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IN THE SUPREME COURT OF THE STATE OF IDAHO

ECHO VANDERWAL and JLZ ENTERPRISES, INC., an Ohio Corporation registered in Idaho, Plaintiffs/Respondents, vs. ALBAR, INC., an Idaho Corporation; Defendant/Appellant and ELMER B. SUDAU; T. OWEN MULLEN and MARITA T. STEWART dba LAKE COUNTRY REAL ESTATE, Defendants	) Supreme Court No. 38085-2010
ALBAR, INC., an Idaho Corporation Plaintiff/Appellant vs. JLZ ENTERPRISES, INC.., an Ohio Corporation; and JAMES O. STEAMBARGE, A single man Defendants/Respondents	)

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Supreme Court ___ Court of Appeals ___
Entered on ATS by ___

RESPONDENTS' BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Bonner

Honorable Steve Verby, presiding

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INTRODUCTION

This appeal presents little more than an attempt to reargue factual issues resolved adversely to appellant by the trial court. The trial court accepted the clear words of the document coupled with appellant's admission that the contract at issue required appellant to remediate a contaminated property it sold to respondent. The trial found that appellant failed to perform within a reasonable time and awarded respondent damages it found to be proximately caused by that breach. Appellant fails to point out in its Opening Brief a single instance in which any of the many factual findings made by the trial court were not supported by substantial evidence. Instead, it simply reargues its case before this Court as if the trial court's decision was only a nonbinding opinion.

STATEMENT OF THE CASE

Echo VanderWal and her physician husband are medical missionaries in Swaziland, Africa (Tr 455, L 20 – 458, L 23). Mrs. VanderWal helped fund their humanitarian endeavors by improving and selling real estate through her corporation, JLZ Enterprises, Inc. ("JLZ").

In 2005, JLZ was induced to undertake a project in Bonner County that brought it ruination. One of several contiguous parcels it purchased was the key to a large mixed use development it planned in Priest River was then owned by appellant, Albar, Inc. ("Albar"). The property was contaminated with petroleum as a result of a leak in an underground tank. JLZ bought the property based on representations by both Albar's owner, Elmer Sudau, and its listing agent, Owen Mullen, that the contaminated soil had been removed and the Idaho Department of Environmental Quality ("IDEQ") was simply monitoring the site to insure the spill had been

cleaned up. Both represented a clearance was expected within 6 months. JLZ accordingly agreed to close escrow secured by Albar's promise that it would be responsible pursuing remediation through clearance.

What JLZ was told about the remediation turned out to be completely false. The contaminated soil had not been removed and, in fact, neither Albar or its remediation contractor even knew the lateral extent of the contamination. Based on the cleanup method being employed, clearance of the site and thus JLZ's ability to develop the property was many years off at best.

When Albar failed to complete the remediation as promised, JLZ retained its own environmental consultant and discovered that what Albar and its real estate agent had represented was untrue and that Albar's ongoing efforts to remediate the site were completely ineffective. To mitigate damages, JLZ stepped in and did what should have been done at the outset to remediate the site.

JLZ also filed suit against Albar, Mr. Sudau and the agents involved (R 12). Later, Albar instituted a judicial foreclosure action against JLZ under a deed of trust given by JLZ to Albar to secure $250,000 of the purchase price (R 246). The actions were ultimately consolidated (R 57).

The case against the agents was settled before trial and since the case for breach of contract was so clear, JLZ elected to dismiss the fraud claim. It therefore proceeded to trial on the only remaining claim - its breach of contract claim against Albar. No dispute existed as to the amount due under the note, so the only factual issues to be tried were the amounts of any offsets JLZ may have because of Albar's breach.

The trial court found that Albar breached its contract by failing to complete the remediation within a reasonable time and that its breach caused damages to JLZ in the sum of

$228,044.72 (R 200). That amount was set off against the balance due under the note secured by the deed of trust and judgment was so entered (*Id.*).

Albar appealed that judgment and then filed an amended notice of appeal after the trial court denied its request to awarded attorney's fees. Four months after judgment was entered, Albar then filed a motion under IRCP 60(b) to alter or amend the judgment (in reality, an untimely motion for reconsideration) based on facts it knew at the time of trial. After securing an extension of the hearing date on its motion, Albar amended the motion to include a request for relief based on matters that occurred over 9 months after judgment was entered. That motion was denied and is not also subject to this appeal.

