STATE OF IDAHO)
County of KOOTENAI)ss
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AT 3:25 O'Clock P. M
CLERK, DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

TODD O. BUTLER,

Plaintiff/Respondent,

VS.

DAVID APPELBAUM and DEANNA APPELBAUM,

Defendants/Appellants.

Case No. **CV28-18-4893**
CV28-18-5963

MEMORANDUM DECISION AND ORDER ON APPEAL

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Todd O. Butler (Butler) is a licensed architect conducting business as Forte Architecture and Planning Inc. (Forte). On April 19, 2016, David and Deanna Appelbaum (Appelbaums) entered into a contract with Forte. A copy of the contract signed by Appelbaums was not found for trial, but a copy bearing Butler's signature as "Principal-forte' architecture & planning inc." was offered and admitted into evidence as Plaintiff's Exhibit 1. Appelbaums contend:

> The contract required Forte to provide services relative to the design and construction of a certain physical structures described in the contract within a specified price range of $250,000 to $300,000. The contractual Scope of Work included: Preliminary Design, Design Development, Construction Documents, Bidding and Negotiation and Construction Administration. The preliminary Design included a "preliminary cost estimate". On or about September 8, 2016, Forte informed Appelbaum that the cost estimate for the construction of the specified structures had increased to $434,555.

> Appelbaum agreed to increase their building budget not to exceed said sum. Thereafter, Forte and Appelbaum were unable to obtain a contractor to construct the specified structures for the sum of $434,555. Bids received varied between 57% and 113% over the not to exceed budget of $434,555. Appelbaum paid Forte a total of $5,210. Forte claimed Appelbaum owed a remaining balance of $9,071.48. Appelbaum declined to pay the remaining sum to Forte because Forte had failed to design the specified structures within the specified budgetary limitations and had therefore breached the contract.

Appellant's Opening Br., 2.

On June 19, 2018, Butler, pro se, filed a Small Claims Claim (Complaint), asserting a claim for unpaid architecture services against Appelbaums in the amount of $5,000.00. Thus began Kootenai County Case no. CV28-18-4893. On July 30, 2018, that case was set for trial before Magistrate Judge James Stow, to be tried on August 28, 2018. On July 30, 2018, Appelbaums, pro se, filed a Small Claims Claim (Complaint), which Appelbaums characterized as a "counterclaim" against "Forte' Architecture & Planning, Inc.", for breach of contract seeking $5,000.00 against Forte as a refund of what they had paid to Forte. Thus began Kootenai County Case no. CV28-18-5963. At the August 28, 2018, trial before Judge Stow in CV28-18-4893, Appelbaums informed Judge Stow that they had filed a separate action against Forte. Both Appelbaums and Butler agreed that Judge Stow could hear both cases at the same time. At the conclusion of the trial, Judge Stow denied Butler's claim against Appelbaums and granted Appelbaums' claim against Forte in the amount of $5,137.

On August 28, 2018, Butler filed a Notice of Appeal of Small Claims Judgment, this time stating the plaintiff to be "Todd Butler/Forte". Notice of Appeal of Small Claims J., 1. October 30, 2018, a trial was held before Judge Exckhart. The trial before Judge Eckhart consisted of a trial de novo on both of the cases heard by Judge Stow. At the conclusion of the trial on October 30, 2019, Judge Eckhart denied Appelbaums' claims and granted Butler's claims awarding judgment to Butler in the amount of $7,671.48. On November 9,

2018, Judge Eckhart entered a Small Claims Judgment awarding $7,671.48 and $25.00 costs to Todd O. Butler against the Appelbaums.

Appelbaums hired an attorney and on December 11, 2018, Appelbaums filed a Notice of Appeal in both cases. That appeal was assigned to the undersigned. Counsel for Appelbaums raised four issues on appeal:

> a. Did the Respondent have standing to file suit in an individual capacity on the claim?
> b. Was the Magistrate Court's Judgment supported by substantial and competent evidence?
> c. Did the Magistrate Court err in failing to cite any law in support of the Judgment?
> d. Did the Magistrate Court err in failing to find that Respondent breached the contract?

