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

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# In the Supreme Court of the State of Idaho

Supreme Court Case No. 34284

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GOODMAN OIL COMPANY,  
Petitioner-Appellant,

v.

SCOTTY'S DURO-BILT GENERATOR, INC., an Idaho corporation,  
Respondent.

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## RESPONDENT'S BRIEF

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Appeal from the District Court of the Third Judicial District for Canyon County  
Case No. CV 04-10007  
Hon. James C. Morfitt, District Judge, presiding

*Attorneys for Respondent:*

Tammy A. Zokan, ISB No. 5450  
MOORE SMITH BUXTON & TURCKE, CHTD.  
950 West Bannock Street, Suite 520  
Boise, ID 83702  
Facsimile: (208) 331-1202  
Email: [taz@msbtlaw.com](mailto:taz@msbtlaw.com)

*Attorneys for Appellant:*

John M. Steele, ISB No. 1911  
Karl J. Runft, ISB No. 6640  
RUNFT & STEELE LAW OFFICES, PLLC  
1020 W. Main Street, Suite 400  
Boise, Idaho 83702  
Facsimile (208) 343-3246  
Email: [kjrunft@runftlaw.com](mailto:kjrunft@runftlaw.com)

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## I.

### STATEMENT OF THE CASE

#### 1. Nature of the Case

Unhappy with certain action and inaction by the City of Nampa, Goodman Oil Company, filed two (2) Petitions against the City of Nampa. Goodman Oil Company petitioned the District Court for (1) a writ of mandate requiring the City of Nampa to publish Ordinance No. 3374; and, (2) judicial review of the easement reservation language contained in Ordinance No. 3374. (R. at 11-20.) Goodman Oil Company wanted the City to publish Ordinance No. 3374 so that the vacation of 1<sup>st</sup> Avenue South authorized by the Ordinance would take effect. (R. 16-17.) However, Goodman Oil Company did not agree with the access/easement reservations imposed on the vacation of 1<sup>st</sup> Avenue South by Ordinance No. 3374; and, therefore wanted the District Court to review and strike the access/easement reservations from Ordinance No. 3374. (R. 19-20.)

Goodman Oil Company named Scotty's Duro-Bilt Generator, Inc., as a defendant in its litigation but stated no claim and sought no relief from Duro-Bilt. (Despite Goodman Oil Company's representation in their Brief (App. Br. 1) Goodman Oil Company did not sue Bart McKnight or Alane McKnight in this action. (R. at 13-14, ¶¶ 3-8.) Goodman Oil Company did attempt to join Bart McKnight later but not Alane McKnight. R. 50-51.))

Due to the complicated nature of the proceedings, the following is a list of the cast of characters relevant to this case:

- **Goodman Oil Company** – is an Idaho corporation and the Plaintiff/Appellant in this case. Goodman Oil Company owns property along 1<sup>st</sup> Avenue South in Nampa, Idaho. (R.12; 21-22.)

- **Scotty's Duro-Bilt Generator, Inc. ("Duro-Bilt")** -- is an Idaho corporation and the Defendant/Respondent in this case. Scotty's Duro-Bilt Generator, Inc. owns property along 1<sup>st</sup> Avenue South in Nampa, Idaho. (R.12; 21-22.) Scotty's Duro-Bilt Generator, Inc. will be referred to as "Duro-Bilt" in this brief.
- **Bart McKnight** – is the President of Scotty's Duro-Bilt Generator, Inc. (R. 54.) Mr. McKnight is not a party to this appeal. Goodman Oil Company sought to join Mr. McKnight but was unsuccessful. (R. 50.) (Despite Goodman Oil Company's representation in their Brief (App. Br. 1) Goodman Oil Company did not sue Mr. McKnight (R.13-14, ¶¶ 3-8.) Goodman Oil Company did attempt to join Mr. McKnight later but its motion was denied. R. 50-51.))
- **Alane McKnight** – is Bart McKnight's wife. Mrs. McKnight is not a party in this case. Goodman Oil Company never sought to join Mrs. McKnight. (Despite Goodman Oil Company's representation in their Brief (App. Br. 1) Goodman Oil Company did not sue Mrs. McKnight or attempt to join Mrs. McKnight. R. 50-51.))
- **The City of Nampa, Idaho** and its Council, Mayor, and City Clerk – were formerly defendant/respondent/cross-appellants in this case but have been dismissed from this appeal. (R.12-13; R. 122; R. 131; R. 142.) The City is the entity with the authority to authorize the vacation of roads, adopt ordinances and take related actions. (*See* R. 12-13.)
- **Bradley G. and Tamara D. Blamires** -- are not parties to this appeal. The Blamires own property along 1<sup>st</sup> Avenue South in Nampa, Idaho. (R. 56.) Goodman Oil Company sought to join the Blamires but was unsuccessful. (R. 50)



- **T.J. Forest, Inc.** -- is not a party in this case. T.J. Forest, Inc. owns property along 1<sup>st</sup> Avenue South in Nampa, Idaho. (R. 21-22.)

## **2. Procedural History**

### **(a) Course of Proceedings Related to Respondent Scotty's Duro-Bilt, Generator, Inc.**

Scotty's Duro-Bilt Generator, Inc. (hereinafter "Duro-Bilt") moved for dismissal on the basis that Goodman Oil Company stated no claim against Duro-Bilt upon which relief could be granted. The District Court agreed and granted Duro-Bilt's motion in an order entered on June 29, 2005. (R. 82-83.) The District Court also entered orders on January 21, 2005, and May 20, 2005, denying Goodman Oil Company's Motions to Amend its Complaint to add parties and contract and tort claims. (Tr. Jan. 21, 2005 pp. 24-25; Tr. May 20, 2005 pp. 12-14, pp. 29-31.)

The District Court awarded Duro-Bilt attorney fees and costs pursuant to Idaho Code § 12-121, on August 29, 2005. (R. 88-89.) The August 29, 2005, order stated that the District Court's findings and conclusions were made on the record and a written transcript of the same was available upon the request of either party. (R. 89.) (Despite Goodman Oil Company's misrepresentation of the Record, App. Br. 15, the District Court explained its findings to the parties on the record and offered a transcript to the parties (R. 89) just as the District Court did when it awarded fees and costs to Goodman Oil Company. (Tr. Jan. 18, 2007 p. 43 ll. 5-8.))

