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DeGroot v. Standley Trenching, Inc. Clerk's Record v. 7 Dckt. 39406

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Vol. 7 of 13

(SUPPLEMENTAL RECORD)

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

LAW CLERK

CHARLES JAY DE GROOT and DE GROOT FARMS, LLC.,

Plaintiffs-Counterdefendants-Appellants,

-vs-

STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO.,

Defendant-Counterclaimant-Respondent,

and

J. HOULE & FILS, INC., a Canadian corporation,

Defendant-Respondent.

FILED - COPY
DEC 12 2012
Supreme Court ____ Court of Appeals
Sent on ATS by: ____

Appealed from the District of the Third Judicial District for the State of Idaho, in and for Canyon County

Honorable GREGORY M. CULET, District Judge

Kevin E. Dinius and Michael J. Hanby II
DINIUS LAW

Attorneys for Appellants

M. Michael Sasser
SASSER & INGLIS, PC

Robert D. Lewis
CANTRILL SKINNER SULLIVAN & KING LLP

Attorneys for Respondents

39406

IN THE SUPREME COURT OF THE

STATE OF IDAHO

CHARLES JAY DE GROOT and DE GROOT FARMS, LLC.,	)	
Plaintiffs-Counterdefendants-Appellants,	)	
-vs-	)	Supreme Court No. 39406-2011
STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO.,	)	
Defendant-Counterclaimant-Respondent,	)	
And	)	
J. HOULE & FILS, INC., a Canadian corporation,	)	
Defendant-Respondent.	)	

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE GREGORY M. CULET, Presiding

Kevin E. Dinius and Michael J. Hanby II, DINIUS LAW

Attorneys for Appellants

M. Michael Sasser, SASSER & INGLIS, PC.

Robert D. Lewis, CANTRILL SKINNER SULLIVAN & KING LLP.

Attorneys for Respondents

TABLE OF CONTENTS

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ORIGINAL

Robert D. Lewis, ISB #2713
CANTRILL, SKINNER, SULLIVAN & KING LLP
1423 Tyrell Lane
P.O. Box 359
Boise, Idaho 83701
Telephone: (208) 344-8035
Facsimile: (208) 345-7212

FILED
A.M. 1:03 P.M.
APR 18 2005
CANYON COUNTY CLERK
D. BUTLER, DEPUTY

Attorneys for Defendant Standley Trenching, Inc., d/b/a Standley & Co.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES DeGROOT, and DeGROOT FARMS, LLC,

Plaintiffs,

vs.

STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO., and J. HOULE & FILS, INC., a Canadian corporation,

Defendants.

STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO.,

Counterclaimant,

vs.

CHARLES DeGROOT; AND DeGROOT FARMS, LLC,

Counterdefendants.

Case No. CV 2001-7777

AFFIDAVIT OF ROBERT D. LEWIS IN SUPPORT OF COUNTERCLAIMANT'S MOTION FOR AWARD OF PREJUDGMENT INTEREST AND ENTRY OF AMENDED JUDGMENT ON COUNTERCLAIM

STATE OF IDAHO)
): ss
County of Ada)

ROBERT D. LEWIS, being first duly sworn upon oath, deposes and says:

1. That he is the attorney of record for the Counterclaimant, Standley Trenching, Inc., d/b/a Standley & Co., and has personal knowledge of the facts set forth in this affidavit.

2. That a Judgment was entered in favor of the Counterclaimant in the above entitled action on or about April 4, 2005.

3. That pursuant to said Judgment there is now due and owing by the Counterdefendants Charles DeGroot and DeGroot Farms, LLC to the Counterclaimant Standley Trenching, Inc., d/b/a Standley & Co., in the sum of $20,259.57.

4. That pursuant to Rule 69 of the Idaho Rules of Civil Procedure, I have calculated the prejudgment interest due on the Judgment amount entered in this action, which was 12.0%, from March 16, 2001 through and including April 4, 2005, which calculates out to be $6.66 per diem.

5. That the calculated prejudgment interest accrued on the Judgment entered in this action is at the rate of accruing interest of 12% per annum ($6.66 per diem) from March 16, 2001 to April 4, 2005 is $9,856.80.

Further your affiant sayeth not.

Robert D. Lewis

SUBSCRIBED AND SWORN To before me this 15th day of April, 2005.

KASEE SERRANO
NOTARY PUBLIC
STATE OF IDAHO

NOTARY PUBLIC FOR IDAHO
Residing at Boise ID
Commission Expires 10/28/09

CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of April, 2005, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Julie Klein Fischer Kevin E. Dinius WHITE PETERSON Canyon Park at The Idaho Center 5700 East Franklin Rd., Ste. 200 Nampa, ID 83687	[ ] [ ] [X]	Facsimile Hand Delivery U.S. Mail
William A. McCurdy 702 West Idaho, Ste. 1000 Boise, ID 83702	[ ] [ ] [X]	Facsimile Hand Delivery U.S. Mail
Michael E. Kelly Howard Lopez & Kelly PLLC 702 W. Idaho, Ste. 1100 P.O. Box 856 Boise, ID 83701-0856	[ ] [ ] [X]	Facsimile Hand Delivery U.S. Mail

Robert D. Lewis

ORIGINAL

Robert D. Lewis, ISB #2713
CANTRILL, SKINNER, SULLIVAN & KING LLP
1423 Tyrell Lane
P.O. Box 359
Boise, Idaho 83701
Telephone: (208) 344-8035
Facsimile: (208) 345-7212

FILED
A.M. 9:10 P.M.
APR 18 2005
CANYON COUNTY CLERK
D. BUTLER, DEPUTY

Attorneys for Defendant Standley Trenching, Inc., d/b/a Standley & Co.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES DeGROOT, and DeGROOT FARMS, LLC, Plaintiffs, vs. STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO., and J. HOULE & FILS, INC., a Canadian corporation, Defendants.	Case No. CV 2001-7777 **MEMORANDUM OF ATTORNEY FEES**
STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO., Counterclaimant, vs. CHARLES DeGROOT; AND DeGROOT FARMS, LLC, Counterdefendants.	

COMES NOW The Counterclaimant, Standley Trenching, Inc., d/b/a Standley & Co., by and through its counsel of record, Robert D. Lewis, of the firm Cantrill, Skinner, Sullivan & King LLP, and pursuant to the Judgement on Counterclaim issued by the Court in this matter on April 4, 2005 and Idaho Rules of Civil Procedure 54(e), hereby submits to this Court Exhibit "A" attached hereto

as a true and correct accounting of attorney fees incurred by Counterclaimant in pursuit of the Counterclaim.

ATTORNEY FEES

For itemization, please refer to Exhibit "A" attached hereto.

TOTAL FEES **$8,359.00**

Attorney	-	$8,268.00
Paralegal	-	$ 91.00

STATE OF IDAHO)
) ss.
County of Ada)

Robert D. Lewis, being first duly sworn upon oath, deposes and says:

1. I am familiar with the attorneys fees expended in prosecution of the Counterclaim in this case, and set forth the amount herein which is computed upon an hourly basis, considering the time and labor required, the novelty and difficulty of the case, and the skill requisite to perform the legal service properly, and the experience and ability of the attorney in the particular field of law, and prevailing charges for like work, the amount involved and results obtained, and awards in similar cases.

2. The basis for computing the attorneys fees herein is at an hourly rate of $130.00 for Robert D. Lewis, attorney, and $65.00 for paralegal Mary L. Hainline.

3. The Counterclaim arose from a commercial transaction. Attorneys fees are allowed to the prevailing party pursuant to Idaho Code § 12-120(3). The defense to the Counterclaim was also pursued within the provisions of Idaho Code § 12-121, since there was no merit to the claim that there was no amount due on open account.

4. The attorneys fees stated herein constitute a full, true and correct statement summarizing Counterclaimant's reasonable attorneys fees expended in this action, each item having been actually and necessarily incurred, and your affiant alleges on information and belief that said attorneys fees are in compliance with Rule 54, I.R.C.P., and allowed on the Judgment on Counterclaim issued by this Court on April 4, 2005.

FURTHER YOUR AFFIANT SAYETH NOT.

Robert D. Lewis

SUBSCRIBED AND SWORN To before me this 15th day of April, 2005.

KASEE SERRANO
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing at: Boise ID
Commission Expires: 10/28/09

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2005, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Julie Klein Fischer Kevin E. Dinius WHITE PETERSON Canyon Park at The Idaho Center 5700 East Franklin Rd., Ste. 200 Nampa, ID 83687	[ ] [ ] [X]	Facsimile Hand Delivery U.S. Mail
William A. McCurdy 702 West Idaho, Ste. 1000 Boise, ID 83702	[ ] [ ] [X]	Facsimile Hand Delivery U.S. Mail
Michael E. Kelly Howard Lopez & Kelly PLLC 702 W. Idaho, Ste. 1100 P.O. Box 856 Boise, ID 83701-0856	[ ] [ ] [X]	Facsimile Hand Delivery U.S. Mail

Robert D. Lewis

11/8/2002	RDL	Telephone conference with M. Kelly about view of Department of Agriculture documents; prepare letter to Kelly about Standley documents; view Department of Agriculture documents.	299.00
11/12/2002	RDL	Telephone conference with K. Trainor about defense; prepare letter to M. Kelly about substitution of counsel.	52.00
11/13/2002	RDL	Telephone conference with A. Ward about meeting electricians; telephone conference with J. Grigg; telephone conference with M. Kelly.	52.00
11/14/2002	RDL	Prepare letter to Continental Western about fee reimbursement and clarification of insurer's reservations.	39.00
11/18/2002	RDL	Review deposition notices and letter from plaintiff's counsel; telephone conference with K. Trainor.	52.00
11/19/2002	RDL	Telephone conference with M. Kelly about case strategy; telephone conference with J. Grigg; telephone conference with A. Ward cancelling meeting; telephone conference with K. Standley about case status.	78.00
11/25/2002	RDL	Review Standley motion for summary judgment, memorandum, affidavit and notice of hearing; prepare letter to K. Standley about summary judgment; prepare letter to K. Standley about Houle's position; review Houle's discovery responses.	104.00
11/27/2002	RDL	Telephone conference with K. Trainor about case status.	26.00
12/2/2002	RDL	Review letter from plaintiff's counsel about depositions.	39.00
12/3/2002	RDL	Review plaintiff's motion to amend complaint; prepare motion to amend counterclaim; prepare letter to Kurt Standley.	104.00
12/4/2002	RDL	Telephone conference with K. Trainer about case status.	13.00
12/6/2002	RDL	Review letter from Kelly to plaintiff's counsel about deposition dates.	26.00
12/10/2002	RDL	Review plaintiff's memorandum, affidavit, and Rule 56(f) affidavit opposing Standley's motion for summary judgment.	39.00
12/11/2002	RDL	Telephone conference with Judge Culet's clerk; telephone conference with M. Kelly about vacating pretrial conference.	39.00
12/12/2002	RDL	Telephone conference with K. Trainer about trial vacated; prepare letter to insurer about fee reimbursement; telephone conference with K. Standley about case status.	104.00
12/16/2002	RDL	Telephone conference with plaintiff's counsel about stipulation to amend pleadings; review stipulation; telephone conference with M. Kelly about stipulation.	91.00
1/9/2003	RDL	Prepare letter to B. McCammon about insurance payment.	26.00
1/17/2003	RDL	Prepare letter to K. Standley about billing and case status.	39.00

3/31/2003 RDL	Review plaintiff's request for trial setting; telephone conference with M. Kelly about case status; prepare response to request for trial setting.	78.00
4/10/2003 RDL	Review order setting trial; prepare letter to K. Standley.	52.00
4/14/2003 RDL	Telephone conference with K. Standley about case status.	26.00
4/15/2003 RDL	Telephone conference with M. Kelly about deposition dates; review scheduling stipulation and return to Kelly.	39.00
4/23/2003 RDL	Review deposition notices for Standley, Griggs, and Hartzell.	39.00
4/25/2003 RDL	Review Standley's responses to request for admissions and fully executed stipulation for discovery.	39.00
4/29/2003 RDL	Telephone conference with M. Kelly about deposition schedule.	26.00
5/2/2003 RDL	Review letter from Kelly to plaintiff's counsel with deposition notices for C. DeGroot and E. DeGroot; telephone conference with M. Kelly.	52.00
5/6/2003 RDL	Review letter with stipulation and order to dismiss K. Standley; prepare letter to K. Trainor; telephone conference with M. Kelly.	65.00
5/8/2003 RDL	Review amended complaint and proposed answer, and prepare counterclaim.	104.00
5/19/2003 RDL	Review conformed copy of Standley answer and counter-claim; prepare letter to K. Trainer.	39.00
7/7/2003 RDL	Telephone conference with K. Standley about case status; Prepare letter to M. Kelly about moving case forward; Prepare letter to K. Standley about return of retainer and agreement to pay.	78.00
7/9/2003 RDL	Telephone conference with Plaintiff's counsel and M. Kelly about deposition schedule.	26.00
8/15/2003 RDL	Review letter from discovery counsel to Kelly and Kelly's response letter. Telephone conference with M. Kelly about vacated depositions.	39.00
9/25/2003 RDL	Review reply to co-counsel; prepare letter to K. Standley.	39.00
10/15/2003 RDL	Review amended deposition notices of K. Standley, J. Griggs and T. Hatzell.	39.00
10/23/2003 RDL	Review letter from Plaintiff's counsel vacating C. DeGrout deposition. Telephone conference with Kent Stanley about case status.	39.00
11/12/2003 RDL	Attend deposition of E. DeGroot; prepare letter to K. Standley with deposition summary.	598.00
11/26/2003 RDL	Review pretrial conference rescheduling.	26.00
12/17/2003 RDL	Review motion for protective order and notice of hearing.	26.00
12/19/2003 RDL	Travel to and from Caldwell; attend pretrial conference.	260.00
12/31/2003 RDL	Prepare letter to Kurt about new trial date.	39.00

1/5/2004	RDL	Review order f[illegible]ediation and order on pretrial conference.	39.00
1/26/2004	RDL	Conference with Standley, Griggs and Hartzell at M. Kelly's office; file review and prepare for C. DeGroot deposition.	312.00
1/27/2004	RDL	Telephone conference with M. Kelly; attend deposition of C. DeGroot; prepare deposition summary.	884.00
2/2/2004	RDL	Telephone conference with M. Kelly about Standley and Company depositions.	52.00
2/24/2004	RDL	Telephone conference with Plaintiff's counsel about mediation; prepare letter to Plaintiff's counsel about trial schedule.	39.00
2/25/2004	RDL	Telephone conference with M. Kelly about case status.	13.00
2/26/2004	RDL	Review C. DeGroot deposition transcript regarding possible summary judgment.	52.00
3/11/2004	RDL	Review Houle's motion to compel.	26.00
3/15/2004	RDL	Prepare letter to M. Kelly about mediation.	26.00
3/17/2004	RDL	Review letter from Houle's counsel about vacating mediation; Telephone conference with M. Kelly about mediation cancellation; prepare mediation statement.	130.00
3/19/2004	RDL	Review letter from Plaintiff's counsel about new mediation date; review Hooper report; prepare letter to K. Standley.	78.00
3/22/2004	RDL	Telephone conference with P. Dougherty about acquiring a stipulation and order dismissing Kurt Standley, individually; prepare letter to K. Trainer.	39.00
4/15/2004	MLH	Calculate prejudgment interest and forward mediation statement to Mike Kelley for review.	19.50
4/19/2004	RDL	Telephone conference with M. Kelly about mediation; revise mediation statement; Telephone conference with K. Standley about mediation.	91.00
4/21/2004	RDL	Prepare for and attend mediation; travel to and from Nampa.	806.00
4/27/2004	RDL	Prepare exhibit list and witness list; prepare letter to M. Kelly.	156.00
4/30/2004	RDL	Telephone conference with M. Kelly about possible settlement.	26.00
5/3/2004	RDL	Telephone conference with Kurt about settlement possibilities and trial strategy.	26.00
5/6/2004	RDL	Travel to and from Caldwell; attend pretrial conference with Judge Culet.	312.00
5/13/2004	RDL	Review order setting trial for October 25, 2004 (10days).	26.00
5/26/2004	RDL	Review offer of judgment.	13.00
6/28/2004	RDL	Review order resetting trial for April 25, 2005.	26.00
12/8/2004	RDL	Review Houle request for supplemental responses to discovery.	26.00
1/7/2005	RDL	Telephone conference with K. Standley about summary judgment; telephone conference with M. Kelly about vacating trial; file review regarding Summary Judgment preparation; prepare letter to M. Kelly about Beltman deposition; prepare motion for Summary Judgment; prepare memo supporting motion for Summary Judgment.	273.00

1/12/2005	RDL	Research regarding Idaho law with action on open account; review memo in Summary Judgment; telephone conference with K. Standley; prepare affidavit of K. Standley; prepare letter to K. Standley.	338.00
1/24/2005	MLH	Draft witness disclosure.	26.00
1/27/2005	RDL	Revise and final Summary Judgment materials.	104.00
1/28/2005	RDL	Prepare notice of hearing on Summary Judgment.	39.00
2/1/2005	RDL	Attorney Fee: Review Standley memorandum on Summary Judgment for case-in-chief.	52.00
2/15/2005	RDL	Attorney Fee: Review DeGroot's response to motion for Summary Judgment; research regarding Idaho case law on burden of non-moving party to establish issue of fact.	156.00
2/17/2005	RDL	Attorney Fee: Prepare reply memo on Summary Judgment.	156.00
2/18/2005	RDL	Attorney Fee: Final reply memo on Motion for Summary Judgment on counterclaim.	91.00
2/24/2005	RDL	Attorney Fee: Review M. Kelly reply memo on Standby motion for Summary Judgment.	52.00
3/1/2005	RDL	Attorney Fee: Prepare for hearing on Summary Judgment; travel to and from Caldwell; attend hearing on Summary Judgment; telephone conference with K. Trainer.	494.00
3/7/2005	RDL	Attorney Fee: Telephone conference with K. Standley about summary judgment ruling.	26.00
3/18/2005	RDL	Attorney Fee: Telephone conference with M. Kelly about attendance at pre-trial conference.	26.00
3/21/2005	RDL	Attorney Fee: Prepare for and attend telephone status conference with court and Plaintiff's counsel.	104.00
	RDL	Attorney Fee: Review DeGroot's motion to vacate trial setting.	39.00
3/29/2005	RDL	Attorney Fee: Review order confirming Summary Judgment.	39.00
3/29/2005	MLH	Paralegal Draft judgment.	45.50
3/30/2005	RDL	Attorney Fee: Finalize judgment on counterclaim; prepare letter to court; prepare letter to K. Standley.	91.00
		Total	**$8,359.00**

SUMMARY

Robert D. Lewis	63.60	@	$130/hr	$8,268.00
Mary L. Hainline	1.40	@	$65/hr	$ 91.00
				$8,359.00

ORIGINAL

Robert D. Lewis, ISB #2713
CANTRILL, SKINNER, SULLIVAN & KING LLP
1423 Tyrell Lane
P.O. Box 359
Boise, Idaho 83701
Telephone: (208) 344-8035
Facsimile: (208) 345-7212

FILED
A.M. 1:10 P.M.
APR 18 2005
CANYON COUNTY CLERK
B. BUTLER, DEPUTY

Attorneys for Defendant Standley Trenching, Inc., d/b/a Standley & Co.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES DeGROOT, and DeGROOT FARMS, LLC,

Plaintiffs,

vs.

STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO., and J. HOULE & FILS, INC., a Canadian corporation,

Defendants.

STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO.,

Counterclaimant,

vs.

CHARLES DeGROOT; AND DeGROOT FARMS, LLC,

Counterdefendants.

Case No. CV 2001-7777

COUNTERCLAIMANT'S MOTION FOR AWARD OF PREJUDGMENT INTEREST AND ENTRY OF AMENDED JUDGMENT ON COUNTERCLAIM

COMES NOW The Counterclaimant, Standley Trenching, Inc., d/b/a Standley & Co., by and through its counsel of record, Robert D. Lewis, of the firm Cantrill, Skinner, Sullivan & King LLP, and pursuant to the Judgement on Counterclaim issued by the Court in this matter on April 4, 2005,

hereby moves this Honorable Court for an Order awarding prejudgment interest on the sum of $20,259.57, accruing at the statutory rate of 12% per annum from March 16, 2001 to April 4, 2005, the entry date of Judgment on Counterclaim, totaling $9,856.80.

Counterclaimant further moves this Honorable Court for issuance of an Amended Judgment itemizing the prejudgment interests allowable by law.

This motion is made and based upon the records and pleadings on file in the above-entitled matter, together with the Affidavit of Robert D. Lewis, filed of even date herewith.

DATED this 15 day of April, 2005.

CANTRILL, SKINNER, SULLIVAN & KING LLP

By: _____

Robert D. Lewis, Of the Firm
Attorneys for Defendant Standley Trenching, Inc., d/b/a Standley & Co.

CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of April, 2005, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Julie Klein Fischer Kevin E. Dinius WHITE PETERSON Canyon Park at The Idaho Center 5700 East Franklin Rd., Ste. 200 Nampa, ID 83687	[ ] [ ] [X]	Facsimile Hand Delivery U.S. Mail
William A. McCurdy 702 West Idaho, Ste. 1000 Boise, ID 83702	[ ] [ ] [X]	Facsimile Hand Delivery U.S. Mail
Michael E. Kelly Howard Lopez & Kelly PLLC 702 W. Idaho, Ste. 1100 P.O. Box 856 Boise, ID 83701-0856	[ ] [ ] [X]	Facsimile Hand Delivery U.S. Mail

Robert D. Lewis

Robert D. Lewis, ISB #2713
CANTRILL, SKINNER, SULLIVAN & KING LLP
1423 Tyrell Lane
P.O. Box 359
Boise, Idaho 83701
Telephone: (208) 344-8035
Facsimile: (208) 345-7212

FILED
A.M. 2:20 P.M.
JUN 06 2005
CANYON COUNTY CLERK
DEPUTY

Attorneys for Defendant Standley Trenching, Inc., d/b/a Standley & Co.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES DeGROOT, and DeGROOT FARMS, LLC,

Plaintiffs,

vs.

STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO., and J. HOULE & FILS, INC., a Canadian corporation,

Defendants.

STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO.,

Counterclaimant,

vs.

CHARLES DeGROOT; AND DeGROOT FARMS, LLC,

Counterdefendants.

Case No. CV 2001-7777

ORDER

On May 31, 2005, this Court heard oral argument on Plaintiff's Motion to Reconsider Judgment on Counterclaim, Standley Trenching Inc.'s Motion for Prejudgment Interest and Entry of Amended Judgment on Counterclaim, and Standley Trenching Inc.'s Motion for Rule 54(b) Certificate. Plaintiff appeared by way of counsel, Jill S. Holinka. Counterclaimant Standley

Trenching Inc., appeared by counsel Robert D. Lewis. Defendant J. Houle & Fils, Inc., appeared by way of counsel William A. McCurdy. Having reviewed the record in this case and heard oral argument, the Court enters the following Orders:

1. Plaintiff's Motion to Reconsider Judgment on Counterclaim is DENIED.

2. Counterclaimant's Motion to add a Rule 54(b) Certificate is DENIED, as it is premature, although the matter may be taken up again if the status of the case changes.

3. Counterclaimant's Motion for Prejudgment Interest is entered for the period of March 16, 2001 to April 4, 2005, with the amount of $9,856.80 found due and owing at the statutory rate, and this issue may be taken up later, when the status of the case changes.

IT IS SO ORDERED this 3 day of June, 2005.

The Honorable Gregory M. Culet

CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of June, 2005, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Julie Klein Fischer Jill Holinka WHITE PETERSON Canyon Park at The Idaho Center 5700 East Franklin Rd., Ste. 200 Nampa, ID 83687	[ ] [ ] [X]	Facsimile Hand Delivery U.S. Mail
William A. McCurdy 702 West Idaho, Ste. 1000 Boise, ID 83702	[ ] [ ] [X]	Facsimile Hand Delivery U.S. Mail
Michael E. Kelly Howard Lopez & Kelly PLLC 702 W. Idaho, Ste. 1100 P.O. Box 856 Boise, ID 83701-0856	[ ] [ ] [ ]	Facsimile Hand Delivery U.S. Mail
Robert D. Lewis Cantrill, Skinner, Sullivan & King, LLP P.O. Box 359 Boise, ID 83701	[ ] [ ] [X]	Facsimile Hand Delivery U.S. Mail

ORIGINAL

FILED
A.M. 1 55 P.M.

JUL 25 2005

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

Robert D. Lewis, ISB #2713
CANTRILL, SKINNER, SULLIVAN & KING LLP
1423 Tyrell Lane
P.O. Box 359
Boise, Idaho 83701
Telephone: (208) 344-8035
Facsimile: (208) 345-7212

Attorneys for Defendant Standley Trenching, Inc., d/b/a Standley & Co.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES DeGROOT, and DeGROOT FARMS, LLC,

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vs.

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Defendants.

STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO.,

Counterclaimant,

vs.

CHARLES DeGROOT; AND DeGROOT FARMS, LLC,

Counterdefendants.

Case No. CV 2001-7777

COUNTERCLAIMANT STANDLEY TRENCHING, INC.'S SUPPLEMENTAL MEMORANDUM SUPPORTING AN AWARD OF FEES

COMES NOW Counterclaimant, Standley Trenching, Inc., d/b/a Standley & Co., ("Standley"), by and through its attorneys of record, Cantrill, Skinner, Sullivan & King, LLP, and hereby presents this Memorandum to the Court in support of its claim for attorneys fees on the

Counterclaim. Following the hearing on Plaintiffs' Objection to Costs held June 29, this Court gave all parties an opportunity to file a Supplemental Memorandum on or before July 22, 2005.

At the hearing, the Court ruled from the bench that (1) this Counterclaim is based upon a commercial transaction, and (2) there is a statute that governs attorneys fees applying to this matter, Idaho Code § 12-120. The Court also ruled that (3) Counterclaimant Standley was a prevailing party, and that Standley also prevailed against Plaintiff on its defenses to the Complaint. Summary Judgment has been issued to Standley both on the Counterclaim and against all claims made by Plaintiff DeGroot.

The question presented by the Court that is addressed by this Memorandum is whether Standley can be the prevailing party for an award of attorneys fees or costs, when this action has been consolidated with a new suit filed by DeGroot versus Beltman. Standley is a Third Party Defendant in the DeGroot v. Beltman case under a Third Party Complaint filed by Beltman.

As the Court knows from the position set forth by Standley at the hearing, the consolidation was acquired without notice or opportunity to be heard by Counterclaimant/Defendant Standley. Although the exact circumstances of the stipulation are unknown to the undersigned, apparently DeGroot counsel stipulated with Beltman counsel to consolidate the actions. Standley reserves the right to contest that consolidation at a later time. For purposes of this Memorandum, and as will be seen by the argument below, Standley does not believe that the consolidation is material to the question of prevailing party and costs in the initial action between DeGroot and Standley.

Rule 54(d)(1)(B), I.R.C.P., provides the Court with the basis for determining which party to an action is a prevailing party and entitled to costs. As the rule states "the trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and

upon so finding may apportion the costs between and among the parties in a fair and equitable manner . . .." (Emphasis added.)

Counterclaimant perceives that the Court is reluctant to now award attorney fees because of his concern about the effect of the DeGroot v. Beltman lawsuit on liabilities of DeGroot and Standley.

In the first place, that concern can be overcome by interpretation of the express language in the Civil Rule. The use of the term "action" is determinative. Rule 2 defines action, and states that "there shall be one form of action to be known as "civil action." Rule 3(a)(1) states that "a civil action is commenced by a filing of a complaint with the Court, ... No claim, controversy or dispute may be submitted to any court in the state for determination or judgment without filing a Complaint . . .."

DeGroot v. Standley is one action. That action has resulted in a Judgment awarded to Standley on the Counterclaim. That action has resulted in a Summary Judgment in favor of Standley against all claims asserted by DeGroot in its Complaint. Regardless of any other action that has been or may be filed by DeGroot against any other entity, it is only the result of the DeGroot v. Standley action that is pertinent to this Court's decision on whether to award costs and attorneys fees to Standley.

The DeGroot v. Beltman action is entirely separate from the action in which Standley now seeks costs and attorneys fees. DeGroot did not prevail against Standley. Whether Beltman prevails against Standley in the DeGroot v. Beltman action is irrelevant. This situation has been addressed by one federal court. Defendant's costs can be assessed against a Plaintiff, when not the prevailing party, even when another Plaintiff does prevail in an action consolidated for trial. Modick v. Carvel

Stores of New York, Inc., 209 F. Supp. 361 (D. N.Y. 1962).

Even though consolidated, the two actions that are of concern to this Court are separate and apart. At issue are costs and attorneys fees in the action initiated by DeGroot against Standley and Houle. The rules set forth above contemplate that this Court only consider the results in this action in determining which party is a prevailing party and entitled to costs and fees. Filing the DeGroot v. Beltman action does not save DeGroot from a fee award. Nor does consolidating the two separate actions.

Furthermore, assuming for the sake of argument that the Court finds some reason to overlook the meaning of "action," consolidation should not play a factor in determining who is the prevailing party between DeGroot and Standley.

DeGroot chose to sue Standley in the DeGroot v. Standley action. Standley Counterclaimed against DeGroot in the DeGroot v. Standley action. Those claims are final for all intents and purposes, although the Court has yet to certify them as final because Houle remains as a party in the DeGroot v. Standley action.

There is no potential for offset in the DeGroot v. Beltman case of a fee award to Standley. There is no legal basis for DeGroot to make any claim against Standley. Nor should such an offset be made between Beltman and Standley, since Beltman is not a party to the DeGroot v. Standley action.

Also, a claim of offset requires that DeGroot prevail against Beltman in the DeGroot v. Beltman case. Such a recovery is no more than mere speculation, since Beltman has valid defenses against DeGroot's claims. If DeGroot does not prevail, there can be no argument for offset. When Beltman prevails against DeGroot, DeGroot should be paying costs and attorneys fees to Beltman.

Assuming that DeGroot does prevail against Beltman, then an offset would arise only if Beltman recovers against Standley. Standley has valid defenses against any claim for indemnity or contribution by Beltman. When Standley prevails, Beltman will not.

The possible results in the DeGroot v. Beltman suit are numerous. It is hard to understand how any result in the DeGroot v. Beltman action could lead to any claim that there be an offset in favor of DeGroot for the costs and attorneys fees that this Court should award in favor of Standley against DeGroot in the DeGroot v. Standley action.

Finally, set off or offset law has not been developed in Idaho. There has been development of some issues in federal court. For instance, in Goldman v. Burch, 780 F. Supp. 1441 (D. N.Y. 1992), the Court held that a Defendant can be the prevailing party on a Counterclaim for the purpose of a cost award, even if Plaintiff has prevailed to a lesser degree on the case in chief. The case addresses who the prevailing party is and does not involve consolidation, but it is instructive on an award of attorneys fees and costs even if Plaintiff does prevail, which DeGroot does not.

In Maryland Casualty Co. v. Jacobson, 37 F.R.D. 427 (D. Mo. 1965), the Court ruled that a judgment for costs awarded on appeal should not be set off against judgment on the merits for Plaintiff. This case is instructive on the fact that an award of costs that becomes a judgment is separate from the claims made by Plaintiff in their case in chief. Thus, a claim of offset is not sound basis for determining the prevailing party issue.

Counterclaimant Standley believes that the Civil Rules and the cited cases firmly establish that fees and costs should be awarded against DeGroot, and the consolidation with another action is not relevant.

CONCLUSION

Clearly, Counterclaimant Standley is the prevailing party and should be awarded attorneys fees. DeGroot chose to sue Standley and Houle, without also suing Beltman, and DeGroot chose to dispute the Counterclaim with no factual or legal defenses. This Court has ruled that Standley prevails on all of Standley's claims against DeGroot and all of DeGroot's claims against Standley. The DeGroot v. Standley action is but one lawsuit and the issues before this Court on costs and attorneys fees should not be affected by the fact that DeGroot has now gone and filed a separate lawsuit in the DeGroot v. Beltman action. The two actions are completely separate. All costs and fees incurred by Standley pursuing the Counterclaim are related only to the DeGroot v. Standley action. The award of costs and attorneys fees should be made now, regardless of any claims pending in the DeGroot v. Beltman action.

There is no legal or factual basis by which an award of costs and attorneys fees in favor of Standley can be offset if DeGroot prevails in the DeGroot v. Beltman action. DeGroot has no claim against Standley, but only against Beltman.

Counterclaimant Standley respectfully requests this Court to award its attorneys fees. Such order should leave open all fees incurred by Counterclaimant Standley until this action is final. The claim for attorneys fees includes not only those fees sought in the Initial Memorandum, but also those fees sought through any Supplemental Memorandum of Costs that may be filed within the time constraints contemplated by Rule 54(d)(5).

DATED this 22nd day of July, 2005.

CANTRILL, SKINNER, SULLIVAN & KING LLP

By: _____
Robert D. Lewis, Of the Firm
Attorneys for Defendant Standley Trenching, Inc., d/b/a Standley & Co.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of July, 2005, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Julie Klein Fischer Kevin E. Dinius WHITE PETERSON Canyon Park at The Idaho Center 5700 East Franklin Rd., Ste. 200 Nampa, ID 83687	[ ] [ ] [X]	Facsimile Hand Delivery U.S. Mail
William A. McCurdy 702 West Idaho, Ste. 1000 Boise, ID 83702	[ ] [ ] [X]	Facsimile Hand Delivery U.S. Mail
Michael E. Kelly Howard Lopez & Kelly PLLC 702 W. Idaho, Ste. 1100 P.O. Box 856 Boise, ID 83701-0856	[ ] [ ] [X]	Facsimile Hand Delivery U.S. Mail

_____
Robert D. Lewis

Westlaw.