Notice of Appeal, 2. On March 5, 2019, a Second Amended Notice of Settlement of Transcript was filed. On April 3, 2019, Appelbaums filed Appellant's [sic] Opening Brief. On April 30, 2019, Butler, through counsel, filed Respondents [sic] Brief on Appeal. On May 20, 2019, Appelbaums filed Appellant's [sic] Reply Brief. Oral argument was held on July 16, 2019.

The Court notes that at no time have these cases been consolidated pursuant to Idaho Rule of Civil Procedure 18, 19 or 20. The Court also notes that apparently the Clerk of Court considers Kootenai County Case no. CV28-18-4893 to be the "lead" case, as that is the case in which all filings have been made on appeal. Nothing has been filed in CV28-18-5963 since the Judgment on November 21, 2018.

II. STANDARD OF REVIEW

This Court will only set aside a trial court's findings of fact if they are clearly erroneous. I.R.C.P. 52; *see McCray v. Rosenkrance*, 135 Idaho 509, 513, 20 P.3d 693, 697 (2001); *In re Williamson v. City of McCall*, 135 Idaho 452, 454, 19 P.3d 766, 768 (2001). "In deciding whether findings of fact are clearly erroneous, this Court

determines whether the findings are supported by substantial, competent evidence." *Aspiazu v. Mortimer*, 139 Idaho 548, 550, 82 P.3d 830, 832 (2003). "Evidence is substantial if a reasonable trier of fact would accept it and rely on it." *Id.* "Findings based on substantial, competent evidence, although conflicting, will not be disturbed on appeal." *Id.* (citing *Bolger v. Lance*, 137 Idaho 792, 53 P.3d 1211 (2002)).

III. ANALYSIS

A. Butler does not have standing, but lack of standing has been resolved.

Appelbaums claim Butler does not have standing. The entirety of Appelbaums' argument is as follows:

> Forte Architecture & Planning Inc. is a corporate entity. The Agreement is on letterhead which states: "Forte Architecture and Planning Inc." The Agreement is signed by Butler as "Principal-Forte Architecture and Planning Inc." The Agreement contains a provision which states: "By signing below the Owner agrees to reimburse Forte Architecture & Planning Inc. for their services in conjunction with the rates outlined above."
>
> Therefore, it is Forte, not Butler, which has a claim against Appelbaum if any colorable claim exists. Butler is not the real party in interest and does not have standing to bring a claim against Appelbaum is alleged herein. As a result, the judgment awarded to Butler is void.

Appellant's [sic] Opening Br., 11. For their argument, Appelbaums cite Idaho Code § 30-29-302 and *Houpt v. Wells Fargo Bank, National Association*, 160 Idaho 181, 370 P.3d 384 (2016). *Id.* at 10. Butler's response is as follows:

> There is no prejudice of any kind here to the Appellants. Furthermore, if The Appellants were to have objected previously in this matter to Respondent's standing, Respondent could have filed to amend the pleadings to reflect his corporation. At this point in the proceedings the appeal has been mode regarding the facts presented at the trial of this matter. If the matter were to be remanded for the purpose of determining standing then Respondent would move to ask the court to allow an amendment to change the parties to effectuate the intent of Rule 15(c) and 17(a).

Respondent's Br. on Appeal, 3. This argument by Butler is largely incoherent. First,

Butler claims Appelbaums should have "objected previously" to Butler proceeding individually instead of as a corporation. The Court is mystified why it would be incumbent upon the Appelbaum's to object to Butler's mistake. As a lawyer, a professional, why is it not it incumbent upon counsel for Butler to realize the mistake that Butler created? Even if the onus were on Appelbaums, they have met that burden. In their Notice of Appeal, filed December 11, 2018, the Appelbaums state as their first issue on appeal: "Did the Respondent have standing to file suit in an individual capacity on the claim?" Notice of Appeal, 2. That paramount issue is fairly direct and succinct, yet Butler took no action from December 11, 2018, up to and including oral argument held on July 16, 2019.

