

7-8-2008

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

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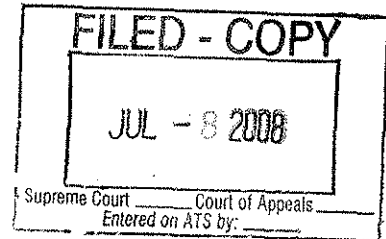
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IN THE SUPREME COURT OF THE STATE OF IDAHO

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 REPLY BRIEF



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APPELLANT'S REPLY BRIEF

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Jon M. Steele, ISB # 1911  
Karl J. Runft, ISB # 6640  
Runft & Steele Law Offices, PLLC  
1020 W. Main St., Ste 400  
Boise, ID 83702  
Tel (208) 333-8506  
Fax (208) 343-3246  
e-mail: [kjrunft@runftlaw.com](mailto:kjrunft@runftlaw.com)  
*Attorney for Appellants*

Tammy Zokan, ISB # 5450  
Moore Smith Buxton & Turke, Chtd.  
950 W. Bannock, Suite 520  
Boise, ID 83702  
Telephone: (208) 331-1800  
Facsimile: (208) 331-1202  
Email: [taz@msbtlaw.com](mailto:taz@msbtlaw.com)  
*Attorney for Respondents*

TABLE OF CONTENTS

TABLE OF CONTENTS.....	<i>i</i>
TABLE OF AUTHORITIES.....	<i>ii</i>
I. INTRODUCTION.....	1
II. THIS CASE IS NOT MOOT.....	1
III. APPELLANT’S NOTICE OF APPEAL WAS TIMELY.....	3
IV. THE DISTRICT COURT’S AWARD OF ATTORNEY’S FEES AND COSTS MUST BE VACATED .....	6
V. CONCLUSION.....	6

**TABLE OF CASES AND AUTHORITIES**

**CASES**

<i>Black v. Young</i> , 122 Idaho 302, 834 P.2d 304 (1992).....	4
<i>Davis v. Peacock</i> , 133 Idaho 637, 991 P.2d 362 (1999).....	4
<i>Hunting v. Clark County School Dist. No. 161</i> , 129 Idaho 634, 931 P.2d 628 (1997).....	4
<i>Idaho Best, Inc. v. First Security Bank of Idaho, N. A.</i> , 99 Idaho 517, 584 P.2d 1242 (1978).....	3
<i>Webb v. Webb</i> , 143 Idaho 521, 148 P.3d 1267 (2006).....	1

**STATUTES**

I.C. § 12-121.....	2, 6
I.C. § 50-311.....	4, 5

**RULES**

I.R.C.P. 54.....	2, 6
I.R.C.P. 84.....	5
I.R.C.P. 84(n).....	5
I.R.C.P. 84(t)(2)(b).....	5
I.R.C.P. 54(e)(2).....	6

I.

INTRODUCTION

Goodman Oil Company (“Appellant”) has appealed the dismissal of the Respondent Scotty’s Duro-Bilt Generator, Inc., (“Respondent”) as a defendant in a writ of mandamus and judicial review proceeding brought by the Appellant against the City of Nampa and Respondent. The Respondent filed its Respondent’s Brief raising the following issues that require rebuttal by Appellant:

1. Whether the case and controversy underlining this case is moot;
2. Whether Appellant’s Notice of Appeal was timely; and,
3. Whether the district court properly awarded attorney’s fees to Respondent in this case.

II.

THIS CASE IS NOT MOOT

An issue is moot when a favorable judicial decision would not result in any relief. *Webb v. Webb*, 143 Idaho 521, 524, 148 P.3d 1267, 1270 (2006).

Appellant’s Motion to Amend, the dismissal of which is the subject of this appeal, sought to bring causes of action against Respondent based upon breach of contract and interference with contract. Whether or not Respondent breached the Vacation Agreement and interfered with Appellant’s contract to sell its property abutting First Avenue South is a matter wholly separate, legally and factually, from whether the City of Nampa had the authority to retroactively veto Ordinance #3374. The issues concerning breach of contract are not mooted by the fact that First Avenue South was eventually vacated by the

district court's issuance of a Writ of Mandamus commanding the publication of the ordinance vacating First Avenue South. Bart McKnight, President of Respondent, intentionally derailed the proper vacation of First Avenue South by contacting the Mayor of Nampa, who then illegally vetoed Ordinance No. 3374 after it had been passed. Respondent's conduct clearly breached the Vacation Agreement, in which the Respondent had agreed to cooperate in the street vacation process, and forced Appellant to engage in years of costly litigation to unwind the confusion directly and intentionally caused by Respondent. Respondent's conduct also interfered with Appellant's sale of its property. Appellant seeks compensation from Respondent for its wrongdoing, and this issue is not moot.

