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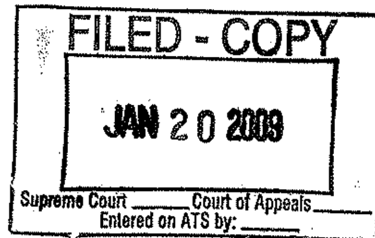
IN THE SUPREME COURT OF THE STATE OF IDAHO

GOODMAN OIL COMPANY, Plaintiff-Appellant, v. SCOTTY'S DURO-BILT GENERATOR, INC., an Idaho corporation; BART and ALANE MCKNIGHT, husband and wife; and DOES I through V, Defendants-Respondents.	Idaho Supreme Court No. 34797 Canyon County Dist. Ct. No. CV-05-9800



BRIEF FOR RESPONDENTS

Appeal from the District Court for the Third Judicial District of the State of Idaho, in and for Canyon County

Hon. Renae J. Hoff, District Judge, presiding

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I.

STATEMENT OF THE CASE

A. Nature of the Case

Appellant, Goodman Oil Co. ("Goodman Oil"), appeals the judgment of the district court dismissing its claims against Respondents, Scotty's Duro-Bilt Generator, Inc., Bart and Alane McKnight (the "McKnights"), and Does I through V (collectively "Duro-Bilt").

This case involves a 1995 agreement (the "1995 Agreement" or the "Vacation Agreement") wherein Goodman Oil, Duro-Bilt, and parties not involved in this litigation agreed to the City of Nampa's vacation of First Avenue South. The Vacation Agreement provided that once the street had been vacated, the parties would execute another agreement identifying grants of easements to each other and other rights and obligations concerning the vacated property. For reasons unimportant here, the vacation process never got very far until 2004, when Goodman Oil entered into a deal to sell the property conditioned on the street being vacated. The city fire department was requiring a twenty-foot easement for itself that wasn't part of the 1995 Agreement and wanted all the adjoining landowners' consent. Goodman Oil's would-be purchaser demanded that Duro-Bilt acquiesce to this new condition, but Duro-Bilt refused. The city passed the ordinance vacating the street anyway, reserving a fifty-foot easement over the eighty-foot-wide street. Duro-Bilt objected to the vacation, and the mayor vetoed the ordinance and it was never published. Goodman Oil filed a mandamus action and a petition for judicial review in October 2004, seeking an order requiring the city to publish the ordinance and seeking to have the ordinance's reservation of a fifty-foot easement set aside.

B. Course of Proceedings Below

While Goodman Oil's mandamus and petition for judicial review action was pending, Goodman Oil filed its complaint in this matter on September 19, 2005. (R. Vol. I, p. 6.) It alleged that Duro-Bilt committed (1) breach of contract; (2) tortious interference with contract; (3) negligent interference with prospective economic advantage; and (4) intentional interference with prospective economic advantage. Duro-Bilt answered on October 12, 2005 (R. Vol. I, p. 37), and filed a motion for summary judgment and motion to dismiss on June 29, 2006. (R. Vol. I, p. 46.) After a hearing, the district court issued an order dismissing Bart and Alane McKnight from the lawsuit on September 20, 2006. (R. Vol. I, p. 81.) Goodman Oil moved the district court to reconsider its decision, but by order dated November 7, 2006, the district court rejected that motion. (R. Vol. II, p. 150.) In that same order, the district court also granted Duro-Bilt's motion for summary judgment on counts two through four (tortious interference with a purchase and sale agreement, negligent interference with prospective economic advantage, and intentional interference with prospective economic advantage), but denied its motion for summary judgment as to count one (breach of contract). (R. Vol. II, p. 151.)

Duro-Bilt filed a second motion for summary judgment on December 16, 2006. (R. Vol. II, p. 154.) On February 9, 2007, the district court issued summary judgment in Duro-Bilt's favor, this time dismissing count one of Goodman Oil's complaint, breach of contract. (R. Vol. II, p. 223.) No further claims, controversies, or issues were left to be decided as to any parties. Goodman Oil sought reconsideration of this order, but, like before, the court rejected this motion in an order filed April 2, 2007, thereby concluding the case. (R. Vol. II, p. 294.) Not only did

the April 2, 2007, order finally dispose of all substantive issues in the case, but it also awarded the McKnights and Duro-Bilt attorney fees and costs pursuant to I.C. § 12-121. (R. Vol. II, pp. 296-97.) This order also directed Duro-Bilt and the McKnights to file affidavits showing attorney fees and costs within 14 days of the order.

Goodman Oil filed a second motion for reconsideration, on May 14, 2007, but it was untimely, and Goodman Oil later withdrew that motion. (R. Vol. III, p. 345.) On June 1, 2007, Duro-Bilt filed a motion for entry of judgment, requesting only the Court issue an order on the Duro-Bilt's and the McKnights' memorandums of costs and attorney fees. (R. Vol. III, p. 336.) The district court issued its order on attorney fees on August 7, 2007. (R. Vol. III, p. 348.)