No Idaho Rule of Civil Procedure 54(b) certificate was issued and the litigation proceeded between the remaining parties (Goodman Oil Company and the City of Nampa); Duro-Bilt was no

longer a party.<sup>1</sup>

**(b) Course of Proceedings as Related to Appellant Goodman Oil Company**

On August 8, 2005, the District Court issued its order granting Goodman Oil Company's Writ of Mandamus, leaving only Goodman Oil Company's Petition for Judicial Review. (R. 85-86.) ("The issue remaining for decision in this case is Goodman Oil's Petition for Judicial Review." (R. 103.)) This order required the City of Nampa to publish Ordinance No. 3374; it did not order the City of Nampa to vacate 1<sup>st</sup> Avenue South (as contended by Goodman Oil Company at App. Br. 2). (R. 85-86.)

On November 7, 2006, the District Court issued its order finally adjudicating Goodman Oil Company's Petition for Judicial Review, which was the only remaining controversy. (R. 100-111.) The order set aside the 50' easement required by Ordinance No. 3374. (R.110.) The November 7, 2006, order finally adjudicated the remaining matters before the District Court; all that was left was for the District Court to resolve the issue of attorney fees and costs between the remaining parties (Goodman Oil Company and City of Nampa). (See R. 95.) Accordingly, as shown by the Register of Actions Report, the Court closed the case. (R. 7, Register of Actions Report.)

Goodman Oil Company filed its Motion and Memorandum for Attorney Fees and Costs on November 20, 2006. (R. 7, Register of Actions Report.) The District Court heard Goodman Oil Company's request for fees and costs on January 18, 2007. (R. 8, Register of Actions Report; Tr. Jan. 18, 2007)). Goodman Oil Company filed its requests for attorney fees and costs contending that

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<sup>1</sup> Goodman Oil Company's "renewed objection to defendants bart and Alane Mcknights' memorandum of costs and attorney fees, date Sept 19, 2006," etc. entered on 2/23/2007 in the Register of Actions Report (R. 9) was misfiled. Goodman Oil Company's renewed objection, etc. was re-filed in Goodman Oil Company's separate litigation against Duro-Bilt and the McKnights.

its litigation was successful and that it was the prevailing party. (*See* Tr. Jan. 18, 2007 p. 15 ll. 12-22.)

While Goodman Oil Company did file a timely Motion and Memorandum for Attorney Fees and Costs, Goodman Oil Company did not file a timely Motion for Reconsideration in accordance with Idaho Rule of Civil Procedure 11(a)(2)(B), 84(r) or Idaho Appellate Rule 42(a). Goodman Oil Company's Motion for Reconsideration was filed on January 29, 2007 (R. 8, Register of Actions Report), a few months after the November 7, 2006, order, and Goodman Oil Company's November 20, 2006, Motion for Attorney Fees and Costs. (R. 7-8, Register of Actions Report.) (*See also* Goodman Oil Company's Motion for Reconsideration attached as Ex. G to Duro-Bilt's Brf. in Support of Motion to Dismiss, filed Jan. 14, 2008.) (Again, contrary to Goodman Oil Company's misstatements, App. Br. 3, Duro-Bilt did advise the Court of the untimely Motion for Reconsideration and furnished the Court a copy of the Motion.) The District Court reopened the case and Goodman Oil Company and the City of Nampa litigated Goodman Oil Company's untimely Motion. (R. 8-9, Register of Actions Report.)

**(c) Course of Proceedings Before the Idaho Supreme Court**

Goodman Oil Company filed its Notice of Appeal on June 6, 2007. (R. 122.) The City of Nampa filed a Notice of Cross-Appeal on June 27, 2007. (R. 131.) This matter was then suspended for the parties to participate in a settlement conference. (R. 137.) The matter was settled between Goodman Oil Company and the City of Nampa and Goodman Oil Company continued its appeal against Duro-Bilt. (R. 142.)

Goodman Oil Company filed a new Notice of Appeal on January 7, 2008. (R. 145.)

Because Goodman Oil Company failed to timely appeal the District Court's November 7,

2006, Order finally adjudicating the case, Duro-Bilt filed a Motion to Suspend/Motion to Dismiss on January 14, 2008. Duro-Bilt's Motion also argued that even if timely, Goodman Oil Company's appeal is moot. The Court granted Duro-Bilt's Motion in part on February 11, 2008, but then on April 17, 2008, granted Goodman Oil Company's Motion for Reconsideration. The Court's April 17, 2008, Order resumed briefing and ordered that the first issue to be addressed in the parties' briefs is the timeliness of Goodman Oil Company's Notice of Appeal.

**(d) Course of Proceedings in Related Litigation**

Goodman Oil Company sued Duro-Bilt and the McKnights in a separate but related case on September 19, 2005. Therein, Goodman Oil Company alleged breach of contract and various torts against Duro-Bilt and Bart and Alane McKnight individually. *Goodman Oil Company v. Scotty's Duro-Bilt Generator, Inc., an Idaho Corporation; Bart And Alane McKnight, Husband And Wife; and Does I through V*, Third Judicial District in and for Canyon County, Case No. 05-9800 (currently pending on Goodman Oil Company's appeal as Supreme Court Docket No. 34797). In summary, the District Court has dismissed Goodman Oil Company's Complaint. First, the McKnights' Motion to Dismiss was granted on September 20, 2006. Then on November 7, 2006, Duro-Bilt's Motion for Summary Judgment was granted in part in denied in part and Counts 2, 3 and 4 (Tortious, Negligent and Intentional Interference of Agreement/Economic Advantage) of Goodman Oil Company's Complaint were dismissed. On February 9, 2007, the District Court granted Duro-Bilt's Second Motion for Summary Judgment and Count 1 (Breach of Contract) of Goodman Oil Company's Complaint was dismissed. The District Court also issued orders awarding attorney fees and costs to Bart and Alane McKnight and Duro-Bilt.

