11-21-2008

Goodman Oil Co. v. Scotty's Duro-Bilt Generator, Inc. Appellant's Brief Dckt. 34797

IN THE SUPREME COURT OF THE STATE OF IDAHO

GOODMAN OIL COMPANY, Appellant, vs. SCOTTY'S DURO-BILT GENERATOR, INC., an Idaho corporation; BART and ALANE MCKNIGHT, husband and wife; and DOES I through V. Respondents.	)	Supreme Court No. 34797 **APPELLANT'S BRIEF**

APPELLANT'S BRIEF

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: jmsteele@runftlaw.com
Attorney for Appellants

Susan Buxton, ISB # 4041
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202
Email: seb@msbtlaw.com
Attorney for Respondents

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I.

STATEMENT OF THE CASE

a) Nature of the Case.

Goodman Oil Company ("Goodman") appeals the dismissal on summary judgment of its breach of contract claim and other related claims against Respondents Scotty's Duro-Bilt Generator, Inc. ("Duro-Bilt"), and Bart and Alane McKnight ("McKnight") ("Respondents" collectively). Appellant contends that Scotty's Duro-Bilt Generator, Inc. breached an agreement to vacate First Avenue South in Nampa, Idaho, when it revoked its consent to the vacation, and that as a result of Respondents' interference, Goodman's sale of its property failed to close.

b) Course of Proceedings Below.

Goodman filed its Complaint in this matter on September 19, 2005, alleging four causes of action against the Respondents: (1) breach of contract, (2) tortious interference with purchase and sale agreement, (3) negligent interference with prospective economic advantage, and (4) intentional interference with prospective economic advantage. R., p.6. On September 29, 2006, the district court dismissed McKnight individually (R., pp. 81-83), a result of McKnight's 12(b)(6) motion. R., p. 46. On November 7, 2006, the district court dismissed Goodman's causes of action two (2) through four (4) but did not dismiss Goodman's breach of contract claim. R., pp. 150-153. Duro-Bilt then brought a second motion for summary judgment on December 27, 2006, as to Goodman's remaining cause of action. The district court granted Duro-Bilt's Motion for Summary Judgment on February 9, 2007. R., pp. 223-224. Goodman moved for reconsideration of

this order on February 23, 2007. The district court denied Appellant's Motion for Reconsideration on April 2, 2007, in a document entitled "Order." *See* R, pp. 294-297.

On June 1, 2007, Respondents moved the court for entry of final judgment P., p 336. On August 7, 2007, the court entered its Order for Attorney Fees and Costs. R, p. 348-350. Mindful of I.R.C.P 58(a), Goodman then moved the court to enter a final judgment on October 16, 2007. R., p. 355. Respondents opposed the motion and the district court ruled on November 15, 2007, that final orders had already been entered and that the time for appeal had expired. R., pp. 416-417.

Goodman filed its Notice of Appeal on November 23, 2007. R., pp. 419-426.

c) Statement of Facts.

On August 2, 1995, Goodman entered into a Property Vacation Agreement with Duro-Bilt, the Blamires Family Trust, and T. J. Forest, Inc.. R., p. 17. Bart McKnight is the president and owner of Duro-Bilt. R. p. 3 para 12 and R., p. 39, para. 12; R., p. 55.

In the Vacation Agreement, the parties exchanged mutual promises consenting to Nampa's vacation of First Avenue South. The parties granted and conveyed among themselves a perpetual easement upon the vacated property for the purpose of access to and from their property. The parties agreed to fully cooperate to ensure that the purpose and intent of the Vacation Agreement was accomplished, and to equally share in the maintenance of the easement in proportion to the amount of property they owned which adjoins First Avenue South. R., pp 17-22.

Prior to vacation, Goodman's property consisted of over 36,800 square feet. Blamires' property consisted of over 17,250 square feet. Forest owned 3,750 square feet. Duro-Bilt owned a single lot of 2,850 square feet.

First Avenue South, prior to its vacation, ran north and south and was a street of eighty (80') feet in width and three hundred (300') feet in length. The actual constructed roadway is forty (40') feet in width, back of curb to back of curb. R., p. 54.

Goodman owns property on both sides of the street. Lots 7, 8, 9, 11 and 12 (each fifty (50') feet in width) are located on the west side of the vacated street. Lots 4, 5 and 6 (each fifty (50') feet in width) are located on the east side of the vacated street. R., p. 55.

