

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 August Term, 2003

4 (Argued: May 3, 2004 Decided: October 13, 2004)

5 Docket Nos. 00-9326, 00-9388

6 - - - - -x

7 ELGARD CORPORATION,

8 Plaintiff-Appellant-Cross-Appellee,

9 - v.-

10 BRENNAN CONSTRUCTION COMPANY and AMERICAN INSURANCE COMPANY,

11 Defendants-Third-Party-Plaintiffs-Appellees-  
12 Cross-Appellants,

13 ROBERT C. ADAMS, DEBRA E. ADAMS and R.C. ADCO INC.,

14 Third-Party-Defendants.

15 - - - - -x

16 Before: Cardamone and Jacobs, Circuit Judges, Korman,\*  
17 District Judge.

18 Following a bench trial, the United States District  
19 Court for the District of Connecticut (Martinez, Magistrate  
20 Judge) awarded contract and statutory damages in favor of  
21 Appellant-Cross-Appellee Elgard Corporation in connection

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\*The Honorable Edward R. Korman, Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

1 with a 1992 contract through which Elgard agreed to supply a  
2 system used in the rehabilitation of a bridge in  
3 Connecticut. Elgard challenges the district court's  
4 exclusion of certain contractual and offer-of-judgment  
5 interest from the award in its favor, and the denial of  
6 attorney's fees. Appellees-cross-appellants Brennan  
7 Construction Company and American Insurance Company cross-  
8 appeal the award of statutory interest on Elgard's recovery,  
9 and the rejection of Brennan's equitable estoppel defense.  
10 We (i) affirm the judgment as to liability but (ii) reverse  
11 the denial of attorney's fees, and (iii) vacate the amount  
12 awarded and remand with instructions to recalculate the  
13 judgment in a manner consistent with this opinion.

14  
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17 Crowley, P.C., New Haven, CT for  
18 Appellant

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22 Appellee

23  
24 DENNIS JACOBS, Circuit Judge:

25 Following a bench trial in this diversity action, the  
26 United States District Court for the District of Connecticut

1 (Martinez, Magistrate Judge) awarded contract damages and  
2 statutory interest in favor of Appellant-Cross-Appellee  
3 Elgard Corporation ("Elgard") in connection with a 1992  
4 construction project. Elgard challenges the district  
5 court's exclusion of certain contract and offer-of-judgment  
6 interest from the award in its favor, and the denial of  
7 attorney's fees. Appellees-cross-appellants Brennan  
8 Construction Company ("Brennan") and American Insurance  
9 Company ("American") (collectively, "defendants") cross-  
10 appeal the award of statutory interest pursuant to Conn.  
11 Gen. Stat. § 49-42 and the rejection of Brennan's equitable  
12 estoppel defense. For the reasons set forth below, we (i)  
13 affirm the judgment as to liability but (ii) reverse the  
14 denial of attorney's fees and (ii) vacate the damage award  
15 and remand for recalculation in a manner consistent with  
16 this opinion.

## 17 **BACKGROUND**

18 Brennan, a Connecticut-based general contractor,  
19 entered an agreement in April 1992 with the State of  
20 Connecticut ("the State") to rehabilitate a bridge over the  
21 West River in New Haven. The project called for the

1 installation of an anti-corrosive cathodic protection  
2 system, which Brennan subcontracted to R.C. Adco, Inc.  
3 ("Adco"). Adco in turn subcontracted with Elgard to  
4 manufacture the necessary equipment. The Elgard/Adco  
5 subcontract became effective on or about April 29, 1992.  
6 For \$110,200, Elgard was to produce and deliver the  
7 protection system to Adco, which would install it. The  
8 Elgard/Adco contract further provided that "[a]ny balance  
9 remaining due after thirty (30) days of delivery shall  
10 accrue interest at the rate of one and one-half percent  
11 (1 1/2%) per month." As of September 9, 1992, Elgard  
12 delivered to Adco all materials called for under the  
13 contract, and has been seeking collection ever since.

14 **I**

15 As a sub-subcontractor, Elgard was required to submit  
16 invoices to Adco, which would submit them to Brennan, which  
17 would seek payment from the State. Upon receipt of state  
18 funds, Brennan was to send payment back down the chain,  
19 through Adco to Elgard. The cause of the various  
20 controversies is that Adco used fraud to induce payment by  
21 the State to Brennan, and by Brennan to Adco for Elgard's

1 account, and then misappropriated Elgard's money en route.