### 3. **Factual Background**

Goodman Oil Company's Petition for Judicial Review was filed under Idaho Rule of Civil Procedure 84 therefore the relevant facts before the District Court are those contained in the record before the City of Nampa. (R. 96-97; Tr. May 20, 2005 p. 17 ll. 24-25, p. 18 ll. 1-2; p. 25 ll. 7-13.) As the District Court repeatedly made clear, the litigation before the District Court was governed by Idaho Rule of Civil Procedure 84(*l*), and factual allegations outside the record before the City of Nampa would not be considered. *Id.* Consequently, Goodman Oil Company's factual allegations unsupported by the record, App. Br. 4-5, are irrelevant to the appeal pending before the Court.

The record before the City of Nampa concerns Goodman Oil Company's "application for the vacation of easement, public right of way or plat" filed on August 3, 1995 (R. 27), and information related to the application. (R. 21-36.) The record included an agreement between Goodman Oil Company, Duro-Bilt, the Blamires Family Trust and T.J. Forest, Inc. (the "1995 Agreement" or "Vacation Agreement"), whereby the parties to the 1995 Agreement agreed to the City of Nampa's vacation of First Avenue South between Blocks 16 and 19 of Pleasants Addition and the execution of subsequent agreements *upon the happening of the following conditions*:

1. City action approving the vacation of First Avenue South;
2. The parties granting a perpetual easement on the vacated property among themselves for access to and from each party's property, which access is to be at the discretion of property owners;
3. The parties executing an agreement defining their rights and obligations after the City vacated the street;

4. The parties sharing of maintenance of the vacated property in proportion to the amount of property they each own.

(R. 21-23.)

No ordinance related to the vacation was adopted in 1995 or anytime thereafter prior to 2004. (R. 27-30.) The delay was caused by Goodman Oil Company's failure to complete conditions imposed by the City. (R. 28-29.) On August 4, 2004, the Nampa Fire Department issued a letter stating its terms of agreement regarding the vacation. (R. 30.) The requirements included: (1) a twenty foot (20') access easement, and (2) written approval of the Nampa Fire Department's access requirement by all affected property owners. (*Id.*) The 20' access did not exist as a condition to vacation prior to August 4, 2004, hence the Fire Department's requirement for owner approval. (*See id.*)

Believing that the City Fire Department's proposal would actually restrict the street width to 20' and thereby impair their ability to access and operate their properties, Duro-Bilt and adjacent property owners declined to agree to the limited 20' access and notified the City of their disagreement. (R. 73-75.)

The Nampa City Council approved the vacation of 1<sup>st</sup> Avenue South by Ordinance No. 3374, adopted on August 16, 2004. (R. 31.) Ordinance No. 3374 conditions the vacation on a certain fifty-foot (50') access and utility easement. (*Id.*) The Mayor vetoed Ordinance No. 3374 on September 2, 2004. (R. 32.) This litigation ensued.

Upon the resolution of the litigation below on November 7, 2006, the first condition of the parties' Vacation Agreement was met (assuming the Vacation Agreement was still in effect.). Thus,

the first condition of the Agreement was not met until 2006. There is no record of the subsequent conditions being met.

## II.

### QUESTIONS PRESENTED ON APPEAL

1. This Court ordered that the first issue to be briefed on appeal is whether Goodman Oil Company's Notice of Appeal was timely filed. Apr. 17, 2008, Order, Ref. 08S-035.

2. Precedent established by this Court makes clear that when issues presented no longer present a real controversy for which a court could award relief, there is no judicial controversy. The question presented is whether Goodman Oil Company's appeal is moot.

3. If the Court determines the appeal is timely filed and not moot, according to Goodman Oil Company's Notice of Appeal filed on January 7, 2008, (R. 145-148), the questions presented are:

- a. Whether the District Court correctly dismissed Duro-Bilt for Goodman Oil Company's failure to state a claim against Duro-Bilt upon which relief could be granted;
- b. Whether the District Court correctly denied Goodman Oil Company's Motion to add unrelated causes of action to its Petition for Judicial Review and Writ of Mandate;
- c. Whether Goodman Oil Company is entitled to attorney fees and costs on appeal.

(R. 146 at ¶3 a-c; App's Brf. at pp. 7-8.)

### III.

#### ADDITIONAL ISSUES

Duro-Bilt seeks attorney fees and costs incurred in responding to Goodman Oil Company's untimely, moot and/or groundless Notice of Appeal in accordance with Idaho Code §§12-120 and 12-121, and Idaho Appellate Rules 40 and 41 for the reason that Goodman Oil Company's Notice of Appeal is frivolous, unreasonable and without foundation.

### IV.

#### SUMMARY OF ARGUMENT

Goodman Oil Company's Notice of Appeal is untimely because it was filed more than forty-two (42) days after the District Court entered the final order adjudicating all remaining claims in this litigation. Even if timely filed, Goodman Oil Company's appeal is moot because the relief requested against the City of Nampa has been granted. Additionally, the claims Goodman Oil Company sought to add against Duro-Bilt have been fully litigated in separate litigation therefore Goodman Oil Company's appeal of the District Court's denial of its motions to amend, is also moot.

If this Court has jurisdiction, the District Court correctly dismissed Duro-Bilt for Goodman Oil Company's failure to state a claim upon which relief could be granted because Goodman Oil Company's Petition for Writ of Mandate and Petition for Judicial Review only stated claims and sought relief against the City of Nampa. Likewise, the District Court correctly denied Goodman Oil Company's attempts to add parties and unrelated contract and tort claims to its Petitions. Finally, the District Court correctly awarded Duro-Bilt its attorney fees and costs.

Goodman Oil Company should not be awarded attorney fees and costs on appeal. Duro-Bilt should be awarded attorney fees and costs.



V.

ARGUMENT

**1. GOODMAN OIL COMPANY'S NOTICE OF APPEAL IS UNTIMELY AND SHOULD BE DISMISSED.**

**(a) Legal Standards for Timeliness of Appeal**

A timely appeal must be filed 42 days after the entry of final order adjudicating all the claims and controversies. I.A.R. 14(a); *Baker v. Idaho*, 142 Idaho 411, 418, 128 P.3d 948, 955 (Ct. App. 2005). The failure to timely file a notice of appeal “shall be jurisdictional and shall cause automatic dismissal of such appeal... upon the motion of any party, or upon the initiative of the Supreme Court.” I.A.R. 21; *Baker v. Idaho*, 142 Idaho at 418, 955 (citing *Walton, Inc. v. Jensen*, 132 Idaho 716, 719, 979 P.2d 118, 121 (Ct. App. 1999)).