Further, while it is correct that Appellant's breach of contract actions against Respondent and Bart McKnight were litigated in a subsequent lawsuit now pending before this Court on appeal (*See*, Supreme Court Docket No. 34797), Appellant filed its Motion to Consolidate in Supreme Court Docket No. 34797 seeking to consolidate that appeal with this case given the common questions of law and fact between them. Respondent opposed Appellant's Motion to Consolidate and that motion was denied pursuant to the initial dismissal by this Court of the appeal in Supreme Court Docket No. 34797 on February, 7, 2008. The Appellant did not renew its Motion to Consolidate after the appeal in this case and the appeal in Supreme Court Docket No. 34797 were reinstated because of the delay already caused by the lengthy preliminary motions. Appellant believes the common issues between this appeal and the appeal in Supreme Court Docket No. 34797 can be sufficiently addressed at oral argument in this case.

Finally, the district court awarded the Respondent attorney's fees under the unreasonable and frivolous rubric set forth in I.C. § 12-121 and I.R.C.P. 54. In order for the Appellant to reverse this finding of attorney's fees, the Appellant must convince this Court that Appellant's case before the district court was not frivolous and not without foundation. The most obvious and expedient way to do so is to show that the district court's findings below were in error. The Appellant has raised the issues in this appeal of whether the district court erred in dismissing Respondent from the suit and in denying Appellant's Motion to Amend. Thus these issues are not moot.<sup>1</sup>

### III.

#### APPELLANT'S NOTICE OF APPEAL WAS TIMELY

Respondent contends that Appellant's initial Notice of Appeal, filed on June 6, 2007, was untimely because the Memorandum Decision on Judicial Review and Order on November 7, 2006, was the final order in this case that started the time for appeal to run. Appellant, however, contends that its appeal was timely for two reasons.

First, the November 7, 2006, Order was not the final order. Whether an instrument is an appealable order or judgment must be determined by its content and substance and not by its title. *Idaho Best, Inc. v. First Security Bank of Idaho, N.A.*, 99 Idaho 517, 584 P.2d 1242 (1978). As a general rule, a final judgment is an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and

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<sup>1</sup> Indeed, logic would dictate that any award of attorney's fees that is based upon an analysis of the merits of the underlying issues in the case prevents those issues from becoming moot at least to the degree necessary to determine the propriety of the award of the attorney's fees. Otherwise, the doctrine of mootness could shield from review any award of attorney's fees if the underlying issues became moot. Certainly this is not a proposition conducive to justice or that comports with the basic concepts of fairness in the law.

represents a final determination of the rights of the parties. *Davis v. Peacock*, 133 Idaho 637, 991 P.2d 362 (1999). It must be a separate document that on its face states the relief granted or denied. *Hunting v. Clark County School Dist. No. 161*, 129 Idaho 634, 931 P.2d 628 (1997); I.R.C.P. 58(a)(2).

The district court's November 7, 2006, Order explicitly remanded to the City of Nampa the issue of whether other factors concerning the "public good" existed as to why First Avenue South had been vacated. *See* Record, pp. 110-111. The November 7, 2006, Order did not end the case. There was still an unresolved issue in the case. I.C. § 50-311 makes it clear that a "finding of expedience of the public good" is a condition, the only condition to the vacation of a city street. *See*, I.C. § 50-311; *Black v. Young*, 122 Idaho 302, 308, 834 P.2d 304, 310 (1992). Clearly, if Appellant had appealed this case from the November 7, 2006, Order and the City of Nampa had subsequently failed to find the vacation of First Avenue South expedient for the public good, the record on appeal would have been severely compromised and the Notice of Appeal would have likely been inaccurate. This Court would have been unable to properly review any issues before it. The district court's November 7, 2006, Order cannot be seen to have been a final order as it did not end the case.