2 On June 30, 1992, Adco submitted to Brennan a  
3 requisition for payment in the amount of \$107,445.<sup>1</sup> By  
4 regulation, Connecticut will reimburse a contractor for so-  
5 called "unincorporated" materials mid-construction if "such  
6 materials have been paid for by the Contractor as shown by  
7 receipted bills, or in lieu of such receipted bill or bills,  
8 a duly executed Certification of Title executed by the  
9 Contractor and the Vendor in the form approved by the  
10 Department [of Transportation]." Conn. Dept. of Transp.,  
11 Standard Specifications for Roads, Bridges and Incidental  
12 Construction § 1.09.06(B). Thus, Adco was entitled to  
13 payment if it had paid Elgard for the materials, or if it  
14 provided Brennan with a Certification of Title to a  
15 presently-existing cathodic protection system. Adco  
16 furnished a Certification of Title, but the certificate was  
17 deficient in two critical and undisputed respects: (i)  
18 partial delivery had been made to Adco's West Haven storage  
19 facility as of the date it sought payment, but the balance

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<sup>1</sup>The Elgard/Adco subcontract provided that Elgard would supply the cathodic protection system for \$110,200. That amount includes \$2,755 of retainage, which Elgard does not seek.

1 of the system was not scheduled to arrive until early  
2 September 1992; and (ii) without Elgard's knowledge or  
3 consent, Adco's president, Robert Adams, forged Elgard's  
4 signature on the Certification of Title. The forgery that  
5 Adams submitted to Brennan was accompanied by two Elgard  
6 invoices, seemingly in an effort to suggest that the  
7 equipment had been delivered. Adco had asked Elgard in late  
8 May 1992 to invoice for the cathodic protection system,  
9 notwithstanding that no equipment had yet been delivered.  
10 Elgard sent Adco two invoices dated May 29 and June 4, 1992,  
11 but each invoice reflected that no materials had been  
12 shipped as of those dates.

13 In reliance on Adco's forgery, Brennan signed the title  
14 certification and requested payment from the State. Before  
15 paying Brennan, the State sent an inspector to Adco's West  
16 Haven storage facility to verify the presence of the  
17 cathodic protection system. By that time, all but two  
18 rectifiers (a \$10,000 value) had arrived, and Adams--perhaps  
19 expecting the audit--had planted among the West River bridge  
20 materials a single rectifier meant for another job. The  
21 ruse succeeded; the inspector noted that some equipment  
22 appeared to be missing, but allowed himself to be persuaded

1 that the project specifications called for a single  
2 rectifier and (thus satisfied) was sent on his way.

3 On August 14, 1992, the State issued a check to the  
4 order of Brennan in the amount of \$107,445. Two weeks  
5 later, Adams came to Brennan's offices looking for payment.  
6 He received a check in the amount of \$107,445 payable to  
7 "R.C. Adco, Inc./Elgard Corporation." Adams knew the funds  
8 were meant for Elgard, and indicated to Brennan that he  
9 would send the check to the company. Instead he deposited  
10 the funds in an Adco account. Brennan was unaware that Adco  
11 had filed for bankruptcy eleven days before this  
12 misappropriation.

13 In the meantime, Elgard completed manufacture of the  
14 cathodic protection equipment, all of which was delivered to  
15 Adco as of September 9, 1992. Elgard awaited payment. The  
16 underlying litigation started when Elgard ran out of  
17 patience.

## 18 19 **II**

20 The procedural posture of this 12-year litigation is  
21 complicated by Adco's bankruptcy and by Connecticut law,  
22 which affords subcontractors like Elgard specific remedies

1 for nonpayment.

2 Brennan undertook the West River bridge rehabilitation  
3 pursuant to a bonded construction contract that was subject  
4 to Conn. Gen. Stat. § 49-42. As a condition precedent to  
5 signing the contract, Elgard and its surety, American,  
6 executed a \$1.4 million payment bond in favor of the State.  
7 Under § 49-42, a subcontractor can enforce its right to  
8 payment under such a bond by serving a notice of claim on  
9 the surety "within one hundred eighty days after the date  
10 [bonded] materials were supplied." Conn. Gen. Stat. § 49-  
11 42(a). Elgard delivered the last of the cathodic protection  
12 equipment to Adco on September 9, 1992, and duly served a  
13 notice of claim on American 114 days later, on January 26,  
14 1993.