On October 16, 2007, Goodman Oil filed a "Motion for Entry of Judgment," contending that a "separate document entitled 'Judgment' ha[d] not yet been entered." (R. Vol. III, p. 359.) At a hearing on the matter, the district court observed that it had previously adjudicated all the claims in the suit and accordingly denied the motion. (Tr. Nov. 5, 2007, pp. 114-120.) Goodman Oil filed its notice of appeal on November 23, 2007. (R. Vol. III, p. 419.)

C. Course of Proceedings in This Court

On December 5, 2007, Duro-Bilt defendants filed a motion to suspend and motion to dismiss, asserting that Goodman Oil's notice of appeal was untimely. On December 18, 2007, Goodman Oil filed a response to Duro-Bilt's motion, and a motion to consolidate this proceeding with the Goodman mandamus and judicial review action, filed in this Court as No. 34284. The Court denied the motion to consolidate, and on February 7, 2008, granted Duro-Bilt's motion to dismiss the appeal. On February 20, 2008, Goodman Oil moved this Court to reconsider its

order dismissing the appeal, and on April 17, 2008, this Court granted Goodman Oil's motion to reconsider. In that order, the Court directed the parties to brief the issue of whether Goodman Oil's notice of appeal was timely.

D. Related Litigation

Goodman Oil Co. v. Scotty's Duro-Bilt Generator, Inc., Supreme Court No. 34284, is the judicial review and mandamus proceeding described above. In addition to filing its petition for judicial review against the city of Nampa, Goodman Oil named Duro-Bilt as a defendant, but the district court dismissed Duro-Bilt from the suit under Idaho R. Civ. P. 12(b)(6). The court later denied Goodman Oil's motion for leave to amend its pleadings to add contract and tort claims against Duro-Bilt. The tort and contract claims Goodman Oil sought to add are the same as Goodman Oil alleged in its complaint in this case. The court awarded Duro-Bilt attorney fees.

The district court granted Goodman Oil's mandamus petition on August 8, 2005. In an order dated November 7, 2006, the district court determined that the city's reservation of the easement was illegal, remanded the ordinance back to the city to determine factors related to the public good requirement in I.C. § 50-311. (R. Vol. I, p. 166.) Goodman Oil filed a motion for reconsideration and clarification in January 2007, claiming that the city was going to act in violation of the court's decision on judicial review. In April 2007, the district court clarified its order.

Goodman Oil filed a notice of appeal in June 2007 and the City of Nampa filed a notice of cross-appeal shortly thereafter. Eventually, the city and Goodman Oil resolved their issues, so the appeal thus became solely between Goodman Oil and Duro-Bilt. The Supreme Court heard

oral arguments in that case on December 8, 2008, and as of the date of filing of this brief, no opinion has issued.

E. The Facts

On July 31, 1995, Duro-Bilt, Goodman Oil, and two other parties not involved in this litigation entered into a the Vacation Agreement. (R. Vol. I, pp. 17-22.) In addition to consenting to the vacation of First Avenue South, the parties granted themselves perpetual easements upon the vacated street, the actual location of which was to be at the discretion of the legal owner of the vacated property upon the city's vacation. The Vacation Agreement also provided that the parties would cooperate to see that the purpose of the agreement was accomplished, that they would execute a formalized agreement recognizing the rights and obligations of the parties upon the city's vacation, and that they would equally share in the maintenance of the easement.

No ordinance vacating the street was passed in 1995. In fact, the street-vacation issue largely died down until 2004. In 2004, one Ralph Wiley entered into an agreement to purchase Goodman Oil's property. (R. Vol. I, p. 23.) Wiley wanted the street vacated, so Goodman Oil went back to the city to initiate the process. The Nampa City Fire Department consented to the vacation, provided that a twenty-foot easement be granted for an "apparatus access road." Affidavit of Jon M. Steele in Support of Motion for Summary Judgment on Issues of Liability (August 22, 2006) Ex. E, Addendum 10 (included as an Exhibit to the Clerk's Record). The fire department also wanted adjoining landowners to consent to this condition, so Wylie obtained those consents from everyone—except Duro-Bilt. Duro-Bilt refused to enter into a new

agreement consenting to an easement that was not part of the 1995 Vacation Agreement and would injure the business.

Nevertheless, the City passed Ordinance No. 3374 in August 2004. This ordinance vacated the street, but retained a fifty-foot easement for access and utilities. (R. Vol. I, p. 30.) Once learning of the vacation, the president of Duro-Bilt, Bart McKnight, contacted the City and objected to the vacation. The mayor of Nampa vetoed the ordinance on September 2. 2004. (R. Vol. I, p. 28.)

Goodman Oil initiated its petition for judicial review and mandamus proceedings in October 2004. In an order dated November 7, 2006, the district court determined that the city's reservation of the easement was illegal, remanded the ordinance back to the city to determine factors related to the public good requirement in I.C. § 50-311. (R. Vol. I, p. 166.)

II.

QUESTIONS PRESENTED

1. Pursuant to this Court's order dated April 22, 2008, the first issue to be addressed is whether the notice of appeal was timely filed.

