5-22-2008

Goodman Oil Co. v. Scotty's Duro-Bilt Generator, Inc. Appellant's Brief Dckt. 34284

IN THE SUPREME COURT OF THE STATE OF IDAHO

GOODMAN OIL COMPANY, Petitioner-Appellant on Appeal, vs. SCOTTY'S DURO-BILT GENERATOR, INC., an Idaho corporation, Respondent- Respondent on Appeal, and CITY OF NAMPA, a corporate body politic; THE CITY COUNSEL of the CITY OF NAMPA; MAYOR TOM DALE, in his capacity as Mayor of the City of Nampa; DIANA LAMBING, in her capacity as City Clerk, Respondents.	)	Docket No. 34284 **APPELLANT'S BRIEF**

APPELLANT'S BRIEF

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I.

STATEMENT OF THE CASE

1. Nature of the Case.

Goodman Oil Company ("Appellant") is appealing the dismissal of Respondents Scotty's Duro-Bilt Generator, Inc., and Bart and Alane McKnight ("Respondents") as defendants in a writ of mandate and judicial review proceeding brought by the Appellant against the City of Nampa.

Appellant contends that Respondents breached an agreement to vacate First Avenue South in Nampa, Idaho, when Respondents revoked their agreement to the vacation and communicated such revocation to the Nampa City Mayor. The Nampa City Mayor subsequently attempted to retroactively veto the ordinance vacating First Avenue South that had already been passed by the Nampa City Council. Appellant sought a writ of mandate against the City of Nampa and the Nampa City Mayor to force the City of Nampa to enact the vacation ordinance. Appellant did obtain a writ of mandate forcing the City of Nampa to vacate First Avenue South, however, the district court dismissed Appellant's claims against Respondents.

2. Relevant Proceedings Below.

Appellant filed its Petition for Writ of Mandate and Petition for Judicial Review under Idaho Rule of Civil Procedure 84 on October 5, 2004. Included as defendants in those actions were the Respondents. On October 21, 2004, the Respondents moved to be dismissed from the case on the basis that neither the Writ of Mandate nor the Petition for Judicial Review stated a cause of action against Respondents. In response, the Appellant

made two motions to amend its action to include actions for breach of contract and tortious interference with contract against Respondents. On June 29, 2005, the district court denied Appellant's Motions to Amend and granted Respondents' Motion to Dismiss.

The case against the City and Mayor of Nampa, however, continued. The Appellant prevailed in its Petition for Writ of Mandate and the district court issued the writ commanding the City of Nampa to vacate First Avenue South on July 20, 2005. The court issued its Memorandum Decision on Judicial Review and Order regarding Appellant's Petition for Judicial review on November 7, 2006. This order corrected the ordinance vacating First Avenue South and remanded to the City of Nampa the issue of whether other factors concerning the "public good" existed as to why vacate First Avenue South had been vacated. The City of Nampa issued on January 25, 2007, its Notice of Public Hearing, which scheduled a public hearing for February 5, 2007, to consider whether First Street South in Nampa was to be vacated.

In reaction, Appellant filed a Motion for Reconsideration and Clarification, Motion for Preliminary Injunction, and Motion to Shorten Time on January 29, 2007. The Appellant claimed that the City of Nampa was violating the district court's Order of November 7, 2006, by deciding to hold a new public hearing on whether to vacate First Avenue South and claimed that the November 7, 2006, Order of the court was improper in its ambiguous remand of the case back to the City of Nampa.

The district court issued on April 26, 2007, an order, which granted in part Appellant's Motion for Clarification that specifically limited the scope of the remand to the City of Nampa to the issue of only what the public good was that supported the

vacation of First Avenue South. The Appellant and the City of Nampa subsequently settled all issues between them. However, Appellant filed its Notice of Appeal against the dismissal of Respondents on June 6, 2007, which was refilled on January 1, 2008, under order from this Court to account for the fact the Appellant had settled with the City of Nampa.

After the appeal was filed, the Respondents moved pursuant to Idaho Appellate Rule 32 for involuntary dismissal under the theory that Appellant's Notice of Appeal was late. The Respondents asserted in their motion that the November 7, 2006, Order was the final order from which the time for appeal ran. The Respondents failed to inform the Court in its motion about the four months of litigation that occurred after the November 7, 2006, Order and failed to tell the Court about the April 26, 2007, order. On February 11, 2008, this Court granted the motion to dismiss in part and stated only issues related to the April 26, 2007, Order could be appealed. The Appellant made a Motion for Reconsideration, arguing that this Court's order splitting a continuous case for purposes of appeal violated the basic tenets of civil procedure and had no basis in law. This Court granted Appellant's Motion for Reconsideration and this appeal went forward.