209 F.Supp. 361

209 F.Supp. 361, 6 Fed.R.Serv.2d 1025

(Cite as: 209 F.Supp. 361)

United States District Court S.D. New York.
Lester M. MODICK et al., Plaintiffs,
v.
CARVEL STORES OF NEW YORK, INC., et al., Defendants.
James OSSOLA et al., Plaintiffs,
v.
CARVEL STORES OF NEW YORK, INC., et al., Defendants.
Joseph P. PHELAN, Plaintiff,
v.
CARVEL STORES OF NEW YORK, INC., et al., Defendants.
James P. PIERCE et al., Plaintiffs,
v.
CARVEL STORES OF NEW YORK, INC., et al., Defendants.
Matthew SEU et al., Plaintiffs,
v.
CARVEL CORPORATION et al., Defendants.
Paul S. GIBERMAN et al., Plaintiffs,
v.
CARVEL STORES OF NEW YORK, INC., et al., Defendants.
Joseph PAZDRO et al., Plaintiffs,
v.
CARVEL STORES OF NEW YORK, INC., et al., Defendants.

Oct. 1, 1962.

Motion to review taxation of costs in actions for fraud and for violation of antitrust laws where, in four of the actions, the plaintiffs had established antitrust violations. The District Court, Dawson, J., held that, in actions in which neither fraud nor antitrust violations had been established, costs had been properly taxed against unsuccessful plaintiffs for docket fees, taking of depositions by defendants, and cost of transcripts of trial testimony, but that costs attributable to duplicate copies of defendants' depositions and trial transcripts should be deleted.

Taxation of costs affirmed except to extent of referring matter to clerk for ascertainment of charges for additional copies so that such charges could be deleted from taxation of costs.

See also 206 F.Supp. 636.

West Headnotes

[1] Federal Civil Procedure 2727
170Ak2727 Most Cited Cases
Fact that certain of the plaintiffs in separate antitrust actions consolidated for trial successfully established anti-trust violations did not render all plaintiffs "prevailing parties" for purposes of taxation of costs.

[2] Federal Civil Procedure 2727
170Ak2727 Most Cited Cases
Where a plaintiff is not the prevailing party costs are properly assessed against him even though his action has been joined with that of another plaintiff and even though the actions were consolidated for trial.

[3] Federal Civil Procedure 2736
170Ak2736 Most Cited Cases
As part of taxation of costs docket fees were properly assessed for all nine fraud and antitrust cases which had been consolidated for trial where docket fees were in fact incurred in each of the separate actions and where actions had been consolidated only a relatively short time before trial.

[4] Federal Civil Procedure 2738
170Ak2738 Most Cited Cases
Cost of taking depositions is taxable in favor of prevailing party when the taking of the deposition was reasonably necessary even though deposition taken may not have been used at the trial. 28 U.S.C.A. § 1920(2).

[5] Federal Civil Procedure 2738

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170Ak2738 Most Cited Cases
Cost of depositions taken on behalf of prevailing defendants in fraud and antitrust actions would be taxed against plaintiffs notwithstanding their voluminous length and high cost where depositions merely represented results of defendants' full use of legitimate pre-trial procedures to ascertain exact nature of plaintiffs' charges. 28 U.S.C.A. § 1920(2).

[6] Federal Civil Procedure ⚿2738
170Ak2738 Most Cited Cases
Cost of defendants' depositions taxed against unsuccessful plaintiffs in fraud and antitrust actions would be limited to the cost of a single original copy and would not include cost of duplicate copies obtained for convenience of counsel.

[7] Federal Civil Procedure ⚿2740
170Ak2740 Most Cited Cases
Cost of transcripts of trial testimony may be taxed against losing party when in court's judgment such transcripts are necessary for use in case. 28 U.S.C.A. § 1920(2).

[8] Federal Civil Procedure ⚿2740
170Ak2740 Most Cited Cases
In fraud and antitrust trial lasting over six weeks and involving twelve different factual situations and interrelated claims necessitating availability of prior testimony to avoid time-wasting disagreements as to previous testimony, transcript was reasonably necessary for use in the case and its cost was properly taxed against losing plaintiffs. 28 U.S.C.A. § 1920(2).

[9] Federal Civil Procedure ⚿2740
170Ak2740 Most Cited Cases
In action in which a trial transcript was necessary for use in the case, losing plaintiffs were properly taxed for its cost and cost of one copy for use of defense counsel, but plaintiffs could not properly be taxed for cost of additional copies. 28 U.S.C.A. § 1920(2).

[10] Federal Civil Procedure ⚿2740
170Ak2740 Most Cited Cases
Cost of transcripts of pre-trial conferences is taxable when such transcripts are necessary for use in the case.

[11] Federal Civil Procedure ⚿2740
170Ak2740 Most Cited Cases
Cost of transcripts of pre-trial conferences devoted to limiting and clarifying issues and formulating plan of trial procedures in fraud and antitrust actions was properly taxed to unsuccessful plaintiffs as part of taxation of costs.

[12] Federal Civil Procedure ⚿2741
170Ak2741 Most Cited Cases
Witness fees are properly includable as costs of trial even where witness is friendly and appears voluntarily and is an officer of a corporate defendant. 28 U.S.C.A. § 1920(3).

[13] Witnesses ⚿24
410k24 Most Cited Cases
Witnesses who are real parties in interest are not entitled to reimbursement or allowance for their testimony.

[14] Witnesses ⚿25
410k25 Most Cited Cases
Where actions were consolidated for trial witness fees were properly allowed real parties in interest where they testified in actions in which they were not party defendants.
***362** Greenfield, Rothstein, Klein & Yarnell, New York City, for plaintiffs, Sidney W. Rothstein, Jules Yarnell, New York City, of counsel.

Amen, Weisman & Butler, New York City, for 'Carvel' defendants, Herbert F. Roth, Astoria, N.Y., of counsel.

DAWSON, District Judge.

This is a motion to review taxation of costs in the above actions. The costs have been taxed by the Clerk only in those cases in which a final judgment was directed to be entered on behalf of the defendants. There are four actions which still await trial on the issue of damages. In those cases no costs have been taxed. There were originally nine lawsuits, in which there were a total of twelve sets

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of plaintiffs. Each lawsuit alleged a cause of action based on fraud and also a cause of action based on violations of the antitrust laws.

In accordance with a pre-trial order entered on September 22, 1961 all of the actions for fraud were consolidated for trial pursuant to Rule 42(a) of the Rules of Civil Procedure, 28 U.S.C.A. A trial was had and findings of fact and conclusions of law were filed on February 7, 1962. Thereafter the causes of action based on alleged violations of the antitrust laws went to trial. These also were consolidated for trial. Findings of fact and conclusions of law in the antitrust causes of action were filed on June 7, 1962. All of the actions for fraud were dismissed for failure of proof. All of the actions for alleged violations of the antitrust *363 laws, with the exception of four, were dismissed. In those four cases the Court decided that the plaintiffs had established violations of the antitrust laws and directed that a hearing be held on the issue of damages. This hearing on the issue of damages has not yet been had and no costs are sought in those cases at the present time.

Since the causes of action of the various plaintiffs were different causes of action involving different sets of facts it became necessary to determine separately the facts as to each set of plaintiffs, both on the fraud causes of action and on the antitrust causes of action, and findings of fact and conclusions of law were handed down separately.

There were a total of sixteen defendants in the fraud causes of action and a total of twenty-three defendants in the antitrust causes of action. It appears from the motion papers submitted by plaintiffs' attorneys that plaintiffs are challenging only the taxation of costs secured by the so-called 'Carvel' defendants and not by the supplier defendants.

1. The Prevailing Parties

[1] The first contention of the plaintiffs on this motion for retaxation of costs is that plaintiffs are the prevailing parties and therefore not liable for costs. They assert that since the actions were consolidated for trial and four of the plaintiffs won on the actions for violations of the antitrust laws all plaintiffs should be deemed to be prevailing parties and therefore not liable for costs. This, of course, is erroneous. The fact that the actions were consolidated for trial does not mean that they were any less separate cases. Such consolidation was for the convenience of parties and the Court. There were the same number of cases tried in both the fraud and antitrust aspects and each case must stand on its own feet so far as costs are concerned. The consolidation of separate causes of action involving separate plaintiffs for trial purposes does not free a losing plaintiff from the duty of paying costs simply because another one of the plaintiffs was successful.

'Where two causes of action, each by a different plaintiff and each against the same defendant, are consolidated for trial, and but one plaintiff is successful, the successful plaintiff is entitled to costs, and defendant is entitled to costs against the unsuccessful plaintiff. * * *' 20 C.J.S. Costs § 95, p. 346; Cornell v. Gulf Oil Corp., 35 F.Supp. 448 (E.D.Pa.1940).

In the Pierce action there were four plaintiffs, each alleging separate causes of action sounding in fraud and violation of the antitrust laws. Here again certain plaintiffs won and certain plaintiffs lost, depending upon the facts of the case. The Court, so far as allowance of costs is concerned, will have to treat each plaintiff separately; those who lost will have to pay costs and those who won will be treated as prevailing parties. The mere fact that plaintiffs joined their causes of action in one suit does not change this rule. Since the four sets of plaintiffs joined in this action did not complain of damages arising out of a single transaction or occurrence, and since the evidence and proof at trial involved four separate claims, with four separate factual situations, each plaintiff will be treated separately in determining the prevailing party entitled to costs.

[2] Where a plaintiff was the prevailing party no costs have been assessed against him. Where plaintiff was not the prevailing party costs were properly assessed against him, even though his action had been joined with that of another plaintiff

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and even though the action was consolidated for trial.

2. Docket Fees

[3] Plaintiffs urge, in the second place, that there should be only a single docket fee in all nine cases since there was a consolidation for trial. This overlooks the fact that docket fees were incurred in each of the actions and that the ***364** actions were consolidated only a relatively short time before trial. A docket fee in each case was properly assessed.

3. Costs for Depositions

Plaintiffs also complain about the allowance of costs for depositions.

[4] It is well established that the cost of taking deposition is taxable in favor of the prevailing party when 'the taking of the deposition was reasonably necessary even though it may not have been used at the trial.' 4 Moore, Federal Practice § 1207. Title 28 U.S.C. § 1920(2) sets forth clearly that the standard for taxing deposition costs is the necessity for use in the case. This language was changed from on the trial to indicate that discovery expenses, as well as trial expenses, can be recovered by the prevailing party if reasonably necessary. See Perlman v. Feldmann, 116 F.Supp. 102 (D.C.Conn. 1953).

[5] It is true that there were voluminous depositions taken on behalf of the defendants in each of the cases. Yet the severity of the charges promulgated by the plaintiffs, as well as the complexity of the legal and factual issues in each case, justified such lengthy and costly examination. The charge of fraud requires very precise proof and it is understandable that defendants went into great detail during the depositions to ascertain the exact nature of plaintiffs' charges. It should be borne in mind that plaintiffs themselves initiated the actions; they cannot now be heard to complain that defendants made full use of legitimate pre-trial procedures.

[6] Plaintiffs argue that even if the costs of depositions are to be taxed to them, their liability should be limited to the cost of a single original copy and not include the cost of duplicate copies obtained from the convenience of counsel. In this contention they are correct. Perlman v. Feldmann, D.C., 116 F.Supp. 102 (D.C.Conn.1953); Hope Basket Co. v. Product Advancement Corp., 104 F.Supp. 444 (W.D.Mich.1954); General Casualty Co. of America v. Stanchfield, 23 F.R.D. 58 (D.C.Mont.1959).

It is not clear from the papers on the taxation of costs whether any portion of the costs taxed for depositions covers duplicate copies obtained for the convenience of counsel. If it does, so much of such costs as are attributable to duplicate copies should be deleted. For this purpose the matter is remanded to the Clerk for consideration of the facts.

4. Trial Transcripts

Plaintiffs also object to the costs of trial transcripts.

[7][8] The cost of transcripts of the trial testimony may be taxed against the losing party when in the Court's judgment such transcripts are necessary for use in the case. Title 28 U.S.C. § 1920(2) specifically authorizes the taxation of such costs, stating that the judge or clerk may tax as costs 'fees of the court reporters for all or any part of the stenographic transcript necessarily obtained for use in the case.' The determinative consideration, therefore, is whether the transcript was reasonably necessary for 'use in the case.' Bank of America v. Loew's International Corp., 163 F.Supp. 924 (S.D.N.Y.1958); Manley v. Canterbury Corp., 17 F.R.D. 234 (D.C.Del.1955). In the instant case testimony at the fraud trial lasted for over six weeks and involved twelve different factual situations. Moreover, since all the claims were interrelated to some degree, it was necessary to have available the testimony of prior witnesses in order to minimize time-wasting disagreements as to what each witness actually testified. Because of the anticipated length and complexity of the trial, and since findings of fact and conclusions of law were required to be rendered at its conclusion, the Court, at a pre-trial conference, pursuant to 28 U.S.C. § 1920(2),

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ordered that a transcript be made and the cost included as part of the taxable costs of the case. The multiplicity of the allegations and the length of the testimony adduced at trial served to reinforce the Court's opinion that copies of the transcript for both the Court and the parties *365 was a necessity, not merely a convenience.

[9] The Court concludes that the taxation of costs for the trial transcript and for one copy obtained by defendants for the use of counsel is proper. If plaintiffs were charged for additional copies such additional expenses are not properly taxable as costs and the matter is remanded to the Clerk for determination of that fact.

5. Pre-Trial Transcripts

Plaintiffs next object to the taxation of costs of transcripts of pre-trial conferences.

[10][11] The cost of transcripts of pre-trial conferences is taxable when such transcripts are necessary for use in the case. In cases of this type where the issues are varied and complicated, pre-trial conferences play an important role in narrowing and delineating the issues to be tried, ascertaining the order of proof and generally laying the groundwork for the trial itself. In the Bank of America case, supra, this Court held:

'It is clear that the cost of the transcript of the minutes of the pre-trial proceedings may be allowed as a cost of the case, and particularly is this true where the pre-trial proceedings devoted considerable efforts to the limiting and clarifying of issues, were conducted at considerable length and where a proper understanding of the matters covered and preparation of a pre-trial order could not properly be had without a transcript thereof.' 163 F.Supp. 924, 931-932.

Pre-trial orders were often made a part of the conference transcript, and in any case, a careful reading of the transcript would have done much to clarify the issues remaining for trial. Defendants obtained and paid for a total of fifteen pre-trial conference transcripts. Only seven are requested to be taxed as costs against the plaintiffs. Defendants assert that they chose these seven conferences because they were devoted to limiting and clarifying the issues and formulating a plan of trial procedures. The remaining eight conferences were not relevant in this regard and no attempt to tax them is made.

In this case the Court feels it must exercise its discretion to tax the costs of pre-trial conference transcripts since they played a vital part in the progress of the lawsuit.

6. Witness Fees

The final item objected to in the taxation of costs was the allowance of certain witness fees.

[12] Witness fees are properly includable as costs of trial, pursuant to 28 U.S.C. § 1920(3). This is true even where the witness is friendly and appears voluntarily and is an officer of a corporate defendant. Kemart Corp. v. Printing Arts Research Lab., 232 F.2d 897 (9th Cir. 1956); Perlman v. Feldmann, 116 F.Supp. 102; Bennett Chemical Co. v. Atlantic Commodities, Ltd., 24 F.R.D. 200 (D.C.N.Y.1959). In the case at bar several witness fees were allowed for officers and employees of the Carvel defendants. As indicated above, there is no proscription against awarding costs for this reason.

[13][14] Plaintiffs object on the additional ground that some witnesses for whom witness fees were awarded were not merely officers or employees of the defendant Carvel Corporation, but were individually named and served as defendants. It is true that witnesses who are real parties in interest are not entitled to reimbursement or allowance for their testimony. 6 Moore, Federal Practice § 54.77(5); Ryan v. Arabian American Oil Company, 18 F.R.D. 206 (S.D.N.Y.1955). It appears that there are five individuals on whose behalf witness fees are requested who are also defendants in certain actions. (Pierce, Giberman and Pazdro). However, the record also indicates that three of these five testified only in actions in which they are not party defendants and the prohibitions against granting witness fees as to these three would not be

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applicable. *366 The objection to witness fees granted by the Clerk should be overruled.

Except to the extent that the matter is referred to the Clerk for the ascertainment of facts as outlined in the foregoing memorandum, the taxation of costs made by the Clerk is affirmed. When the Clerk has ascertained the facts as to the matters referred to him, further taxation of costs should be made on those items.

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780 F.Supp. 1441

(Cite as: 780 F.Supp. 1441)

H

Motions, Pleadings and Filings

United States District Court,
S.D. New York.
Jane H. GOLDMAN and Allan Howard Goldman,
as Executors Under the Last Will and
Testament of Sol Goldman, Deceased, Plaintiffs,
v.
Robert BURCH, Individually and as Trustee Under
Trust Known as GC-1 Trust,
Defendant.
No. 87 Civ. 7189 (BN).