15 When American investigated the claim, it learned that  
16 Brennan had received the Elgard invoices and the forged  
17 Certification of Title for the cathodic protection system on  
18 June 30, 1992, and had paid Adco for the equipment two  
19 months later. Because Elgard submitted its claim (on  
20 January 26, 2003) more than 180 days after the date on which  
21 American (erroneously) believed the equipment had been  
22 delivered (i.e., June 30, 1992), it was denied as untimely.

1           Section 49-42 provides that when a surety denies  
2 liability on a bonded claim, the claimant can file suit in  
3 Connecticut Superior court within one year of the date that  
4 materials were last supplied. Conn. Gen. Stat. § 49-42(a),  
5 (b). Elgard commenced the underlying action in the District  
6 of Connecticut<sup>2</sup> on September 2, 1993, "demand[ing] a  
7 judgment against Brennan and American in the sum of  
8 \$107,445, plus interest, costs, and attorneys' fees." Five  
9 days later, Elgard filed a settlement offer in the amount of  
10 \$105,000, pursuant to Connecticut's "Offer of Judgment"  
11 statute. See Conn. Gen. Stat. § 52-192a. Brennan and  
12 American moved to dismiss for failure to state a claim.

13           During the pendency of that motion, Brennan moved in  
14 the Adco bankruptcy proceedings for an allowance of an  
15 administrative expense claim in the amount of \$107,445 on  
16 the grounds that (i) Adco's "estate ha[d] been benefitted by  
17 virtue of Brennan's post-petition payment of . . . \$107,445  
18 . . . which should have rightfully been turned over to  
19 Elgard for the post-petition delivery of goods," and (ii)  
20 that "any payment . . . of the administrative expense claim

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<sup>2</sup>Defendants' challenge to federal diversity jurisdiction was unsuccessful. See Elgard Corp. v. Brennan Constr. Co., 157 F.R.D. 1 (D. Conn. 1994).

1 to Brennan would be turned over to Elgard in satisfaction of  
2 any of its valid claims against . . . Brennan related to the  
3 payment of the cathodic protection system materials." The  
4 United States Bankruptcy Court for the District of  
5 Connecticut granted the motion on March 24, 1994. At  
6 approximately that time, Brennan recovered \$77,445, and  
7 entered an agreement with Adco that \$30,000 was still owing  
8 from Adco's bankruptcy estate. Contrary to its  
9 representations to the bankruptcy court, Brennan did not pay  
10 Elgard the \$77,445, but continued to contest the § 49-42  
11 action in the District of Connecticut, where it asserted  
12 various affirmative defenses, including the statute of  
13 limitations and estoppel.

14 On February 7, 1997, three years after Brennan  
15 recovered on the administrative expense claim (ostensibly to  
16 pay Elgard for the cathodic protection system), Brennan sent  
17 the subcontractor a check in the amount of \$107,445, with a  
18 cover letter reciting that the funds were to be used "as a  
19 principal only payment," and "not . . . for interest or  
20 attorney's fees . . . or for any other purpose." Elgard  
21 cashed the check, and the litigation continued. Magistrate  
22 Judge Donna F. Martinez conducted a bench trial from May 13

1 to 15, 1998. In a decision entered September 27, 1999, the  
2 district court found Brennan and American liable to Elgard  
3 under Conn. Gen. Stat. § 49-42, rejecting defendants'  
4 defenses of estoppel and limitations. The judgment (a)  
5 awarded Elgard \$78,001.28 in statutory interest pursuant to  
6 § 49-42, but (b) denied its claim for interest alleged to be  
7 due and owing under the Elgard/Adco contract and (c) because  
8 the amount recovered did not exceed \$105,000, denied  
9 Elgard's claim for "offer of judgment" interest pursuant to  
10 Conn. Gen. Stat. § 52-192a. This appeal and cross-appeal  
11 ensued.

## 12 DISCUSSION

13 In diversity cases, we review a district court's  
14 findings of fact for clear error, Elliott Assocs., L.P. v.  
15 Banco de la Nacion, 194 F.3d 363, 369 (2d Cir. 1999), and  
16 its conclusions of state law de novo, Salve Regina College  
17 v. Russell, 499 U.S. 225, 231, 233-34 (1991). The district  
18 court found: (i) that Elgard supplied materials in the  
19 prosecution of work described in Brennan's contract with the  
20 State; (ii) that Elgard was not paid for those materials  
21 within 90 days of the date they were last supplied; (iii)

1 that Elgard's notice of claim to American was timely under  
2 § 49-42; and (iv) that Elgard had timely commenced suit  
3 within the limitations period following American's denial of  
4 its claim. These findings are not contested on appeal, and  
5 they are sufficient to sustain the district court's finding  
6 of liability under § 49-42. Defendants' challenge to the  
7 denial of their equitable estoppel defense is borderline  
8 frivolous at best. There remains only Elgard's appeal as to  
9 prejudgment interest, offer-of-judgment interest, and  
10 attorney's fees.