Idaho Appellate Rule 14 requires that an appeal from the district court must be made by physically filing a notice of appeal with the clerk of the “district court within 42 days” of any judgment, order or decree. The time for an appeal will be extended by the filing of “a timely motion which, if granted, could affect any findings of fact, conclusions of law or any judgment in the action.” I.A.R. 14(a). However, the filing of a motion for costs or attorney fees, or an objection to such a motion, does not extend the time to appeal a judgment. I.A.R. 14(a); (fn2) *State ex rel. Moore v. Lawson*, 105 Idaho 164, 165, 667 P.2d 267, 268 (Ct. App. 1983). The failure to file an appeal within the 42-day time period is jurisdictional and will result in immediate dismissal of the case. I.A.R. 21.

*Walton, Inc. v. Jensen*, 132 Idaho at 719.

Whether an instrument is an appealable order or judgment must be determined by its content and substance, and not by its title. As a general rule, a final judgment is an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties. It must be a separate document ... that on its face states the relief granted or denied.

*Camp v. East Fork Ditch Co., Ltd.*, 137 Idaho 850, 867, 55 P.3d 304, 321 (2002) (citing *Idah-Best, Inc. v. First Security Bank of Idaho*, 99 Idaho 517, 519, 584 P.2d 1242 (1978), *Davis v. Peacock*, 133 Idaho 637, 991 P.2d 362 (1999), *Hunting v. Clark County School Dist. No. 161*, 129 Idaho 634, 931 P.2d 628 (1997), I.R.C.P.

58(a)).

*See also Watson v. Watson*, 144 Idaho 214, 159 P.3d 851, 854 (2007); *Deeds v. Regence Blueshield of Idaho*, 143 Idaho 210, 211-212, 141 P.3d 1079, 1081 (2006); *Scaggs v. Mutual of Enumclaw Insurance Company*, 141 Idaho 114, 117, 106 P.3d 440 (2005) (“[I]n this case there were no issues left after the district court’s ruling.”); *Eastern Idaho Economic Development Council v. Lockwood Packing Corp. Idaho*, 139 Idaho 492, 495-496, 80 P.3d 1093 (2003) (“Order constitutes the final appealable judgment because it struck [plaintiff’s] cross-claim and third-party complaint and denied [plaintiff’s] Motion to Alter or Amend Judgment. These were the two remaining issues that neither [previous order] resolved.”).

The general rule is that if an order or judgment ends the suit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties, the instrument constitutes a final judgment.

*Davis v. Peacock*, 133 Idaho at 641; *Scaggs v. Mutual of Enumclaw Insurance Company*, 141 Idaho at 117; *Eastern Idaho Economic Development Council v. Lockwood Packing Corp. Idaho*, 139 Idaho at 495-496.

**(b) Goodman Oil Company’s Notice of Appeal Was Untimely**

The District Court’s November 7, 2006, Order was a final, separate order that adjudicated all the remaining issues in controversy “and represented a final determination of the rights of the parties. It ended the suit.” *Equal Water Rights Assn. v. City of Coeur d’Alene*, 110 Idaho 247, 249, 715 P.2d 917 *on reh’g* (1986); *id.*

As is clear from the cases cited herein, Idaho Courts have liberally construed and read together Rules 54(a) and 58(a), and applied the Rules in accordance with the longstanding standard – used by Idaho Courts both before and after the amendment of Rule 58(a) – as follows,

The general rule is that if an order or judgment ends the suit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties, the instrument constitutes a final judgment.

*Davis v. Peacock*, 133 Idaho at 641; *Watson v. Watson*, 159 P.3d at 854; *Scaggs v. Mutual of Enumclaw Insurance Company*, 141 Idaho at 117; *Eastern Idaho Economic Development Council v. Lockwood Packing Corp. Idaho*, 139 Idaho at 495-496; *see also* I.R.C.P. 1(a) (The Rules “shall be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding.”).

Cases that reference the “separate document” language of Rule 58(a) have not been decided based on how many pieces of paper were in the record. *Hunting v. Clark County School District 161*, 129 Idaho 634, 931 P.2d 628 (1996) (*reh’g den.* 1997); *In the Matter of Universe Life Insurance*, 144 Idaho 751, 171 P.3d 242, 246-248 (2007); *Camp v. East Fork Ditch Co. Ltd.*, 137 Idaho at 868-869. Rather, in those cases, the instrument in question failed to finally determine all the rights of the parties. *Id.* That is not the case here; the November 7, 2006, Order resolved all remaining controversy raised by Goodman Oil Company’s Petitions.

As of November 7, 2006, the only issue left for the District Court’s determination was the amount of attorney fees and costs. *Id.* (Goodman Oil Company filed its request for fees and costs on November 20, 2006 (R. 7). The District Court granted Goodman Oil Company’s request on January 18, 2007. (Tr. Jan. 18, 2007 pp. 41-43.)) The time for filing an appeal of the November 7, 2006, order and all preceding orders expired no later than December 19, 2006, and could only be extended if Goodman Oil Company timely filed a motion affecting the substantive decision and order of the Court. *Walton, Inc. v. Jensen*, 132 Idaho at 719. While Goodman Oil Company did file a Motion for

Reconsideration, Goodman Oil Company's Motion was untimely because it was filed after December 19, 2006; therefore, it could not extend the time for filing an appeal. (R. 8, Register of Actions Report.) *Walton, Inc. v. Jensen*, 132 Idaho at 720 ("A trial court cannot unilaterally extend the time to file an appeal by simply attaching the term 'final judgment' to a document."); *see also Equal Water Rights Assn. v. City of Coeur d'Alene*, 110 Idaho 247, 249, 715 P.2d 917 *on reh'g* (1986) (the court's earlier order, which included a comprehensive adjudication and represented a final determination of the parties' rights was the final judgment in the case; the subsequent document entitled "final judgment" was not).

The District Court clearly intended that its November 7, 2006, order be treated as a separate order, which order finally adjudicated the remaining issues in the case.<sup>2</sup> Liberally construing Idaho Rule of Civil Procedure 58(a) and applying the finality standard used by the Idaho Courts, the November 7, 2006, order was a final appealable order. *Davis v. Peacock*, 133 Idaho at 641; *Watson v. Watson*, 159 P.3d at 854; *Scaggs v. Mutual of Enumclaw Insurance Company*, 141 Idaho at 117; *Eastern Idaho Economic Development Council v. Lockwood Packing Corp. Idaho*, 139 Idaho at 495-496.