2. Whether the district court erred by dismissing Respondents Bart and Alane McKnight.

3. Whether the district court erred by granting summary judgment in Duro-Bilt's favor.

4. Whether the district court erred in awarding attorney fees to Duro-Bilt.

III.

ADDITIONAL QUESTION PRESENTED

Whether Respondents are entitled to an award of costs and attorney fees on appeal pursuant to Idaho App. R. 40 and 41, I.C. §§ 12-120(3) (as this case concerns a commercial transaction), and 12-121 (as the appeal is frivolous and lacks a reasonable basis in law and fact).

IV.

STANDARD OF REVIEW

The district court dismissed the McKnights from the case on their and Duro-Bilt's Motion for Summary Judgment and Motion to Dismiss. (R. Vol. I, pp. 46-47 (motion); R. Vol. I, pp. 81-82 (order).) (The McKnights sought dismissal under Idaho R. Civ. P. 12(b)(6). Affidavits were submitted in support of the motion and were not excluded by the district court.) The district court issued summary judgment in Duro-Bilt's favor on the remaining claims pursuant to Idaho R. Civ. P. 56. (R. Vol. II, pp. 150-52; Vol. II, pp. 223-24.)

When, on a 12(b)(6) motion, matters outside the pleading are presented and the court does not exclude them, the motion shall be treated as one for summary judgment. Idaho R. Civ. P. 12(b). Summary judgment is proper when the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Idaho R. Civ. P. 56(c). Key to this appeal, if the basis for a properly supported motion for summary judgment is that no genuine issue of material fact exists with respect to an element of the non-moving party's case, the non-

moving party must establish an issue of fact regarding that element. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

Importantly:

> Flimsy or transparent contentions, theoretical questions of fact which are not genuine, or disputes as to matters of form do not create genuine issues which will preclude summary judgment. Neither is a mere pleading allegation sufficient to create a genuine issue as against affidavits and other evidentiary materials which show the allegation to be false. *A mere scintilla of evidence is not enough to create an issue; there must be evidence on which a jury might rely.* A popular formula is that summary judgment should be granted on the same kind of showing as would permit direction of a verdict were the case to be tried.

Petricevich v. Salmon River Canal Co., 92 Idaho 865, 871, 452 P.2d 362, 368 (1969) (quoting 3 Baron & Holtzhoff, Fed. Prac. & Proc., § 1234, p. 133 (Rules ed. 1958)) (emphasis by Court).

In an appeal from a grant of summary judgment, the Supreme Court employs the same standard the district court uses. *Brown v. Caldwell Sch. Dist. No. 132*, 127 Idaho 112, 898 P.2d 43 (1995). The Supreme Court exercises free review over questions of law. *Yoakum*, 129 Idaho at 175, 923 P.2d at 420. On questions of fact, the Court will not disturb the district court's findings unless they are clearly erroneous. Idaho R. Civ. P. 52(a). On appeal, the appellant has the burden to demonstrate error:

> On appeal the appellant must carry the burden of showing that the district court committed error. Error will not be presumed on appeal but must be affirmatively shown on the record by the appellant. *Dawson v. Mead*, 98 Idaho 1, 557 P.2d 595 (1976); *Glenn Dick Equip. Co. v. Galey Construction, Inc.*, 97 Idaho 216, 541 P.2d 1184 (1975).

Rutter v. McLaughlin, 101 Idaho 292, 293, 612 P.2d 135, 136 (1980).

V.

ARGUMENT

A. Goodman Oil's Notice Of Appeal Was Untimely; Therefore, This Court Must Dismiss This Appeal.

First, brief recap of the relevant orders affecting the timeliness of Goodman Oil's notice of appeal: The district court dismissed the McKnights on September 20, 2006. The district court denied Goodman Oil's motion for reconsideration of that issue on November 7, 2006. On that date, the district court also dismissed counts two through four of Goodman Oil's complaint. The district court granted Duro-Bilt's motion for summary judgment as to the final count of the complaint on February 9, 2007. Goodman Oil's motion for reconsideration of that issue was denied on April 2, 2007. The district court issued its order awarding the Duro-Bilt defendants costs and attorney fees on August 7, 2007. Only on November 23, 2007, after its unsuccessful attempts to prolong its 42-day appeal-filing period failed, did Goodman Oil file a notice of appeal.

Those facts demonstrate that Goodman Oil's notice of appeal is untimely. Idaho App. R. 14(a) provides that any appeal as a matter of right from the district court may be made only by filing a notice of appeal within 42 days of the district court's judgment, order, or decree. That same rule also provides that the time to appeal is 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—and motions for attorney fees, or objections thereto, are explicitly excluded from the class of such motions. Here, an appeal of the non-attorney fees portion of the case was due

within 42 days of April 2, 2007, which would have been May 14, 2007. An appeal of the attorney fees award would have been due on September 18, 2007. Goodman Oil's notice of appeal was late. Lateness is jurisdictional. Idaho App. R. 21.