11 **I**

12 In an action to recover on a bonded contract pursuant  
13 to § 49-42, "the court judgment shall award the prevailing  
14 party the costs for bringing such proceeding and allow  
15 interest at the rate of interest specified in the labor or  
16 materials contract under which the claim arises . . . upon  
17 the amount recovered." Conn. Gen Stat. § 49-42(a). To  
18 determine the "amount recovered," the court looks to "the  
19 subcontractual value . . . placed on the work performed."  
20 Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc., 239  
21 Conn. 708, 720 (1997). The Elgard/Adco subcontract is a

1 straightforward, single-page price quote providing that  
2 Elgard would manufacture and deliver a cathodic protection  
3 system for a principal amount of \$110,200, and that "[a]ny  
4 balance remaining due after thirty (30) days of delivery  
5 shall accrue interest at the rate of one and one-half  
6 percent (1 1/2%) per month."

7 As of September 9, 1992, Elgard had completed delivery  
8 of the materials, and was owed \$107,445. Per contract,  
9 interest began to accumulate on that amount at 18% per annum  
10 30 days later. On February 7, 1997, Brennan sent Elgard a  
11 check for \$107,445, which it characterized as a "principal  
12 only payment" for the cathodic protection system. As of  
13 that date, Elgard was owed the \$107,445 principal plus years  
14 of contractual interest, i.e., \$78,001.28,<sup>3</sup> for a total due  
15 of \$185,446.28. The \$78,001.28 in interest remained unpaid,  
16 and Brennan continued to contest its obligation to pay  
17 interest under the contract through trial in May 1999. When  
18 judgment was entered on September 30, 1999, the district  
19 court should have awarded Elgard the \$78.001.28 in

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<sup>3</sup>Elgard does not contest the district court's use of January 26, 1993--the date it served a notice of claim on American--as the start date for the calculation of contract interest, thus, \$78,001.28 = (\$107,445 x 18%/365) x (1,472 days between January 26, 1993 and February 7, 1997).

1 accumulated contract interest, plus prejudgment interest on  
2 that unpaid amount pursuant to § 49-42 of \$37,113.90,<sup>4</sup> for a  
3 total award of \$115,115.18.

4 Magistrate Judge Martinez appears to have concluded  
5 that Elgard "prevail[ed]" within the meaning of § 49-42 when  
6 it received Brennan's check for \$107,445 on February 7,  
7 1997, and the court therefore awarded 18% per annum  
8 statutory interest on that amount, i.e., \$78,001.28. This  
9 calculation is erroneous in two respects. First, by  
10 February 7, 1997, Elgard was owed \$185,446.28 in principal  
11 plus interest under the disputed materials contract.  
12 Second, Elgard did not "prevail" for § 49-42 purposes on  
13 February 7, 1997; it prevailed two and one-half years later,  
14 when it was awarded a judgment. In Connecticut, a party  
15 "who has secured a judgment of the court" has prevailed.  
16 See, e.g., Wallerstein v. Stew Leonard's Dairy, 258 Conn.  
17 299, 303-04 (2001).

## 18 19 II

20 Connecticut's offer-of-judgment statute, Conn. Gen.

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<sup>4</sup> (\$78,001.28 x 18%/365) x (965 days between February 7, 1997 and September 30, 1999).

1 Stat. § 52-192a, provides that:

2 (a) After commencement of any civil action based upon  
3 contract or seeking the recovery of money damages . . .  
4 the plaintiff may . . . file with the clerk of the  
5 court a written "offer of judgment" . . . offering to  
6 settle the claim underlying the action and to stipulate  
7 to a judgment for a sum certain. . . . If the "offer of  
8 judgment" is not accepted within sixty days and prior  
9 to the rendering of a verdict by the jury or an award  
10 by the court, the "offer of judgment" shall be  
11 considered rejected . . .