This Court finds that Todd O. Butler is not the real party in interest. This Court finds that Forte Architecture & Planning, Inc. is the real party in interest. In small claims, a person can represent a corporation. Idaho Rules for Small Claim Actions, Rule 3 reads: Who may be a plaintiff – Any individual, partnership, corporation or association may file a small claim as a plaintiff in the action. An employee of the plaintiff may sign the pleadings." While Butler could sign his small claim complaint on behalf of his corporation, that does not answer the question of standing. This Court finds that all Rule 3 does is give a pro-se litigant in small claims court the ability to sue on behalf of his or her corporation (or association or partnership) and not commit the unauthorized practice of law. It is well-established that a non-attorney is prohibited from representing another layperson in a pro se capacity, and to do so would be to engage in the unauthorized practice of law. *See* I.C. § 3-104.[1] The issue of standing requires more.

[1] The relevant portion of I.C. § 3-104 reads: "If any person shall practice law or hold himself out as qualified to practice law in this state without having been admitted to practice therein by the Supreme Court and without having paid all license fees now or hereafter prescribed by law for the practice of law he is guilty of contempt both in the Supreme Court and district court for the district in which he shall so

There can be no doubt that the contract was between Forte Architecture & Planning, Inc. and the Appelbaums, and not a contract between Todd O. Butler as an individual and the Appelbaums. Butler signed as "Principal-Forte Architecture and Planning Inc." Ex. 1.

The issue of standing can be raised at any time, even for the first time on appeal. *Houpt*, 160 Idaho 181, 186, 370 P.3d 384, 390. The Idaho Supreme Court in *Houpt* went on to state:

> Idaho's real party in interest rule is found in the Idaho Rules of Civil Procedure and states in relevant part:
>
> > Every action shall be prosecuted in the name of the real party in interest.... No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.
>
> I.R.C.P. 17(a). The purpose of this rule is to "prevent forfeiture when determination of the proper party is difficult or when an understandable mistake has been made in selecting the party plaintiff." *Conda Partnership, Inc. v. M.D. Constr. Co.*, 115 Idaho 902, 904, 771 P.2d 920, 922 (Ct.App.1989). Consequently, when interpreting this rule we have stated that "[l]iberal construction should be given to this rule and courts should 'further the policy favoring the just resolution of actions—providing litigants their day in court.' " *Hayward v. Valley Vista Care Corp.*, 136 Idaho 342, 348, 33 P.3d 816, 822 (2001) (quoting *Conda*, 115 Idaho at 904, 771 P.2d at 922).

160 Idaho at 186-87, 370 P.3d at 390-91.

At oral argument, the Court first heard arguments by counsel on the issue of standing. After hearing that argument and after having read the briefs, the Court announced that Todd O. Butler did not have standing because the contract was entered into between Appelbaums and Forte Architecture and Planning, Inc. Counsel for Butler moved to amend the pleadings in both cases to reflect that Forte Architecture and

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practice or hold himself out as qualified to practice."

Planning, Inc. was substituted as the party in each respective case for Todd O. Butler. Counsel for Appelbaum did not object to the motion. Thus, the standing issue has been resolved.

B. Judge Eckhart's decision is supported by substantial, competent evidence.

Appelbaums claim Judge Eckhart's decision is not supported by substantial competent evidence. Appellants' Opening Br., 11-17. Appelbaums go to great length in their briefing to provide several examples, but those claimed instances where Judge Eckhart's findings were not supported by the record, actually are supported by the record.

First, Appelbaums argue:

> The Trial Court's finding of fact that: "An additional component of this Proposal and the construction of the home was that Appelbaum's wanted to use a friend or family member that had construction experience in an effort to cut down the costs of construction["] is not supported by substantial and competent evidence is clearly erroneous.