STATEMENT OF FACTS

On July 2, 2009, the trial court presented on the record a very detailed and unusually elaborate statement of its Findings of Fact and Conclusions of Law (Tr 1047 *et seq.*). Albar largely ignores the factual findings of the trial court, never once challenging that anything it found was not supported by competent evidence. Instead, Albar's Opening Brief simply reargues its version of what took place.

JLZ will not repeat all of the trial court's findings. Instead it will focus on those facts supporting the trial court's decisions which Albar challenges in this appeal:

1. In June of 2005, Albar was the owner of 2 parcels of real property in Priest River, Idaho commonly known as 208 Railroad Dr. in Priest River, Idaho. The property was improved with a gas station, convenience store and small marina for the mooring and fueling of boats on the Pend Oreille River (Tr 1048, L 1). Those improvements were commonly known as the "Dock N' Shop" and were operated directly by Albar.

2. In May of 2003, one of the three underground storage tanks on the Dock N' Shop property leaked petroleum product into the surrounding soil and eventually impacted the ground water (*Id.*). At the time, Albar was insured by the Idaho Petroleum Storage Tank Fund ("PSTF"), which provided $1,000,000 in coverage for the cleanup of the resulting contamination. Upon discovery of the leak, Albar notified the Idaho Department of Environmental Quality ("IDEQ") and PSTF. *Albar retained Kleinfelder, Inc., an environmental consulting firm.*

3. Kleinfelder was tasked to remediate the balance of the Dock N' Shop property pursuant to the terms of a Consent Order between Albar and IDEQ (Trial Exhibit 4) (Tr 1049, L 19). Under the terms of the Consent Order, Albar was required to remediate its property and any impacted adjacent property to the point that it met IDEQ standards for both soils and groundwater purity and was cleared by IDEQ. Clearance of the property required that four consecutive quarterly monitorings of both soils and groundwater after remediation was complete demonstrate that the property met those standards (Tr 1050 L 1).

4. Over the course of the following year, Kleinfelder installed a series of vapor extraction wells designed to remediate the soil and air sparging wells and an air stripping system to attack the groundwater contamination (Tr 1050, L 5). That system was completely ineffective for its intended purpose (see *infra*). The only effective way to remediate the site given circumstances was to "dig and haul" the contaminated soil and replace it with clean fill after treating the ground water (Tr 1069, L 6).

5. In November of 2004, IDEQ advised Albar and Kleinfelder in writing that while it had received and reviewed the investigative report and proposed corrective action plan ("CAP") for the remediation of the site, no closure of the remediation would be possible until the lateral extent of the remediation was determined (Trial Exhibit 11) (Tr 1050, L 24). That

notification clearly signaled to Albar and Kleinfelder that eventually the soils beneath the convenience store building and the remaining USTs would have to be tested and, if necessary, remediated in order for the Dock N' Shop property to be cleared.

6. Despite that warning, no testing was done under the convenience store, nor were any wells angle drilled under the building pad to remediate any contamination that might exist at that location (Tr 1050, L 15). Similarly, no testing was done and no treatment wells installed to address the soils under the remaining USTs, even though one of them was immediately adjacent to the UST that leaked (*Id.*).

7. In early 2005, Albar listed the Dock N' Shop property (both parcels) for sale with Owen Mullen of Lake Country Real Estate in Sandpoint. At the time, Albar did not have an approved CAP. In connection with that listing, Albar completed a Seller's Property Disclosure Form as required by Idaho Code 55-2501 et seq. (Trial Exhibit 3) (Tr 1052, L 5). That form represented that Albar had no knowledge of any hazardous materials on the property (*Id.*). The form did, however, reveal the fact of the 2003 petroleum leak, *but stated that the "suspect soil" had been "removed and replaced" and that IDEQ was "monitoring" the site* . (*Id.*)

8. On June 14, 2005, Owen Mullen, as a dual agent, presented Albar with an offer to buy the Dock N' Shop property from Echo VanderWal, the owner of JLZ. The offer provided a 90-day close of escrow and was contingent upon institutional financing, a 45-day inspection period *and* clearance from IDEQ (Trial Exhibit 2) (Tr 1052, L 20). Albar countered, increasing the purchase price and changing the condition of clearance by agreeing to remain "responsible and liable" for the 2003 gasoline contamination since clearance within the escrow period was not feasible. *Albar conceded through the testimony of its president, Elmer Sudau, that that provision required Albar to prosecute the remediation until the property was cleared by IDEQ* (Tr 33, L 20).

