circumstances in which the construction professional ***actually undertakes the repairs required to repair the construction defect***. As a consequence, on any remand it would be reasonable to expect that the district court is likely to reach a determination in this case that NORA simply does not apply to the parties' remediation/restoration agreement relating to Davisons' cabin at all.

If this is in fact the outcome on any remand of this appeal to the district court, then

almost certainly another appeal will inevitably arise on this very same question: Does NORA apply to remediation/repair agreements entered into by the parties under which the construction professional responsible for the construction defect simply agrees to pay someone else to remedy/restore that defect? Therefore, the decision of this issue in this appeal, rather than waiting for a subsequent appeal, would be consistent with principles of judicial economy and reason. *Matter of Estate of Keeven*, 110 Idaho 452, 457, 716 P.2d 1224, 1229 (1986); and I.C. § 1-205.

C. If NORA Expressly Permits A Claimant Homeowner To Commence A Contract Action For Damages Or Indemnity Against The Construction Professional Who Has Caused A Construction Defect, Then The Common Law "Privity Defense" That Would Otherwise Bar That Action Must Be Deemed To Be Statutorily Waived By NORA

In response to Davison's argument that enactment of NORA has waived any privity requirement that might otherwise exist for contract claims asserted after the conditions precedent of that Act have been satisfied, DeBest has argued that "privity" is a required element of a breach of contract claim, and is not an affirmative defense. *See*, Respondent's Brief at pg. 18.[2] In all circumstances, what constitutes a Rule 8(c) affirmative defense is necessarily dependent upon the claim that is being asserted and pursued. Even if NORA did not exist, and the Davisons had commenced a civil action in which they had stated a contract claim against DeBest as the intended third-party beneficiary of the contract/agreement between GCBI and DeBest, it would

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[2] DeBest raised the absence of privity of contract as its fourth "affirmative defense" in response to the Davison's Complaint in the action underlying this Appeal. *See*, Answer and Demand For Jury Trial – 4 (R., pg. 24).

be surprising if DeBest would not raise the defense of a "lack of privity" as an affirmative defense to that third-party beneficiary claim that would be asserted against DeBest.

The contract claim at issue in this appeal is Davison's right to proceed against DeBest after satisfying the statutorily-required conditions precedent of NORA as to their construction professional with whom they had contracted. The statutorily defined terms of: "Claimant," "Construction Professional," and "Action," are respectively defined in NORA at I.C. § 6-2502 subsections (3), (4), & (1). The conditions "precedent" to commencing this action are outlined in I.C. § 6-2503(1), but the critical language is:

> Prior to commencing an action against a construction professional for a construction defect, the claimant shall serve written notice of claim on the construction professional. . . . Any action commenced by a claimant prior to compliance with the requirements of this section shall be dismissed by the court without prejudice and may not be recommenced until the claimant has complied with the requirements of this section. . . . .

Therefore, Davisons, as the statutory "claimant", in bringing an action against DeBest, as among a statutorily defined "construction professional, for damages caused by a water leak that persisted unabated for a period of 40-days, a construction defect that DeBest admittedly caused and accepted liability, and despite their admitted responsibility, has postured "privity" in this matter as their affirmative defense, claiming DeBest did not have a contractual relationship with Davisons, thereby asserting that defense within the context of the NORA statutory framework.

Rule 8(c) affirmative defenses are broadly defined under Idaho law. In *Fuhriman v. State, Dept. of Transp.*, 143 Idaho 800, 803, 153 P.3d 480, 483 (2007), the Court declared that, "An affirmative defense is '[a] defendant's assertion raising new facts and arguments that, if

true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true.' Blacks Law Dictionary 186 (2d Pocket ed.2001)." Also cited in *Bolognese v. Forte*, 153 Idaho 857, 862, 292 P.3d 248, 253 (2012). Certainly in the context of this matter, privity has been determined by the district court to be a bar to Davisons' contract claims.