Goodman Oil contends that no "separate document," which it says is required by Idaho R. Civ. P. 58(a), has issued and hence, no final judgment has been entered in this case.[1] Brief for Appellants, p. 8. Goodman Oil is wrong. Idaho Code section 13-201 provides that an appeal may be taken "from such orders and judgments . . . as prescribed by rule of the Supreme Court." Idaho R. Civ. P. 54(a) says that a "judgment" is any decree or order from which an appeal lies. Idaho App. R. 11 identifies judgments and orders from which appeal may be taken as a matter of right, but, as this Court has observed, that rule does define "final" judgments, orders, or decrees. *Camp v. East Fork Ditch Co., LTD*, 137 Idaho 850, 866-67, 55 P.3d 304, 320-21 (2002).

Hence, "[w]hether an instrument is an appealable order must be determined by its content and substance, and not by its title." *Id.* at 867, 50 P.3d at 321 (citing *Idah-Best, Inc. v. First Sec. Bank of Idaho, N.A.*, 99 Idaho 517, 584 P.2d 1242 (1978)). The "general rule," this Court has said, is that "a final judgment is an order or judgment that ends the lawsuit, adjudicates and represents a final determination of the rights of the parties." *Id.* (citing *Davis v. Peacock*, 133 Idaho 637, 991 P.2d 362 (1999)).

In this case, the April 2, 2007, order meets the definition of a final judgment. The last order, which dismissed the final remaining count of Goodman Oil's complaint, issued on

[1] If no final appealable order has been issued, the appeal must be dismissed as only interlocutory orders have been issued. If this is an appeal of interlocutory orders, Goodman Oil did not follow the procedures set out in Idaho App. R. 12, and regardless, the deadline to appeal those orders has long since passed.

February 9, 2007. (R. Vol. II, p. 223.) No further issues were left to be decided. The suit was over. Goodman Oil did timely file a motion for reconsideration. That motion precipitated the final, appealable order in this suit, the April 2, 2007, order. First, as to form, it was set forth on a separate document, as Idaho R. Civ. P. 58(a) requires. Second, in substance, it ended the suit. It accomplished the following: (1) it denied Goodman Oil's motion for reconsideration of the February 9, 2007, order and awarded Duro-Bilt costs and attorney fees; (2) awarded the McKnights costs and attorney fees in the amounts requested; (3) awarded Duro-Bilt costs and attorney fees for defending counts two through four of Goodman's complaint; and (4) denied Duro-Bilt's request for costs and attorney fees for defending count one of Goodman Oil's complaint. (R. Vol. II, pp. 295-97.) In short, it "end[ed] the suit, adjudicate[ed] the subject matter of the controversy, and represent[ed] a final determination of the rights of the parties." *Davis v. Peacock*, 133 Idaho at 641, 991 P.2d at 366.

Goodman Oil seeks refuge in *Hunting v. Clark County School Dist. No. 161*, 129 Idaho 634, 931 P.2d 628 (1997), but that case provides no safety for Goodman Oil's position. *Hunting* held that an order granting the defendant's motion for summary judgment, stating that "'[p]laintiff's complaint is dismissed with prejudice'" was not a "judgment set forth on a separate document" as contemplated by Idaho R. Civ. P. 58(a). 129 Idaho at 637, 931 P.3d at 631 (brackets in opinion of Court). Rather, the Court held that the district court's later document was the "separate document" constituting a judgment. *Id.* This is different than the situation here, where, after a final order adjudicating the entire controversy issued, a motion for reconsideration was filed, considered, and rejected. Indeed, this Court has, post-*Hunting*, held

that partial judgments resolving five counts and the counterclaims were not final, but that the judgment resolving the last count was. *Camp,* 137 Idaho at 868, 55 P.3d at 322.

A final "order" followed by a final "judgment" does not modify the effect of the earlier order. "A trial court cannot unilaterally extend the time to file an appeal by simply attaching the term 'final judgment' to a document." *Walton, Inc. v. Jensen*, 132 Idaho 716, 720, 979 P.2d 119, 123 (Ct. App. 1999); *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).

From the district court's orders in this case, there can be little doubt that the April 2, 2007, order was indeed a final, appealable order. As this Court's precedents make clear, the focus is on what the document in question *does*, not what it is *called.* Issuance of another document entitled "Final Judgment" and simply re-stating all that had already been stated, would have put the case in the same category as the case in *Equal Water Rights Association.* Goodman Oil contends the April 2, 2007, order did not resolve the case, but this contention does not pass the straight-face test. There is no question that the entire case was resolved and that there was nothing more to do. Goodman Oil makes also much of the fact that Duro-Bilt filed a motion for entry of judgment. Duro-Bilt's motion for entry of judgment, as the record clearly indicates, was aimed solely at obtaining a determination on the matter of attorney fees and costs. (R. Vol. III, p. 336.) Goodman Oil's suggestion otherwise is flatly incorrect.