12 (b) After trial the court shall examine the record to  
13 determine whether the plaintiff made an "offer of  
14 judgment" which the defendant failed to accept. If the  
15 court ascertains from the record that the plaintiff has  
16 recovered an amount equal to or greater than the sum  
17 certain stated in the plaintiff's "offer of judgment",  
18 the court shall add to the amount so recovered twelve  
19 per cent annual interest on said amount, computed from  
20 the date . . . the complaint in the civil action was  
21 filed . . .

22 Conn. Gen. Stat. § 52-192a(a), (b) (emphasis added). The  
23 purpose of the statute is to conserve judicial resources by  
24 encouraging "fair and reasonable compromise between  
25 litigants and by penalizing a party that fails to accept a  
26 reasonable offer of settlement." Blakeslee, 239 Conn. at  
27 742. An "offer of judgment is to be compared to the amount  
28 that the plaintiff 'has recovered,' which includes  
29 compensatory interest." Id. at 740 n.35.

30 Elgard offered to settle for \$105,000 on September 7,  
31 1993, the same day it filed its complaint against Brennan

1 and American. Defendants rejected the offer and have waged  
2 a 12-year litigation in an effort to avoid paying for the  
3 cathodic protection system that Brennan unquestionably  
4 received and incorporated into the rehabilitation of the  
5 West River bridge. Since Elgard was entitled to a  
6 \$115,115.18 judgment--well above the \$105,000 settlement  
7 offered in 1993--it is entitled to offer-of-judgment  
8 interest in the amount of \$83,791.24.<sup>5</sup>

9 **III**

10 A Connecticut court may award attorney's fees in a  
11 recovery action under § 49-42,  
12 if upon reviewing the entire record, it appears that  
13 either the original claim, the surety's denial of

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<sup>5</sup>I.e.,  $(\$115,115.18 \times 12\%/365) \times (2,214 \text{ days from September 7, 1993 through September 30, 1999})$ . This calculation of the amount recovered amount does not reflect the \$107,445 Brennan paid to Elgard in February 1997--a result that may seem anomalous given that Elgard would not likely have recovered the money absent litigation. Moreover, the 1997 payment appears in the "record," and could (arguably) be included in the amount Elgard "recovered" within the meaning of § 52-192a. The Connecticut Supreme Court construes the term "recovered" more narrowly, however. Though it has not faced the precise circumstances of this case, the amount "recovered" for purposes of § 52-192a(b) is limited to the amount reflected in a judgment, see Civiello v. Owens-Corning Fiberglass Corp., 208 Conn. 82, 90-93 (1988), or a jury verdict, see Cardenas v. Mixcus, 264 Conn. 314, 320-24 (2003).

1 liability, or the defense interposed to the claim is  
2 without substantial basis in fact or law.

3 Conn. Gen. Stat. § 49-42(a). "The rule in Connecticut is  
4 that absent contractual or statutory authorization, each  
5 party must pay its own attorney's fees. Any statute in  
6 derogation of the general rule . . . should be construed so  
7 as to give it efficacy and application only under the  
8 circumstances where the conditions giving rise to the  
9 exception, under the statute, are manifest." Ernst Steel  
10 Corp. v. Reliance Ins. Co., 536 A.2d 969, 974 (Conn. App.  
11 Ct. 1988).

12 Though we have found no controlling precedent on the  
13 question, the parties agree that we would review a  
14 Connecticut court's rulings with respect to attorney's fees  
15 for abuse of discretion, and we adopt that standard here.

16 In Connecticut,

17 "[d]iscretion means a legal discretion, to be exercised  
18 in conformity with the spirit of the law and in a  
19 manner to subserve and not to impede or defeat the ends  
20 of substantial justice. . . . State v. Polanco, 26  
21 Conn. App. 33, 41, 597 A.2d 830 (1991). The salient  
22 inquiry is whether the court could have reasonably  
23 concluded as it did. Yale University School of  
24 Medicine v. McCarthy, [26 Conn.App. 497, 500-501, 602  
25 A.2d 1040 (1992)]. It goes without saying that the term  
26 abuse of discretion does not imply a bad motive or  
27 wrong purpose but merely means that the ruling appears  
28 to have been made on untenable grounds. State v.  
29 Schroff, 198 Conn. 405, 413, 503 A.2d 167 (1986). In

1 determining whether there has been an abuse of  
2 discretion, much depends upon the circumstances of each  
3 case. Id." (Internal quotation marks omitted.) State v.  
4 Arbour, 29 Conn. App. 744, 748, 618 A.2d 60 (1992).