As the Idaho Supreme Court has pointed out in *Mendenhall v. Aldous*, 146 Idaho 434, 196 P.3d 352 (2008), the Idaho Building Contractors Association sponsored the enactment of NORA for the purpose of curbing litigation against building contractors by homeowners. "The purpose of the law is to give contractors the opportunity to fix construction defects before a lawsuit is filed." 146 Idaho at 436, 196 P.3d at 354. The essential feature of the Act is the provision of a series of several options by which a "construction professional" can inspect, offer to compromise and settle, remedy the defect, or refuse to remedy the alleged defect. Upon the failure of the construction professional to satisfactorily address these options the "claimant" is then allowed to pursue a civil action against the construction professional to obtain a remedy in damages.

Both I.C. § 6-2503(1), and the definition of "action" provided in I.C. § 6-2502(1) are quite specific as to the identity of the party against whom an action can ultimately brought if NORA's statutorily-mandated settlement process does not resolve the dispute:

> **6-2502. Definitions. –**
>
> (1) "Action" means any civil lawsuit or action in contract or tort for damages or indemnity **brought against a construction professional** to assert a claim . . . caused by a defect . . . .
>
> **6-2503. Notice and opportunity to repair. –**

(1) Prior to commencing an action **against a construction professional for a construction defect**, ... (Emphasis added).

The construction professional who has caused the defect (in this case DeBest), in order to avoid litigation, has a right to trigger the NORA settlement procedures. If those statutory settlement procedures fail to produce a mutually-agreed upon settlement, which had cured the defect through one of the stated means, then the homeowner, as stated in the above-cited statutes, is given a right to bring an action against that construction professional who caused the defect. Inherent in that statutorily-created procedure is the compulsion to force the homeowner to engage in settlement before litigation, and the corresponding right of the homeowner to then proceed to litigation if settlement fails. Except in this instance, the district court held that the construction professional cannot be compelled by the homeowner to be subject to litigation because the ***common law privity defense*** is not waived as an inherent part of the legislature's enactment of NORA.

The Davisons' argument was based upon the above-cited statutory language, and also upon the language intended effects of I.C. § 6-2504(6), which declares:

(6) All applicable affirmative defenses are preserved **for causes of action to which this chapter does not apply**. (Emphasis added).

If NORA's statutorily-created *quid-pro-quo* is to be effective, then inherent in that statutory procedure there must be a waiver of the privity defense to contract claims brought against the enumerated construction professionals. Otherwise, there is no incentive for a construction professional to enter into honest and meaningful settlement negotiations with

harmed homeowners, such as Davisons, when the statutory language that the homeowner claimant is entitled to bring an action against that construction professional will not be given effect in respect to a contract related claim.

The NORA statute declares a claimant-homeowner (Davisons) have the right to proceed against a construction professional (DeBest) who caused the construction defect, to recover damages or indemnity. The district court in this matter said the absence of privity of contract bars Davisons from proceeding on that basis against DeBest. In order to make NORA statutory procedures work equitably, the statute must be construed to have intended inclusion of a waiver of the common law privity, so that the statutory right to bring an action against the construction professional who caused the construction defect can be meaningfully pursued. Therefore, the district court's summary judgment decision should be reversed.

D. The District Court's Own Construction Of NORA Has Undercut Its Reliance Upon The Decision In *Spencer v. Jameson* As Barring Equitable Remedies

In reliance upon *Spencer v. Jameson*, 147 Idaho 497, 211 P.3d 106 (2009) the District Court rejected Davisons' resort to equity involving questions of waiver, estoppel, and promissory estoppel, on the basis that NORA provided adequate legal remedies, and that equity cannot be invoked when a statute provides adequate legal remedies. Davisons argued in their Opening Brief in this appeal (pp. 27-29), that not only did the district court's application of NORA deny Davison's any meaningful remedy, but that the district court's clear indication of its inclination that NORA probably did not apply to the facts of this dispute at all, could end up denying the Davisons any remedy under the statute. The Davisons would be left to conclude that in these

circumstances, NORA was so artfully employed by the construction professional that it had not just afforded a means to avoid civil litigation, but apparently also provided a means by which to create immunity from any civil liability whatsoever.