The final order in this case was the district court's April 26, 2007, Order. *See* Exhibit "A" to this Brief. The April 26, 2007, Order was entered pursuant to Appellant's Motion for Clarification and Motion for Reconsideration. The district court granted in part Appellant's Motion for Clarification and specifically limited the scope of the remand to the City of Nampa only to the issue of what public good supported the vacation of First Avenue South. Under the April 26, 2007, Order the City of Nampa could not undue the



vacation of First Avenue South by finding no public good existed under I.C. § 50-311. The City of Nampa was charged with the duty to find the public good and thus complete the process of the vacation of First Avenue South already ordered by the district court's Order Granting Writ of Mandamus, filed August 8, 2005. *See, R.*, p. 85. Indeed, the district court granted Appellant's Motion for Preliminary Injunction on April 27, 2007, preventing the City of Nampa from holding a public hearing to unwind the vacation of First Avenue South. Any further proceedings by the City of Nampa were thus perfunctory and could not and did not affect any issues raised in the subsequent Notice of Appeal that was entered June 6, 2007.

In the alternative to Appellant's contention that the November 7, 2006, Order was not the final Order, Appellant asserts that even if that Order was the final order, Appellant's Motion for Reconsideration and Motion for Clarification filed on January 29, 2007, was timely. Petitions for judicial review to the district court, such as the one in this case, are governed by I.R.C.P. 84, and motions for reconsideration under those procedures are set forth in I.R.C.P. 84(t)(2)(b), which provides a party with forty-two (42) days to make a motion for reconsideration (entitled therein as a motion for rehearing). However, the failure to meet the timelines set down in I.R.C.P. 84 are governed by I.R.C.P. 84(n), which states that failure to meet any deadline in a Rule 84 proceeding, other than failure to timely file a Rule 84 petition, "shall not be deemed jurisdictional, but may be grounds only for such other action or sanction as the district court deems appropriate." I.R.C.P. 84(n). So even if Appellant's Motion for Reconsideration and Motion for Clarification were late under Rule 84, it is not automatic grounds for denying consideration of that motion. The district court in this case thought

it proper to consider these motions anyway and overruled by implication any finding they were untimely.

#### IV.

#### THE DISTRICT COURT'S AWARD OF ATTORNEY'S FEES

#### AND COSTS MUST BE VACATED

The Respondent claims the award of attorney's fees under I.C. § 12-121 and I.R.C.P. 54 must be upheld because the district court entered findings supporting the award in a hearing transcript. However, under 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." Appellant contends that a separate document does not include a hearing transcript. A "separate document" must be a written document entered into the record by the court. Further, the hearing transcript is not a part of the record on appeal. This Court has no basis to review the findings of the district court – further underscoring the point that the district court should have entered the relevant finding in a written document directly into the record as an order or decision of the court.

#### V.

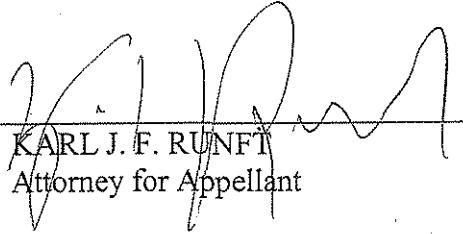
#### CONCLUSION

The issues in this appeal are not moot. Appellant's appeal was timely, and the district court's award of attorney's fees must be vacated.

DATED this 8 day of July 2008.

RUNFT & STEELE LAW OFFICES, PLLC

By:



KARL J. F. RUNFT  
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 8 day of July 2008, a true and correct copy of the **APPELLANT'S REPLY BRIEF** was served upon opposing counsel as follows:

Tammy Zokan  
Moore Smith Buxton & Turke, Chtd.  
950 W. Bannock, Suite 520  
Boise, ID 83702

US Mail  
 Personal Delivery  
 Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: \_\_\_\_\_

  
KARL J. F. RUNFT  
Attorney for Appellant

FILED  
A.M. P.M.