5 Thames River Recycling, Inc. v. Gallo, 720 A.2d 242, 262  
6 (Conn. App. Ct. 1998).

7 The district court denied Elgard's request for  
8 attorney's fees on the ground that the estoppel defense  
9 asserted by Brennan and American was not without substantial  
10 basis in fact or law. We disagree. Attorney's fees are  
11 appropriately awarded under § 49-42 if the court finds that  
12 any of the original claim, its denial, or the defenses  
13 interposed are "without substantial basis in fact or law."  
14 Conn. Gen Stat. § 49-42(a). The original claim and  
15 American's denial of it were both tenable: Elgard had not  
16 been paid as of the time it submitted the claim on January  
17 26, 1993; and when American initially denied the claim two  
18 months later, there was unresolved confusion surrounding the  
19 final delivery date of the cathodic protection system (i.e.,  
20 June 30, 1992 or at some later date).

21 There was, however, no substantial basis in fact or law  
22 for the estoppel defense interposed by Brennan and American  
23 on August 8, 1994. The premise of estoppel was that "Elgard  
24 represented" in the Certification of Title "that it ha[d]

1 made an outright sale or transfer" of the cathodic  
2 protection system to Brennan, and that "Brennan relied upon  
3 Elgard's representations contained in the Certification of  
4 Title and in the Invoices from Elgard to Adco, particularly,  
5 but not limited to, Elgard's representation of delivery of  
6 the cathodic protection system materials on or prior to June  
7 30, 1992, to request payment from the State of Connecticut,  
8 and thereafter to pay Adco." Brennan & American Answer and  
9 Affirmative Defenses ¶¶ 5-6 (emphases added).

10 In its letter dated April 1, 1993, Elgard informed  
11 Brennan and American (i) that it had "never seen" a  
12 Certificate of Title for the cathodic protection system and  
13 (ii) that no one by the name of the purported signatory  
14 "ha[d] ever been employed by either Elgard . . . or its  
15 parent." Elgard further indicated that it would forward the  
16 letter to the Connecticut Department of Transportation and  
17 to the bankruptcy court for the district, and urged the  
18 defendants to investigate the facts for themselves. In July  
19 1993 (more than a year before the defendants asserted their  
20 estoppel and other defenses in the District of Connecticut)  
21 Elgard forwarded to American the results of the State's  
22 investigation of the matter. That investigation (i)

1 established that Elgard shipped the final elements of the  
2 cathodic protection system on September 2, 1992, and (ii)  
3 noted that Elgard disputed the authenticity of the  
4 Certification of Title forged by Adco. Finally, in February  
5 1994, Brennan petitioned in Adco's bankruptcy proceedings  
6 for an administrative expense claim equal to the value of  
7 the cathodic protection system, on the grounds that Adco's  
8 "post-petition acceptance of payment, acceptance of the  
9 delivery of the materials and failure to turn over the  
10 \$107,445.00 Check to Elgard in consideration for the post-  
11 petition delivery of the . . . materials has resulted in  
12 [Adco] having the benefit of \$107,445 . . ." Brennan's Mot.  
13 for Relief from the Automatic Stay and Application for  
14 Allowance of Administrative Expense Claim ¶¶ 17-18.

15 Given these facts (and Brennan's contradictory  
16 representations in the Adco bankruptcy) it is hard to find  
17 any factual basis for defendants' assertions, on August 8,  
18 1994, that Elgard made any misrepresentations with respect  
19 to the title or delivery of the cathodic protection system.  
20 Defendants' estoppel defense therefore had no substantial  
21 basis in fact, and the district court's denial of attorney's  
22 fees rests on "untenable grounds." Thames River, 720 A.2d

1 at 262. On these facts, Elgard has a manifest basis for  
2 attorney's fees under § 49-42. See Ernst Steel, 536 A.2d at  
3 974.

4 **CONCLUSION**

5 For the foregoing reasons: (i) the district court's  
6 finding of liability is affirmed; (ii) the denial of  
7 Elgard's request for attorney's fees is reversed; and (iii)  
8 the judgment is vacated and remanded for recalculation  
9 consistent with this opinion,<sup>6</sup> including prejudgment  
10 interest and attorney's fees under § 49-42, and offer-of-  
11 judgment interest under § 52-192a. The judgment is in all  
12 other respects affirmed.

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<sup>6</sup>The calculations made in this opinion are based on the record on appeal. The district court is free to adjust them as appropriate to ensure that the final award is consistent with any conventions not reflected in this opinion (e.g., the counting of days between particular dates).