Jan. 13, 1992.

Executors of estate of hotel purchaser sought to recover amount allegedly overpaid for hotel. The United States District Court for the Southern District of New York, 778 F.Supp. 781 entered judgment in part for sellers and in part for purchasers. Parties cross moved for relief. The District Court, Newman, Senior Judge, sitting by designation, held that: (1) purchasers were liable to sellers for accounts receivable which existed on date of closing; (2) hotel's cash receipts during seller management period, whether or not derived from accounts receivable, were available to seller to pay hotel's bills; and (3) sellers were entitled to award of counsel fees as sellers were successful on their counterclaims to substantially greater extent than purchasers.

Ordered accordingly.

West Headnotes

[1] Vendor and Purchaser 79
400k79 Most Cited Cases
Under amendment to hotel purchase agreement, purchaser was obligated to reimburse vendor for uncollected balance of hotel's accounts receivable that existed as of first closing date and not as of management transfer date.

[2] Vendor and Purchaser 196
400k196 Most Cited Cases
Under amendment to hotel purchase agreement, only those accounts receivable relating to period after closing date which were on hand at closing belonged to purchaser and thus seller had right to use cash receipts during seller management period for hotel operation regardless of what percentage of hotel's revenues were derived from credit card sales; after receipt of funds for credit card sales during seller management period, accounts receivable became "cash receipts" and thus were not accounts receivable "on hand at closing."

[3] Vendor and Purchaser 196
400k196 Most Cited Cases
Under hotel purchase agreement, cash payments received by hotel from account receivable debtors during seller management period could be used by seller to pay its bills received in normal course of business, including bills resulting from preseller management period expenses.

[4] Vendor and Purchaser 196
400k196 Most Cited Cases
Hotel's cash receipts received during seller management period, whether or not derived initially from accounts receivable, were available to seller for payment of old bills received in ordinary course of business, for expenses accruing either before or after closing date; all cash receipts and disbursements during that period were factors in computing net profits in accordance with agreement and generally accepted principles of cash basis accounting.

[5] Vendor and Purchaser 196
400k196 Most Cited Cases
Under hotel purchase agreement, "net profits"

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included all expenses which hotel paid during seller management period whether those expenses accrued prior to or during that period.

[6] Vendor and Purchaser ⚿341(3)
400k341(3) Most Cited Cases
Corroborated testimony of trustee of seller supported finding that seller had made working capital advance to hotel purchaser, although unexplained failure of trustee to produce documentary evidence from hotel's bank establishing wire transfer bore on weight and credibility of testimony and other evidence; trustee's testimony and that of hotel's assistant controller showed that advance was transferred by wire to bank, for purposes of determining extent of amounts owed to purchaser for alleged overpayment.

[7] Vendor and Purchaser ⚿202
400k202 Most Cited Cases
Hotel purchase agreement showed that vendor and purchaser agreed explicitly and unconditionally on prorations and adjustments and thus vendor was entitled to receive apportionment credits in conformity with section of agreement covering prorations and adjustments of expenses that were paid by seller during seller management period.

[8] Federal Civil Procedure ⚿2737.5
170Ak2737.5 Most Cited Cases
Seller of hotel was entitled to award of reasonable counsel fees in action stemming from sale of hotel; seller was successful under its counterclaims to substantially greater extent than were purchasers on their complaint.

[9] Federal Civil Procedure ⚿2737.5
170Ak2737.5 Most Cited Cases
Trustee of seller of hotel was not entitled to award of counsel fees as "prevailing party" in his individual capacity in action stemming from sale, although seller was prevailing party, as trustee was not party to purchase agreement which was contractual predicate for fee shifting award of counsel fees, even though suit against trustee individually was frivolous.

[10] Vendor and Purchaser ⚿31
400k31 Most Cited Cases
Error in hotel purchase agreement in making reference to local law governing fire protection systems for buildings other than hotels did not release seller from its obligation to reimburse purchasers for installing required fire protection system.

[11] Federal Civil Procedure ⚿2658
170Ak2658 Most Cited Cases
Cross motion made within ten business days after entry of judgment was timely. Fed.Rules Civ.Proc.Rules 6(a, b), 52(b), 28 U.S.C.A.
***1442** Stephen H. Penn & Associates, Noel W. Hauser, New York City, for plaintiffs.

Gibson, Dunn & Crutcher, Mitchell A. Karlan, New York City, for defendant.

OPINION AND ORDER

NEWMAN, Senior Judge, United States Court of International Trade, sitting as a United States District Court Judge by Designation:

INTRODUCTION

The parties, asserting various errors in the court's Opinion, Findings of Fact and Conclusions of Law dated November 25, 1991, 778 F.Supp. 781 (1991), and the judgment entered thereon dated November 29, 1991, have cross-moved for relief under Fed.R.Civ.P. 52(b), 59(a) and (e). Additionally, plaintiffs seek a new trial to adduce additional evidence regarding the Trust's claim of a $500,000 cash advance to the Hotel by wire transfer for working capital.

For the reasons that follow, plaintiffs' applications are denied *in toto;* defendant's applications are granted in part.

DISCUSSION

I.

Plaintiffs contend that the court erred in holding: "the plaintiff [sic] is [sic] absolutely obligated to pay the defendant an amount equal to the total of accounts receivable in favor of the Hotel as of the Management Transfer Date, *September 30, 1987.*"

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Affirmation of Noel W. Hauser, dated December 5, 1991, par. 4 (emphasis added). Plaintiffs further argue that the accounts receivable in question for which the court determined plaintiffs had an obligation to reimburse the Trust relate only to the period *after* May 15, 1987, which accounts according to plaintiff belonged to Goldman under § 7(a) of the Amendment. ***1443** Finally, plaintiffs claim that the court's award to defendant of $50,774.86 for accounts receivable is unsupported by the record. Accordingly, plaintiffs request that the court subtract $50,774.86 from the sum awarded to the Trust. The request is denied.

[1] Counsel for plaintiffs has misread the court's opinion. The court did not hold that plaintiffs are liable to the Trust for accounts receivable as of the *Management Transfer Date, September 30, 1987.* Rather, the court determined that pursuant to § 7(a) of the Amendment, after the Management Transfer Date (*viz.,* September 30, 1987) Goldman was obligated to reimburse the Trust $50,774.86 for the uncollected balance of accounts receivable *that existed as of the First Closing, May 15, 1987.* Plaintiffs concede that after the Management Transfer Date the Trust was entitled to the uncollected balance of accounts receivable existing as of the First Closing--May 15, 1987.

Burch's credible and uncontradicted testimony (Burch, Tr. 106) and the figures shown in plaintiffs' exhibits 5 and 6 (based on the books and records of the Hotel) establish that the accounts receivable as of the First Closing (May 15, 1987) amounted to $850,623.55 and that by the Management Transfer Date (September 30, 1987) the Trust had withdrawn $799,848.69 from the Hotel during the Seller Management Period, leaving a balance due the Trust for uncollected accounts receivable of $50,774.86. Consequently, the court adheres to its prior award to the Trust of the balance of accounts receivable that existed as of May 15, 1987, to which the Trust was entitled under § 7.

II.

Plaintiffs persist in their challenge to the Trust's right pursuant to the Amendment to use revenues generated by the Hotel during the Seller Management Period to pay bills received during such period for expenses incurred prior to that period. In further support of their position, plaintiffs have annexed an affidavit dated December 5, 1991 executed by Paul Underhill, Goldman's representative at the Hotel during the Seller Management Period. Ostensibly, the affidavit calls to the court's attention controlling new facts.

[2] According to Underhill's affidavit, a substantial percentage of the Hotel's sales of food, lodging, and other services were credit card transactions and other accounts receivable rather than cash receipts. Plaintiffs maintain that since under § 7(a) accounts receivable generated by the Trust after the First Closing for sales during the Seller Management Period belonged to Goldman, Burch had no right to pay pre-Seller Management Period expenses out of Hotel revenues, thus reducing "Net Profits" as defined in § 2.

[3] Plaintiffs' argument ignores the fact that under § 7(a), only those accounts receivable relating to the period after May 15, 1987 "*which are on hand at closing* " (emphasis added) belonged to Goldman (Burch, Tr. 93-4). That stipulation is clearly indicative of the Trust's right to use *cash receipts* during the Seller Management Period for Hotel operations. Regardless of what percentage of the Hotel's revenues were derived from credit card sales and thus were initially on the Hotel's books as accounts receivable, after receipt of funds from the banks for credit card sales during the Seller Management Period, the accounts receivable became "cash receipts" and obviously were not accounts receivable "on hand at closing." After receipt by the Hotel of cash payments from the accounts receivable debtors during the Seller Management Period, such cash receipts were properly used by the Trust for payment of its bills received in the normal course of business during the Seller Management Period, *including bills resulting from pre-seller Management Period expenses.* Such cash disbursements reduced Seller Management Period "Net Profits" in accordance with § 2 of the Amendment and with principles of cash basis accounting.

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[4] Thus, even accepting the facts recited in the Underhill affidavit, the court adheres to its previous ruling that the Hotel's ***1444** "cash receipts" during the Seller Management Period (whether or not derived initially from accounts receivable) were available to the Trust for payment of all bills received in the ordinary course of business, whether for expenses accruing before or on and after May 16, 1987. All cash receipts and disbursements during the Seller Management Period were factors in the computation of "Net Profits" in accordance with the definition thereof in § 2 and in accordance with generally accepted principles of cash basis accounting. Conversely, under § 7(a), any Seller Management Period accounts receivable *still on hand at closing* (*viz.,* uncollected receivables) belonged to Goldman, and since accounts receivable were neither cash receipts nor cash disbursements, they were not relevant to the calculation of "Net Profits" under § 2 or under cash basis accounting principles.

As was stressed in the original opinion, a critical issue in the determination of the "net profits" of a business within a certain time-frame is the method of accounting agreed upon by the parties. Inexplicably, in the case of the Amendment, which obviously received close scrutiny by counsel for Burch and Goldman, there is no definitive agreement regarding the accounting method for the determination of "Net Profits."

[5] Arguably, the "bare bones" definition of "Net Profits" in § 2 of the Amendment--in essence, cash receipts less cash disbursements--strongly suggests that cash basis accounting was intended by the parties to the Amendment, but the definition is not explicit in that regard. On the basis that the definition of "Net Profits" in the Amendment was ambiguous, plaintiffs sought, successfully, rulings, initially from Judge Cedarbaum and after reassignment of this case, from the writer, avoiding the strictures of the Parol Evidence Rule. Thus, at trial, the parties were permitted to establish the intent of Goldman (who was deceased at the time of trial) and Burch by the context in which the term was used, the situation of the parties and the surrounding circumstances pertaining to the Amendment.

As pointed up in the original opinion concerning accounting methodology, counsel for plaintiffs questioned his witness Breger at trial specifically concerning the method of accounting he had discussed with Burch--cash basis or accrual basis--and attorney Breger (who negotiated and reviewed the Amendment on behalf of Goldman) testified unequivocally on direct examination that the method he discussed was "on a cash basis" (Breger, Tr. 43).

Plaintiffs now disingenuously attempt, in a back-handed fashion, to impeach the testimony of Breger, a veteran business lawyer, on his understanding of the distinction between cash basis and accrual accounting. Plaintiffs have not even submitted an affidavit by Breger supporting their bald allegation that his understanding of cash basis accounting differed from the fundamental accounting sense.

There is no suggestion in the record that in determining the "net profits" of a Hotel, the terms "cash basis" and "accrual basis" accounting have a special meaning in the Uniform System of Hotel Accounting that differs from generally accepted accounting principles. Moreover, the authoritativeness of the "Uniform System" as an accounting "bible" for the hotel industry is largely emasculated by the fact that "nobody completely abides by it" (Coords, Tr. 232).

III.

[6] Plaintiffs contend that the court's finding of a $500,000 working capital advance by the Trust is "not supported by anything of record" and therefore is "clearly erroneous" (plfts' motion, par. 18). Such contention is frivolous since it ignores the uncontradicted and credible testimony of Burch *corroborated by that of Leyco, the Hotel's assistant controller,* showing the advance was transferred by wire to the Hotel's bank, Manufacturers Hanover. [FN1] ***1445** *See* Burch, Tr. 104-107, 156, 162; Leyco, Tr. 13, 53-55, 67, 69-70; Coords, Tr. 202, 204, 217-18, 236, 243-44; plfts' exh. 5 ("Working Capital") and 6 ($150,000 "net advances by seller"),

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24, 25; and deft's exh. 5.

> FN1. Plaintiffs' own witness, Leyco, testified:
> Q. [Y]ou know, do you not, from our own personal knowledge that Mr Burch during September, 1987 did in fact contribute $500,000 working capital to the Hotel Dorset business, correct?
> A. $500,000 was bank wired sometime in September 1987, yes. Leyco, Tr. 69.

The Amendment contemplated that Burch could make a working capital advance if Goldman failed to do so and that such advance by the Trust would be reimbursed with interest (deft's exh. B, § 7(d); Burch, Tr. 63-64, 95. Understandably, if the advance was transferred by wire directly to the Hotel's bank, the advance might not appear in the Hotel's cash schedule or other records of cash receipts, including cash received shown on the daily reports. Of course, defendant's unexplained failure to produce documentary evidence from the Hotel's bank establishing the wire transfer bears on the weight and credibility of the testimonial and other evidence submitted by defendant. Nonetheless, the court concludes that on the issue of the working capital advance by the Trust, Burch's *corroborated* testimony was sufficient to make a finding in favor of the Trust. Reopening the case for additional evidence on the working capital issue, as requested by plaintiffs, is entirely unwarranted.

IV.

[7] In the original opinion, 778 F.Supp. at 789, the court determined that when the Agreement providing for the prorations was executed, the parties did not contemplate a Seller Management Period or reduction in purchase price by "Net Profits," as thereafter provided for in § 2 of the Amendment. Hence, the court concluded that under the Amendment, the parties did not intend that the Trust should receive both apportionment credits in conformity with § 5.01 of the Agreement and a reduction of "Net Profits" for expenses paid out of Hotel revenues during the Seller Management Period under § 2.

Defendant now urges, and the court is constrained to agree, that the parties had precisely apportionment of the § 5.01 expenses in mind when they *reiterated* in §§ 5(e) and 6(d) of the Amendment that there be prorations *as provided in § 5.01*--ostensibly following the parties' understanding that during the Seller Management Period, the Hotel and its revenues still belonged to the Trust, not Goldman. Accordingly, the Trust maintains that it should recover the sum of $254,632.31 for the § 5.01 prorations and adjustment of expenses that were paid by the Trust out of Seller Management Period revenues and benefitted Goldman after September 30, 1987.

In the Amendment, Burch and Goldman agreed explicitly, unqualifiedly and unconditionally on prorations and adjustments under § 5.01, without excepting expenses paid by the Trust out of Hotel revenues during the Seller Management Period. "A court may not rewrite into a contract conditions the parties did not insert or, under the guise of interpretation, add or excise terms ..." *Marine Associates v. New Suffolk Development Corp.,* 125 A.D.2d 649, 510 N.Y.S.2d 175, 178 (2d Dept.1986) .

In view of the foregoing considerations, the court modifies its former determination regarding the prorations under § 5.01 and now, awards the Trust an additional $254,632.31 to be added to the net amount of the judgment previously awarded to the Trust on its counterlaims--$70,787.92 plus prejudgment interest.

V.

[8] Defendant asserts that the court erroneously denied it an award of its counsel fees in accordance with § 14(e) the Agreement as the "prevailing party," citing *Roberts v. Madigan,* 921 F.2d 1047, 1058 (10th Cir.1990); *Studiengesellschaft Kohle v. Eastman Kodak,* 713 F.2d 128, 131 (5th Cir.1983); *Solow v. Wellner,* 150 Misc.2d 642, 569 N.Y.S.2d 882, 888 (Civ.Ct.1991). *See also* 10 Wright, Miller & Kane, *Federal Practice and Procedure* § 2667, p. 191 (1983) ("a successful counterclaimant generally will be considered the prevailing party when plaintiff fails to recover or is awarded less

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than defendant receives on ***1446** the counterclaim"). On reconsideration of defendant's request for counsel fees, the court concludes on the basis of the authorities called to its attention that since defendant has overwhelmingly succeeded under its counterclaims and to a substantially greater extent than did plaintiffs on their complaint, *the Trust* is entitled to be awarded its reasonable counsel fees.

VI.

[9] Defendant Burch in his *individual capacity* also requests an award of attorney's fees inasmuch as his motion for summary judgment of dismissal was granted by Judge Cedarbaum. Although Judge Cedarbaum found that there was no justification for suing Burch individually and such suit was frivolous (March 23, 1990 transcript, p. 21-22), unfortunately Burch's request (in his individual capacity) for counsel fees as the "prevailing party" must be denied. Burch in his *individual capacity* although a party to this lawsuit was not a party to the *Agreement,* which is a contractual predicate for a fee-shifting award of counsel fees to the "prevailing party." However, since an award of costs to the prevailing party is provided by Fed.R.Civ.P. 54(d), Burch is awarded costs in both his individual capacity and capacity as Trustee.