Moreover, to the extent this Court finds useful decisions of the federal courts of appeals, interpreting a nearly identical rule, these decisions uniformly follow a substance-over-form approach and support Duro-Bilt's position. *See Casey v. Albertson's, Inc.,* 362 F.3d 1254, 1259 (9th Cir. 2004) ("We have found no cases that apply Rule 58 . . . as a sword to reopen a case in which the parties and the judge all have indicated that they treat a district court entry as a final, separate judgment."); *Kirkland v. Legion Ins. Co.,* 343 F.3d 1135, 1139 (9th Cir. 2003) (although no formal final judgment was entered, the order in question had all the characteristics of a final judgment as it ended the litigation on the merits and left the court nothing to do but execute the judgment); *Trotter v. Regents of Univ. of New Mexico,* 219 F.3d 1179, 1183 (10th Cir. 2000) ("because *Rule 58* was designed solely to eliminate uncertainty, 'the separate document rule does not apply where there is no question about the finality of the court's decision.'" (citation omitted)); *Gross v. Burggraf Constr. Co.,* 53 F.3d 1531, 1536 (10th Cir. 1995) (since Rule 58 applies where there is uncertainty regarding whether a final judgment has been entered, the absence of a separate Rule 58 order did not prohibit appellate review where there was no question regarding the finality of the district court's order); *Beaudry Motor Co. v. Abko Props. Inc.,* 780 F.2d 751, 754-55 (9th Cir 1986) (holding that a civil minute order satisfied Rule 58 where it by its language it was clearly a decision of the Court and where it "put plaintiff's counsel on notice that an order had been entered against his client"); *Simmons v. Ghent,* 970 F.2d 392 (7th Cir 1992) (the failure to file a separate judgment order was not an issue as the court's intention to terminate the litigation was clear); *Hummer v. Dalton,* 657 F.2d 621 624 (4th Cir. 1981) (where decisions of the district court were plainly intended to be "final decisions in the

case," were recorded on the docket and were understood and accepted by the plaintiff as final for purposes of filing an appeal, the reason for the application of Rule 58 was not present).

In the end, the April 2, 2007, order meets the definition of a final judgment, from which an appeal was due within 42 days. But the notice of appeal did not come until well after that date. To hold for Goodman Oil in this instance would allow a party who has missed its time to file an appeal to re-open the case and preserve its time to appeal, even when the whole case had long been adjudicated.

B. If the Court Determines the Appeal Was Timely, It Should Nevertheless Affirm the District Court's Dismissal of the McKnights.

Goodman Oil contends that the district court erred by dismissing Bart and Alane McKnight from the suit. Brief for Appellants p. 13. Goodman Oil is wrong. In short, the Complaint demonstrates that the viability of Goodman's tort-based claims against the McKnights individually necessarily depends on the McKnights being personally responsible for the actions of the company. There was neither allegation nor evidence to support such a conclusion, and hence, the district court did not err in dismissing the McKnights.

The factual basis for the tortious conduct is Duro-Bilt's alleged withdrawal of its consent to the Vacation Agreement. Goodman Oil alleges in its complaint that "[s]ometime after August 17, 2004, but prior to August 23, 2004, Defendant McKnight contacted the City and attempted to withdraw *Duro-Bilt's consent* to the vacation of First Avenue South." (R. Vol. I, p. 10) (emphasis added). Goodman Oil presented evidence of this alleged withdrawal of Duro-Bilt's consent in the form of Exhibit D to its Complaint, which unambiguously identifies the author as

the President and Owner of Duro-Bilt in his capacity as such. (R. Vol. I, p. 33.) There are no other factual allegations of tortious conduct.

The legal allegations similarly relate to the actions of Duro-Bilt. Counts two through four of Goodman Oil's Complaint concern tortious conduct with the Goodman Oil/Wylie Purchase and Sale Agreement. In each count, the sole factual allegation about that conduct concerns Duro-Bilt's alleged withdrawal of its consent to the Vacation Agreement. For instance, Count One identifies the tortious conduct as follows: "By attempting to withdraw its consent to the Vacation Agreement, Defendants [sic] interfered with the contract between Goodman and Wylie." (R. Vol. I, p. 13.) In Count Three, Goodman Oil alleges that "[b]y notifying the City of Nampa of the withdrawal of their consent to the vacation of First Avenue South, the Defendants disrupted Goodman's relationship with Wylie[,] causing the sale to fail." (R. Vol. I, p. 13.) Count Four uses the same language as exists in Count Three. Thus, the only allegedly tortious conduct is the alleged revocation of consent to the Vacation Agreement.

And only the company can revoke its consent to the Vacation Agreement. The McKnights cannot be responsible for the alleged withdrawal of consent unless they did so in whatever capacity they may have with the Company. It is the *company's* consent that was withdrawn, not the McKnights' consent. There is no dispute that neither Bart nor Alane McKnight were parties to the Vacation Agreement in their individual capacities. (R. Vol. I, p. 8 (allegation in Complaint that "Defendant McKnight, President of Duro-Bilt, executed the Vacation Agreement on behalf of Duro-Bilt"); p. 17 (Vacation Agreement; identifying parties); p. 19 (same; showing Bart McKnight's signature for Scotty's Duro-Bilt Generator, Inc.).)

Just as the factual and legal allegations concern only conduct of the company, so does Goodman Oil's claim for relief: It seeks relief solely against Duro-Bilt and not against the McKnights individually. (R. Vol. I, p. 15.)