3. Factual Background.

This dispute arises out of proceedings to vacate the public right-of-way of First Avenue South located between Blocks 16 and 19 of the City of Nampa, Canyon County, Idaho.

On August 2, 1995, Appellant entered into a contract with Respondents, the Blamires Family Trust, and T.J. Forest, Inc. (other adjacent property owners). The

contract is entitled Property Owner Street Vacation Agreement (hereafter "Vacation Agreement"). *See* R., p. 21. In the Vacation Agreement, the parties exchanged mutual promises consenting to the City of Nampa's vacation of First Avenue South as public right-of-way. Also pursuant to the Vacation Agreement, the parties granted and conveyed among themselves a perpetual easement upon the vacated property for the purpose of access to and from their property. The parties also agreed to fully cooperate to ensure that the purpose and intent of the Vacation Agreement was accomplished and to equally share in the maintenance of the easement in proportion to the amount of property they owned which adjoins First Avenue South.

On August 3, 1995, Appellant submitted an application to the City for vacation of First Avenue South. On September 5, 1995, a public hearing was held and the Nampa City Council (the "Council") approved the vacation of First Avenue South between 2nd Street South and 3rd Street South. *See* R., p. 27. On September 18, 1995, the first reading of the Ordinance vacating First Avenue South was completed by the Council. On October 2, 1995, the second reading of the Ordinance was completed by the Council. On October 16, 1995, the third reading of the Ordinance was tabled by the Council because the necessary approval by the Nampa Fire Department had not yet been obtained.

Between 1995 and 2004, Appellant had offers and contracts to sell its real property adjacent to First Avenue South. In 1999 and 2001, Appellant inquired of the City regarding the status of the vacation of First Avenue South. The Planning Director for the City of Nampa confirmed that the vacation of First Avenue South between 2nd Street South and 3rd Street South had been approved by the Council on September 5, 1995.

The vacation application never lapsed during the time period between Appellant's initial application and its final approval, indeed it was a subject of continual inquiry and review by Appellant and the City of Nampa.

In July, 2004, Appellant and Mr. James R. Wylie (Wylie) signed a Purchase and Sale Agreement whereby Appellant agreed to sell its property adjacent to First Avenue South to Wylie. The sale price was Six Hundred Thousand ($600,000) Dollars to be paid in cash at closing. The sale was contingent upon the City of Nampa completing the vacation of First Avenue South. Appellant contends that both Brad Blamires and Respondents had knowledge of this transaction and knowledge that the transaction was contingent on the successful vacation of First Avenue South.

On August 4, 2004, the Nampa Fire Department provided written conditional approval of development plans for the vacated property and the property owned by Appellant. The Nampa Fire Department approved the vacation of First Avenue South subject to a dedicated twenty (20) foot wide fire apparatus access road. R., p. 30.

The vacation of First Avenue South was then presented to the Council for passage. On August 16, 2004, the vacation ordinance ("Ordinance #3374") was approved by the Council and the Mayor. R., p. 31. Yet the Ordinance approved by the City Council reserved a fifty (50) foot easement instead of a twenty (20) foot easement recommended by the Nampa Fire Department. On the same day, the Mayor signed Ordinance #3374 and the City Clerk attested his signature. At that Council meeting, the Mayor declared Ordinance #3374 passed and directed the City Clerk to record it as required by law. The Mayor then relinquished possession and control of the approved Ordinance to the City Clerk.

On or about August 17, 2004, the City Clerk delivered Ordinance No. 3374 to the Idaho Press Tribune with instructions that the Ordinance be published on August 23, 2004. However, sometime after August 17, 2004, but prior to August 23, 2004, the City Clerk contacted the Idaho Press Tribune and cancelled the request to publish Ordinance #3374. On September 2nd, Mayor Tom Dale vetoed Ordinance #3374.

After the Ordinance was passed, Respondent Bart McKnight, President of Scotty's Duro-Bilt Generator, Inc., made contact with the Mayor and the Nampa City Attorney, Mr. White, to voice Respondent Duro-Bilt's objections to the Ordinance. Through these *ex parte* contacts, Mr. McKnight was able to cause Ordinance # 3374, which had already been passed, to be vetoed.[1]