VII.

[10] The court does not concur with defendant's argument, previously addressed in the original opinion, that because § 17 of the Agreement refers to Local Law 5, the Trust was not obligated to reimburse Goldman for installing a fire system in compliance with Local Law 16. It was previously mentioned that Local Law 5 applies to buildings other than Hotels. The court may readily infer from the context of the provision that both parties intended the inept reference to "the balance of Local Law 5" (Agreement, § 17, emphasis added) as merely a short-hand description for *additional fire alarm system work in the Hotel required by the New York City fire code.*

Since Local Law 5 applies to fire protection systems, but in buildings other than hotels, defendant's literal reading of the contract to refer to reimbursement to Goldman for only work under Local Law 5 simply ignores the substance of their agreement and attempts to take advantage of an error in citing the applicable Local Law. Defendant's argument results in ascribing to the parties an intent to provide a meaningless and ineffectual--indeed absurd-- agreement regarding reimbursement to Goldman for fire alarm system work. Fundamentally, a literal reading of contract language should be eschewed by the court where such interpretation makes the provision in question absurd or meaningless, and the substance of parties' agreement may be gleaned and effectuated consistently with their obvious intent. Accordingly, the court adheres to original findings and conclusions.

VIII.

[11] Finally, plaintiffs contend that defendant's cross-motion, filed on December 13, 1991 is untimely under Fed.R.Civ.P. 52(b) since it was not made within the ten days after the entry of judgment permitted by the rule, and that the ten day period may not be extended by the court under Fed.R.Civ.P. 6(b). Defendant, however, has not requested an extension of time under Rule 6(b) and maintains, correctly, that its cross-motion filed on December 13, 1991 was made within ten *business* days after entry of judgment on November 29, 1991, and is therefore timely under Fed.R.Civ.P. 6(a).

CONCLUSION

For the foregoing reasons, it is hereby ORDERED:

1. The judgment entered on November 29, 1991 is hereby vacated and the Findings of Fact and Conclusions of Law as set forth in the opinion of November 25, 1991 are modified to the extent indicated *supra.*

2. Within thirty (30) days of the entry of this order the Trust shall file in this court and serve plaintiffs with an application for an award of counsel fees with ***1447** supporting documentation. Plaintiffs may respond to such application within twenty (20) days after service of the application; defendant may thereafter file and serve a reply within five (5) days

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after service of plaintiffs' response.

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Motions, Pleadings and Filings (Back to top)

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  (Oct. 07, 1987)

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(Cite as: 37 F.R.D. 427)

C

United States District Court, W.D. Missouri, Western Division.
MARYLAND CASUALTY COMPANY, Plaintiff,
v.
Joseph P. JACOBSON, Defendant.
No. 12345-1.

June 11, 1965.

Surety's action to recover on indemnity agreement. The District Court, John W. Oliver, J., held that defendants who were granted costs by Court of Appeals which had reversed action of District Court in granting plaintiff's motion for summary judgment were entitled, on remand at which summary judgment was again entered for plaintiff to execution for amount of costs taxed rather than having amount of costs offset against monetary judgment awarded plaintiff in excess of costs.

Judgment for plaintiff in accordance with opinion.

West Headnotes

[1] Federal Courts ⚿951.1
170Bk951.1 Most Cited Cases
(Formerly 170Bk951, 106k406.9(18))
Where defendant, on remand of case after district court's action in sustaining plaintiff's motion for summary judgment had been reversed by Court of Appeals, elected to produce no further evidence and defense counsel after having been given opportunity to examine plaintiff's files after close of trial on remand stated he still did not have any defense, summary judgment was again entered for plaintiff.

[2] Courts ⚿96(4)
106k96(4) Most Cited Cases
(Formerly 106k96)
District Court has duty to follow mandate of Court of Appeals.

[3] Federal Civil Procedure ⚿2621
170Ak2621 Most Cited Cases

[3] Federal Civil Procedure ⚿2742.1
170Ak2742.1 Most Cited Cases
(Formerly 170Ak2742)
Entry of judgment and taxation of costs are entirely separate legal acts. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc. rule 58, 28 U.S.C.A.; U.S.Ct. of App. 8th Cir. rule 17, 28 U.S.C.A.; U.S.Dist.Ct.Rules W.D.Mo., rule 4.

[4] Federal Civil Procedure ⚿2748
170Ak2748 Most Cited Cases
Defendants who had been granted costs by Court of Appeals, which had reversed action of district court in granting plaintiff's motion for summary judgment, were entitled on remand, at which summary judgment was again entered for plaintiff, to execution for amount of costs taxed rather than having amount of costs offset against monetary judgment awarded plaintiff in excess of costs. 28 U.S.C.A. § 1920; Fed.Rules Civ.Proc. rule 58, 28 U.S.C.A.; U.S.Ct. of App. 8th Cir. rule 17, 28 U.S.C.A.; U.S.Dist.Ct.Rules W.D.Mo., rule 4.
***427** Rodger J. Walsh, Kansas City, Mo., for plaintiff.

John M. Cleary, Kansas City, Mo., for defendant.

JOHN W. OLIVER, District Judge.

Our earlier action sustaining plaintiff's motion for summary judgment was reversed by the Court of Appeals in Jacobson v. Maryland Casualty Company, 8th Cir. 1964, 336 F.2d 72, cert. denied 379 U.S. 964, 85 S.Ct. 655, 13 L.Ed.2d 558, for reasons there stated.

The Court of Appeals held that the pre-trial procedures followed by this Court did 'not justify the trial court in refusing [defendant] his day in

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court, particularly on the issue of his affirmative defense, as well as as any other issue not shown by the record to be a sham, frivolous or so unsubstantial that a trial would obviously be futile.'

In compliance with the portion of the mandate of the Court of Appeals remanding this case for further proceedings not inconsistent with its opinion, we afforded the defendant the day in court that our controlling court held had been refused him. Defendant elected not to use that day any differently than he used the other days he has spent in our Court. The defendant did cross-examine the witnesses called by the plaintiff to re-establish its prima facie case on remand but ***428** he called no witnesses of his own and introduced no evidence whatever. [FN1]

> FN1. The transcript of the trial on remand shows the following question and answer directed by the Court to counsel for the defendant:
> THE COURT: Let me ask you if you have any evidence that you would wish to adduce in connection with the presentation of any alleged defenses in regard to Mr. Jacobson's case? The Court of Appeals indicated that they felt that Mr. Jacobson had been denied his day in this court, and I want to make certain that he has his day in this court, and that it appear of record that full opportunity has been given him, * * * Now, do you have any evidence at all to introduce here today?
> MR. CLEARY [counsel for the defendant]: I have no evidence to introduce today, Your Honor.

During the course of the trial on remand we required that plaintiff made available to counsel for the defendant its entire office file of any and all matters connected with plaintiff's cause of action in order to afford defendant's counsel an additional 'opportunity to examine them [all of plaintiff's office files] to see whether or not he can ferret out any affirmative defense from those records.'

Defendant's counsel was given a two week period after the close of the trial on remand within which to accomplish that task. Defendant's counsel reported to the Court at the end of that period that, he had made a full examination of all of plaintiff's records and that he still did not have any defense to plaintiff's cause of action and that he had found no evidence in plaintiff's files to support any alleged affirmative defense.

[1] The judgment heretofore entered on plaintiff's motion for summary judgment in accordance with our earlier pre-trial procedures will again be entered because we believe the procedures we have followed on remand have been consistent with the mandate of our controlling Court.

A real dispute between the parties, however, has been created by that portion of the mandate of the Court of Appeals that taxed appellate costs against the plaintiff on the appeal. We turn now to that question.

The last part of the Court of Appeals' mandate provided that:

> And it is further Ordered by this Court that Joseph P. Jacobson have and recover against Maryland Casualty Company the sum of Three Hundred, Seventy-six and 62/100--Dollars for its costs in this behalf expended and have execution therefor.

Shortly before the date we set this case for the trial on remand, plaintiff filed a motion for a stay of proceedings to enforce the quoted portion of the Court of Appeals' mandate. Conferences between the Court and counsel for both parties had revealed (a) that defendant still did not have any known defense to plaintiff's cause of action; [FN2] and (b) that plaintiff's counsel was personally obligated to E. L. Mendenhall Brief Printing Company for the cost of printing the record on appeal. [FN3]

> FN2. As is apparent from footnote 2 of the Court of Appeals opinion, this was not the first time that defendant had advised this Court that there never has been any real dispute about the facts of this case and that the alleged affirmative defense as pleaded

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by the defendant was only a 'paper' defense.

FN3. That fact, and the further fact that defendant's counsel advised us in his most recent brief that defendant lives in Canada and that defendant's counsel 'has not been able to get him to respond to correspondence or telephone calls in his efforts to be paid for said record on appeal (or even for other expenses)' are facts totally without significance in regard to the determination of the question relating to costs that has arisen since the remand of this case from the Court of Appeals.

As a result of those conferences, the parties agreed that each would write the Clerk of the Court of Appeals to ascertain whether the $376.62 costs taxed by ***429** the Court of Appeals should or should not be offset against the judgment that both parties acknowledged should again be entered for the plaintiff.

Counsel for the defendant wrote the Clerk of the Court of Appeals and requested that an execution be issued by that Court. In his letter, defendant's counsel stated that: 'It is apparent that in all probability the Maryland Casualty Company will obtain a judgment for more than the amount of the costs' and added that 'the request for an execution is made in order to determine whether such execution can be obtained before a final judgment in the case.'

Counsel for the plaintiff stated in his letter that:

> The question involved in this matter is whether Maryland Casualty Company should pay Joseph P. Jacobson the sum of $376.62 under your court's mandate before the District Court enters a final judgment, after trial, against Jacobson for Maryland in excess of these costs, or whether the District Court can set off the sum of $376.62 against the prospective judgment in Maryland's favor against Jacobson.
>
> I am of the opinion that the cost mandate of this Court can be used as a set-off in the judgment against Jacobson or it can be a partial satisfaction of the judgment. * * *
>
> * * *
>
> I therefore respectfully request a stay of execution in this matter until the District Court enters a final judgment under Rule 54.

The Clerk of the Court of Appeals replied to both letters as follows:

> These two letters have been distributed to the panel of judges before whom this appeal was submitted and I have been directed to write you as follows: The mandate of this Court in which we provided for taxation of costs in the District Court was in our usual form and in accord with our regular practice. This Court has no process to enforce execution as does the District Court and the Court declines to issue execution as requested by Mr. Cleary [counsel for the defendant].

The fact that the Court of Appeals refused defendant's request for execution and the fact that it also refused plaintiff's request for a stay of execution left the question for our determination. We requested authorities from both sides.

Plaintiff now relies upon Rule 54(b) of the Rules of Civil Procedure, although he based his original motion for a stay on Rule 62 of those Rules. Neither of those Rules, in our judgment, touch the question. Nor were the cases cited by defendant, in our judgment, close to the point; they need not be discussed.

Independent research, however, has convinced us that plaintiff's motion to stay execution should be denied and that the costs taxed by the Court of Appeals should be paid defendant in spite of the fact that plaintiff may never be able to collect a single cent of its judgment. [FN4]

FN4. Plaintiff argues in its last brief that 'it is unfortunate that defendant's counsel owes the printer but the Court of Appeals' mandate was not in favor of the defendant's counsel and in all equity the plaintiff should not have to expend more money for defendant's benefit than it has already.' Plaintiff added: 'That defendant's counsel cannot collect from his own client

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> for his fees and expenses augers a dim future for plaintiff in ever collecting on its own judgment.' Those arguments are as irrelevant as the argument made by the defendant that we noted in footnote 3.

[2] The point of beginning is the recognition of the duty of this Court to follow the mandate of our Court of Appeals. The following language of Judge Samborn from Thornton v. Carter, 8th Cir. 1940, 109 F.2d 316, 319, was ***430** most recently quoted with approval in Paull v. Archer-Daniels-Midland Company, 8th Cir. 1963, 313 F.2d 612, 617:

> 'When a case has been decided by this court on appeal and remanded to the District Court, every question which was before this court and disposed of by its decree is finally settled and determined. The District Court is bound by the decree and must carry it into execution according to the mandate. It cannot alter it, examine it except for purposes of execution, or give any further or other relief or review it for apparent error with respect to any question decided on appeal, and can only enter a judgment or decree in strict compliance with the opinion and mandate.'

In dealing with questions relating to the entry of judgment and the taxation of costs, recognition must also be made of the fact that neither the applicable statute (28 U.S.C.A. § 1920), the rules of various courts (Rule 17 of the Rules of the Court of Appeals for the Eighth Circuit and Local Rule 4 of this Court) nor the rules of decision announced in the few cases that discuss questions of taxation of costs are phrased with what Mr. Justice Frankfurter in Commissioner of Internal Revenue v. Estate of Bedford, 325 U.S. 283, 287, 65 S.Ct. 1157, 89 L.Ed. 1611 (1945), [FN5] called a 'fastidious precision' of language.

> FN5. The paucity of reported cases that relate to the taxation of costs, both in the trial and the appellate courts is undoubtedly due to the fact that, except under unusual circumstances, the taxation of costs is not an appealable order. In order to afford plaintiff the opportunity to appeal our ruling on the taxation of costs question we are including that ruling in our final judgment.

[3] It is clear, however, that the Rules of Civil Procedure now expressly recognize that the entry of a judgment and the taxation of costs are entirely separate legal acts. The failure to make express recognition of that proposition prompted an amendment to Rule 58 in the year 1946 by the addition of a sentence in that rule that '[the] entry of the judgment shall not be delayed for the taxing of costs.' That added sentence in the 1946 amendment was carried over in its entirety when present Rule 58 was amended in 1963.

As the cases cited by the Advisory Committee on Rules in support of the 1946 amendment imply, and as the cases to which we shall call attention hold, courts that have been called upon to pass upon questions of costs have consistently recognized that questions relating to the taxation of costs, particularly to the taxation of costs by an appellate court, are not to be confused with questions that relate to the merits of an appeal or with questions that relate to the validity or invalidity of an actual judgment rendered by the trial court.

For a collection of the cases that relate to 'the award of costs by appellate court as affected by subsequent proceedings or course of action in the lower court,' see the annotation under that title in 116 A.L.R. 1152.

The Federal cases are clear and consistent. The leading case in the federal courts was decided by Judge and later Justice Lurton. It is Scatcherd v. Love, 6 Cir. 1908, 166 F. 53.

The first trial in that case resulted in a verdict for the defendant. The plaintiff was successful in the first appeal. Appellate costs were therefore taxed against defendant. After remand the case was settled and the trial court taxed the appellate costs, together with other costs, against the defendant. Judge Lurton held that the '[c]osts paid by plaintiff * * * in obtaining a review, are costs which the plaintiff is entitled to recover' (l. c. 56 of 166 F.).

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He held that '[t]his is true * * * for the * * * reason that the costs of the former writ of error were adjudged by this court [i. e. the Court of Appeals] against the defendant * * * and the judgment was made the judgment of the *431 court below' (l. c. 57 of 166 F.). That case emphasized that '[t]his judgment [for appellate costs made by the appellate court] was beyond the control of the court below, regardless of the final result of the case' (l. c. 57 of 166 F.).

The cases of Berthold v. Burton, S.D.N.Y.1909, 169 F. 495, and Jennings v. Burton, S.D.N.Y.1910, 177 F. 603, presented a situation not dissimilar from the present posture of this case.

In that case plaintiffs recovered a judgment on the first trial. That judgment was reversed by the Court of Appeals and costs of appeal were taxed by the appellate court against the plaintiff. Those costs were then paid. Plaintiff, as plaintiff in this case, was also successful in the second trial but, in connection with the taxation of costs after the second trial, he sought to have allowed his payment of the appellate costs as a 'disbursement' and therefore included as a part of the costs taxed after the second trial the money he had paid for the costs taxed against him in the appellate court in connection with the successful appeal of the first trial.

Plaintiff's request was denied because the court held that 'to allow reimbursement in the way suggested would practically be to annul its [the Court of Appeals] decision.'

[4] Should we allow plaintiff in this case to offset the amount of appellate costs taxed against it by the Court of Appeals, we would, as a practical matter, prevent defendant from recovering the costs taxed by the Court of Appeals and would in effect annul that action taken by our controlling court. Cf. Parkerson v. Borst, 5th Cir. 1919, 256 F. 827, 828, and Miller v. C. C. Hartwell Co., 5th Cir. 1921, 271 F. 385, 389-390.

The two Burton cases cited above were followed in Land Oberoesterreich v. Gude, 2nd Cir. 1937, 93 F.2d 292, 293, and in Broffe v. Horton, 2nd Cir. 1949, 173 F.2d 565. The Broffe case, in turn, was followed most recently in Stearns v. Tinker & Rasor, 9th Cir. 1958, 252 F.2d 589, 606.