Appellant's Opening Br., 13. Nowhere do Appelbaums favor this Court on appeal with a citation as to where in the record Judge Eckhart found such, but such finding does appear in Judge Eckhart's decision. Decision on Small Claims Appeals, 2-3. The problem with Appelbaums' argument is that the comment by Judge Eckhart is supported by substantial, competent evidence. Counsel for Butler asked Todd Butler the following, and got the following answers:

> Q. BY MR. REDAL: So before we get to the contractor thing, you had made a comment earlier that when this whole thing started, the Appelbaums had made some suggestion to you with regard to having some family members assist in the building; correct?
> A. Correct.
> Q. And what was the nature of those discussions?
> A. Well, again, in discussing -- in discussing the overall project and probably sharing some concerns with the costs and everything else, I believe it was Deanna's cousin, I want to say he lived in Spokane or the area, but was either a contractor or had construction experience, and, in

fact, I believe I met him one of the times up at the site. But they had talked about the interest of having him, you know, act in their capacity, just trying -- you know, trying to approach the project from a budgetary standpoint and get the project built, and them also doing a lot of the work themselves.

Tr. p. 23, L. 24-p. 25, L. 15. At the end of the trial before Judge Eckhart, David Appelbaum certainly did not deny this fact as he testified:

MR. REDAL: Very brief, Judge.
So, Mr. Appelbaum, when you talked to Mr. Butler, did you discuss possibly having some type of relative that would assist in construction of the property – the construction of the home to keep the costs down?
MR. APPELBAUM: We discussed a lot of options, but what we made abundantly clear to Mr. Butler was that our bank out in Hayden -- or Mountain West Bank did not permit us to use -- take an owner/builder approach or use anybody that was not on their approved contractor list.

Tr. p. 92, L. 19-p. 93, L. 3.

Appelbaums' claim that Judge Eckhart's finding as to a discussion between Appelbaums and Butler that perhaps friends or family with construction experience could be employed, is entirely supported by the record.

Next, Appelbaums argue:

2. The Court erred in finding that the "building boom happening in this area" was the basis for no responsive bids and/or bids received being above Appelbaum's budget.

There is nothing in the record to support the Trial Court's finding of fact that the reason that no responsive bids, and/or bids received were above the Appelbaum budget, was based upon the "building boom happening in this area".

Appellant's Opening Br., 13. Again, nowhere do Appelbaums favor this Court on appeal with a citation as to where in the record Judge Eckhart found such, but such finding does appear in Judge Eckhart's decision. Decision on Small Claims Appeals, 3.

Again, Judge Eckhart's finding is supported by the record. Butler testified:

Q. In general, was it difficult to get contractors who weren't so busy that they could actually bid jobs? Is that what you were running into here?

A. I think our original bid list, we had identified and talked to six or seven builders, and nobody responded.
Q. Okay. So your experience is that everybody was just so busy --
A. Extremely busy.
Q. -- you didn't find any contractors?
A. Yeah.

Tr. p. 40, L. 25-p. 41, L. 9.

Next, Appelbaums argue:

> **3. The Court erred in finding that "the cost of subcontractors and materials was significantly higher in 2016".**
>
> The Trial Court relied upon the testimony of John Delbridge in making this finding of fact. The testimony of Mr. Delbridge pertinent to this finding of fact is found on Pages 76 and 77 of the transcript. In essence, Mr. Delbridge testified that he was in business at the time of the "big recession", that the "big recession" effectively lowered the cost of building homes, that the construction industry started "backup" around 2016 and that it consequently became more expensive to hire subcontractors. In addition, Mr. Delbridge testified that the market with regards to the volatility also affected construction materials.
>
> The Trial Court concluded that "...the construction market presented an awful time for constructing a home. This is shown not only by the cost of building but also the lack of bids received for the project." There is nothing in the record to support the Trial Court's finding and conclusion that the cost of subcontractors and materials was significantly higher in 2016, and the finding is not supported by substantial and competent evidence and is clearly erroneous.