DeBest in its Respondent's Brief (pp. 22-28), now faults Davisons for not adequately distinguishing the *Spencer* Court's rejection of an equitable remedy in deference to the full and adequate legal remedies provided by the Trust Deed Act in that case, as compared to the non-existent remedies provided to the Davisons by NORA in this case. Briefly, in *Spencer,* the Court was confronted with how to dispose of funds that had been bid excess of the amount due on the underlying notes in a non-judicial foreclosure. I.C. § 45-1507 provided express direction to the Trustee concerning how to apply those excess funds. The Respondents made an alternative argument for the application of those excess funds in satisfaction of liens under several subordination agreements. The Court rejected those arguments, stating that the Trustee was bound by the statutory directive as to apply the excess funds. The statute in that case applied and controlled, as opposed to an alternative appeal to equity in contravention to the express statutory directive.

In contrast, in the matter before this Court in this appeal concerning the NORA remedies, and by reference to the arguments made in both Appellant's Opening Brief and again on this Reply Brief, the district court clearly expressed its inclination to simply reject the NORA directives as applied to the facts of this case, involving a remediation/restoration agreement. In other words, the district court indicated it would be unwilling to provide any statutory remedy

under NORA as applied to the parties' remediation/restoration agreement, which is at issue in this appeal. In addition, even if that hurdle is surmounted, if this Court on appeal interprets NORA for the first time as not waiving any privity requirement as to subcontractors who have not settled homeowner claims, then again, there will be no statutory remedy available for Davisons. So, both of these scenarios are in contrast to the situation that was before the Court in *Spencer*, in which there was a straight-forward and applicable statutory remedy under the Idaho Trust Deed Act, in lieu-of the argued-for alternative equitable remedy.

In summary, because a remediation/restoration agreement was entered into on the day the construction defect was discovered (July 26, 2013), all attempts at any further notice and cure after that date are rationally rendered impossible, unnecessary or futile to pursue. The settlement was accomplished. Nonetheless, though Davisons adhered to their part of the agreement, eliminating the huge costs of alternate housing accommodations, and allowed major restoration to be commenced that fall, failure to undertake further conditions precedent (notice), or otherwise, as it now stands, Davisons are rendered without a NORA remedy. If further notice to DeBest (beyond the forwarded e-mail from GCBI to DeBest) is deemed to be a "*pro forma*" requirement, would not the presentation of the invoices to DeBest for the labor and materials expended in the remediation/repair process be sufficient compliance? Those invoices were submitted prior to the filing of the civil action, and no objection raised by DeBest, as that was their arrangement. If the requirement of further notice is to be deemed unnecessary and futile by this court, then as it stands from the lower court, common law privity bars Davisons from

recovery/indemnity for their damages relating to any contract-based action that Davisons otherwise have attempted, notwithstanding NORA's express language a claimant may commence an action against a construction professional who caused the defect. Finally, because NORA provisions do not expressly incorporate "remediation/restoration agreements," the possibility remains NORA may be held to be inapplicable to the enforcement of that very agreement. Unlike the straight-forward list of priorities for the application of excess fund payments under the Trust Deed Act in *Spencer*, in this matter Davisons may not have any meaningful remedy whatsoever under NORA. In these circumstances they should not be held to be without a meaningful remedy, but the actual facts should be honestly addressed, and if necessary equitable remedies in the nature of waiver by conduct amounting to estoppel should be employed. *Knipe Land Co. v. Robertson*, 151 Idaho 449, 458, 259 P.3d 595, 604 (2011).

E. <u>The District Court Erred In Awarding Attorney's Fees To DeBest Below</u>

In response to Davisons' argument the district court erred in awarding attorney's fees below under I.C. § 12-121, DeBest has misapprehended the argument that has been made by the Davisons in opposition to the award of those fees. The district court awarded DeBest § 12-121 on the Davisons' contract claims. In arguing for reversal of that award in their Opening Brief, Davisons had pointed out that the district court had really entered into a kind of a straddle in its logic, both reasoning that the remediation/repair agreement which was entered into on July 26, 2013 was not subject to NORA, but that even if that agreement was subject to NORA, the Davisons simply had no right to commence any civil action against DeBest, as a construction

professional, due to the bar implicated by the lack of privity.