Duro-Bilt is the owner of Lot 10 located on the west side of the vacated street. Lot 10 is bordered by Goodman property to the north (Lot 11) to the south (Lot 9), and following vacation of First Avenue South, to the east. R., p. 55

On August 3, 1995, Goodman submitted an application to Nampa for vacation of First Avenue South. On August 24, 1995, Mr. Holm, Nampa Planning Director, prepared a Staff Report. The Staff Report lists the applicant as the adjoining property owners, Goodman, Duro-Bilt, Blamires, and Forest. On September 5, 1995, a public hearing was held and the Nampa City Council (hereafter "Council") approved the vacation of First Avenue South between 2nd Street South and 3rd Street South. R., p. 55-56.

However, the vacation ordinance ("Ordinance No. 3374") was not approved until August 16, 2004. R., p. 58.

On July 28, 2004, Goodman and James R. Wylie ("Wylie") signed a Purchase and Sale Agreement whereby Goodman agreed to sell its property. The sale price was Six Hundred Thousand ($600,000) Dollars to be paid in cash at closing. The only contingency was completing the vacation of First Avenue South in a manner acceptable to Goodman and Wylie. R., pp. 56-57.

In August of 2004, Goodman and Wylie informed Respondents of this sale and that the sale was contingent upon the successful vacation of First Avenue South. R., p. 57.

On August 4, 2004, the Nampa Fire Department provided written conditional approval of development plans for the vacated property and the property owned by Goodman. The development plans had been submitted by Goodman's purchaser - Wylie. The Nampa Fire Department approved the vacation of First Avenue South subject to a dedicated twenty (20') foot wide fire apparatus access road. The Fire Department also requested Wylie to obtain the consent, once again, of the adjoining property owners, including Respondents. R., p. 57.

After signing the Goodman/Wylie Purchase and Sale Agreement, Wylie visited McKnight 3 or 4 times during July and August of 2004. Wylie told McKnight about the pending sale and the need to complete the street vacation. It is undisputed that Respondents had knowledge of the Goodman/Wylie Purchase and Sale Agreement and that Respondents knew the sale was contingent upon the vacation of First Avenue South. R., p. 57

Wylie asked Duro-Bilt to sign the consent requested by the Fire Department. Wylie will testify that McKnight agreed to sign the consent form presented to him after the other property owners signed. After Wylie obtained the consent of the other property owners, he returned to Duro-Bilt. Duro-Bilt then refused its consent. R., p. 57.

On August 16, 2004, the vacation ordinance ("Ordinance No. 3374") was approved by the Council and the Mayor. R., p. 58.

Respondents' efforts to interdict Ordinance No. 3374 began with McKnight speaking to a Nampa City Clerk and telling the City Clerk he no longer consented to the vacation of First Avenue South and wished to prevent Ordinance No. 3374 from going into effect. The City Clerk directed McKnight to call the City Attorney, Mr. White. McKnight called the City Attorney that same day and voiced his objections to Ordinance No. 3374. McKnight was told by Mr. White that, "they could withdraw this if I talked to the mayor." McKnight then again that same day called Nampa City Hall, spoke to Mayor Dale, and explained his objection to the vacation. Mayor Dale agreed to veto Ordinance No. 3374. McKnight specifically recalled this exchange in his deposition testimony: "I asked him [the Mayor] if there was a way to pull this off of being published, and he said, 'Yes, I can veto it.'" R., pp. 58-59.

An e-mail dated August 19, 2004, from the City Clerk, Diana Lambing, had the following message to deputy clerks at the Nampa City Clerks office:

> Hi Kids!
> Just a little note to let you know that at the Mayor and Terry White's direction, I pulled this Ordinance for Vacation of First Avenue South from being published. One of the property owners is not in agreement anymore. So it is on hold until further notice. Thanks.

R., p. 59.

On September 2nd, Mayor Dale vetoed Ordinance No. 3374. It was Mayor Dale's only veto since the beginning of his term. This is the only veto seen by Planning Director Holm in his 27 years with the City of Nampa. R., p. 59.

Mayor Dale and McKnight are friends and had been on a ski trip to Sun Valley in March of 2004. R., p. 59

In his deposition, Mayor Dale confirmed McKnight's material, *ex parte* contact, recalling that "he [McKnight] conveyed to me that, as a property owner on that street, he did not agree to the vacation at this time." Concerning his decision to veto Ordinance No. 3374, the Mayor stated:

> [O]ne of the ways of dealing with this was with a veto. Another way was to bring it back before city council. Because, since the ordinance had not been published, it had not become law at this time. And the city council could have brought it back and reconsidered it and voted on it. It was my decision that the most expedient way to do it was through the veto.
>
> R., p. 60.