Appellant's Opening Br., 14. Again, nowhere do Appelbaums favor this Court on appeal with a citation as to where in the record Judge Eckhart made this finding, but such finding does appear in Judge Eckhart's decision. Decision on Small Claims Appeals, 3. Again, Judge Eckhart's finding is supported by the record. Butler called John Delbridge as a witness, and Delbridge testified:

Excuse me. Let me ask you this: So you've been in this business for over 20 years you stated; correct?
A. Um-hum.
Q. And were you in business when we had the big recession some time ago?
A. Yes, I was.
Q. Did that effect the cost of building homes?
A. Yes, it did.

Q. Did that lower the cost of building homes?
A. Quite a bit.
Q. And once we came back into around 2016, the construction industry started going back up; correct?
A. Correct.
Q. And did it become consequently more expensive to hire subcontractors?
A. Yes.

Tr. p. 76, Ll. 1-16. Thus, there is substantial competent evidence to support Judge Eckhart's finding that, "the cost of subcontractors and materials was significantly higher in 2016", because that was precisely Delbridge's uncontroverted testimony.

Next, Appelbaums argue:

> **4. The Court erred in finding that "It should be obvious to any person building a home that factors such as the status of the construction/building market, significant changes to the construction plans, incorporating high and materials, vaulted ceilings or other high end designs is going to increase the cost of a home."**
>
> At the time the Agreement was entered into, Butler had been an architect for 21 years. At the time the Agreement was entered into, Appelbaum had no education training or experience in architecture or construction. What the Trial Court concludes should be obvious to any person is not supported by the record.

Appellant's Opening Br., 15. Again, nowhere do Appelbaums favor this Court on appeal with a citation as to where in the record Judge Eckhart made this finding, but such finding does appear in Judge Eckhart's decision. Decision on Small Claims Appeals, 5. Again, Judge Eckhart's finding is supported by the record. These issues are exactly what Delbridge testified about. If the point counsel for Appelbaum is trying to make is that his clients, the Appelbaums, were clueless as to those factors, and that that is why these things are not "obvious to any person", then one or both of the Appelbaums should have testified that they were clueless as to these obvious things. But Deanna Appelbaum did not testify and David Appelbaum did not testify about this subject. In his closing argument, David Appelbaum stated "We have never built a

home. We are the ignorant, naïve party here." Tr. p. 103, Ll. 1-2. However, that is argument, not testimony. It is not evidence. Thus, Delbridge's testimony on this subject is uncontradicted. Thus, Judge Eckhart's findings are not only based on substantial competent evidence, her findings are based on the only evidence in the record. There is no contrary evidence. Finally, whether the Appelbaums were ignorant or not really has no bearing on whether their contract with Forte Architects & Planning Inc. was breached.

Finally, Appelbaums argue:

> **5. The Court erred in finding that Appelbaum had received the benefit of the bargain because "The Appelbaum's have a completed set of working drawings for their home which they can use in the future when building costs come down."**

Again, nowhere do Appelbaums favor this Court on appeal with a citation as to where in the record Judge Eckhart made this finding, but such finding does appear in Judge Eckhart's decision. Decision on Small Claims Appeals, 6. What Judge Eckhart actually found was:

> 6. Exhibit 8 shows that Butler completed 95% of the contract entered into between the parties. Butler did not charge the Appelbaums for the Project Administration which was equal to 5% or $750.00. The Appelbaums have a completed set of working drawings for their home which they can use in the future when building costs come down. Even the Appelbaums recognize this fact. See Exhibit 7.

Id. Exhibit 7 is an e-mail from David Appelbaum to Butler, stating in part, "We simply couldn't afford that cost, and, as a result, we have suspended this project (for now) and taken another interim path. We hope to re-approach this build in the future, when construction costs are hopefully realistic or we can tackle the project under an owner-build scenario." Ex. 7. Thus, Judge Eckhart's finding is supported by David Appelbaum's own words in an e-mail sent to Butler. Judge Exchart's finding is supported by substantial, competent evidence in the record.