9. Albar's counteroffer was accepted on June 16, 2005. At the time, the parties' contemplated institutional financing would be secured by the buyer, plaintiff JLZ Enterprises, Inc., Echo VanderWal's development company ("JLZ"). However, institutional financing was difficult or impossible to secure because of environmental concerns, so at some point before escrow closed Albar agreed to take back a $250,000 note secured by a deed of trust on the Dock N' Shop property as part of the purchase price.

10. Echo VanderWal lived toured the property with Owen Mullen and Elmer Sudau during the inspection contingency period. During that tour both Owen Mullen and Elmer Sudau affirmatively represented that the contamination had been cleaned up and that Albar was in the final stages of monitoring (Tr 1055l L 2). Two more monitorings were required and that a clearance would be forthcoming in or around January of 2006. Elmer Sudau denied making any such representation or hearing Mr. Mullen make a similar representation during that inspection. For reasons it detailed, the trial court found Echo VanderWal's testimony to be more persuasive on that point (*Id.*).

11. Their representations to Ms. VanderWal were untrue. The contaminated soil had not been removed; the site had not been remediated; and the extent of the contamination had not even been determined at that point (Tr 1055, L 15).

12. Escrow closed on September 14, 2005. JLZ had purchased the 3 lots immediately to the east of the Dock N' Shop property a few months before. By early to mid-2006, JLZ also acquired the 2 parcels to the east, all of which it incorporated into its preliminary planning for a residential condominium development upon the expectation that the remediation would be timely completed, a fact the trial court found for reasons detailed Albar knew and appreciated (Tr 1085, L 5).

13. By spring of 2006, neither Albar nor Kleinfelder still had not tested the lateral extent of the contamination (Tr 1059, L 13). Albar resisted requests from JLZ that Albar remove

the building (which was adjacent to the location of the tank that leaked) to test the soil thereunder in order to facilitate the investigation and remediation of contamination. On August 23, 2006, JLZ demolished the building anyway (Tr 1060, L 1).

14. Kleinfelder did not test the soil beneath the building footprint for months after the building was demolished (Tr 1061, L 4). It finally did so in December of 2006. Those tests revealed the presence of additional contamination at various locations in the soil under the former building (*Id.*).

15. Even though its original solutions were proving worthless, Kleinfelder abandoned any thought of a "dig and haul" correction to the area of additional contamination in the first quarter of 2007 (Tr 1062, L 10). While Kleinfelder apparently reported to IDEQ that it would not pursue a "dig and haul" solution because of rising water levels, the trial court accepted the testimony of Mike Brush of PSTF who made the real reason plain. He testified that Kleinfelder's estimate of $400,000 to $600,000 to "dig and haul" was unacceptable since there was not enough money left in Albar's policy to cover that cost. Elmer Sudau also testified that money and his policy limits were a concern to Albar in that it never intended to expend more than its PSTF policy limits in its remediation obligations. Kleinfelder accordingly proposed that more vapor extraction wells be installed to remediate the soils beneath the former building. However, no additional wells were installed at any time during the next 12 months (Tr 1062, L 19).

16. As with the building, the Dock N' Shop property could not be cleared until the soils beneath the remaining USTs had been tested and remediated. By the summer of 2007 and despite being on site for over 4 years, Kleinfelder had still not tested beneath either tank, even though one of them was only a few feet away from the UST that was the source of the contamination and was between that contamination source and the building area where contamination had been found the year before (Tr 1063, L 7).

17. In August of 2007, more than 2 years after its purchase of the Dock N' Shop property, JLZ again stepped in to protect itself. JLZ applied for and secured approval of the IDEQ to remove the remaining USTs to facilitate remediation of the site because Albar and Kleinfelder refused to do so (Tr 1064, L 10). While the tanks were being removed, JLZ took advantage of the equipment of site and the opportunity to remove and store the top 15 feet of overburden of the soil from the tank area through the former building site and easterly property line to expose the "smear zone" so that a "dig and haul" remediation of that portion of the property would be expedited (Tr 1064, L 19). As expected, testing revealed contamination under the UST adjacent to the one that leaked and was removed in 2003 (*Id.*). No evidence was offered by Albar that anything JLZ did during its excavation of the tanks and overburden interfered with the operation or effectiveness of the Kleinfelder system to the west.