The District Court's November 7, 2006, order is titled "Memorandum Decision on Judicial Review and Order." (R. 100.) The District Court set forth its findings, conclusions and analysis on pages 1-11, then in a separate section clearly delineated as "Order," entered its order. (R. 100-111.) The District Court clearly intended that its order be entered separate and apart from its decision and that the order should be treated as an appealable order under Idaho Rules of Civil Procedure 54(a)

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<sup>2</sup> Indeed, this Court has dismissed as untimely a Notice of Appeal from a "Memorandum Decision and Order" filed more than 42 days from said Decision and Order. *See Zokan Aff.* at ¶ 2, Ex. A-1, attached to Duro-Bilt's Brf. in Support of Motions to Suspend/Dismiss filed on Jan. 14, 2008, as Exhibit H.

and 58(a). (See R. 100-111; and see R. 7, Register of Actions; Tr. Jan. 18, 2007 p. 2, p. 44-45); *Spreader Specialists, Inc. v. Monroc, Inc.*, 114 Idaho 15, 19, 752 P.2d 617 (Ct. App. 1987). The District Court further treated the case as finally determined by closing the case on November 7, 2006, (R. 7, Register of Actions Report), and then hearing the attorney fees claims; and, by further noting on the record that the case before it had concluded. (Tr. Jan. 18, 2007 p. 2, p. 44-45.)

Indeed, even Goodman Oil Company treated the November 7, 2006, order as a final order. Goodman Oil Company filed its request for attorney fees and costs arguing that it achieved a successful result in the litigation and was the prevailing party in the case. (See Tr. Jan. 18, 2007 p. 15 ll. 12-22.)

**2. IF GOODMAN OIL COMPANY'S NOTICE OF APPEAL IS TIMELY, THE APPEAL IS MOOT.**

**(a) Legal Standard for Mootness**

“[P]rior precedent and the court system’s constitutionally based inability to adjudicate disputes before a justiciable controversy” preclude the Court from deciding anything but justiciable legal claims. *Davidson v. Wright*, 143 Idaho, 616, 621, 151 P.3d 812, 817 (2006). Mootness is a subcategory of justiciability. *Webb v. Webb*, 143 Idaho 521, 148 P.3d 1267, 1270 (2006).

This court has consistently ruled that an appeal will be dismissed where only a moot question is involved. Logic and reason dictate therefrom that that this court need not consider a moot issue on appeal even though it may retain jurisdiction of the case to consider other issues which remain viable and not moot.

*State v. Boise City*, 95 Idaho 380, 384, 509 P.2d 1301 (1973). “Mootness applies when an appellant lacks a legal interest in the outcome ... when a favorable judicial decision would not result in any relief ... [and when] a judicial determination will have [no] practical effect on the outcome.” *Fenn v.*

*Noah* 142 Idaho 775, 779, 133 P.3d 1240, 1244 (2006).

The controversy alleged by Goodman Oil Company's Petitions "has ceased to exist and any decision by this Court would be without effect and a meaningless gesture to the case at bar." *Tryon v. Baker*, 94 Idaho 222, 223, 485 P.2d 964 (1971); *see also Koch v. Canyon County*, 145 Idaho 158, 177 P.3d 372, 377 (2008). Goodman Oil Company has achieved everything it asked for; there is no remedy left to award. Consequently, Goodman Oil Company's appeal "does not present a real and substantial controversy that is capable of being concluded through judicial decree of specific relief." *State v. Rogers*, 140 Idaho 223, 226-227, 91 P.3d 1127 (2004).

**(b) Goodman Oil Company's Petition for Writ of Mandate is Moot.**

Goodman Oil Company's underlying Petition for Writ of Mandate sought an order requiring the City of Nampa to publish Ordinance No. 3374. (R. 11.) The requested relief has been granted: Ordinance No. 3374 was published. (See R. 85; R. 100.)

**(c) Goodman Oil Company's Petition for Judicial Review is Moot.**

Goodman Oil Company's Petition for Judicial Review sought judicial review of the easement reservation language contained in the ordinance. (R. 11.) This too has been resolved in accordance with Goodman Oil Company's Petition: the challenged easement language was reviewed and removed from the ordinance, and 1<sup>st</sup> Avenue South has been vacated in accordance with Goodman Oil Company's demands. (R. 85; R. 100.)

**(d) Goodman Oil Company's Contract and Tort Claims Against Duro-Bilt are Moot.**

Goodman Oil Company's appeal regarding the District Court's grant of Duro-Bilt's Motion to Dismiss and denial of Goodman Oil Company's attempts to add Bart McKnight as a party, and add its contract and tort claims against Duro-Bilt is also moot because Goodman Oil Company has

been given the opportunity to fully litigate its contract and tort claims against Duro-Bilt and Bart McKnight in a separate case, which is also pending on Goodman Oil Company's separate appeal in Supreme Court Docket No. 34797. The claims have been litigated; they cannot be litigated again because such re-litigation would be barred by res judicata and collateral estoppel. *Watkins v. Peacock*, --- P.3d. ---, 2008 WL 1960332 \*2-3 (May 7, 2008); *Navarro v. Yonkers*, 144 Idaho 882, 173 P.3d 1141, 1144 (2007).

'Under principals of claim preclusion, a valid final judgment rendered on the merits ... is an absolute bar to a subsequent action between the same parties on the same claim.' *Hindermarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). Collateral estoppel, or issue preclusion, may be applied to prior judgments, estopping a person from arguing a finding or verdict that has already been rendered.

*Navarro v. Yonkers*, 173 P.3d at 1144.

Goodman Oil Company's separate contract and tort litigation (1) involved the same parties Goodman Oil Company sued and sought to join in this case, Duro-Bilt and Bart McKnight; (2) included the same contract and tort claims related to the Vacation Agreement and Duro-Bilt's expressed disagreement with limited access that Goodman Oil Company sought to add to its Petitions in this case, and said issues were decided in the separate litigation; and, (3) has been fully litigated and final judgment issued by the District Court. *Watkins v. Peacock*, 2008 WL 1960332 \*2-3; *Navarro v. Yonkers*, 173 P.3d at 1144.