It remains important to remember this entire case ended at the summary judgment stage below, ultimately on the alleged failure of the Davisons to comply with the NORA "notice requirements. The case did not continue long enough for the underlying theories to reach greater development, but as to the remediation/repair agreement between DeBest and GCBI, it was made for the direct benefit of the Davisons. It was their summer cabin that was damaged as the result of the water leak caused by DeBest. The remediation/repair undertaken by GBCI was for the purpose of repairing that damage, and was to be paid for by DeBest. Certainly, that the Davisons would have had standing, as third party beneficiaries, to enforce that remediation/repair agreement could hardly be disputed. *Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley & Toole, P.S.*, 159 Idaho 679, 691, 365 P.3d 1033, 1045 (2016). 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; *Sirius LC v. Erickson*, 144 Idaho 38, 42, 156 P.3d 539, 543 (2007). So even if NORA did not apply, as advanced by the district court, the Davisons' standing to proceed would not have been impaired as to their alleged contract claims, certainly not to the extent of being deemed completely frivolous.

NORA itself contemplates a *quid pro quo* type of statutory mandated settlement process. Both I.C. § 6-2503(1) and the definition of "action" in I.C. § 6-2502(1) are quite specific as to the identity of the party against whom an action can ultimately brought if that statutorily-mandated settlement process does not resolve the dispute:

6-2502. Definitions. –

(1) "Action" means any civil lawsuit or action in contract or tort for damages or indemnity **brought against a construction professional** to assert a claim . . . caused by a defect . . . . (Emphasis added)

6-2503. Notice and opportunity to repair. –

(1) Prior to commencing an action **against a construction professional for a construction defect**, ... (Emphasis added).

The construction professional who has caused the defect (DeBest), in order to avoid litigation, has a right to trigger the NORA settlement procedures. If those statutory settlement procedures fail to produce a mutually-agreed settlement which cures the defect through one of the stated means, then the homeowner claimant, as stated in the above-cited statutes, is given a right to bring an action against that construction professional who caused the defect. Inherent in that statutorily-created procedure is the compulsion to force the homeowner to engage in settlement before litigation, and the corresponding right of the homeowner to then proceed to litigation if settlement fails. Except in this instance, the district court held that the construction professional can't be compelled by the homeowner to be subject to litigation because of the lack of privity defense.

The Davisons' argument was merely that if this statutorily-created *quid-pro-quo* was to be effective, then inherent in that statutory procedure was a waiver of the privity defense to contract claims brought against the enumerated contract professionals. By way of analogy, the Davisons cited in their Opening Brief the fact that until the Court's decision in *Brian and Christie, Inc. v. Leishman Elec., Inc.*, 150 Idaho 22, 244 P.3d 166 (2010) there had been a

general misapplication of the economic loss rule in negligence cases, even by highly regarded district judges. Hence Davisons' argument in this appeal, on a question of statutory interpretation concerning the application of NORA, which has never before been decided. The Davisons still invoke those long-standing standards as stated in *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 684 P.2d 307 (Ct.App.1984) and *Herbst v. Bothof Dairies, Inc.*, 110 Idaho 971, 975, 719 P.2d 1231, 1235 (Ct.App.1986) the standard for determining whether such an award should be made is not whether the position urged by the nonprevailing party is ultimately found to be wrong, but whether it is so plainly fallacious as to be frivolous. Davisons' argument, as based upon the right set out on the face of NORA to bring a claim directly against the construction professional who caused the defect, even if that claim is based upon contract, was, and is not, so fallacious as to be deemed frivolous.