18. By October of 2007, Albar had made no further progress towards remediation of the site (Tr 1065, L 4). Kleinfelder had yet to secure approval of a revised CAP for final remediation of the site and was proposing no other course of action than continued use of the same, ineffective system employed for the preceding 4 years. In the same month, JLZ accordingly applied for and was admitted to IDEQ's Voluntary Remediation Program in order to prosecute the remediation itself (Tr 1065, L 17). Under that program, JLZ initially assumed liability for the cleanup, but would receive a covenant not to sue when the remediation was complete. It might also qualify for financial assistance to cover a portion of the remediation costs under the State's Pilot Assistance Program if and when the property was cleared and the remediation closed (*Id.*).

19. JLZ submitted its remediation plan to IDEQ in November of 2007. After the ultimate approval of JLZ's plan, JLZ promptly began "dig and haul" operations over the entire site, including the areas in which Kleinfelder had been working since 2003.

20. JLZ's remediation efforts were undertaken following the investigation and under the supervision of Paul VanMiddlesworth of Golder & Associates. *Mr. VanMiddlesworth was the only expert to testify in this matter*. The opinions he expressed were uncontroverted by competent evidence from Albar and fully accepted by the trial court. Mr. VanMiddlesworth testified, and the Court accepted that:

a. Kleinfelder's plan for remediation was poorly designed. By February of 2007 by JLZ, virtually nothing had been accomplished by Kleinfelder towards clearance of the Dock N' Shop property. At best, the wells would eventually clean the soil in areas immediately surrounding each individual well, but the soil in between would remain contaminated. Wells would have to be relocated or additional wells installed to cover that design deficiency. Accordingly, it would take many years at best to effectively remediate the soil in the areas selected by Kleinfelder for its efforts (Tr 1067, L 19 – 1068, L 19).

b. Exacerbating the design problems of the system was the fact that the system was poorly maintained and often not in working condition due to broken equipment and pipes. Regardless of its effectiveness, the system was working sporadically at best (*Id.*).

c. By 2007, Kleinfelder had not explored or determined the lateral extent of the contamination despite knowing from virtually the outset of the project that it would ultimately have to do so. The efforts ongoing for years thus had no effect on any contamination that might exist under the building or the remaining USTs. Those areas had to be tested and remediated before the site would ever be cleared by IDEQ, adding more years to the cleanup (*Id.*) .

d. The only effective, timely and cost-efficient way to remediate the site given its hydrogeologic conditions was to "dig and haul". Starting from scratch, a "dig and haul" solution could have been completed in 16 to 18 months at the outside. That time frame included

preparing, negotiating and securing approval of a CAP, the onsite physical "dig and haul" operation, testing and a year of quarterly monitorings.

21. Had the status of the remediation been as recited in the Seller's Real Estate Disclosure Form, the timeframe for completing the remediation and a year of monitoring (thus securing clearance of the site) would have been April 2007 (Tr 1069, L 16; 1086, L 22).

22. JLZ's decision to change the level of cleanup from commercial to residential did not negatively impact the timing of the remediation or interfere with Albar's ability to perform. The trial court accepted Paul VanMiddlesworth unchallenged testimony that the issue of the level of remediation did not affect what Kleinfelder was doing or add complexity or time to Golder's eventual work plan (Tr 1076, L 12 – 1077, L 6).

ISSUES OF APPEAL

1. Should this Court overrule the trial court's interpretation of the contract and the finding of Albar's breach when the same are supported by substantial evidence?

2. Should this Court second guess the trial court's factual determinations as to what damages were foreseeable and caused by Albar's breach of contract?

3. Did the trial court abuse its discretion in refusing to find Albar was the prevailing party when Albar lost on the only substantive issue addressed to the trial court for resolution?

4. Is Albar entitled to benefit from the risk and years of work JLZ was forced to endure to qualify for a rebate from IDEQ?