This Court need not decide whether these claims should be litigated as part of Goodman Oil Company's claims against the City of Nampa. Goodman Oil Company's contract and tort claims having been raised and finally decided in a separate case, present no judicial controversy in this appeal.

(e) **Exceptions to the Mootness Doctrine do not Apply to Goodman Oil Company's Appeal.**

“[T]here is no possibility of collateral legal consequences imposed on the person raising the issue ... the challenged conduct is [not] likely to evade judicial review ... and [does not] raise[] concerns of substantial public interest.” *Ameritel Inns v. Greater Boise Auditorium*, 141 Idaho 849, 851-852, 119 P.3d 624 (2005); *Ellibee v. Ellibee*, 121 Idaho 501, 503, 826 P.2d 462 (1992), *Robinson v. Bodily*, 97 Idaho 199, 200, 541 P.2d 623 (1975). The controversy at the heart of Goodman Oil Company's Petition is not alive; Goodman Oil Company's claims have been fully resolved by subsequent orders of the District Court and actions by the City of Nampa; and/or by the litigation decided in the contract and tort litigation, which appeal is currently before this Court in Supreme Court Docket No. 34797. *Id.*

**3. IF THE COURT GETS TO THE MERITS OF GOODMAN OIL COMPANY'S APPEAL, THE COURT SHOULD AFFIRM THE DISTRICT COURT'S DISMISSAL OF DURO-BILT AND DENIAL OF GOODMAN OIL COMPANY'S MOTIONS TO AMEND.**

**(a) Dismissal of Duro-Bilt**

The District Court correctly dismissed Duro-Bilt from Goodman Oil Company's Petition for Writ of Mandate to require the City of Nampa to publish Ordinance No. 3374 and Petition for Judicial Review of the City's inclusion of a 50' easement in Ordinance No. 3374 for failing to state a claim against Duro-Bilt upon which relief could be granted. (R. 82.) In reviewing a motion to dismiss, a court draws all inferences in favor of the nonmoving party and determines whether a request for relief has been stated. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157 (2002). Goodman Oil Company's Petitions stated claims and requested relief against the City of Nampa: (1) only a City has the authority to adopt an ordinance; (2) only a mayor has the authority to



veto an ordinance; (3) only a City has the authority to cause publication of an ordinance. The District Court correctly recognized that it must make all inferences in Goodman Oil Company's favor, (Tr. May 5, 2005, p. 10 ll. 19-21), and after doing so, determined that Goodman Oil Company's Petitions could prove no set of facts that would entitle Goodman Oil Company to relief against Duro-Bilt. (Tr. May 5, 2005 p. 14 ll. 7-17). As the District Court explained:

The court cannot order Scotty's Duro-Bilt to publish the ordinance, nor do they have any authority to, and the issue of Judicial Review of the action of the city council ... how are they a party ... that the court can grant any relief against? (Tr. May 20, 2005 p. 5 ll. 1-7.)

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The court finds and concludes that in the pleadings filed no relief is sought against Scotty's Duro-Bilt. The court finds in this matter that Scotty's Duro-Bilt – the court could not, on the status of the pleadings, order them to publish the ordinance, to rescind or change the requirements of the easement. All relief is simply directed against the City of Nampa. (Tr. May 20, 2005 p.13 ll. 2-10.)

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The whole thrust of this litigation is to require the Nampa City Council to publish an ordinance, thereby making the ordinance vacating the street go into effect and to review the actions of the Nampa City Council and the determination that there should be certain fire apparatus and ingress and egress easements required as a condition of the vacating of the street, and that's not relief that can be granted against Scotty's Duro-Bilt. (Tr. May 20, 2005 p. 13 ll. 21-25, p. 14 ll. 1-4.)

When reviewing a 12(b)(6) dismissal on appeal, the same standard applies. *Young v. City of Ketchum*, 137 Idaho at 104. For the reasons identified by the District Court and herein, the District Court's Order (R. 82) should be affirmed.

For the same reasons, the District Court correctly concluded that Duro-Bilt is not an indispensable party under Idaho Rule of Civil Procedure 19(a)(1). "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). "It is not necessary that all persons who have an interest in the subject matter of the suit be joined as parties, but only those who have an

interest in the object of the suit.” *Pro Indiviso, Inc. v. Mid-Mile Holding Trust*, 131 Idaho 741, 746, 963 P.2d 1178 (1998).

Goodman Oil Company argues it should have been able to include Duro-Bilt as a party because Duro-Bilt “[is] an adjoining First Avenue South property owner.” App. Br. 10. According to Goodman Oil Company, Duro-Bilt needed to participate to protect its interest. *Id.* This argument is misplaced. First, Goodman Oil Company’s Petitions pray for no judgment against Duro-Bilt, only relief against the City of Nampa. Second, Duro-Bilt did not claim an interest relating to the subject matter of Goodman Oil Company’s lawsuit. Third, if adjoining property owners are indispensable parties, Goodman Oil Company should have sought to join all neighboring properties; not just Duro-Bilt and/or Duro-Bilt and Blamires. (As Goodman Oil Company admits, there are other properties adjacent to the vacated street. App. Br. 3; (R. 21; Tr. May 20, 2005 p. 3 ll. 18-19). Fourth, no matter what the outcome between Goodman Oil Company and the City, with or without Goodman Oil Company’s Petitions ever being filed, any interest of Duro-Bilt and adjoining property owners is protected by Idaho law:

Provided further that whenever any street, avenue, alley or lane shall be vacated, the same shall revert to the owner of the adjacent real estate, one-half (1/2) on each side thereof, or as the city council deems in the best interests of the adjoining properties, *but the right of way, easements and franchise rights of any lot owner or public utility shall not be impaired thereby.*

Idaho Code § 50-311 (emphasis added). (This is consistent with the Vacation Agreement, (*see* R. 22), and pp. 7-8, above, which provides each adjoining property access upon the vacated area at each party’s discretion and for the parties to agree on the parties’ rights and obligations related to the vacated area. (R. 21-23.))