F. DeBest's Arguments In Opposing The Davison's Request For An Award Of Attorney's Fees On Appeal Are Without Merit

The only argument made by DeBest in opposition to Davisons' request for an award of attorney's fees under I.C. § 6-2504(1)(d), should the Davisons prevail on this appeal, is that Davisons' request should be denied on the basis that they "failed to meet the notice requirements of Idaho Code § 6-2503 prior to commencing their lawsuit for the reasons explained above." *See*, Respondent's Brief at pg. 33. As already argued above, DeBest has realistically abandoned any further notice requirements when it entered into the remediation/repair agreement on July 26, 2013, essentially rendering any further attempt at performance of any further procedural prerequisites under NORA to be entirely futile. As to the remediation/repair agreement itself,

inasmuch as actual written notice of the performance of the agreed remediation/restoration was a condition precedent of the commencement of any civil action, then certainly notice consistent with that deemed sufficient in *Mendenhall v. Aldous*, 146 Idaho 434, 436, 196 P.3d 352, 354 (2008) occurred when DeBest, at the very least, received direct written invoices representing the performance of that remediation/repair arrangement prior the commencement of the underlying civil action. Certainly, if Davisons prevail in this appeal, they should be entitled to an award of attorney's fees as provided by I.C. § 6-2504(1)(d).

DeBest's arguments in opposition to Davisons' request for an award of attorneys' fees under I.C. § 12-120(3) misapprehends the basis upon which that statute has been invoked by the Davisons on this appeal. That statute has been interpreted to have three separate "prongs" upon which recovery may be obtained. There are six separately listed instruments or claims constituting the first prong ([1] open account, [2] account stated, [3] note, [4] bill, [5] negotiable instrument, and [5] guaranty). The second is the contract prong ("contract relating to the purchase or sale of goods, wares, merchandise, or services"). *Noak v. Idaho Dept. of Correction*, 152 Idaho 305, 271 P.3d 703 (2012) ("Noak thus sought to recover against IDOC based on a contract relating to services. . . . Noak misunderstands the essence of his claim, which he characterizes as something other than a contract claim, but that does not change the fact that Noak alleged a cause of action based upon a contract (even though he was not a party to that contract). Accordingly, IDOC, as the prevailing party, may recover fees."). The third is the commercial transaction prong ("and in any commercial transaction unless otherwise provided by

law"). *Garner v. Povey*, 151 Idaho 462, 470, 259 P.3d 608, 616 (2011); and *Eriksen v. Blue Cross of Idaho Health Services, Inc.*, 116 Idaho 693, 778 P.2d 815 (Ct.App.1989) ("'services' and the other enumerated elements of I.C. § 12-120(3) are not limited by the words 'commercial transaction.'").

The Davisons requested an award based upon the second prong of I.C. § 12-130(3) – a contract for services. DeBest has only argued against an award being made under I.C. § 12-120(3) on the basis of the third prong, the commercial transactions prong, and then by the invocation of the household purposes exception to the commercial transactions prong. *See*, Respondent's Brief at pp. 35-36. Under NORA, an "Action" is defined at I.C. § 6-2502(1) as a lawsuit in which the claimant proceeds "in contract or tort for damages **or indemnity** brought against a construction professional . . . ." (Emphasis added). As declared in the Statement of Facts in the Davisons' Opening Brief on this Appeal (Appellant's Opening Brief at pg. 16), Davisons' have paid the full amount of the remediation/repairs ($123,345, 64) in order to avoid potential complications that might otherwise arise if liens were placed against the state leased land upon which their summer home cabin is located. Therefore, this action can be characterized as one in ***indemnity,*** or perhaps alternatively one in which Davisons are intended third party beneficiaries of the remediation/restoration agreement made between GBCI and DeBest. In either scenario, a contract for services exists which Davisons are entitled to enforce, and under which they are entitled to seek an award of attorney's fees if deemed the prevailing party in this appeal. Because DeBest has failed to challenge the "contract for services" prong upon which the

Davisons requested fees under I.C. § 12-120(3), an award should be made to the Davisons under that statute if they are the prevailing party on this appeal.