Goodman's transaction with Wylie failed by reason that the vacation had not been completed in an acceptable manner. R., p. 60.

Planning Director Holm stated in his deposition that all that was required from the adjoining owners to effect a vacation was a simple note establishing that all adjoining landowners had consented. Holm also testified that the Property Vacation Agreement, signed by Duro-Bilt, was more formal and detailed than the usual consents received for street vacations. Holm knows of no source of authority allowing the Nampa Fire Department to request an access easement be reserved in a street vacation ordinance. Holm also had no expectation that a detailed easement would be submitted to the City of Nampa until such time as the property owner or developer sought a building permit. R., pp. 60-61.

McKnight not only intentionally breached the Property Vacation Agreement but also actively undermined Goodman's opportunity to sell its property to Wylie. Goodman subsequently filed suit against the City of Nampa to overturn the veto. Goodman succeeded in obtaining a writ of mandate ordering the vacation ordinance to be published.

See Goodman Oil Company v. City of Nampa, et al., Case No. CV 04-10007. R., p. 11, para. 42. Goodman then filed suit against Respondents.

The companion case of *Goodman v. City of Nampa*, Supreme Court No. 34284 concerns Judge Morfitt's dismissal of McKnight and Duro-Bilt from the original suit.

II.

ISSUES ON APPEAL

Appellant raises these issues on appeal:

a) Did Goodman file a timely Notice of Appeal?

b) Did the District Court err by dismissing Respondents Bart and Alane McKnight?

c) Did the District Court err by granting Summary Judgment to Respondents Duro-Bilt?

d) Did the District Court err by awarding attorney's fees to Respondents and is Goodman entitled to attorney fees in this appeal?

III.

APPLICABLE STANDARDS

In an appeal from an order granting summary judgment this Court's standard of review is the same as the standard used by the district court in passing upon a motion for summary judgment. *Kolln v. Saint Luke's Regl. Med. Ctr.*, 130 Idaho 323, 327, 940 P.2d 1142, 1146 (1997). "Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the

nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Badell v. Beeks,* 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). "In making this determination, all allegations of fact in the record, and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion." *City of Kellogg v. Mission Mountain Interests Ltd.,* 135 Idaho 239, 243, 16 P.3d 915, 919 (2000). If the evidence reveals no genuine issue as to any material fact, then all that remains is a question of law over which this Court exercises free review. *Yoakum v. Hartford Fire Ins. Co.,* 129 Idaho 171, 175, 923 P.2d 416, 420 (1996).

The standard for review of a 12(b)(6) motion is the same as that applicable to motions for summary judgment. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.2d 1157, 1159 (2002).

IV.

ARGUMENT

a) Goodman's Notice Of Appeal Was Timely.

The district court found that a final judgment was entered in this case on April 2, 2007, when the district court rejected Appellant's Motion for Reconsideration. Following the April 2, 2007 decision the district court failed to grant Respondent's and Goodman's Motion for Entry of Judgment. The district court erred.

Goodman asserts that the district court's April 2, 2007, decision is not a final judgment because of the "separate document" requirement of I.R.C.P. 58(a) and therefore no final judgment has been entered in this case.

Respondents brought their Motion for Entry of Judgment on June 1, 2007. R., pp. 334-344. The district court did not rule on Respondents' Motion for Entry of Judgment.

Idaho Appellate Rule 14(a) sets forth the time for taking an appeal from the district court and provides in pertinent part as follows:

> Any appeal as a matter of right from the district court may be made only by physically filing a notice of appeal with the clerk of the district court within 42 days from the date evidenced by the filing stamp of the clerk of the court on any judgment, order or decree of the district court appealable as a matter of right in any civil ... action.

I.R.C.P. 58(a) provides for the entry of a final judgment from which an appeal lies, stating:

> Subject to the provisions of Rule 54(b):
> .....
> (2) upon a decision by the court granting other relief ..., the court shall approve the form and sign the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document.