Finally, the fact that Duro-Bilt voiced its disagreement to a proposal it believed to limit its reasonable access, does not make Duro-Bilt an indispensable party. Duro-Bilt bears no responsibility for the Nampa Mayor's decision to veto Ordinance No. 3374 nor the City's determination of the easement as it is identified in Ordinance No. 3374. According to Goodman Oil Company's arguments, any agreement or disagreement by a single citizen assumes them the responsibility for the acts of their elected of officials. Such claims have no basis in law of fact.

After making all inferences in Goodman Oil Company's favor, the District Court correctly determined that Goodman Oil Company's Petitions could prove no set of facts that would entitle Goodman Oil Company to relief against Duro-Bilt and that Duro-Bilt was not an indispensable party.

**(b) Motions to Amend**

The District Court also correctly denied Goodman Oil Company's attempt to add unrelated contract and tort claims against Duro-Bilt, Bart McKnight and the Blamires. Motions to amend are liberally granted and a decision to grant or deny such motions are left to the court's sound discretion.

*Estate of Becker v. Callahan*, 140 Idaho 522, 527-528, 96 P.3d 623 (2004); *Christensen Family Trust v. Christensen*, 133 Idaho 866, 871, 993 P.2d 1197 (1999). When proposed amendments would result in undo delay or prejudice, amendment may be denied. *Hinkle v. Winey*, 126 Idaho 993, 997, 898 P.2d 594 (Ct. App. 1995); *Spur Products Corp. v. Stoel Rives LLP*, 142 Idaho 41, 44, 122 P.3d 300 (2005).

In Goodman Oil Company's First Motion to Amend, it sought to add Bart McKnight, Bradley G. and Tamara D. Blamires as additional defendants and to state two (2) new claims against Mr. McKnight and Durobilt: breach of contract and tortuous interference with contract. (Tr. Jan. 21, 2005 p. 22.) That motion was denied by the District Court. (*Id.* at pp. 24-25.) Goodman Oil

Company's Second Motion to Amend sought to add Bradley G. and Tamara D. Blamires as defendants, to add claims against the Blamires and Duro-Bilt for breach of contract, and claims against Duro-Bilt and the City of Nampa for tortious interference with contract. (Tr. May 20, 2005 p. 27 ll. 18-23.) The only difference between the two motions is that Goodman Oil Company decided not to add Mr. McKnight as a defendant individually and to add a claim against the City of Nampa for tortious interference with a contract.

The District Court correctly identified that motions to amend are liberally granted and that a decision to grant or deny such motions are left to the court's sound discretion. (Tr. Jan. 21, 2005 pp. 22-23; Tr. May 20, 2005 pp. 27-28); *Estate of Becker v. Callahan*, 140 Idaho 522 at 527-528. The District Court then identified its concerns about the nature and scope of the proposed amendments and adverse effects such would have on the City and Duro-Bilt. (Tr. Jan. 21, 2005 pp. 24-25; Tr. May 20, 2005 pp. 27-30.) The District Court recognized that when proposed amendments would best be decided in separate litigation, a court may exercise its discretion and deny such motions. (*Id.* at pp. 23-25; at p. 29); *Hinkle v. Winey*, 126 Idaho at 997.

The District Court correctly determined that Goodman Oil Company's Petitions contained succinct claims against the City of Nampa, which would be determined on oral argument without a jury, with the Petition for Judicial Review heard as an appellate proceeding in accordance with Idaho Rule of Civil Procedure 84(I). The District Court acknowledged that the significant delay in seeking to amend that was present in *Hinkle*, was not a factor in this case; however, it identified other factors making amendment improper. As explained by the District Court:

In this case I don't know that we have that time separation that existed in *Hinkle*.

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It would I believe almost certainly delay a resolution of this case.

In addition, the court believes that there is a lack of commonality in the facts that must be addressed. (Tr. Jan. 21, 2005 p. 24.)

Adding tort and contract claims, in my opinion, 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 and the legitimacy of the easement requirements adopted by the City of Nampa as a condition of vacating the street right-of-way.

The court – that would turn on what I think is something that is, one, on the one hand an appellate process on the Petition for Judicial Review and something that is a question largely of law with respect to the mayor’s veto, which may well be resolved on summary judgment, into a full-blown trial involving numerous other totally unrelated and unnecessary issues.

Again, as in Hinkle, the court notes that Goodman Oil can pursue tort and contract claims against the City of Nampa, the Blamires, and Scotty’s Duro-Bilt independent of this action. Bringing those in would delay the resolution of this action as it is presently situated. And the resolution of this action may do something to resolve some of the other claims that may be out there. And resolution of it would be of – of this action I think will enhance the ability to litigate any other issues that may be out there. (Tr. May 20, 2005 p. 29 ll. 25, p. 30.)

The District Court did not abuse its discretion. It “correctly perceived [the] issue as on of discretion, act[ed] within the boundaries of its discretion consistent with applicable legal standards, and reach[ed] its decision by an exercise of reason.” *Christensen Family Trust v. Christensen*, 133 Idaho at 871. The reason for denying Goodman Oil Company’s attempts to add contract and tort claims to a Petition for Writ of Mandate compelling a city to publish an ordinance and a Petition for Judicial Review of city action are not only readily apparent, the District Court has provided ample reason for its denial of Goodman Oil Company’s Motions to Amend. The disparity between the issues raised by Goodman Oil Company’s Petitions and proposed new claims and the potential for significant delay in resolving Goodman Oil Company’s Petitions, made amendment improper. The District Court’s orders denying Goodman Oil Company’s Motions to Amend should be affirmed. (Tr. Jan. 21, 2005 p. 25, ll. 16-7; Tr. May 20, 2005, p. 31 ll. 1-2.)

**4. THE COURT SHOULD AFFIRM THE DISTRICT COURT'S AWARD OF ATTORNEY FEES AND COSTS TO DURO-BILT.**

The District Court correctly awarded attorney fees and costs to Duro-Bilt as the prevailing party below under Idaho Code § 12-121. (R. 89.) “An award of attorney fees under I.C. 12-121 is appropriate where a party’s claim of defense is frivolous, unreasonable, or without foundation. If there is a legitimate, triable issue of fact or a legitimate issue of law, attorney fees may not be awarded under this statute.” *Kiebert v. Goss*, 144 Idaho 225, 159 P.3d 862, 865 (2007) (internal citations omitted). As the Court made clear below, there was no foundation for Goodman Oil Company to include Duro-Bilt as a defendant in Goodman Oil Company’s litigation filed against the City of Nampa: (1) a Petition for Writ of Mandate requiring the City of Nampa to publish and ordinance; (2) a Petition for Judicial Review of the City’s access easement contained in the same ordinance. *See* p. 19, above.