5. Is JLZ entitled to attorney's fees on appeal?

STANDARD OF REVIEW

Quoting this Court in *Caldwell v. Cometto*, 151 Idaho 34 (2011):

> This Court reviews the trial court's findings after a bench trial for clear error. I.R.C.P. 52(a). "A trial court's findings of fact in a bench trial will be liberally construed on appeal in favor of the judgment entered, in view of the trial court's role as trier of fact." *Beckstead v. Price,* 146 Idaho 57, 61, 190 P.3d 876, 880 (2008) (quoting *Anderson*

v. Larsen, 136 Idaho 402, 405, 34 P.3d 1085, 1088 (2001)). Factual findings will be upheld if supported by substantial, competent evidence, even if the parties presented conflicting evidence at trial. *Griffin v. Anderson,* 144 Idaho 376, 378, 162 P.3d 755, 757 (2007). By contrast, this Court freely reviews issues of law. *Neider v. Shaw,* 138 Idaho 503, 506, 65 P.3d 525, 528 (2003).

Here, Albar has not pointed to a single instance where a finding of the trial court is not supported by competent, substantial evidence. Accordingly, this Court need go no further than the trial court's findings of fact to evaluate and dismiss virtually all of Albar's arguments on appeal.

ARGUMENT

A. Albar's "Breach of Contract" Arguments Are Incomprehensible. The pages spent by Albar in Section I of its "Argument On Appeal" are difficult to understand and thus virtually impossible to address. For example, in Subsection A, Albar argues that the contract does not require remediation "to JLZ's satisfaction". Where Albar got the idea to assert that is an issue in the case is more than perplexing since JLZ never made that claim and the trial court did not so find. To the contrary, the trial court unequivocally held that the contract obligated Albar to prosecute the remediation until the property met IDEQ standards and was cleared (Tr 1049, L 17; 1053, L 7; 1079, L1). The trial court never held that remediation to some other standard was required by the contract and nowhere in the record does JLZ make that assertion.

Albar's apparent confusion must come from the fact that the trial court considered Albar's admitted knowledge of JLZ's development plans (Tr 34, L 3-35, L 7) as a factor relevant to the issue of what was a reasonable time under the circumstances to expect completion of the remediation (Tr 1085, L 2). However, the fact that the trial court considered Albar's knowledge of JLZ's intended use of the property as one factor material to the determination of what would be a reasonable time for performance cannot possibly be twisted into the assertion Albar now

makes (especially when the trial court so clearly and repeatedly states otherwise). JLZ is at a complete loss to otherwise respond.

The same holds true with Subsections B through E of Argument I. At best, what is presented is a request for this Court to reconsider the factual findings of the trial court, something this Court routinely finds to be frivolous. *Sun Valley Shamrock Resources, Inc. v. Travelers Leasing Corp.*, 118 Idaho 116, 120 (1990). At worst, what Albar presents are series of mixed factual statements (some of which are belied by Albar's actual trial testimony) with no citations to the record, arguments with no supporting authorities or clear purpose and offhanded challenges to the credibility of Ms. VanderWal.

Cutting through the pages of dialog, Albar does not effectively challenge any of the material findings of the trial court. Thought lengthy and very detailed, the trial court's findings are quite simple and largely based on admissions by Albar at trial: Albar owned a property contaminated by petroleum. By law and the Consent Order it signed, Albar was required to remediate the property to IDEQ standards. Albar hired a remediation contractor using funds from the PSTF to pay for the remediation.

While the remediation was ongoing, Albar entered into a contract to sell the property to JLZ. As the president of Albar specifically acknowledged in his testimony, the contract "Absolutely" required Albar to complete the remediation (Tr 33, L 20).

Since the contract did not specify a particular time for completion of the remediation, the law will imply a reasonable time in which performance must occur. *Ujdur v. Thompson*, 126 Idaho 6 (1994); *Curzon v. Wells Cargo, Inc.*, 86 Idaho 38, 43 (1963). Under the operative facts, the unchallenged testimony of Paul VonMiddlesworth and given Albar's knowledge of JLZ's plans for development, the trial court found that Albar could and should have completed

remediation by March of 2006 and provided clearance by April of 2007 if the proper remediation technic had been employed at the outset.

The work performed by Albar's contractor, however, was poorly designed, managed and executed. Whether the fault laid exclusively with Albar's contactors or not, Albar failed to provide JLZ with a clearance within that time and thus breached its contractual obligations to JLZ. What steps JLZ took after Albar's breach do not absolve Albar of liability or a waiver of any right of action JLZ had as a result of that breach.

Albar has the burden of showing error in the trial court. *Brooks v. Brooks,* 119 Idaho 275 (App. 1990). To do so, it must at least point this Court and JLZ to the record it contends contains the error. IAR 35(a)(6). Albar has not done so and thus has not and thus has not met its burden of establishing the trial court's findings are not supported by substantial evidence.