The next subject argued by Appelbaums on appeal is their claim that "The Magistrate Court erred in failing to find that Butler and/or Forte breached the contract." Appellant's Opening Br., 17-21. This is really the heart of Judge Eckhart's decision and what should be the focus of this appeal. Appelbaums make the following claims:

> Lest we not forget that the essence of the Agreement was for Forte to design a structure which could be constructed for a cost of between $250,000 and $300,000 and that it was Forte's duty and obligation to design such a plan. Forte failed in that regard.

Id. at 16. No doubt that is what the Appelbaums *want* the contract to read, however, that is not at all what the agreement states. Appelbaums make the following similar claim

> Therefore, they [sic] can be no doubt that the intent of the Parties as reflected in the Agreement was for Forte to design a structure for Appelbaum to be constructed for a cost of $250,000-$300,000.

Appellant's Opening Brief, 20. There actually can be doubt because that is simply not what the contract says. To determine if there was a breach of contract, one needs to look at the language of the contract, which is found in Exhibit 1. The contract or the agreement starts out:

> Dear Dave & Deanna,
> The following proposal is based upon the preliminary site visits and meetings in regards to your new home to be located off of Kidd Island Road in Kootenai County Idaho.

Ex. 1. Nowhere in that agreement does Forte Architecture & Planning Inc. promise to develop a set of plans upon which a contractor will build a home for between $250,000 and $300,000. No architect would ever enter into such a contract because the architect has no ability to force a given contractor to build a house according to those plans for a set price determined by the architect or the architects client. Only the contractor determines the price he bids the project and the architect has absolutely no control over the contractor. This was pointed out by Forte Architecture & Planning Inc to the

Appelbaums in Exhibit 7, where Butler wrote:

> David, Deanna,
> I can sure understand your frustrations with the project costs. Frankly, I'm as surprised as you are that all the bids came in at similar amounts (around $200/s.f.). Where I think there are still refinements in the bids to be had—I think the reality check is that it seems to be a builders market out there. As you found out it seems to make more sense to purchase than to build in this market.
> I'm in a challenging business from the stand point of producing a product (custom home design/drawings) by taking a clients direction and trying to fit it into an end product that is dictated by costs out of my control (builder). Where as I try to be conscious of design elements that I know can run up costs, I try to strike a balance between cost effective construction methods and the clients wishes. That being said the process can be an unfortunate catch 22. If costs drive the final decision of the project moving forward the only way we can get definitive costs is by producing drawings for the contractors to bid. So regardless my work is required up-front to help us determine the final costs. As in most professional services—all I really have to generate money with is my time and expertise.

Ex. 7, 2. All of this is consistent with the contract. Exhibit 1 discusses the fact that Forte Architecture & Planning Inc. will deliver a preliminary design for 15% of the overall cost of architectural services. Ex. 1, 1. In this agreement, that was specifically enumerated at a cost of $2,250.00. Exh. 1, 2. The agreement stated, "As discussed you would like to develop a new home with a minimum of 3 bedrooms/2.5 baths (w/Master Bedroom/Gath on the Main Level), a Great Room incorporating the living, kitchen, and dining areas, and a 2 car garage." Ex. 1, 1. If the Appelbaums approved of the preliminary design, Forte Architecture & Planning Inc. moves on to design development for an additional 20% of the overall cost of architectural services. *Id.* If the Appelbaums approve the design development, Forte Architecture & Planning Inc. moves on to prepare construction documents for an additional 55% of the overall cost of architectural services. *Id.* If Appelbaums approve that, then Forte Architecture & Planning Inc. moves on to bidding and negotiation for an additional 5% of the overall cost of architectural services. *Id.* Finally, Forte Architecture & Planning Inc. charges

5% of the overall cost of architectural services for construction administration. *Id.* It is only this last component that was not charged to Appelbaums, and that is because it did not occur. The overall cost of architectural services, according to the agreement was based on a percentage of the estimated costs of construction, 6% for a house constructed for between $250,000 and $500,000, and 5% for a house constructed for $500,000 or more. *Id.* at 3. Butler, on behalf of Forte Architecture & Planning Inc. did what was promised in the agreement. The agreement simply does not state that the plans would result in a bid from a contractor for a set price. This Court finds on appeal that there was no breach of the agreement by Forte Architecture & Planning Inc. The findings of Judge Eckhart to that effect are affirmed both from a substantial, competent evidence standpoint, and as a matter of law. Forte Architecture & Planning Inc. provided Appelbaums exactly what the agreement promised, for the price agreed upon.