We shall follow this line of cases. Final judgment will therefore be entered in favor of the plaintiff on the merits. That judgment will include a provision that will order execution in favor of defendant for the $376.62 costs taxed in defendant's favor by the Court of Appeals unless plaintiff voluntarily makes that payment within ten (10) days.

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P. SPIERING, DEPUTY

Julie Klein Fischer
Kevin E. Dinius
WHITE PETERSON, P.A.
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687-7901
Telephone: (208) 466-9272
Facsimile: (208) 466-4405
ISB Nos.: 4601, 5974
jkf@whitepeterson.com
ked@whitepeterson.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES DeGROOT, and DeGROOT DAIRY, LLC, Plaintiffs, -vs- BELTMAN CONSTRUCTION, INC., d/b/a BELTMAN WELDING AND CONSTRUCTION, a Washington corporation; Defendant.	**CASE NO.** CV-05-2277 **COMPLAINT AND DEMAND FOR JURY TRIAL** **Fee Category: A-1** **Filing Fee: $77.00**

COME NOW, CHARLES DeGROOT, and DeGROOT DAIRY, LLC (hereinafter referred to as "Plaintiffs"), the above-named Plaintiffs, and for their claims for relief and causes of action against the Defendant, BELTMAN CONSTRUCTION, INC. d/b/a BELTMAN

ORIGINAL

WELDING AND CONSTRUCTION, a Washington corporation ("Beltman"), COMPLAIN AND ALLEGE as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Charles DeGroot at all times relevant herein was a resident of Canyon County, Idaho.

2. Plaintiff DeGroot Dairy, LLC is an Idaho LLC with its principal place of business in Canyon County Idaho.

3. Plaintiffs are "Buyers" within the meaning of Idaho Commercial Code § 28-2-103.

4. Defendant Beltman is a Washington corporation doing business in Canyon County, Idaho. At the time the acts and omissions complained of herein occurred, Beltman was doing business as Beltman Welding and Construction.

5. Defendant Beltman is a "Seller" within the meaning of Idaho Commercial Code § 28-2-103.

6. This court has jurisdiction over Beltman pursuant to Idaho Code § 5-514(a).

7. Venue is proper in Canyon County, Idaho pursuant to Idaho Code § 5-404 because Defendant does not reside in Idaho and the causes of action complained of herein arose in Canyon County, Idaho.

GENERAL ALLEGATIONS

8. Plaintiffs own and operate a 2,000+ head dairy in Canyon County, Idaho.

9. In June 1999, Plaintiff Charles "Chuck" DeGroot entered into a contract with Beltman for the construction of a dairy facility near Melba, Canyon County, Idaho. Attached hereto as Exhibit "A" and incorporated herein by this reference is a true and correct copy of said contract.

10. Pursuant to the contract, Defendant was to construct a dairy facility including the following: two (2) free stall sheds, including lockups (only one of which was to be built immediately); a dry shed, maternity and sick shed, including lockups; fences and gates; service alleys, loading chute and catch pens behind the barn; plumbing; asphalt area by the commodity shed and silage area; gravel driveways; a manure handling system; and heifer corrals, including lockups.

11. The total cost of the dairy facility was set at $2,095,828.00 to be paid as follows: down payment of $50,000.00; six (6) monthly payments of $240,000.00 beginning July 10, 1999 and ending on December 10, 1999; the balance of $665,828.00 to be paid in three (3) payments of $160,000.00 at the start of construction on the second free stall and heifer corrals (weather permitting); and $125,828 due upon completion.

12. In about July or August 1999, Defendant subcontracted the engineering, design and installation of manure handling equipment to Standley Trenching, Inc. d/b/a Standley & Co. ("Standley") for Plaintiffs' dairy constructed in Canyon County, Idaho. Standley is a distributor of manure handling equipment manufactured by Houle & Fils, Inc. ("Houle").

13. The equipment and products sold by Defendant to Plaintiffs are "goods" within the meaning of Idaho Commercial Code §§ 28-2-105 and/or 28-2-107. Said goods include without limitation "goods" manufactured by Houle.

14. Defendant collected from Plaintiffs and in turn paid Standley in excess of $100,000 for engineering, designing and installing manure handling equipment (including Houle equipment) at Plaintiffs' dairy.

15. At all relevant times, Plaintiffs relied upon Defendant's knowledge, representations, expertise and experience to design and construct a properly functioning dairy for

Plaintiffs. In connection with this, Plaintiffs relied on Defendant to hire subcontractors who would provide goods and services free of defects.

16. The manure handling equipment installed at the Plaintiffs' dairy by Standley at the direction and request of Defendant is inadequate, does not function as intended, and is not fit for its intended use.

17. Because of the defects and deficiencies in the manure handling system installed by Standley at the direction and request of Defendant, Plaintiffs were required to contract directly with Standley to modify and renovate the manure handling equipment. The amount charged for said "renovation" work exceeds $35,000.

COUNT ONE

Breach of Contract

18. Plaintiffs incorporate and reallege by reference all the allegations contained in paragraphs 1 through 17 above.

19. In connection with the contract for Plaintiffs' purchase of their dairy facility, Defendant promised to construct the dairy facility in a workmanlike manner and to provide a dairy facility free of defects in construction.

20. Plaintiffs paid Defendant in excess of $2,000,000.00 for the construction of Plaintiffs' dairy facility.

21. Defendant breached its contract with Plaintiffs by failing to construct the dairy in a workmanlike manner, resulting in numerous defects in the operation of the dairy, particularly with respect to the manure handling system installed by Standley at the direction and request of Defendant.

22. Plaintiffs have been required to spend over $35,000 repairing, renovating and

modifying the defective/inadequate manure handling system installed by Standley, which amount is in excess of the total cost of the improperly functioning system. Despite Plaintiffs efforts to renovate and repair the system installed by Standley, the system still does not function properly and/or does not perform as contracted.

23. Plaintiffs have suffered consequential damages as a direct and proximate result of Defendant's breach in an exact amount to be proven at trial.

24. As a direct result of Defendant's breach of contract, Plaintiffs suffered damages in an amount to be proven at trial, but which amount exceeds $150,000.

25. Plaintiffs have been required to retain the services of the law firm of White Peterson, P.A. to prosecute this action and are entitled to recover reasonable attorney fees and costs incurred pursuant to Idaho Code §§ 12-120 and 12-121.

COUNT TWO

Breach of Implied Covenant of Good Faith and Fair Dealing

26. Plaintiffs incorporate and reallege by reference all the allegations contained in paragraphs 1 through 25 above.

27. The covenant of good faith and fair dealing is implied in the contract between Plaintiffs and Defendant.

28. The covenant requires Defendant to act in good faith, with fairness and with honesty-in-fact toward Plaintiffs. As a further result of the acts, omissions and occurrences alleged herein above, Defendant violated, nullified and/or significantly impaired the benefits provided to Plaintiffs under contractual relationship and thus materially breached its implied obligation to act in good faith, fairness and honesty-in-fact toward Plaintiffs.

29. As a direct and proximate result of Defendant's conduct, as alleged herein above,

Plaintiffs suffered damages in the form of lost profits, lost opportunity, and other special and general damages in an exact amount to be proven at trial in a sum in excess of $10,000.

30. Plaintiffs have been required to retain the services of the law firm of White Peterson, P.A. to prosecute this action and are entitled to recover reasonable attorney fees and costs incurred pursuant to Idaho Code §§ 12-120 and 12-121.

COUNT THREE

Rescission

31. Plaintiffs incorporate and reallege by reference all the allegations contained in paragraphs 1 through 30 above.

32. Defendant constructed Plaintiffs' dairy facility during the fall of 1999 and winter of 2000. As part of Defendant's construction of the dairy facility, it hired subcontractors, including Standley, to design and install the various operating systems at the dairy.

33. Substantially all of the manure handling equipment installed at Plaintiffs' dairy by Defendant was manufactured by Houle.

34. The design and equipment supplied and installed by Standley and manufactured by Houle at the direction and request of Defendant was inadequate for the size of Plaintiffs' dairy and does not function properly.

35. Plaintiffs are entitled to revoke their acceptance of the insufficient/defective manure handling equipment provided by Defendant pursuant to Idaho Commercial Code § 28-2-608.

36. Plaintiffs notified Standley on June 18, 2001, that Plaintiffs were revoking acceptance of said manure handling equipment, and demanded a return of Plaintiffs' purchase money pursuant to the Idaho Code § 28-2-608.

37. Defendant has refused to return Plaintiffs' purchase money for the insufficient and/or defective manure handling equipment.

38. As a result of the defective and/or insufficient design and installation of insufficient and/or defective manure handling equipment installed by Standley at the direction and request of Defendant at the Plaintiffs' dairy, which defective equipment was manufactured by Houle, and Defendant's refusal to accept Plaintiffs' rescission of said equipment, Plaintiffs have suffered damages in the amount of the purchase price of the manure handling equipment.

39. In addition to the damages referenced in the preceding paragraph, Plaintiffs have also suffered incidental and consequential damages in excess of $35,000 for costs associated with modifying and renovating the defective/insufficient manure handling system in an attempt to make the same operational.

40. Plaintiffs have been required to retain the services of the law firm of White Peterson, P.A. to prosecute this action and are entitled to recover reasonable attorney fees and costs incurred pursuant to Idaho Code §§ 12-120 and 12-121.

COUNT FOUR

Breach of Warranties

41. Plaintiffs incorporate and reallege by reference all the allegations contained in paragraphs 1 through 40 above.

42. Plaintiffs requested that Defendant engineer, design, select equipment for and construct a dairy facility for a 2000+ head dairy operation.

43. Defendant represented to Plaintiffs that it had the expertise and knowledge to design and construct such a facility, and represented that it would provide the equipment for the same.

44. Plaintiffs relied upon Defendant's expertise, knowledge and experience in designing and constructing the dairy facility.

45. The design and equipment prepared, constructed and installed by Defendant is insufficient for managing and disposing of manure from a 2,000 head dairy operation.

46. Defendant was aware of the intended use and purpose of the dairy facility.

47. The equipment manufactured by Houle and installed by Standley at the direction and request of Defendant at the Plaintiffs' dairy does not function or operate as intended and is not merchantable.

48. Defendant, having reason to know of the intended purpose of the dairy facility, and Plaintiffs' reliance on Defendant's skill and judgment to hire a subcontractor who could select and furnish a suitable system impliedly warranted the system would be fit for the intended purpose.

49. Defendant breached the implied warranty of fitness for a particular purpose pursuant to Idaho Code § 28-2-315.

50. Defendant breached the implied warranty of merchantability pursuant to Idaho Code § 28-2-314.

51. Defendant, by representing that it could construct a manure handling system that would be sufficient to handle manure disposal for a 2,000+ head dairy operation, breached an express warranty pursuant to Idaho Code § 28-2-313.

52. As a direct result of Defendant's breach of warranties, Plaintiffs have suffered

damages, including incidental and consequential damages, in an amount exceeding $150,000 the exact amount to be proven at trial.

53. Plaintiffs have been required to retain the services of the law firm of White Peterson, P.A. to prosecute this action and are entitled to recover reasonable attorney fees and costs incurred pursuant to Idaho Code §§ 12-120 and 12-121.

COUNT FIVE

Negligence

54. Plaintiffs incorporate and reallege by reference all the allegations contained in paragraphs 1 through 53 above.

55. Defendant owed Plaintiffs a duty of reasonable care in the construction and maintenance of the dairy facility located at 10394 Melmont Road, Melba, Idaho.

56. Defendant acted carelessly, recklessly and negligently in failing to construct and maintain the Plaintiffs' dairy facility in a reasonable manner, resulting in numerous defects in and around the dairy facility.

57. As a direct and proximate result of the Defendant's negligent actions, Plaintiffs have suffered property damage in an amount exceeding $150,000 to be proven with specificity at trial.

58. Plaintiffs have been required to retain the services of the law firm of White Peterson, P.A. to prosecute this action and are entitled to recover reasonable attorney fees and costs incurred pursuant to Idaho Code §§ 12-120 and 12-121.

ATTORNEYS FEES

Plaintiffs have been required to retain the law firm of White Peterson, P.A. to prosecute this action and are entitled to recover attorney fees and costs incurred pursuant to Idaho Code

§§12-120 and 12-121 and any other applicable law.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial composed of no less than twelve (12) persons on all issues so triable, pursuant to Idaho Rule of Civil Procedure 38(b).

PRAYER

WHEREFORE, Plaintiffs pray for Judgment, Order and Decree of this Court as follows:

1. For money damages from Defendant that fully and fairly compensate Plaintiffs for Defendant's breach of contract, breach of warranty, breach of the implied covenant of good faith and fair dealing, and negligence in a sum to be determined at trial exceeding $150,000.

2. For an order allowing Plaintiffs' to rescind acceptance of the manure handling equipment from Defendant, and damages associated with Defendant's refusal to allow the same, in an amount to be proven at trial;

3. For an award of attorney's fees pursuant to Idaho Code §§ 12-120, 12-121 and any other applicable law;

4. For such other relief as the Court deems appropriate and just.

DATED this 4th day of March, 2005.

WHITE PETERSON, P.A.

By: _____
Kevin E. Dinius, of the Firm
Attorneys for Plaintiffs

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Julie Klein Fischer
Kevin E. Dinius
John R. Kormanik
WHITE PETERSON, P.A.
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687-7901
Telephone: (208) 466-9272
Facsimile: (208) 466-4405
ISB Nos.: 4601, 5974, 5850
jkf@whitepeterson.com
ked@whitepeterson.com
jkormanik@whitepeterson.com
Attorneys for Plaintiffs

FILED
A.M. 4:30 P.M.
MAR 18 2005
CANYON COUNTY CLERK
D. BUTLER, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES DeGROOT, and DeGROOT DAIRY, LLC, Plaintiffs, -vs- BELTMAN CONSTRUCTION, INC., d/b/a BELTMAN WELDING AND CONSTRUCTION, a Washington corporation; Defendant.	**CASE NO. CV05-2277** **MOTION TO CONSOLIDATE PENDING ACTIONS**

COME NOW, Charles Degroot and DeGroot Farms, LLC, the above-named Plaintiffs, by and through their attorneys of record, the law firm of WHITE PETERSON, P.A., and hereby

submit their MOTION TO CONSOLIDATE PENDING ACTIONS. This motion is brought pursuant to Idaho Rule of Civil Procedure 42(a), and is supported by the Affidavit of Kevin E. Dinius submitted concurrently herewith along with the pleadings and record before this Court.

On September 12, 2001, Plaintiffs Charles DeGroot and DeGroot Farms, LLC filed an action in the Third Judicial District, Canyon County, seeking the Court's determination regarding claims of breach of contract, recission, breach of warranties, breach of the implied covenant of good faith and fair dealing and violations of the Idaho Consumer Protection Act against Defendant STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO. and claims of recission, breach of warranties and violations of the Idaho Consumer Protection Act against Defendant J. HOULE & FILS, INC. (*Charles DeGroot and DeGroot, LLC v. Standley Trenching, Inc., d/b/a Standley & Co. and J. Houle & Fils, Inc.* Case No. CV-2001-7777) (hereinafter "Standley action"). In the instant action, Plaintiffs seek the Court's determination regarding claims of breach of contract, breach of implied covenant of good faith and fair dealing, recission, breach of warranties and negligence against Defendant BELTMAN CONSTRUCTION, INC., d/b/a BELTMAN WELDING AND CONSTRUCTION. Charles DeGroot and DeGroot Farms, LLC are parties in interest in the claims against the Defendants in the two above referenced actions.

The Standley action involves a common question of fact and law pending in the instant matter before this Court. The instant action relates to Plaintiffs' contract with Beltman for the construction of a dairy facility and Defendant Beltman's subcontract with Standley for the engineering, design and installation of manure handling equipment for Plaintiffs' dairy constructed in Canyon County, Idaho. The Standley action relates to Standley's engineering, design and installation of manure handling equipment for Plaintiffs' dairy constructed in Canyon County, Idaho and Standley's distributorship of manure handling equipment manufactured by Defendant J. Houle & Fils, Inc.

It is in the interest of justice that this Court consolidate the instant action with the Standley action in order to avoid unnecessary costs, expense, and delay. Further, the Standley action arises from the same transaction or occurrence alleged by Plaintiffs in the instant action. Therefore, consolidation is proper pursuant to Idaho Rule of Civil Procedure 42(a).

DATED this 18th day of March, 2005.

WHITE PETERSON, P.A.

By _____
Kevin E. Dinius, of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 18th day of March, 2005, a true and correct copy of the above and foregoing was served upon the following by:

David J. Myers
FILICETTI LAW OFFICE, P.A.
5987 W. State St., Ste. B
Boise, ID 83701

_____ US Mail
_____ Overnight Mail
_____ Hand Delivery
X Facsimile No. 388-0120

_____
for White Peterson

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DAVID J. MYERS, ISB No. 6528
FILICETTI LAW OFFICE, P.A.
5987 W. State Street, Suite B
Post Office Box 105
Boise, ID 83701
Telephone: (208) 388-0123
Facsimile: (208) 388-0120
djm@filicettilaw.com

Attorneys for Defendant/Third Party Plaintiff

FILED
A.M. P.M.
MAR 2 2 2005
CANYON COUNTY CLERK
C ROBINSON, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES DeGROOT and DeGROOT DAIRY, LLC,

Plaintiffs,

v.