The upshot is that each tort-based count concerns alleged tortious activity of the company—there is no allegation that Bart or Alane McKnight as individuals committed any conduct which could supply the basis for the tort-based claims in Goodman Oil's Complaint—and no relief is sought against the McKnights individually. Goodman Oil's conclusory contention that its tort-based claims "are directed at McKnight for his tortious conduct both as an individual and as the alter ego of Duro-Bilt," Brief for Appellants, p. 14, is, therefore, entirely incorrect. The district court was correct to dismiss the McKnights from the suit.

Goodman Oil contends, nevertheless, that "[t]he tortious interference allegations of Counts II, III, and IV are made against all respondents." Brief of Appellants, p. 13. "These tortious theories of recovery," says Goodman Oil, "have their own elements and do not include 'piercing the corporate veil.'" Brief for Appellants, p. 13. The key inquiry is not whether the corporate veil can be pierced, but whether Goodman Oil alleged tortious conduct against, or sought relief from, the McKnights individually. It did not. Indeed, the very case Goodman Oil cites, *Davis v. Professional Business Services, Inc.*, 109 Idaho 810, 712 P.2d 511 (1985), does not support the position Goodman Oil takes here. In that case, the plaintiff sought to hold the president of the defendant billing service company liable for her conduct. The plaintiff argued that the claim sounded in tort, and hence, the president could be held liable once the corporate veil was pierced. The Court, however, held that the claim sounded in contract and reversed the

judgment against the president. 109 Idaho at 815, 712 P.2d at 516. So, the plaintiff argued in the alternative that the president was liable because her actions constituted tortious interference with contracts between the plaintiff and its patients. *Id.* But the Court observed that "[n]othing in plaintiff's Second Amended Complaint alleges any such tort." *Id.* While the opinion does not appear to include all the allegations in the complaint, it is clear that where the plaintiff failed to allege the president committed tortious conduct, it could not maintain such a claim against her.

The same situation presents in this case. The allegations relate to conduct of the company; the complaint seeks relief only from the company. The Court should not indulge Goodman Oil's post-hoc attempts to reconstruct its pleadings now.

C. The District Court's Grant of Summary Judgment in Duro-Bilt's Favor Must Be Affirmed.

1. Goodman Oil has not demonstrated reversible error in the district court's grant of summary judgment on the breach of contract claim.

After dismissing the tort-based claims, the district court later granted summary judgment to Duro-Bilt on Count One of the Complaint, breach of contract. In announcing her findings from the bench, the district judge stated that the Vacation Agreement was not ambiguous. (Tr. p. 103, LL. 19-21.) She indicated also that the street had not then been vacated. (Tr. p. 104, LL. 1-3). Having recognized that the interpretation of a contract is the province of the courts, Tr. p. 103, LL. 5-6, the district judge ruled that the Vacation Agreement had not been breached because performance was not yet due, noting that performance was required only after vacation had been accomplished. (Tr. p. 104, LL. 3-7.) Thus, the Duro-Bilt's performance of the provision in the

Vacation Agreement that Duro-Bilt grant a perpetual easement was not due because the contract itself called for this to occur post-vacation. (Tr. p. 104, LL. 8-14.)

The judge also ruled that the claim that Duro-Bilt was somehow the "instigator" of the veto was of no moment, as it was the mayor, not Duro-Bilt, that vetoed the ordinance. (Tr. p. 104, LL. 15-22.) Finally, the judge also ruled that there was no breach of the covenant of good faith and fair dealing because the Vacation Agreement did not require Duro-Bilt to consent to the easement required by the Nampa Fire Department. (Tr. p. 104, L. 23—p. 105 L. 9.)

Goodman Oil challenges the district court's rulings, but its bare, conclusory challenges must fail, as the record supports the district court's findings. Indeed, Goodman Oil's arguments do little but invite this Court to second-guess the district court's findings. First, Goodman Oil argues that "[t]here is no dispute that the Mayor of Nampa vetoed Ordinance No. 3374 only because of [Duro-Bilt's] request." Brief for Appellants, p. 15. This argument is followed up by the conclusion that "[t]he district court's finding is contrary to the facts and stands instead of a decision that should have been made by a jury," Brief for Appellants, p. 15, but Goodman Oil offers this Court no facts whatsoever to call the district court's finding into doubt. So it is unclear exactly which facts the finding is contrary to. Such a conclusion does not demonstrate that the district court's findings are clearly erroneous. *Marshall v. Blair*, 130 Idaho 675, 679, 946 P.2d 975, 979 (1997); Idaho R. Civ. P. 52(a). Indeed, the district court was quite correct to find that only the mayor, and not Bart McKnight, can veto an ordinance. *See* I.C. § 50-611 (granting the mayor, and no one else, veto power).