This Court's finding that the contract was not breached by Forte is consistent with case law on the subject. This Court could find no Idaho appellate law directly on point, but was able to find two cases from other jurisdictions which are on point. In *Cobb v. Thomas*, 565 S.W.2d 281 (Tex. Civ. App. 1978), homeowners sued their architect and building contractor alleging breach of contract, breach of fiduciary duties and negligence in failing to keep construction cost of house below alleged agreed limit and in failing to complete house by alleged agreed date. The written agreement by the architect was to build a home according to his plans and "We can do it for $400,000" (and he quoted the exact bid from the contractor which was $396,619), plus the architect fee of $100,000, for a total of $500,000. 565 S.W.2d at 285. The completed project was actually $660,000.00. *Id.* The Court of Civil Appeals of Texas held:

> In contracting for his services, an architect implies that he possesses skill and ability, and that he will exercise and apply his skill and ability reasonably and without neglect. The skill and diligence which he is

> bound to exercise are such as are ordinarily required of architects, and his duty depends on the particular agreement entered into with his employer. 5 Am.Jur.2d Architects sec. 8.
>
> A party who proposes to build, may in his contract of employment with an architect state an amount as to the limit of cost of the building and provide that reasonable conformity to such cost shall be a condition for payment for services rendered by the architect; or, such agreement may result from a stipulation that the cost of the building proposed by the architect will not exceed a definite maximum. Where such a positive cost limitation is stipulated in an architect's contract, a substantial violation thereof will preclude a recovery of architect's fees. 5 Am.Jur.2d Architects sec. 17; *Bueche v. Eickenroht*, 220 S.W.2d 911 (Tex.Civ.App. San Antonio 1949, no writ); *Moore v. Bolton*, 480 S.W.2d 805 (Tex.Civ.App. Houston (14th Dist.) 1972, writ ref'd n. r. e.). Such rule, however, is not applicable to the situation presented here because, in the present case, there is no expressed cost limitation in the parties' agreement or contract. In this case, the architect merely agreed to do the architectural work according to the expressed wishes of the owner at an hourly compensation rate. Where the contract, as here, requires the preparation of plans and specifications for the construction of a building according to the express wishes of the owner as to the details of construction without mentioning a cost limitation, the mere nonconformity in the actual cost of construction with the amount so estimated by the architect does not amount to a breach of duty on the part of the architect and therefore forms no basis for a suit to recover the fees paid him. *Bueche v. Eickenroht, supra.* Under such circumstances the architect is entitled to compensation even though the cost exceeds the hopes and expectations of the owner. It follows that appellants' claim for a recovery of the architects' fees paid Thomas is without foundation.

Id. at 286-87. Later, that Court continued:

> We find no merit in this point because, as pointed out before, there is no evidence that Thomas [the architect] contracted or promised appellants that the cost of construction would not exceed $500,000. His only promise in this regard was to give them the "probable" cost of construction. He fulfilled his contract in this regard when he gave them the figure of $500,000. Even assuming, arguendo, that Thomas did contract that the maximum cost of construction would not exceed $500,000, the only evidence as to the cause of the excess cost points to appellants as the ones responsible for the additional cost by having added expensive extras and having suspended construction. Thus, there is no evidence to raise the issue of a breach of duty on the part of Thomas in this regard, and therefore the trial court did not err in refusing to submit the issues requested by appellants. The fifth point is overruled.

Id. at 287-88. In the present case, Forte did not contract that the maximum cost would be any given amount. Forte's only promise was to give a probable cost of construction.