BELTMAN CONSTRUCTION, INC., d/b/a BELTMAN WELDING AND CONSTRUCTION, a Washington corporation,

Defendant/Third Party Plaintiff,

v.

STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO., an Idaho corporation, and J. HOULE & FILS, INC., a Canadian corporation,

Third Party Defendants.

Case No. CV05-2277

THIRD PARTY COMPLAINT AND DEMAND FOR JURY TRIAL

Defendant/Third Party Plaintiff BELTMAN CONSTRUCTION, INC., d/b/a BELTMAN WELDING AND CONSTRUCTION ("Beltman"), by and through its undersigned counsel, for cause of action against the Third Party Defendants, STANDLEY TRENCHING, INC. d/b/a/

STANDLEY & CO. ("Standley") and J. HOULE & FILS, INC. ("Houle"), a Canadian corporation, complains and alleges as follows:

1. Defendant/Third Party Plaintiff Beltman has been sued by plaintiffs Charles DeGroot and DeGroot Dairy, LLC ("DeGroot") for breach of contract, breach of implied covenant of good faith and fair dealing, rescission, breach of warranties, and negligence – all arising from subcontract work performed by Standley and equipment manufactured by Houle.

2. Standley and/or Houle are liable to Beltman for all of the plaintiffs' claims against Beltman.

3. Standley, under the assumed business name of Standley & Co., offers services and sells manure handling equipment for dairy operations throughout Idaho, including Canyon County, Idaho.

4. Houle is a Canadian corporation, on information and belief, with its principal place of business in the United States located in Michigan.

5. Houle manufactures and sells manure handling equipment, which it distributes and sells throughout the United States, including Idaho.

6. Standley is a "Seller" within the meaning of Idaho Commercial Code § 28-2-103.

7. Houle is a "Seller" within the meaning of Idaho Commercial Code § 28-2-103.

8. In about July or August 1999, Beltman subcontracted the engineering, design, and installation of manure handling equipment to Standley for DeGroot's dairy being constructed in Canyon County, Idaho.

9. The equipment and products sold by Standley to Beltman are "goods" within the meaning of Idaho Commercial Code §§ 28-2-105 and/or 28-2-107.

10. Beltman is a "Buyer" within the meaning of Idaho Commercial Code § 28-2-103.

11. Beltman collected from DeGroot and in turn paid Standley in excess of $100,000 for engineering, designing, and installing manure handling equipment (including Houle equipment) at DeGroot's dairy.

12. Beltman relied upon Standley's and Houle's knowledge, representations, expertise, and experience to design, engineer, and install a properly functioning manure handling system for DeGroot's Canyon County dairy.

13. Standley and Houle were aware of the intended purpose of the manure handling system, including Houle equipment, used on DeGroot's dairy.

14. Some of the manure handling equipment installed by Standley is manufactured by Houle.

15. The manure handling equipment installed at DeGroot's dairy by Standley is inadequate, does not function as intended, and is not fit for its intended use.

16. The manure handling equipment manufactured by Houle and installed at DeGroot's dairy does not function or work as intended.

COUNT ONE
Breach of Contract
(Standley)

17. Beltman incorporates and realleges by reference all the allegations contained in paragraphs 1 through 17 above.

18. Beltman subcontracted with Standley for the engineering, design, and installation of manure handling equipment at DeGroot's dairy in Canyon County, Idaho.

19. Beltman paid Standley in excess of $100,000 for the manure handling equipment and services of Standley.

20. Standley failed to provide the equipment and services contracted and as such materially breached its agreement with Beltman.

21. Despite Beltman's and DeGroot's efforts to renovate and repair the system installed by Standley, the system still does not function properly and/or does not perform as contracted.

22. Beltman has suffered consequential damages as a direct and proximate result of Standley's breach in an exact amount to be proven at trial.

23. As a direct result of Standley's breach of contract, Beltman suffered damages in an amount to be proven at trial, but which amount exceeds $150,000.

24. Beltman has been required to retain the services of the law firm of Filicetti Law Office, P.A. to prosecute this action and is entitled to recover reasonable attorney fees and costs incurred pursuant to Idaho Code §§ 12-120 and 12-121.

COUNT TWO
Rescission
(Standley & Houle)

25. Beltman incorporates and realleges by reference all the allegations contained in paragraphs 1 through 24 above.

26. Standley designed and selected the materials and equipment for, and installed manure handling equipment at, DeGroot's Canyon County, Idaho dairy in 1999 and 2000.

27. Substantially all of the manure handling equipment installed at DeGroot's dairy by Standley was manufactured by Houle.

28. The design and equipment supplied and installed by Standley and manufactured by Houle was inadequate for the size of DeGroot's dairy and does not function properly.

29. Beltman is entitled to revoke its acceptance of the insufficient/defective manure handling equipment provided by defendants pursuant to Idaho Commercial Code § 28-2-608.

30. DeGroot notified Standley on June 18, 2001 that they were revoking acceptance of said manure handling equipment, and demanded a return of the purchase money pursuant to Idaho Code § 28-2-608.

31. Standley has refused to return the purchase money for the insufficient/defective manure handling equipment.

32. As a result of Standley's design and installation of insufficient/defective manure handling equipment at DeGroot's dairy, which defective equipment was manufactured by Houle, and Standley's refusal to accept the rescission of said equipment, Beltman has suffered damages in the amount of the purchase price of the manure handling equipment.

33. In addition to the damages referenced in the preceding paragraph, Beltman also has suffered incidental and consequential damages for costs associated with modifying and renovating the defective/insufficient manure handling equipment in an attempt to make the same operational.

34. Beltman has been required to retain the services of the law firm of Filicetti Law Office, P.A. to prosecute this action and is entitled to recover reasonable attorney fees and costs incurred pursuant to Idaho Code §§ 12-120 and 12-121.

COUNT THREE
Breach of Warranties
(Standley and Houle)

35. Beltman incorporates and reallege by reference all the allegations contained in paragraphs 1 through 34 above.

36. Beltman, as general contractor, requested that Standley engineer, design, select equipment for, and install a manure handling system for a 2000 plus head dairy operation.

37. Standley represented to Beltman that it had the expertise and knowledge to design, construct, and install such a system, and represented that it would provide the equipment for the same.

38. Houle represented, through the sales of its products, that its manure handling equipment and goods were sufficient to perform manure disposal functions for dairies of all sizes.

39. Beltman relied upon Standley's expertise, knowledge, and experience in designing, engineering, and installing the manure handling system.

40. Beltman relied upon Houle's products to be sufficient and capable of performing the functions for which they are manufactured.

41. The design and equipment prepared, constructed, and installed by Standley is insufficient for managing and disposing of manure from a 2,000 head dairy operation.

42. The equipment manufactured and designed by Houle and installed by Standley is insufficient for managing and disposing of manure from a 2,000 head dairy operation.

43. Houle and Standley were aware of the intended use and purpose of the manure handling system and equipment.

44. The equipment manufactured by Houle and installed by Standley at DeGroot's dairy does not function or operate as intended and is not merchantable.

45. Standley, having reason to know of the intended purpose of the manure system and Beltman's reliance on Standley's skill and judgment to select and furnish a suitable system, impliedly warranted that the system would be fit for the intended purpose.

46. Houle, having manufactured and sold manure handling equipment and knowing the intended use of said equipment, impliedly warranted the equipment would be fit for the intended purpose.

47. Standley and Houle breached the implied warranty of fitness for a particular purpose pursuant to Idaho Commercial Code § 28-2-315.

48. Standley and Houle breached the implied warranty of merchantability pursuant to Idaho Commercial Code § 28-2-314.

49. Standley, by representing that its products and services would be sufficient to handle manure disposal for a 2,000 head dairy operation, breached the warranty of affirmation or promise pursuant to Idaho Commercial Code § 28-2-313.

50. Houle, by holding out its products as sufficient to process manure from dairies of all sizes, breached the warranty of affirmation or promise pursuant to Idaho Commercial Code § 28-2-313.

51. As a direct result of Standley and Houle's breach of warranties, Beltman has suffered damages, including incidental and consequential damages, in an amount exceeding $150,000, with the exact amount to be proven at trial.

52. Beltman has been required to retain the services of the law firm of Filicetti Law Office, P.A. to prosecute this action and is entitled to recover reasonable attorney fees and costs incurred pursuant to Idaho Code §§ 12-120 and 12-121.

COUNT FOUR
Breach of Implied Covenant of Good Faith and Fair Dealing
(Standley)

53. Beltman incorporates and realleges by reference all the allegations contained in paragraphs 1 through 52 above.

54. The covenant of good faith and fair dealing is implied in the contract between Beltman and Standley.

55. The covenant requires Standley to act in good faith, with fairness and with honesty-in-fact toward Beltman. As a further result of the acts, omissions, and occurrences alleged herein above, Standley violated, nullified, and/or significantly impaired the benefits provided to Beltman under the contractual relationship and thus materially breached its implied obligation to act in good faith, fairness, and honesty-in-fact toward Beltman.

56. As a direct and proximate result of Standley's conduct, as alleged herein above, Beltman suffered damages in the form of lost profits, lost opportunity, and other special and general damages in an exact amount to be proven at trial, in a sum in excess of $10,000.

57. Beltman has been required to retain the services of the law firm of Filicetti Law Office, P.A. to prosecute this action and is entitled to recover reasonable attorney fees and costs incurred pursuant to Idaho Code §§ 12-120 and 12-121.

COUNT FIVE
Violations of the Idaho Consumer Protection Act
(Standley and Houle)

58. Beltman incorporates and realleges by reference all the allegations contained in paragraphs 1 through 57 above.

59. Standley sold goods and services to Beltman, as the same are defined in the Idaho Consumer Protection Act, Idaho Code §§ 48-602(6) and (7).

60. Houle is the seller of goods, as defined in the Idaho Consumer Protection Act, Idaho Code § 48-602, which goods ultimately were purchased by Beltman.

61. Standley and Houle's conduct, including without limitation, representations to Beltman that the goods and services were of a particular quality and standard, constituted unfair and deceptive acts or practices in the conduct of trade and violated the Idaho Consumer Protection Act, Idaho Code §§ 48-601 *et seq.*

62. As a direct and proximate result of Standley and Houle's conduct, as alleged hereinabove, Beltman suffered special and general damages, in a sum in excess of $100,000.00, the exact amount to be proven at trial.

63. Beltman has been required to retain the services of the law firm of Filicetti Law Office, P.A. to prosecute this action and is entitled to recover reasonable attorney fees and costs incurred pursuant to Idaho Code §§ 12-120, 12-121 and 48-608(4).

ATTORNEY'S FEES

Beltman has been required to retain the law firm of Filicetti Law Office, P.A. to prosecute this action and is entitled to recover attorney fees and costs incurred pursuant to Idaho Code §§12-120 and 12-121, 48-608, and any other applicable law.

DEMAND FOR JURY TRIAL

Beltman demands a trial composed of no less than twelve (12) persons on all issues so triable, pursuant to Idaho Rule of Civil Procedure 38(b).

PRAYER

WHEREFORE, Beltman prays for the following:

1. An award of damages against Standley for breach of contract in an amount to be proven at trial, but which amount exceeds $150,000;
2. An order allowing Beltman to rescind acceptance of the manure handling equipment from Standley and Houle, and damages associated with Standley and Houle's refusal to allow the same, in an amount to be proven at trial;
3. An award of damages against Standley and Houle for breach of the warranty of fitness for a particular purpose, breach of warranty of merchantability, and breach of warranty of promise, in an amount to be proven at trial, but which amount exceeds $150,000;
4. An award of damages against Standley for breach of the covenant of good faith and fair dealing in an amount to be proven at trial;
5. An award of damages against Standley and Houle for violations of the Idaho Consumer Protection Act, in an amount to be proven at trial;

6. An award of attorney's fees pursuant to Idaho Code §§ 12-120, 12-121, 48-601 *et seq.*, and any other applicable law; and

7. Such other relief as the Court deems appropriate and just.

Dated this March 21, 2005.

Respectfully submitted,

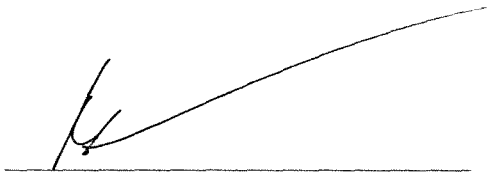
FILICETTI LAW OFFICE

By: _____
David J. Myers
Attorney for Beltman Construction, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this March 21, 2005, I caused to be served a true and accurate copy of **THIRD PARTY COMPLAINT** by the method indicated below, addressed to the following:

Julie Klein Fischer	Hand Delivery	_____
Kevin E. Dinius	U.S. Mail	___XX_
Filicetti Law Office, P.A., P.A.	Facsimile	___XX_
5700 East Franklin Road, Suite 200	Overnight Mail	_____
Nampa, ID 83687-7901		



David J. Myers

FILED
11:10 A.M. P.M.
APR 19 2005
CANYON COUNTY CLERK
C ROBINSON, DEPUTY

Julie Klein Fischer
Kevin E. Dinius
WHITE PETERSON, P.A.
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687-7901
Telephone: (208) 466-9272
Facsimile: (208) 466-4405
ISB Nos.: 4601, 5974
jkf@whitepeterson.com
ked@whitepeterson.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES DeGROOT, and DeGROOT DAIRY, LLC, Plaintiffs, -vs- BELTMAN CONSTRUCTION, INC., d/b/a BELTMAN WELDING AND CONSTRUCTION, a Washington corporation; Defendant.	**CASE NO. CV05-2277** **STIPULATION OF THE PARTIES TO CONSOLIDATE PENDING ACTIONS**

COME NOW Plaintiffs, CHARLES DeGROOT, and DeGROOT FARMS, LLC, by and through their attorneys of record, WHITE PETERSON, P.A., and Defendant BELTMAN CONSTRUCTION, INC., d/b/a BELTMAN WELDING AND CONSTRUCTION, by and

ORIGINAL

through its attorney of record, David J. Myers, of the law firm FILICETTI LAW OFFICE, and stipulate, agree and respectfully request the Court to enter its Order Consolidating Pending Actions.

On September 12, 2001, Plaintiffs Charles DeGroot and DeGroot Farms, LLC filed an action in the Third Judicial District, Canyon County, seeking the Court's determination regarding claims of breach of contract, recission, breach of warranties, breach of the implied covenant of good faith and fair dealing and violations of the Idaho Consumer Protection Act against Defendant STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO. and claims of recission, breach of warranties and violations of the Idaho Consumer Protection Act against Defendant J. HOULE & FILS, INC. (*Charles DeGroot and DeGroot, LLC v. Standley Trenching, Inc., d/b/a Standley & Co. and J. Houle & Fils, Inc.* Case No. CV-2001-7777) (hereinafter "Standley action"). In the instant action, Plaintiffs seek the Court's determination regarding claims of breach of contract, breach of implied covenant of good faith and fair dealing, recission, breach of warranties and negligence against Defendant BELTMAN CONSTRUCTION, INC., d/b/a BELTMAN WELDING AND CONSTRUCTION. Charles DeGroot and DeGroot Farms, LLC are parties in interest in the claims against the Defendants in the two above referenced actions.

The Standley action involves a common question of fact and law pending in the instant matter before this Court. The instant action relates to Plaintiffs' contract with Beltman for the construction of a dairy facility and Defendant Beltman's subcontract with Standley for the engineering, design and installation of manure handling equipment for Plaintiffs' dairy constructed in Canyon County, Idaho. The Standley action relates to Standley's engineering, design and installation of manure handling equipment for Plaintiffs' dairy constructed in Canyon County, Idaho and Standley's distributorship of manure handling equipment manufactured by Defendant J. Houle & Fils, Inc.

It is in the interest of justice that this Court consolidate the instant action with the Standley action in order to avoid unnecessary costs, expense, and delay. Further, the Standley action arises from the same transaction or occurrence alleged by Plaintiffs in the instant action. Therefore, consolidation is proper pursuant to Idaho Rule of Civil Procedure 42(a).

DATED this 14th day of April, 2005.

WHITE PETERSON, P.A.

Kevin E. Dinius, of the Firm
Attorneys for Plaintiffs

DATED this _____ day of April, 2005.

FILICETTI LAW OFFICE, P.A.