B. Albar's Damage Arguments Are Frivolous. Again, without even citing supporting evidence in the record, Albar simply rehashes the various damage arguments presented to the trial court. Though jumbled and unspecified, Albar seems to lump the defenses of waiver, estoppel, failure to mitigate and unforeseeability into a few paragraphs highlighted with questions of Ms. VanderWal's credibility.

All of Albar's assertions are controverted by evidence trial court found persuasive: (1) Albar had a contractual obligation to remediate the property to IDEQ standards; (2) Albar knew at the time of contracting that JLZ intended to develop the property for residential use; (3) Albar could have completed the remediation within a reasonable time (i.e. 18 months) if it had undertaken the only feasible method of remediation; (4) Albar breached its contract by failing to remediate the site in a timely fashion; and (5) as a proximate result JLZ incurred over $228,000 in damages completing what Albar was contractually obligated to do. Albar has not identified a

single instance where any of those findings are not supported by substantial evidence in the record before this Court.

C. Albar Is Not Entitled To Attorney's Fees In The District Court. Albar petitioned for an award of attorney's fees after the trial court awarded JLZ offset damages in excess of $228,000 against its $276,000 claim. While JLZ believes the trial court erred in allowing interest to Albar at the note rate of 10% while it was in breach of contract (an issue it has not appealed), it is clear both sides prevailed in part (almost totally offsetting each other).

Before an award of costs under IRCP 54(d)(1) or attorneys' fees under IRCP 54(e)(1) can be made, the trial court must first determine if the party requesting fees and costs is the prevailing party. To make that determination, the trial court is required "in its sound discretion" to "consider the final judgment or result in the action in relation to the relief sought by the respective parties. In the exercise of that discretion, the trial court may also equitably apportion the fees awarded "after considering all of the issues and claims involved in the action and the resulting judgment or judgments obtained" (IRCP 54(d)(1)(B)).

The import of IRCP 54(d)(1)(B) means that the determination whether or not a party prevails is not a matter of simply making a mathematical calculation as to which party received the highest award. Instead, the trial court is required to consider "(a) the final judgment or result obtained in the action in relation to the relief sought; (b) whether there were multiple claims or issues presented; and (c) the extent to which each of the parties prevailed on each of the issues or claims. *Shurtliff v. Northwest Pools, Inc.*, 120 Idaho 263 (App. 1991). Through that process the trial court may determine that a party prevailed even if he or she did not receive any affirmative relief (*Chadderdon v. King*, 104 Idaho 406 (App. 1983)), that the circumstances dictate that no party should prevail (*Ruge v. Posey*, 114 Idaho 890 (App. 1988); *Hutchinson v. Kelton*, 99 Idaho

866 (1979)), or that a party should receive only a portion of the fees and costs incurred (*Walton, Inc. v. Jensen*, 132 Idaho 716 (App. 1999)).

Where there are claims and counterclaims between opposing parties, the determination of who prevailed "in the action" is also a matter of discretion for the trial court. That determination requires the trial court to examine the results of the case from an overall view, not a claim-by-claim analysis. *Eighteen Mile Ranch, L.L.C., v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719 (2005). When both parties are partially successful, it is within the trial court's discretion to decline an award of attorney fees to either side. *Israel v. Leachman*, 139 Idaho 24, 27 (2003).

In this case, none of the parties should be considered the prevailing party for the purpose of costs or fees. But for the affirmative claims JLZ made in this action (raised as defenses to the claims made by Albar in the foreclosure action, there was no dispute as to the existence of the Note from JLZ to Albar or the Mortgage and the amounts due thereunder absent offset or those defenses was a matter of pure mathematical calculation. What was at issue in this case and what was tried to in the District Court was whether Albar breached its contractual obligations to remediate the property and, if so, to what degree their breach cause damage to JLZ. By all measures, Albar did not prevail on any material issue addressed the trial court for resolution. JLZ established that Albar materially breached the contract and caused JLZ hundreds of thousands of dollars in damages. The only issue that warranted a trial and the dozens of hours on post-trial matters was Albar's liability to JLZ. Albar lost on those issues and ended up with only pennies on the dollar of what it sought.

Under the circumstances, the trial court was clearly not in error, nor did it abuse its discretion, in denying Albar's request. *Jorgensen v. Coppedge*, 148 Idaho 536 (2010).