Unlike in *Black v. Young*, 122 Idaho 302, 309, 834 P.2d 304 (1992), the District Court in this case held a hearing on Duro-Bilt’s request for attorney fees and costs and Goodman Oil Company’s objections thereto, and issued a written order thereon. (R. 88-89.) The District Court explained its findings to the parties on the record and offered a transcript to the parties (R. 89) just as the District Court did when it awarded fees and costs to Goodman Oil Company. (Tr. Jan. 18, 2007 p. 43 ll. 5-8.) (In *Black*, “the only indication that attorney fees were addressed appears in the court minutes of June 10, 1991, where it is written ‘case frivolous and unreasonable.’”)

The District Court’s award of attorney fees and costs to Duro-Bilt as the prevailing party should be affirmed.

## VI.

### ATTORNEY FEES ON APPEAL

#### 1. Goodman Oil Company is not Entitled to Attorney Fees on Appeal.

While “[l]egitimate issues concerning the district court’s interpretation of laws do not result in an award of attorney fees” to the prevailing party, *Kiebert v. Goss*, 159 P.3d at 866, illegitimate issues do. *Id.* Goodman Oil Company is not entitled to attorney fees on appeal for the reasons that (1) Goodman Oil Company’s Notice of Appeal is untimely; (2) Goodman Oil Company’s appeal is moot; (3) Goodman Oil Company’s appeal “fail[s] to raise legitimate issues regarding the district court’s decision” *id.*; and/or (4) Goodman Oil Company’s persistence in its pursuit of Duro-Bilt for actions taken by the City of Nampa – disputes long resolved by the District Court and settlement between Goodman Oil Company and the City -- despite the lack of foundation and without any basis in law, shows this appeal is nothing more than sham litigation pursued in bad faith for inappropriate purposes and Goodman Oil Company should not be awarded for such conduct.

#### 2. Duro-Bilt Should be Awarded Attorney Fees on Appeal.

The District Court made clear that Goodman Oil Company failed to state a claim against Duro-Bilt and awarded Duro-Bilt its attorney fees and costs under Idaho Code § 12-121. Despite the District Court’s ruling, the fact Goodman Oil Company has achieved everything it requested in its Petition, the fact Goodman Oil Company has fully litigated its contract and tort claims against Duro-Bilt in a separate action, the untimely filing of Goodman Oil Company’s Notice of Appeal, and the fact Goodman Oil Company’s appeal is moot, Goodman Oil Company continues to pursue its appeal. *Castrigno v. McQuade*, 141 Idaho 93, 98, 106 P.3d 419 (2005). Additionally, for the reasons stated

above, Goodman Oil Company's appeal is frivolous, unreasonable and without foundation and Duro-Bilt should be awarded attorney fees and costs on appeal. *Id.*; *Kiebert v. Goss*, 159 P.3d at 866.

Alternatively, Duro-Bilt should also be awarded attorney fees under Idaho Code § 12-120(3). Section 12-120(3) provides that "the prevailing party shall be allowed reasonable attorney fees" in civil actions to recover under a commercial transaction unless otherwise provided by law. If an allegation relates to a contract "that was for other than personal or household purposes [it] constituted the allegation of a commercial transaction" and falls under § 12-120(3). *Miller v. St. Alphonsus Regional Medical Center*, 139 Idaho 825, 839, 87 P.3d 934 (2004). Furthermore, "attorney fees are awardable under Idaho Code § 12-120(3) even if there were other theories also asserted in support of the claim that would not have triggered the application of the statute." *Id.* at 839. "Idaho Code § 12-120(3) does not require that there be a contract between the parties before the statute is applied; the statute only requires that there be a commercial transaction." *Great Plains Equip. v. Northwest Pipeline, Corp.*, 136 Idaho 466, 472, 36 P.3d 218 (2001).

According to Goodman Oil Company, all its claims against Duro-Bilt sound in contract. App. Br. 13. Goodman Oil Company's contractual allegations against Duro-Bilt concern a transaction related to real property – a Vacation Agreement -- not a contract for personal or household purposes therefore Goodman Oil Company's contractual allegations should fall under § 12-120(3), and Duro-Bilt should be entitled to attorney fees under that provision.

## VII.

### CONCLUSION


For the reasons stated herein this Court should dismiss Goodman Oil Company's Notice of Appeal as untimely or moot. If the Court gets to the merits of Goodman Oil Company's Notice of



Appeal, Duro-Bilt requests that this Court affirm the District Court's orders dismissing Duro-Bilt, denying Goodman Oil Company's Motions to Amend, and granting Duro-Bilt's request for attorney fees and costs. Duro-Bilt also respectfully requests that it be awarded attorney fees and costs incurred in responding to Goodman Oil Company's Notice of Appeal in accordance with Idaho Code §§ 12-120 and 12-121, and Idaho Rules of Appellate Procedure 40 and 41; and, that Goodman Oil Company's request for fees and costs be denied.

DATED this 18<sup>th</sup> day of June, 2008.

MOORE SMITH BUXTON & TURCKE, CHTD.

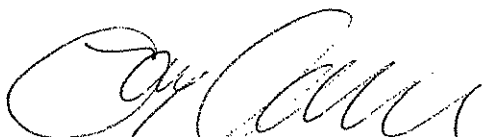
By:   
\_\_\_\_\_  
Tammy A. Zokan  
Attorneys for Duro-Bilt

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18<sup>th</sup> day of June, 2008, I caused a true and correct copy of the foregoing RESPONDENT'S BRIEF by the method indicated below, and addressed to the following:

Jon M. Steele  
Karl J. F. Runft  
RUNFT & STEELE LAW OFFICES, PLLC  
1020 W. Main Street, Suite 400  
Boise, Idaho 83702  
Facsimile (208) 343-3246  
Email: [jmsteele@runftlaw.com](mailto:jmsteele@runftlaw.com)

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

  
\_\_\_\_\_  
Tammy A. Zokan