G. DeBest Is Not Entitled To An Award Of Attorney's Fees On This Appeal

DeBest requested an award of attorney's fees on this appeal pursuant to I.C. § 12-121 and I.R.C.P. 54(e)(2). The procedural rule upon which an award of attorney's fees can be made upon appeal is Idaho Appellate Rule 41. Generally the civil rules have no application on appeals to Idaho's appellate courts. *See e.g.*, *Bradbury v. Idaho Judicial Council*, 149 Idaho 107, 112, 233 P.3d 38, 43 (2009) ("Although the Idaho Rules of Civil Procedure do not apply in appellate proceedings, Rule 40(d), pertaining to disqualification of trial court judges, is instructive." (Emphasis added)). The Court in *Bagley v. Thomason*, 149 Idaho 799, 241 P.3d 972 (2010) addressed this exact question more thoroughly:

> In the argument portion of their brief, Bagleys did not address their request for an award of attorney fees. For example, they did not explain what provision in Idaho Code § 12-120(3) provides for an award of attorney fees in this case. They did not elucidate how Idaho Rule of Civil Procedure 54, which is applicable in the district courts and the magistrate's division of the district courts (Idaho R. Civ. P. 1(a)), grants the right to attorney fees on appeal. They did not explicate how Idaho Code § 12-123, which does not apply on appeal (*Bird v. Bidwell*, 147 Idaho 350, 353, 209 P.3d 647, 650 (2009)), applies to this particular appeal. They did not enlighten this Court as to how Idaho Appellate Rule 41, which does not provide authority to award attorney fees (*Swanson v. Kraft, Inc.*, 116 Idaho 315, 322, 775 P.2d 629, 636 (1989)), authorizes such an award here. Finally, they did not expound upon how this appeal meets the standard for awarding attorney fees under Idaho Code § 12-121, nor did they even state what that standard is.

149 Idaho at 805, 241 P.3d at 978 (emphasis added). *See also*, *Belstler v. Sheler*, 151 Idaho 819, 827 n. 4, 264 P.3d 926, 834 n. 4 (2011) ("Both parties cite to Rule 54(e)(1) as part of their

arguments for attorney fees on appeal, but neither argues how this rule is applicable to the Supreme Court. *See* I.R.C.P. Rule 1(a); *Bagley v. Thomason*, 149 Idaho 799, 805, 241 P.3d 972, 978 (2010).”). Inasmuch as DeBest has expressly based its procedural claim to attorney's fees on Civil Rule 54, rather than upon Appellate Rule 41, that claim to attorney's fees should be denied.

This appeal involves a liability claim that is essentially undisputed. The Respondent DeBest failed to properly install a plumbing fixture in Davison Appellant's summer home, with the result that a water leak ran undiscovered for almost 40 days causing severe and extensive damage to that residence. DeBest accepted responsibility and entered into a remediation/restoration agreement on the day the leak was discovered on July 26, 2013.

The issues raised and presented in this appeal under the Notice and Opportunity to Repair Act (NORA), I.C. §§ 6-2501 through 2504 are of first impression. Generally an award of attorney's fees should not be made under I.C. § 12-121 when the question presented involves a matter of first impression, *Oldcastle Precast, Inc. v. Parktowne Constr., Inc.*, 142 Idaho 376, 379, 128 P.3d 913, 916 (2005), or a novel question is raised that has not been previously considered by the court, *Hoagland v. Ada Cnty.*, 154 Idaho 900, 916, 303 P.3d 587, 603 (2013), or an area of unsettled area of the law is raised, presented and decided by the court on the facts presented, *Stewart v. Stewart*, 143 Idaho 673, 681, 152 P.3d 544, 552 (2007) (“The previously unsettled state of the law on the characterization of professional goodwill makes an award of attorney's fees under § 12-121 inappropriate.”); this result is dictated even by application of that

change in the rule which now permits an apportionment of fees under § 12-121 as to those "elements of the case that were frivolous, unreasonable and without foundation." *James v. City of Boise*, 160 Idaho 466, 488, 376 P.3d 33, 55 (2016). *See generally*, *Wyman v. Eck*, 161 Idaho 723, 727, 390 P.3d 449, 453 (2017) ("Fees will generally not be awarded for arguments that are based on a good faith legal argument.' *Easterling v. Kendall*, 159 Idaho 902, 918, 367 P.3d 1214, 1230 (2016).").