Second, Goodman Oil contends with a one-sentence argument that Duro-Bilt breached the Vacation Agreement when it withdrew its consent to the vacation of the street. Brief for Appellants, p. 15. It is undisputed that the ordinance included an easement not contemplated in the Vacation Agreement (although Goodman Oil conveniently omits this fact). And it is undisputed that Duro-Bilt did not express any objection to the vacation of the agreement until the ordinance—containing the offending easement—was passed. Indeed, the Vacation Agreement expressly provides that the parties will, among themselves, determine how grants of easements should be accomplished on the vacated property. Because title to vacated property reverts one-half to each adjoining landowner, I.C. § 50-311, it was entirely reasonable for Duro-Bilt to expect that its title to that property would have remained free of encumberances other than those to which it acquiesced. The Vacation Agreement unambiguously did not require Duro-Bilt to agree to Wylie's or Goodman Oil's demands that the vacated street contain an easement for the city. So the problem with Goodman Oil's argument is that the district court specifically found that the 1995 Vacation Agreement did not require consent to a fifty- or twenty-foot easement. The meaning of an unambiguous contract is a question of law, *Albee v. Judy*, 136 Idaho 226, 230, 31 P.3d 248, 252 (2001), and Goodman Oil has presented nothing that would justify overturning the district court's ruling.

Third, Goodman Oil argues that the covenant of good faith and fair dealing was breached, citing a provision of the Vacation Agreement stating that "the parties shall fully cooperate to ensure that the purpose and intent of this agreement shall be accomplished." Brief for Appellants, p. 15. Goodman Oil cites only Bart McKnight's correspondence with the mayor as

proof of this breach. But again, there is no evidence that Duro-Bilt did not fully comply with the Vacation Agreement. Duro-Bilt simply objected to a vacation that was inconsistent with the Vacation Agreement. The district court interpreted the Vacation Agreement to mean that the twenty- or fifty-foot easement conflicted with the terms of the Vacation Agreement. (Tr. p. 104, L. 23—p. 105, L. 9.) Therefore, the Vacation Agreement had not been breached. And Goodman Oil has presented nothing to suggest that the district court's interpretation of the Vacation Agreement—that Duro-Bilt was not required to consent to an easement as the Fire Department was mandating—was wrong as a matter of law.

Next, Goodman Oil asserts that the district court's finding that the street had not then been vacated was erroneous. Brief for Appellants, p. 16. Goodman Oil cites to no evidence showing the court's finding is incorrect. It appears to argue that the August 7, 2005, and the April 27, 2007, decisions by Judge Morfitt in the mandamus and judicial review case somehow had the effect of vacating the street. Neither decision vacated the street. In fact, nothing in the record demonstrates that the street had been vacated in January 2007 when the district court entered its findings. The record shows that as of April 26, 2007, there were still issues to be decided as to the proper scope of the vacation and what the proceedings to vacate the street should be. (R. Vol. III, pp. 306-308 (Order of Judge Morfitt in Canyon County No. CV-04-10007).) It is unclear, even now, whether the street has been successfully vacated.

Goodman Oil also challenges the district court's ruling on the time for performance under the Vacation Agreement. Brief for Appellants, p. 16. It says the time for performance was 2004. But again, its attack on the district court's legal determinations and factual findings are supported

with nothing but conclusory statements void of any substance. Indeed, the court's findings and conclusions are supported by the Vacation Agreement and the facts in the record. The plain language of the agreement says that the mutual grant of easement among the parties will occur "upon the City's vacation" of the street. (R. Vol. I, p. 18.) The only way to read this is that the easements among the owners will be determined after the street is vacated and that it can't be done before. The agreement also states that the parties shall execute an agreement related to the parties' respective rights and obligations "upon the City of Nampa's vacation" of the street. (R. Vol. I, p. 18.) This provision, too, unquestionably calls for performance to occur upon—meaning after, or subsequent to—the vacation of the street. If vacation has not occurred, performance is not yet due.

Even if performance was due in 2004, there is no evidence in the record to suggest that Duro-Bilt had failed to perform any term of the contract, and Goodman Oil can point to none. Goodman Oil simply requests that this Court side with it on the evidence and the law, without supplying any reasonable justification. The Court should affirm the grant of summary judgment as to Count One of the Complaint.

2. Goodman Oil has not demonstrated reversible error in the district court's grant of summary judgment on the tort-based claims.

In its Complaint, Goodman Oil claimed that Duro-Bilt had committed tortious interference with a contract between Goodman Oil and Wylie "[b]y attempting to withdraw its consent to the Vacation Agreement." (R. Vol. I, p. 13.) The district court rejected this claim, and, on appeal, Goodman Oil challenges the district court's ruling on this issue. But there is a

glaring lack of evidence connecting any alleged attempt by Duro-Bilt to withdraw its consent and the failure of the sale. Moreover, key to the inquiry on appeal (which Goodman Oil conveniently leaves out) is the fact that Mr. Wylie sent Goodman Oil's attorney a letter stating that the fifty-foot easement and other zoning changes were the reason the purchase of the property failed. (Tr. p. 71, L. 21—p. 72, L. 2.)[2] The district court relied on this evidence on the question of the reason for the sale. (Tr. p. 71, L. 21—p. 72, L. 2.) Neither the fifty-foot easement nor the zoning changes were attributable to Duro-Bilt, and Goodman Oil has not and cannot contest the contents of this letter. Nor has Goodman Oil asserted that this letter is not sufficient to support a conclusion that the cause of the failed sale was the easement.