D. Albar Is Not Entitled To Any Relief Resulting From The IDEQ Rebate. Albar's argument that it is entitled to relief from the judgment because JLZ later qualified for a partial rebate under the IDEQ program under which it remediated the property after Albar's breach is procedurally, substantively and legally in error.

1. Albar's Motion is Procedurally Deficient. Albar moved the trial court under IRCP 60(b) for relief from the judgment based on what it claims is newly discovered evidence – the fact JLZ ultimately received a rebate for participating in the Pilot Project Fund Program administered by IDEQ. Aside from the fact Albar mistakenly claimed such evidence is "newly discovered" (see *infra*), a Rule 60(b) motion is not the proper procedural vehicle.

Albar repeatedly asserts that the issue is one related to its mitigation of damages defense. It concedes, however, with almost the same degree of repetition that it was fully aware at the time of trial that JLZ was participating in that program and thus knew at the time of trial that JLZ might someday receive a rebate of some of the costs it was claiming as damages. Based on that knowledge, Albar argued that JLZ had a duty to mitigate damages by completing the tasks and undergoing the expenses required to secure a rebate.

The fact that the trial court did not address that defense in the judgment or make express findings on that issue does not give Albar the right to reargue the same in a Rule 60(b) motion. A Rule 60(b) motion may not be used as a substitute for a timely motion for new trial or to alter or amend the judgment under IRCP 59(a) or (e). A party cannot disguise a Rule 59(e) motion for reconsideration that is time barred (i.e. not filed within 14 days of the judgment) by making the same arguments in a Rule 60(b) motion. *Ross v. State*, 141 Idaho 670, 672 (App. 2005).

If Albar was dissatisfied with the trial court's rejection of it mitigation of damages arguments, Albar should have filed a motion to alter or amend the judgment under Rule 59(e) or asked for a new trial under Rule 59(a). Albar did neither. The argument that the trial court should have reconsidered its judgment on Albar's mitigation of damage defense is thus procedurally in error.

2. No Newly Discovered Evidence Exists. Under IRCP 59(b) and 11(a)(2), a party is required to present a motion for new trial or reconsideration based on newly discovered evidence within 14 days of the date judgment is entered. IRCP 60(b) relief based on newly discovered evidence is available only when such evidence could not be discovered with reasonable diligence during the 14 day period allowed under Rule 59(b).

Here, Albar admits that it knew of JLZ Enterprises' participation in the IDEQ voluntary remediation program at the time of trial and, in fact, concedes that it presented arguments based thereon. Since Albar knew of JLZ Enterprises' participation and the fact that it might receive a rebate, Albar should have requested relief from the judgment within the 14 days permitted by Rule 59(b) to add provisions or language dealing with the possibility some portion of the expenses this Court used to calculate the offset damages might be rebated in the future. Albar did not do so and its Rule 60(b) motion was therefore untimely even if it were the proper procedural vehicle.

Moreover, no Idaho case law is presented to even remotely suggest that a trial court can reconsider its judgment under Rule 60(b) after the time for a new trial or for amendment thereof under Rule 59 has expired based on evidence that did not exist at the time of trial. As a matter of pure logic, events occurring after the trial cannot be considered newly discovered evidence since that evidence did not exist at the time of trial. JLZ can find no

reported case which includes post-trial events or occurrences in the definition of "newly discovered evidence" as that term is used in Rule 60(b). To find otherwise, would also make no sense, especially when, as here, the events Albar claims to have been "newly discovered" occurred almost 2 years after the judgment was entered.[1]

Albar's arguments based on IRCP 60(b)(5) are also misplaced. As this Court made clear, the application of that subsection is limited to situations where the judgment is prospective and the circumstances presented demonstrate that it is no longer equitable to continue to enforce the judgment. *Rudd v. Rudd*, 105 Idaho 112, 118 (1983); *VFP VC, LLC v. Dakota Company*, 142, Idaho 675 (2006). Here, the judgment is not prospective; it awards monetary damages against Albar and offsets the same against an acknowledged debt. Nothing in the judgment required the continued monitoring or enforcement by the district court. The judgment in this case is therefore not subject to being modified pursuant to Rule 60(b)(5).