APR 26 2007

CANYON COUNTY CLERK  
J VASKO, DEPUTY

JON M. STEELE (ISB # 1911)  
KARL J. RUNFT (ISB # 6640)  
RUNFT & STEELE LAW OFFICES, PLLC  
1020 W. Main Street, Suite 400  
Boise, Idaho 83702  
Phone: (208) 333-9495  
Fax: (208) 343-3246  
Email: [jmsteele@runftlaw.com](mailto:jmsteele@runftlaw.com)

Attorneys for Petitioner

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

GOODMAN OIL COMPANY, )  
 )  
 ) Petitioner, )  
 )  
 vs. )  
 )  
 ) CITY OF NAMPA, a corporate body politic; )  
 ) THE CITY COUNCIL 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; and SCOTTY'S DURO-BILT )  
 ) GENERATOR, INC., an Idaho corporation, )  
 )  
 ) Respondents. )  
 )

CASE NO. CV 04-10007

ORDER

COPY

This matter having come for hearing on April 13, 2007, and the Court having heard  
Petitioner's Motion for Reconsideration and Clarification, Petitioner's Motion for  
Reconsideration of Attorney Fees and Mediation, Petitioner's Motion for Entry of Proposed  
Findings of Fact and Conclusions of Law; Proposed Judgment as to Nampa Respondents and

Proposed Preliminary Injunction as to Nampa, and Respondent City of Nampa's Motion for Reconsideration Regarding Attorney Fees, and the Petitioner being represented by its counsel of record, Jon M. Steele, and the Nampa Respondents being represented by their counsel of record, Christopher D. Gabbert, and the Court being fully advised,

DOES HEREBY ORDER the following:

1. Nampa's Motion for Reconsideration of Attorney Fees Award on the Judicial Review portion of the case is DENIED.
2. Goodman's Motion for Reconsideration of this Court's remand is DENIED.
3. Goodman's Motion for Clarification of Remand Order is GRANTED with these clarifications and directions:
  - a. The remand is limited solely to the issue of whether Ordinance No. 3374, when passed by the Nampa City Council and approved by the Mayor in September of 2004, was expedient for the public good.
  - b. The issue of expedience for the public good and the vacation of First Avenue South are not to be treated as new issues or a new application for the vacation of First Avenue South.
  - c. Consent of all adjoining property owners to the vacation of First Avenue South was given prior to passage of Ordinance No. 3374 in the Property Owners Vacation Agreement, an original of which is found in the Nampa Planning Department's file on this vacation.
  - d. Consent of the adjoining property owners to the vacation of First Avenue South is not an issue to be considered or addressed in determining expedience of the public good.

- e. Rights-of-way, easements and franchise rights of adjoining property owners and utility easements, including the existing water line, are not issues to be considered in determining expedience of the public good as they are protected by the statutory reservations in Idaho Code § 50-311, ~~and by the cross easements set forth in the Property Owner's Vacation Agreement.~~ *for*
- f. The City's inability to consider or require any ~~access or~~ easement beyond those provided by Idaho Code § 50-311 is not a factor to be considered in determining expedience of the public good. *for*
- g. There will be no public hearing held in determining expedience of the public good. ~~The fact finding process is closed.~~ *for*  
 The determination shall be made at an open, public meeting. Input from Nampa city staff is permissible
- h. The lack of reservation of a fire apparatus access in Ordinance No. 3374 is not a factor to be considered in determining expedience of the public good.
- i. Whether a fire apparatus access will be addressed in the development process is a factor which the City may consider.
- j. The Preliminary Injunction issued by this Court on February 2, 2007, will remain in effect until the expedience of the public good is considered by the Nampa City Council.

DATED this 25 day of April 2007.

*James C. Morfitt*

---

JUDGE JAMES C. MORFITT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26 day of April 2007, a true and correct copy of the foregoing ORDER was served upon opposing counsel as follows:

Chris D. Gabbert  
White Peterson, P.A.  
5700 East Franklin Road, Ste 200  
Nampa, ID 83687-7901

US Mail  
 Personal Delivery  
 Facsimile

Jon Steele  
Runft & Steele Law Offices, PLLC  
1020 Main Street, Suite 400  
Boise, ID 83702

US Mail  
 Personal Delivery  
 Facsimile

Tammy Zokan  
Moore Smith Buxton & Turke, Chtd.  
950 W. Bannock, Suite 520  
Boise, ID 83702

US Mail  
 Personal Delivery  
 Facsimile

By: J. Vaslo  
Clerk of Court

State of Idaho } ss  
County of Canyon }  
I hereby certify for the foregoing instrument  
a true and correct copy of the original of the  
same to the undersigned.  
DATE: 4/26/07  
By: J. Vaslo