On this appeal DeBest has freely admitted that it was unaware of the NORA requirements until the underlying litigation was initiated, yet in this appeal DeBest has emphatically argued that the action below was properly dismissed for lack of notice and the associated opportunity to cure the defects. This argument is made in the face of the fact that once the remediation/repair agreement was made on July 26, 2013 any further attempt by Davisons to further comply with NORA's notice requirements as associated with that opportunity to cure would have been entirely futile. DeBest had abandoned those opportunities (apparently claiming they did not know they existed) in exchange for making a payment for the remediation/repair to be undertaken by GCBI.

The district court, although declaring it concurred with the parties' arguments NORA applied to this dispute, nonetheless, in a *sua sponte*, fashion, interjected an over-arching question into this case concerning whether NORA on its face has any application to a dispute that arises over the payment of a remediation/repair settlement agreement that has arisen out of a construction defect dispute, the repair of which otherwise to be covered through NORA.

The entire settlement methodology that was to be provided by NORA was to reduce, or eliminate litigation, for the benefit of the enumerated construction professionals. The enacted statutes provided the claimant homeowners the right to commence civil litigation against those same enumerated construction professionals if those statutory settlement procedures failed to produce a mutually agreeable and satisfactory outcome that cured the construction defect. Inherent in that enactment was both the compulsion to first engage in settlement prior to litigation (dismissal of any prematurely filed action), and the right after satisfying those statutory conditions precedent of a homeowner claimant to commence litigation upon a failure of the settlement procedures. In this case the district court ruled that a bar remains to a homeowner claimants' right to commence litigation, even if NORA settlement procedures have otherwise been properly triggered – the lack of privity of contract as a bar to the contract claim.

All that Davisons have argued is that if the enumerated construction professionals (including subcontractors and those with lien rights) have been granted the right to compel settlement in order to avoid litigation (even litigation in which those construction professionals might only be joined as third-parties), then the corresponding right of the homeowner to bring a direct action against those construction professionals should clearly be understood to exist under the statute. Otherwise the NORA settlement procedures as to those contract claims becomes a meaningless exercise – the construction professional knows that homeowner claimant has no recourse to a direct action against that construction professional as NORA otherwise contemplates for other claims.

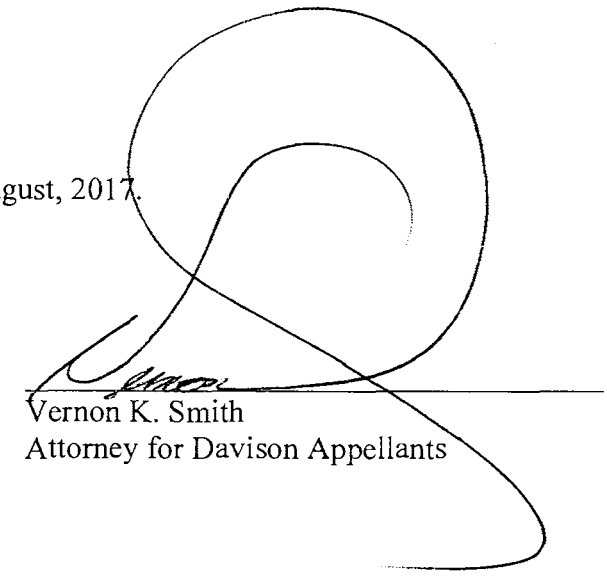
None of these issues and questions as to the application of NORA is controlled by existing Idaho precedent. The Davisons remain uncompensated for damages for which there is virtually no question that DeBest is the responsible party. The questions are how those damages are to be procedurally presented and determined either by satisfying the NORA conditions precedent, or perhaps free of that statutory constraint, by some other means. To attempt to resolve these questions and obtain fair and adequate compensation in these circumstances cannot be deemed unreasonable, nor frivolous. Therefore, even if DeBest should prevail on this appeal, it should be denied its request for attorney's fees under I.C. § 12-121.

III.

CONCLUSION

The decision of the district court, dismissing Davisons' claims should be reversed. The decision of the district court awarding DeBest attorney's fees should be reversed. The Davisons should be awarded their costs and attorney's fees on appeal. This case should be remanded to the district court for further proceedings.

Respectfully submitted this 14th day of August, 2017.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 14th day of August, 2017 two true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF** were served upon the following:

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