Goodman Oil's argument that the district court's ruling on the tortious interference with contract claim is in error is as follows: "Goodman contends there is an issue of fact as to whether the sale with Wylie failed because of the 50 foot easement or because of the veto of Ordinance No. 3374. This issue of fact precludes the entry of summary judgment." Brief for Appellants, p. 18. In order to create a genuine issue of material fact, Goodman Oil must present something more than bare allegations or contentions. Idaho R. Civ. P. 56(e). Whether the sale failed because of the easement or because of the veto matters not: The district court found that the sale failed because of the easement and zoning changes and that Duro-Bilt was not responsible for the veto. Goodman Oil has neither identified anything to contradict the district court's findings

[2] This letter is in the Clerk's Exhibits to the Record as part of the Affidavit of Jon M. Steele in Support of Motion for Summary Judgment on Issues of Liability, filed August 22, 2006. It is the letter referenced in Answer to Interrogatory No. 7 and attached to Plaintiff's First Supplemental Responses to Defendant's First Set of Interrogatories, Request for Production of Documents, and Request for Admission. These Responses are Exhibit H to the aforementioned Affidavit of Jon M. Steele.

regarding the failure of the sale or to demonstrate that either conclusion is in error. It has pointed to nothing that could create a genuine issue of fact on this question. Simply saying an issue of fact exists does not create one. In short, Goodman Oil essentially asks this Court to reverse the district court's findings but supplies no evidence either that (a) the finding is in error; or, at the very least (b) that there is a genuine issue of fact on either question. This is not enough to withstand a motion for summary judgment. The Court should affirm the district court's rulings on this issue.

* * *

Goodman Oil also alleged in its Complaint that Duro-Bilt committed negligent and intentional interference with prospective economic advantage, (R. Vol. I, pp. 13-14), but it has presented neither argument nor authority to support a claim that the district court's rulings on these counts were in error. As such, it has waived any such arguments, and these rulings will not be addressed in this brief.

D. The District Court's Award of Attorney Fees to the McKnights and Duro-Bilt Must Be Affirmed.

Goodman Oil states as an issue on appeal "[d]id the District Court err by awarding attorney's fees to Respondents and is Goodman entitled to attorney fees in this appeal?" Brief for Appellants, P. 7. However, Goodman Oil presents no argument or authority for its position that the district court's award of fees was erroneous. In its brief, Goodman Oil simply states its position as a heading, Brief for Appellants, p. 18, but that is the extent of its argument. This Court has said that it will not entertain issues not supported by argument or authority. *Cowan v.*

Board of Comm'rs of Fremont County, 143 Idaho 501, 148 P.3d 1247 (2006). It should adhere to that practice here.

E. Duro-Bilt Should Be Awarded Attorney Fees on Appeal.

Duro-Bilt requests attorney fees on appeal under I.C. §§ 12-120(3) and 12-121, assuming it will be the prevailing party on appeal. Idaho Code § 12-120(3) allows attorney fees to the prevailing party in a civil action involving a "commercial transaction," and a commercial transaction is "all transactions except transactions for personal or household purposes." The heart of this case is a contract between Goodman Oil and Duro-Bilt. It is unquestionably a commercial transaction, as that term is defined in I.C. § 12-120(3).

Alternatively, Duro-Bilt requests an award of attorney fees and costs under I.C. §12-121. This appeal is frivolous. Goodman Oil has simply invited this Court to second-guess the district court's findings and conclusions without supplying facts to support its stated reasons why the judgment below was in error. It has offered nothing but conclusory challenges to the rulings it dislikes, reiterating bare arguments that the district court rejected. In such a case, attorney fees under I.C. § 12-121 are warranted. *Electrical Wholesale Supply Co., Inc. v. Nielson*, 136 Idaho 814, 41 P.2d 242 (2001).

VI.

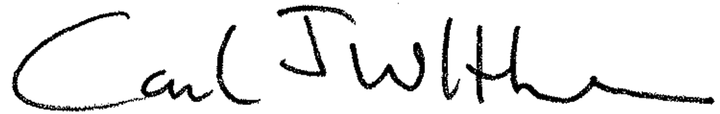
CONCLUSION

For the foregoing reasons, Duro-Bilt respectfully request that this Court affirm the rulings and judgment of the district court in their entirety and award Duro-Bilt and the McKnights their attorney fees and costs.

* * *

January 16, 2009

MOORE SMITH BUXTON & TURCKE, CHARTERED



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 16, 2009, I caused a true and correct copy of the foregoing Brief for Respondents by the method indicated below, and addressed to the following:

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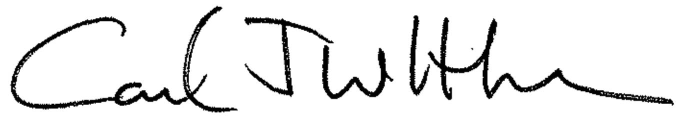

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