The other case located by this Court is *Getzschman v. Miller Chem. Co.*, 232 Neb. 885, 443 N.W.2d 260 (1989). In that case the architect sued the client for architect fees, the client had refused to pay those fees because the construction costs were in excess of the architects estimate. The jury found for the architect and on appeal, the Supreme Court of Nebraska affirmed. ("When architect has no express contractual obligation to design structure within specified budget or to estimate construction cost of proposed project, construction at cost greater than anticipated by or acceptable to owner is no defense to architect's action to recover fee.").

> Regarding an architect's duty to inform the client concerning the cost of a proposed project, *Durand* governs only those situations when the architect has agreed to design a project with a specified budget, or when the architect is obligated to furnish an estimate of construction costs. "An architect employed to prepare plans and specifications for a building, with the understanding that the construction would be accomplished within certain cost limitations, cannot recover compensation for [architectural] services when the building cannot be erected except at a cost materially in excess of the amount specified." *Kleinschmidt, Brassette & Associates v. Ayres,* 368 So.2d 1153, 1155 (La.App.1979). See, also, *Kurz v. Quincy Post No. 37, American Legion,* 5 Ill.App.3d 412, 283 N.E.2d 8 (1972); *Guirey, Smka & Arnold, Architects v. City of Phoenix, supra; Baylor University v. Carlander,* 316 S.W.2d 277 (Tex.App.1958); *Zannoth v. Booth Radio Stations,* 333 Mich. 233, 52 N.W.2d 678 (1952); 6 C.J.S. *Architects* § 32(b) (1975).
>
> However, when an architect has no express contractual obligation to design a structure within a specified budget or to estimate the construction cost of a proposed project, construction at a cost greater than anticipated by or acceptable to the owner is no defense to an architect's action to recover a fee.
>
> > "[W]here the cost of construction is not fixed in the agreement employing an architect, nor estimated by him, but the plans are prepared according to details dictated by the owner, it has been held that the fact that the plans when completed call for a building which will cost more to erect than the owner expected, or is willing, to pay, will not preclude the architect from recovering compensation for his services in making the plans."
>
> *Guirey, Smka & Arnold, Architects v. City of Phoenix, supra,* 9 Ariz.App. at 76, 449 P.2d at 312. "[W]here an architect is employed to prepare plans

> and specifications for a building and there are no cost limitations agreed upon, such architect can recover compensation for his services irrespective of the costs of construction." *Kleinschmidt, Brassette & Associates v. Ayres, supra* at 1155.

232 Neb. at 899-900, 443 N.W.2d at 270-71. In the present case, Exhibit 1 does not provide an express contractual obligation to design a structure within a specified budget. The cost of construction is not fixed in Appelbaums' agreement with Forte.

Appelbaums then turn their attention to their claims for reimbursement. Appellant's Opening Br., 21-23. On this subject, Judge Eckhart found:

> 8. As to the Appelbaums' claim for reimbursement, the same is denied. The services the Appelbaums paid for are services that they will need to complete for the construction of their home. There was no evidence that Butler misled the Appelbaums in any fashion regarding whether or not they should incur these services. The parties were both acting in good faith hoping to find a contractor that would be able to build their home within their budget and to the plan specifications.

Decision on Small Claims Appeals, 6. Judge Eckhart's finding is supported by substantial, competent evidence. More importantly, this claim for reimbursement by Appelbaums only comes into play if there was a breach of the contract by Forte Architects & Planning, Inc., and there was no breach.

IV. CONCLUSION AND ORDER.

For the reasons stated above, the decision of Judge Eckhart entered on November 9, 2018, is AFFIRMED in all aspects.

IT IS HEREBY ORDERED the decision of Judge Eckhart entered on November 9, 2018, is AFFIRMED in all aspects. This case is remanded back to the Magistrate Division for any further proceedings.

IT IS FURTHER ORDERED that Forte Architecture & Planning Inc. is the prevailing party on appeal, however, Forte Architecture & Planning Inc. has not requested attorney fees on appeal.

Entered this 17th day of July, 2019.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 17th day of July, 2019 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

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Honorable Anna M. Eckhart ✓
I.D.

By _____
Jeanne Clausen, Secretary