Respondent McKnight's efforts to interdict Ordinance #3374 began with speaking with a Nampa City Clerk and telling the City Clerk he no longer consented to the vacation of First Avenue South and wished to prevent Ordinance #3374 from going into effect. The City Clerk directed Respondent McKnight to call the City Attorney, Mr. White. Respondent McKnight called the City Attorney that same day and voiced his objections to Ordinance #3374. Respondent McKnight stated at his deposition that Mr. White advised McKnight that, "they could withdraw this if I talked to the mayor." Respondent McKnight then, again that same day, called Nampa City Hall, spoke to Mayor Dale, and explained his objection to the vacation. Mayor Dale agreed to veto Ordinance #3374. Respondent McKnight specifically recalled this exchange in his

[1] It should be noted, Respondent McKnight's objection to Ordinance No. 3374 was aided by the fact he is a friend of Mayor Dale. Respondent McKnight and the Mayor have participated in various civic activities and events together. The Mayor has taught Mr. McKnight's children. McKnight and the Mayor have mutual friends, specifically the Nampa City Counsel member Mr. Martin Thorne. Mr. McKnight and the Mayor went on a ski trip together to Sun Valley in March of 2004. The Mayor Dales himself has described Bart McKnight as a friend.

deposition testimony: "I asked him [the Mayor] if there was a way to pull this off of being published, and he said, 'Yes, I can veto it.'"

Once learning of Mayor Dale's veto, the Appellant immediately wrote to the Mayor on September 3rd and the Council in an effort to save the transaction with Wylie. Appellant later argued to the Mayor and Nampa City Council at the September 20, 2004, City Council meeting that the Mayor did not have authority to veto Ordinance #3374 after he had fully approved the Ordinance. Appellant told the Mayor and Council that it would file a Petition for Writ of Mandate if the City refused to amend and publish Ordinance No. #3374. However, the Mayor and Council refused to override the Mayor's veto and publish Ordinance #3374. As a result, Goodman's transaction with Wylie failed.

Goodman subsequently filed its Petition for Writ of Mandate and Petition for Judicial Review.

II.

ISSUES PRESENTED ON APPEAL

The Notice of Appeal in that case raises the following issues:

a. Whether the district court erred in dismissing Respondents as a defendant;

b. Whether the District Court erred in denying Appellant's Motion to Amend its Petition for Writ of Mandate to include causes of action against Respondents; and,

c. Whether Appellant is entitled to an award of costs and attorney's fees as a result of this appeal.

III.

APPLICABLE STANDARDS

This case comes to the Court on review of an order granting the Respondents' Motion to Dismiss pursuant to Rule 12(b)(6) for failure to state a claim. The Court's standard of review for an order of the district court dismissing a case pursuant to I.R.C.P. 12(b)(6) is the same as the summary judgment standard of review. *See Coghlan v. Beta Theta Pi Fraternity,* 133 Idaho 388, 398, 987 P.2d 300, 310 (1999); *see also Orthman v. Idaho Power Co.,* 126 Idaho 960, 962, 895 P.2d 561, 563 (1995). After viewing all facts and inferences from the record in favor of the non-moving party, the Court will ask whether a claim for relief has been stated. *Coghlan,* 133 Idaho at 398, 987 P.2d at 310. "The issue is not whether the plaintiff will ultimately prevail, but whether the party is 'entitled to offer evidence to support the claims.' " *Id., citing* Orthman 126 Idaho at 962, 895 P.2d at 563, *quoting Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90, 96 (1974) (citation omitted).

"The denial of a plaintiff's motion to amend a complaint to add another cause of action is governed by an abuse of discretion standard of review." *Estate of Becker v. Callahan,* 140 Idaho 522, 527, 96 P.3d 623, 628 (2004) (*quoting Thomas v. Medical Center Physicians, P.A.*, 138 Idaho 200, 210, 61 P.3d 557, 567 (2002)). An "abuse of discretion" standard requires this Court to inquire as to:

> (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer

> boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and, (3) whether the trial court reached its decision by an exercise of reason.

Sun Valley Shopping Center, Inc. v. Idaho Power Co., 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

IV.

THE RESPONDENTS SHOULD NOT HAVE BEEN DISMISSED

Respondents asserted that they should be dismissed as a party/respondent before the district court because the Appellant did not seek any remedy against them; and thus, Appellant's action against Respondents could not succeed under any set of facts. The District Court agreed and under I.R.C.P. 12(b)(6) dismissed the Respondents from the case. *See* R., pp. 82-84.

Appellant contends that this was error because Respondents were indispensable parties to the lawsuit. I.R.C.P. 19(a)(1) provides that a party shall be joined if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) **the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest** or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

See I.R.C.P. 19(a)(1)(emphasis added).