David J. Myers, of the Firm
Attorney for Defendant

FILED
11:10 A.M. P.M.
APR 19 2005
CANYON COUNTY CLERK
C ROBINSON, DEPUTY

Julie Klein Fischer
Kevin E. Dinius
WHITE PETERSON, P.A.
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687-7901
Telephone: (208) 466-9272
Facsimile: (208) 466-4405
ISB Nos.: 4601, 5974
jkf@whitepeterson.com
ked@whitepeterson.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES DeGROOT, and DeGROOT DAIRY, LLC, Plaintiffs, -vs- BELTMAN CONSTRUCTION, INC., d/b/a BELTMAN WELDING AND CONSTRUCTION, a Washington corporation; Defendant.	**CASE NO. CV05-2277** **ORDER TO CONSOLIDATE PENDING ACTIONS**

Pursuant to the Stipulation of the Parties to Consolidate Pending Actions on file herein, and good cause appearing therefore;

IT IS HEREBY ORDERED AND THIS DOES ORDER, that the instant action shall be consolidated with the Third Judicial District, Canyon County, matter entitled *Charles DeGroot*

ORIGINAL

and DeGroot, LLC v. Standley Trenching, Inc., d/b/a Standley & Co. and J. Houle & Fils, Inc.

Case No. CV-2001-7777.

IT IS HEREBY ORDERED this 15th day of April, 2005.

Honorable Juneal C. Kerrick

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 19 day of April, 2005, a true and correct copy of the above and foregoing was served upon the following by:

David J. Myers FILICETTI LAW OFFICE, P.A. 5987 W. State St., Ste. B Boise, ID 83701	X US Mail ____ Overnight Mail ____ Hand Delivery ____ Facsimile No. 388-0120
Julie Klein Fischer Kevin E. Dinius WHITE PETERSON, P.A. 5700 East Franklin Road, Suite 200 Nampa, Idaho 83687-7901	X US Mail ____ Overnight Mail ____ Hand Delivery ____ Facsimile No. 466-4405

for White Peterson

cm\Z:\Work\D\DeGroot Dairy, LLC\Beltman Construction 19213.001\Order to Consolidate.doc

William A. McCurdy
McCURDY LAW OFFICES
702 West Idaho, Ste. 1000
Boise, Idaho 83702
Telephone: 947-7250
Facsimile: 947-5910
ISB # 1686

FILED
A.M. P.M.
JUN 20 2007
CANYON COUNTY CLERK
J VASKO, DEPUTY

Attorneys for Defendant/Third-Party Defendant J. Houle & Fils, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES DeGROOT, and DeGROOT FARMS, LLC,

Plaintiffs/Counterdefendants,

v.

J. HOULE & FILS, INC., a Canadian corporation,

Defendant.

ORDER OF DISMISSAL OF CLAIMS AGAINST THIRD-PARTY DEFENDANT HOULE & FILS, INC. WITH PREJUDICE

Case No. ~~CV 01-7777~~
Case No. CV 05-2277

CHARLES DEGROOT, and DEGROOT DAIRY, LLC,

Plaintiffs,

v.

BELTMAN CONSTRUCTION, INC., d/b/a BELTMAN WELDING AND CONSTRUCTION, a Washington corporation,

Defendant/Third Party Plaintiff.

v.

STANDLEY TRENCHING, INC. d/b/a STANDLEY & CO., an Idaho corporation, and J. HOULE & FILS, INC.

Third Party Defendants.

Third-Party Defendant Houle & Fils, Inc.'s ("Houle") Motion for Summary Judgment in Case No. CV 05-2277 having come before this Court, and the claims alleged against Third-Party Defendant Houle in the Third-Party Complaint having been withdrawn by Third-Party Plaintiff Beltman before this Court:

IT IS HEREBY ORDERED that the claims against Third-Party Defendant Houle contained in the Third-Party Complaint are dismissed with prejudice.

IT IS FURTHER ORDERED that Third-Party Defendant Houle has properly reserved its right to seek an award of attorney's fees and costs incurred in its defense of the Third-Party Complaint.

DATED this 18 day of June, 2007.

By _____
Gregory Culet
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on th 20 day of June, 2007, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Julie Klein Fischer
Kevin E. Dinius
WHITE PETERSON
Canyon Park at The Idaho Center
5700 East Franklin Rd., Ste. 200
Nampa, ID 83687

- ☐ U.S. Mail
- ☒ Hand-Delivered courthouse box
- ☐ Overnight mail
- ☐ Facsimile

Michael E. Kelly ISB # 4351
Peg M. Dougherty ISB #6043
LOPEZ & KELLY PLLC
1100 Key Financial Center
702 West Idaho Street
Post Office Box 856
Boise, Idaho 83701

- ☐ U.S. Mail
- ☐ Hand-Delivered
- ☐ Overnight mail
- ☐ Facsimile

No envelopes

Robert Lewis
Cantrill Skinner Sullivan & King LLP
1423 Tyrell Ln
P.O. Box 359
Boise, ID 83701

- ☐ U.S. Mail
- ☐ Hand-Delivered
- ☐ Overnight mail
- ☐ Facsimile

William A. McCurdy
McCURDY LAW OFFICES
702 West Idaho, Ste. 1000
Boise, Idaho 83702

- ☐ U.S. Mail
- ☐ Hand-Delivered
- ☐ Overnight mail
- ☐ Facsimile

C. Vasco
Deputy Clerk

Robert D. Lewis, ISB No. 2713
CANTRILL, SKINNER, SULLIVAN & KING LLP
1423 Tyrell Lane
PO Box 359
Boise, Idaho 83701
Telephone: (208) 344-8035
Facsimile: (208) 345-7212

FILED
9:30 A.M. P.M.
JUL 31 2012
CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

Attorneys for Counterclaimant/Respondent Standley Trenching, Inc., d/b/a Standley & Co.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES DeGROOT, and DeGROOT FARMS, LLC, Plaintiffs/Counter-defendants/ Appellants, vs. STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO., and J. HOULE & FILS, INC., a Canadian corporation, Defendants/Respondents, and STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO. Counterclaimant/ Respondent.	Case Nos. CV 01-7777 CV 05-2277 **RESPONDENT / COUNTER-CLAIMANT STANDLEY TRENCHING, INC.'S OBJECTION AND REQUEST FOR ADDITIONAL TRANSCRIPT AND RECORD**
CHARLES DeGROOT, and DeGROOT	

RESPONDENT/COUNTERCLAIMANT STANDLEY TRENCHING, INC.'S OBJECTION AND REQUEST FOR ADDITIONAL TRANSCRIPT AND RECORD - 1

DAIRY, LLC,

Plaintiffs,

vs.

BELTMAN CONSTRUCTION, INC., d/b/a BELTMAN WELDING AND CONSTRUCTION, a Washington corporation;

Defendant/Third-Party Plaintiff,

vs.

STANDLEY TRENCHING, INC. d/b/a STANDLEY & CO., an Idaho corporation, and J. HOULE & FILS, INC.

Third-Party Defendants.

TO: THE ABOVE-NAMED APELLANTS AND THEIR ATTORNEY OF RECORD, KEVIN E. DINIUS, AND THE REPORTER AND CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that the Respondent/Counterclaimant in the above-entitled proceeding hereby requests, pursuant to Rule 29, I.A.R., the addition of the following material to the Reporter's Transcript and the Clerk's Record. Any additional transcript is to be provided in hard copy:

1. Reporter's transcript:

   The entire reporter's standard transcript as defined in Rule 25(a), I.A.R. for the hearing held on June 29, 2005

2. Clerk's Record:

   a. Affidavit of Robert D. Lewis, with exhibits, dated April 18, 2005;

   b. Memorandum of Attorney Fees, dated April 18, 2005;

   c. Motion for Award of Prejudgment Interest, dated April 18, 2005, filed by Counterclaimant;

   d. Order, dated June 6, 2005;

   e. Counterclaimant Standley Trenching Supplemental Memorandum Supporting Award of Fees, dated July 25, 2005;

   f. Certain portions of the Clerk's Record from the case Consolidated, DeGroot v. Beltman, Case No. CV-2005-0002277:

      (1) Civil Complaint, filed March 4, 2005;

      (2) Motion to Consolidate, filed March 18, 2005;

      (3) Third-Party Complaint, filed March 22, 2005;

      (4) Stipulation of the Parties to Consolidate Pending Actions, filed April 19, 2005;

(5) Order to Consolidate Pending Cases, filed April 19, 2005; and

(6) Dismissal with Prejudice, dated June 20, 2007.

2. I certify that a copy of this request was served upon the reporter and clerk of the District Court and upon all parties required to be served pursuant to Rule 20.

DATED this 31 day of July, 2012.

CANTRILL SKINNER SULLIVAN & KING, LLP

Robert D. Lewis – Of the Firm
Attorneys for Respondent/Counterclaimant
Standley Trenching, Inc., d/b/a Standley & Co.

CERTIFICATE OF SERVICE

I hereby certify that on the 31 day of July, 2012, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Kevin E. Dinius Michael J. Hanby, II DINIUS LAW 5680 E. Franklin Rd. - Suite 130 Nampa, ID 83687 *Attorneys for Plaintiffs DeGroot & DeGroot Farms, LLC*	[ ] [ ] [X]	Facsimile: (208) 475-0101 Hand Delivery U.S. Mail
William A. McCurdy MCCURDY LAW OFFICES 702 West Idaho Street - Suite 1100 Boise, ID 83702 *Attorney for Defendant J. Houle & Fils, Inc.*	[ ] [ ] [X]	Facsimile: (208) 947-5910 Hand Delivery U.S. Mail
M. Michael Sasser SASSER & INGLIS 1902 W. Judith Lane - Suite 100 PO Box 5880 Boise, ID 83705 *Attorneys for Third-Party Defendant Standley*	[ ] [ ] [X]	Facsimile: (208) 344-8479 Hand Delivery U.S. Mail
Laura Whiting Court Reporter for the Honorable Gregory M. Culet CANYON COUNTY COURTHOUSE 1115 Albany Street Caldwell, ID 83605	[ ] [ ] [X]	Facsimile: (208) 454-7442 Hand Delivery U.S. Mail
Judge's Copy to Chambers: Honorable Molly Huskey CANYON COUNTY COURTHOUSE 1115 Albany Street Caldwell, ID 83605	[ ] [ ] [X]	Facsimile: Hand Delivery U.S. Mail

Robert D. Lewis

RESPONDENT/COUNTERCLAIMANT STANDLEY TRENCHING, INC.'S OBJECTION AND REQUEST FOR ADDITIONAL TRANSCRIPT AND RECORD - 5

Robert D. Lewis, ISB No. 2713
CANTRILL, SKINNER, SULLIVAN & KING LLP
1423 Tyrell Lane
PO Box 359
Boise, Idaho 83701
Telephone: (208) 344-8035
Facsimile: (208) 345-7212

FILED
A.M. 2:00 P.M.
SEP 07 2012
CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

Attorneys for Counterclaimant/Respondent Standley Trenching, Inc., d/b/a Standley & Co.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES DeGROOT, and DeGROOT FARMS, LLC,

Plaintiffs/Counter-defendants/Appellants,

vs.

STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO., and J. HOULE & FILS, INC., a Canadian corporation,

Defendants/Respondents,

and

STANDLEY TRENCHING, INC., d/b/a STANDLEY & CO.

Counterclaimant/ Respondent.

Case Nos. CV 01-7777
CV 05-2277

ORDER TO AUGMENT THE RECORD ON APPEAL

ORIGINAL

CHARLES DeGROOT, and DeGROOT DAIRY, LLC,

Plaintiffs,

vs.

BELTMAN CONSTRUCTION, INC., d/b/a BELTMAN WELDING AND CONSTRUCTION, a Washington corporation;

Defendant/Third-Party Plaintiff,

vs.

STANDLEY TRENCHING, INC. d/b/a STANDLEY & CO., an Idaho corporation, and J. HOULE & FILS, INC.

Third-Party Defendants.

IT IS HEREBY ORDERED that pursuant to Rule 29, I.A.R, that the record on appeal be augmented by addition to the Reporter's Transcript and the Clerk's Record. The additional transcript is to be provided in hard copy and is described in 1. below. The additional Clerk's Record is described in 2. below.

1. Reporter's transcript:

   The entire reporter's transcript as defined in Rule 25(a), I.A.R. for the hearing held on June 29, 2005, on Motion for Fees and Costs and for Reconsideration. Sue Wolf as Court Reporter.

2. Clerk's Record:

a. Affidavit of Robert D. Lewis, with exhibits, dated April 18, 2005;

b. Memorandum of Attorney Fees, dated April 18, 2005;

c. Motion for Award of Prejudgment Interest, dated April 18, 2005, filed by Counterclaimant;

d. Order, dated June 6, 2005;

e. Counterclaimant Standley Trenching Supplemental Memorandum Supporting Award of Fees, dated July 25, 2005;

f. Certain portions of the Clerk's Record from the case Consolidated, DeGroot v. Beltman, Case No. CV-2005-0002277:

(1) Civil Complaint, filed March 4, 2005;

(2) Motion to Consolidate, filed March 18, 2005;

(3) Third-Party Complaint, filed March 22, 2005;

(4) Stipulation of the Parties to Consolidate Pending Actions, filed April 19, 2005;

(5) Order to Consolidate Pending Cases, filed April 19, 2005; and

(6) Dismissal with Prejudice, dated June 20, 2007.

DATED this 5th day of Sept, 2012.

Honorable Molley Huskey

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of Dec, 2012, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Kevin E. Dinius Michael J. Hanby, II DINIUS LAW 5680 E. Franklin Rd. - Suite 130 Nampa, ID 83687 *Attorneys for Plaintiffs DeGroot & DeGroot Farms, LLC*	[ ] [ ] [X]	Facsimile: (208) 475-0101 Hand Delivery U.S. Mail
William A. McCurdy MCCURDY LAW OFFICES 702 West Idaho Street - Suite 1100 Boise, ID 83702 *Attorney for Defendant J. Houle & Fils, Inc.*	[ ] [ ] [X]	Facsimile: (208) 947-5910 Hand Delivery U.S. Mail
M. Michael Sasser SASSER & INGLIS 1902 W. Judith Lane - Suite 100 PO Box 5880 Boise, ID 83705 *Attorneys for Third-Party Defendant Standley*	[ ] [ ] [X]	Facsimile: (208) 344-8479 Hand Delivery U.S. Mail
Sue Wolf Court Reporter for the Honorable Thomas F. Neville ADA COUNTY COURTHOUSE 200 W. Front Street Boise, Idaho 83702-7300	[ ] [ ] [X]	Facsimile: Hand Delivery U.S. Mail
Robert D. Lewis Cantrill, Skinner, Sullivan & King, LLP P.O. Box 359 Boise, Idaho 83701 *Attorneys for Standley Trenching, Inc., d/b/a Standley & Co*	[ ] [ ] [X]	Facsimile: (208) 345-7212 Hand Delivery U.S. Mail

TCA

Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES JAY DE GROOT, etal.,	)	
	)	
Plaintiffs-Counterdefendants-Appellant,	)	Case No. CV-01-07777*C
	)	
-vs-	)	CERTIFICATE OF EXHIBIT
	)	
STANDLEY TRENCHING, INC, etal.,	)	
	)	
Defendant-Counterclaimant-Respondent,	)	
And	)	
	)	
J. HOULE & FILS, INC.,	)	
	)	
Defendant-Respondent.	)	

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the following is being sent as an exhibit:

NONE

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 7 day of December, 2012.

CHRIS YAMAMOTO, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.
By: J Rondall Deputy

CERTIFICATE OF EXHIBIT

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES JAY DE GROOT, etal.,	)	
	)	
Plaintiffs-Counterdefendants-Appellant,	)	Case No. CV-01-07777*C
	)	
-vs-	)	CERTIFICATE OF CLERK
	)	
STANDLEY TRENCHING, INC, etal.,	)	
	)	
Defendant-Counterclaimant-Respondent,	)	
And	)	
	)	
J. HOULE & FILS, INC.,	)	
	)	
Defendant-Respondent.	)	

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the above and foregoing Supplemental Record in the above entitled cause was compiled and bound under my direction as, and is a true, full correct Supplemental Record of the pleadings and documents as requested and ordered.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 7 day of December, 2012.

CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon.

By: J Rondell Deputy

CERTIFICATE OF CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES JAY DE GROOT, etal.,	)	
	)	
Plaintiffs-Counterdefendants-Appellant,	)	Supreme Court No. 39406-2011
	)	
-vs-	)	CERTIFICATE OF SERVICE
	)	
STANDLEY TRENCHING, INC, etal.,	)	
	)	
Defendant-Counterclaimant-Respondent,	)	
And	)	
	)	
J. HOULE & FILS, INC.,	)	
	)	
Defendant-Respondent.	)	

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that I have personally served or had delivered by United State's Mail, postage prepaid, one copy of the Clerk's Supplemental Record and one copy of the Reporter's Transcript to the attorney of record to each party as follows:

Kevin E. Dinius and Michael J. Hanby II, DINUS LAW
M. Michael Sasser, SASSER & INGLIS P.C.
Robert D. Lewis, CANTRILL SKINNER SULLIVAN & KING, LLP

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 7 day of December, 2012.

CHRIS YAMAMOTO, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.
By: J Randall Deputy

CERTIFICATE OF SERVICE