Whether the collateral source rule applies or not, Albar knew of JLZ's participation in the program, knew of a possible rebate, presented arguments based thereon and did not prevail at trial. Albar could have presented evidence at trial from IDEQ as to the procedures and steps required for participation, what JLZ had to do to receive a rebate and what the likelihood was of JLZ mitigating some or all of its damages. Albar did not do so. Perhaps the result would have been different had it presented that evidence, but a Rule 60(b) motion is not the proper method for seeking relief from one's own trial tactics or failure to present available evidence.

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[1] The consequences of such a ruling are mind numbing. A defendant who challenges the cost of repair of property he damaged, could come back to court many months after the judgment has been entered and satisfied with evidence the repairs did not actually cost what was awarded at trial. A judgment which included the costs of future surgery for a person he injured could later file a challenge based on the fact the plaintiff had yet to have the surgery. A wrongful death verdict could be reduced if the widowed plaintiff remarries after the trial. The list could go on.

3. The Collateral Source Rule Applies. Above and beyond the timing and procedural deficiencies in its motion, Albar makes the bold statement without legal support in Idaho that the common law collateral source rule does not apply in a breach of contract cause of action. That statement clearly arises from a mistaken understanding of the collateral source rule. While a defendant *in a breach of contract* case is legally protected from having to *pay* double damages, he cannot complain if the plaintiff receives partial compensation of his damages from another source.

Until the adoption of Idaho Code § 6-1606, Idaho recognized the common law collateral source rule (see, e.g. *Swift & Co. v. Guteriez*, 76 Idaho 82 (1954)). Section 6-1606 modified that rule as it applied to actions "for personal injury or property damage". Since the statute is specifically limited to certain types of actions, the common law rule remains in force by omission to other forms of action, including breach of contract claims. Albar's citation to Am. Jur. 2nd for the proposition that application of the collateral source rule to breach of contract actions is "less compelling" than in tort actions is of no avail. That provision of the treatise has not been recognized in Idaho and appears wholly inconsistent with the finding of this Court in *Hines v. Hines*, 129 Idaho 847 (1997). The defendant in that case argued the plaintiff was not entitled to recover attorney's fees as the prevailing party since her fees had been paid by her corporate employer. This Court dismissed that argument, stating that § 6-1606 was inapplicable (*Id* at 854).

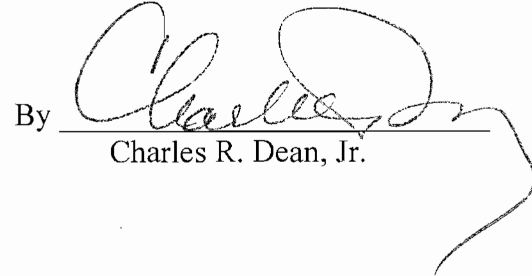
Accordingly, Albar has no right to benefit from the fact JLZ Enterprises was a responsible property owner who endured the delay caused by Albar's breach and finally undertook the expense and years of effort required to remediate the property Albar was contractually bound to clean up.

E. <u>JLZ Is Entitled To Attorney's Fees On Appeal</u>. JLZ is entitled to an award of attorney's fees as provided in IAR 41. These consolidated actions present both an action on a note and one for breach of contract, both of which arise from a commercial transaction (R 246 and R 12). JLZ is thus entitled to recover its fees pursuant to Idaho Code 12-120(3) and the express terms of the parties contract (Trial Exhibit 2).

Respectfully Submitted,

Dated: 5/10/12

Dean & Kolts

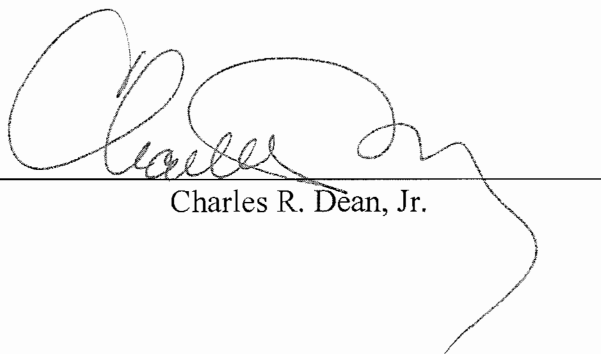
By 
Charles R. Dean, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of May 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

John A. Finney
Finney Finney & Finney, PA
120 East Lake Street, Suite 317
Sandpoint, ID 83864
Facsimile: (208) 263-8211

☒ U.S. MAIL
☐ FEDEX GROUND
☐ HAND DELIVERED
☐ OVERNIGHT MAIL
☐ FACSIMILE



Charles R. Dean, Jr.