The Idaho Supreme Court has stated, "Whether or not a party is indispensable to an action depends largely upon the relief sought." *Barlow v. International Harvester Co.*, 95 Idaho 881, 896, 522 P.2d 1102, 1117 (1974). In *Deer Creek, Inc. v. Clarendon Hot*

Springs Ranch, Inc., 107 Idaho 286, 292, 688 P.2d 1191, 1197 (Ct. App. 1984), the Idaho Court of Appeals listed three purposes behind Rule 19: to protect the absentee from prejudice resulting from the judgment, to protect the parties from harassment by successive suits and to advance judicial economy.

Respondents are clearly an indispensable party. Respondents are an adjoining First Avenue South property owner. If Appellant were successful in obtaining a Writ of Mandate causing Ordinance #3374 to be published, then First Avenue South would have been vacated (and indeed was). Respondents' property would have then by way of I.C. § 50-311 accreted one-half the vacated property (and indeed did). Respondents' lot adjoining First Avenue South consists of 2,800 square feet. Respondents' lot increased in size by an additional 2,000 square feet upon vacation of the street. Without question, Respondents had an interest in the subject matter of the action that necessitated its participation in order for that interest to be protected.

Further, Ordinance #3374 reserved what was determined by the district court to be an inappropriate fifty (50) foot wide access and utility easement. *See* R., pp at 108-109. The easement encumbered the west side of the vacated property. The west side is the Respondents' side. Respondents also had an interest in either preserving its existing access and utility easements or participating in revising the description of the access and utility easements as reserved in the ordinance. Again, Respondents had an interest in the subject matter of the action that necessitated its participation in order for that interest to be protected.

This case also presented issues concerning Respondents' *ex parte* contacts with Mayor Dale following approval of the Ordinance #3374. Mayor Dale's "veto" of

Ordinance #3374 and the basis of this whole action is the direct result of Respondents' belated objection to the vacation of First Avenue South. *See* Reporter's Transcript of July 15, 2005, hearing, p. 39, lns. 9-13. Respondents' role in the case went beyond being mere witnesses to being involved parties to the case. The Respondents instigated the decision by the City of Nampa and its mayor to engage in unlawful conduct at the expense of Appellant. Respondents were the ones ultimately responsible for Appellant filing its Petition for Writ of Mandate and Petition for Judicial review. The Respondents were necessary and indispensable parties, and the district court was in error to summarily dismiss them.

V.

APPELLANT SHOULD HAVE BEEN ALLOWED TO AMEND ITS CAUSES OF ACTION

As this Court knows, after a responsive pleading has been served "a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires . . . ." *I.R.C.P. 15(a).* In *Family Trust v. Christensen*, 133 Idaho 866, 993 P.2d 1197 (1999), the Idaho Supreme Court summarized the standard for amendment of pleadings:

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be freely given.

Id at 871, 993 P.2d at 1203 *quoting Smith v. Great Basin Grain Co.*, 98 Idaho 266, 272, 561 P.2d 1299 (1977) and *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Appellant sought to add claims of breach of contract and tortious interference of contract to the action for writ of mandate and action for judicial review against Respondents. The district court correctly noted that leave to amend must be freely given. Yet the district court denied Appellant's motions to amend on the basis that adding such matters would "add a multitude of new issues, would add new parties, and would delay resolution of the critical question; that is the validity of the ordinance that Mayor Dale purportedly vetoed...." *See* Reporter's Transcript of May 20, 2005, hearing, p. 30, lns. 1-4. The court's denial of Appellants motion was explicitly based upon the case of *Hinkle v. Winey*, 126 Idaho 993, 895 P.2d 594 (Ct. App. 1995). However, *Hinkle v. Winey* does not support the district court's decision.

In *Hinkle v. Winey*, the district court denied a motion made prior to trial to add causes of action for unlawful entry, assault, battery, conversion, false imprisonment and wrongful possession to an action to compel the conveyance of real property pursuant to an alleged contract of sale. In affirming the district court's denial of the motion to amend, the Idaho Court of Appeals stated:

> The amendment sought by the Hinkles was to state causes of action based upon events that occurred a year or more after the events giving rise to formation of the disputed agreement that was the subject of the original complaint and counterclaim. The evidence that would be offered on the proposed new claims would be entirely different from that necessary for the original causes of action. The proposed amendment would have added parties and opened up new avenues of discovery, almost certainly requiring a delay of the trial. In addition, there has been no showing of any prejudice to the Hinkles from the district court's determination that the new issues would best be resolved in a separate action.

Finally, I.R.C.P. 18(a) allows Appellant to join "as many claims" as Appellant has against the opposing parties, and I.R.C.P. 20(a) allows the Appellant to join multiple defendants if there is asserted against them a right to relief "arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all of them will arise in the action." As stated, Respondents conduct was what instigated the illegal action on the part of the City of Nampa and its mayor. The breach of the Vacation Agreement by Respondents in soliciting the Mayor of Nampa to retroactively veto the street vacation was at the heart of the proposed causes of action and the action for the writ of mandate. The Respondents and the City of Nampa acted in concert when they succeeded in illegally vetoing the vacation ordinance.

The Appellant was entitled to amend its cause of action to include contract and tort claims against the Respondents. The district court cited no reason based in actual fact not to allow the amendment and thus abused its discretion.

VI.

THE DISTRICT COURT AWARD OF ATTORNEY'S FEES AND COSTS MUST BE VACATED

After dismissing the Respondents from the case and denying Appellant's Motions to Amend, the district court awarded Respondents $9,332.49 attorneys' fees pursuant to I.C. § 12-121 and I.R.C.P. 54 and $962.49 in costs as a matter of right under I.R.C.P. 54. R., p. 89. If the Appellant prevails on any of the issues presented for appeal, then this award for costs and attorney's fees must be vacated as the Respondents could no longer

be seen as the prevailing party under I.R.C.P. 54 and as Appellant's case could no longer be seen as frivolous.

Further, even if Appellant does not prevail on the above issues, the Court is obligated to vacate the award of attorney fees for two reasons. First, if a court is to award fees pursuant to I.C. § 12-121 and I.R.C.P. 54, the court must under I.R.C.P. 54(e)(2) "make a written finding, either in the award or separate document, as to the basis and reasons for awarding such attorney fees." No such writing or document was ever entered by the district court. Under I.R.C.P. 54(e)(2) a party is entitled to a written explanation as to why its case has been found to have been frivolous. The district court did not explain why it found so and the award must be vacated by this Court. *See Black v. Young*, 122 Idaho 302, 834 P.2d 304 (1992).

Second, the award of fees should be vacated on the basis that Appellant's claims were not frivolous. "An award of attorney fees under I.C. § 12-121 is appropriate where a party's claim or defense is frivolous, unreasonable, or without foundation." *Kiebert v. Goss,* 144 Idaho 225, ----, 159 P.3d 862, 865 (2007). There was a reasonable foundation to have Respondents named in the action against the City of Nampa. As stated, the Respondents were the instigators of the legal quagmire Appellant had to fight through in order to accomplish the vacation of First Avenue South. Further, the Respondents had a critical interest in the subject matter of the litigation as adjoining property owners. They were indispensable parties to the litigation. The district court refused to keep them in the case and litigate the contract claims against them merely for the convenience of the court and not in accord with any principle of law. Appellant's actions thus are not frivolous.

VII.

APPELLANT IS ENTITLED TO ATTORNEY'S FEES ON APPEAL

If Appellant prevails on any issues on appeal, it is entitled to attorney's fees and costs as the prevailing party under I.C. § 12-120(3). "The critical test is whether the commercial transaction comprises the gravamen of the lawsuit; the commercial transaction must be integral to the claim and constitute the basis upon which the party is attempting to recover." *Ervin Constr. Co. v. Van Orden,* 125 Idaho 695, 704, 874 P.2d 506, 515 (1993). The basis of Appellant's inclusion of Respondents in the action against the City of Nampa and Appellant's contract actions that Appellant attempted to bring in to the case were based upon the Vacation Agreement entered into between Appellant and Respondents. The Vacation Agreement is an enforceable contract, and the Respondents intentionally breached it, causing the Mayor of Nampa to illegally and retroactively veto the ordinance vacating First Avenue South. The breach of the Vacation Agreement is the foundation up which this entire case rests and thus I.C. § 12-120(3) applies.

VIII.

CONCLUSION

Respondents knowingly and willing entered into the Vacation Agreement to vacate First Avenue South. When Appellant sought to effectuate the Vacation Agreement and have First Avenue South in fact vacated, the Respondents intentionally sabotaged Appellant's work. Respondents breached the Vacation Agreement and forced Appellant to engage in three years of litigation against the City and Mayor of Nampa to undue Respondents' subterfuge. Respondents conduct in this regard was the root of

Appellant's action against the City of Nampa. It was entirely proper and necessary that Respondents be included in the actions against the City of Nampa, and the district court abused its discretion not allowing all relevant claims, including the contract claims against Respondents, to be heard all at once.

DATED this 22nd day of May 2008.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
KARL J. F. RUNFT
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 22nd day of May 2008, a true and correct copy of the **APPELLANT'S BRIEF** was served upon opposing counsel as follows:

Tammy Zokan
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_____ US Mail
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RUNFT & STEELE LAW OFFICES, PLLC

By:_____
KARL J. F. RUNFT
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