The present Rule 58(a) was adopted in 1992. The Reporter for the Supreme Court Rules Committee explained the reasons for the 1992 amendment as follows:

> 4. Rule 58(a) – This is a substantial amendment to this rule dealing with the method of an entry of judgment. The impetus for this rule arose in the Appellate Rules Committee which found that in recent years there have been a number of situations in which the Supreme Court has ruled that a memorandum decision of a trial court was in fact a "final judgment" from which the time to appeal commenced to run. Quite a number of attorneys have been caught off base with this as they did not file the notice of appeal within 42 days of the memorandum decision ... For all of these reasons, the Appellate Rules Committee felt that the rule should be amended so that there must be a separate judgment document so that all parties will know that the time to appeal has commenced to run. The Appellate Rules Committee therefore suggested that this rule be amended, and the Civil Rules Committee concurred, so as to amend the rule to adopt language out of the corresponding federal rule that "Every judgment shall be set forth on a separate

> document." If a memorandum decision grants a motion for summary judgment, that *[sic]* this must be followed by a judgment which has to be set forth on a separate document.

L. Davis, *Highlights of 1992 Rules Changes*, The Idaho State Bar Advocate, Vol. 35, No. 6, (June 1992), pullout section at 5.[1]

This Court has dealt directly with the meaning and application of the "separate document" requirement in I.R.C.P. 58(a). In *Hunting v. Clark County School Dist.*, 129 Idaho 634, 931 P.2d 628 (1997), the respondent/defendant therein claimed appellant/plaintiff's appeal was untimely given appellant's appeal was filed more than 42 days after the district court entered an "'Order Granting Defendant's Motion for Summary Judgment,' stating that '[p]laintiff's complaint is dismissed with prejudice,' [which according to respondent/defendant] served as a judgment set forth on a separate document, pursuant to I.R.C.P. 58(a)." *See Id.* at 637, 931 P.2d at 631. This Court found that such an order was not "a judgment set forth on a separate document" as required

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[1] As noted in the *Advocate* article, Federal Rule of Civil Procedure 58 contains the identical requirement of Idaho Rule 58(a) that "[e]very judgment shall be set forth on a separate document." In reversing a lower court decision holding an appeal untimely under Federal Rule of Appellate Procedure 4(a), the United States Supreme Court discussed the purpose behind the inclusion of the separate judgment requirement in Federal Rule 58, stating as follows:

> Prior to 1963, there was considerable uncertainty over what actions of the district court would constitute an entry of judgment, and occasional grief to litigants as a result of this uncertainty. (Citations omitted.) To eliminate these uncertainties, which spawned protracted litigation over a technical procedural matter, Rule 58 was amended to require that a judgment was to be effective only when set forth on a separate document.
>
> The separate document provision ... "was needed to make certain when a judgment becomes effective which has a most important bearing, inter alia, on the time for appeal ..." (Citation omitted.)

United States v. Indrehmas, 411 U.S. 216, 220 (1973); citing 6A J. Moore Federal Practice 58.04 (4. – 2) at 158-161 (1972); *see also Allah v. Superior Court*, 871 F.2d 887 (9th Cir. 1988) where the Ninth Circuit held that "[a] judgment or order is not entered within the meaning of Rule 4(a) ... unless it is entered in compliance with Rule 58 and 79(a) of the Federal Rules of Civil Procedure" and "[a]bsent compliance with these requirements, 'a party will not ordinarily be found to have exceeded any of the time periods set forth in Fed. R. App. P. 4(a).'" *Id.* at 889. (citations omitted.)

under I.R.C.P. 58(a). *Id.* This Court found that the document constituting the final judgment in the case was the separate document entered several months later by the district court that was entitled "Judgment." *Id.* The Court found, therefore, the Appellant's appeal was timely. *Id.*

The rule that a final judgment must be a "separate document" was also examined in *Camp v. East Fork Ditch Co., Ltd.*, 137 Idaho 850, 55 P.3d 304 (2002) – a case analogous to this one. In *Camp*, the district court had entered partial judgments in favor of the respondent/defendant on all claims in the case except the appellant/plaintiff's cause of action for malicious prosecution. *Id.* at 866, 55 P.3d at 320. Later, the district court entered an order on November 24, 1999, stating, "Defendant's Motion for Summary Judgment as to Malicious Prosecution Claim is hereby GRANTED," and the respondent/defendant submitted a memorandum of costs for prevailing on that count. *Id.* at 867, 55 P.3d at 321. The appellant/plaintiff objected on the ground that it was untimely because it was filed more than 14 days after the above final judgment (as characterized by the appellant/plaintiff) was entered as required under I.R.C.P. 54(d)(5); the district court agreed. *Id.* at 866, 55 P.3d at 320. This Court overruled the district court and held:

> The order simply granting summary judgment does not constitute a judgment dismissing a count [for malicious prosecution] in Camp's second amended complaint. *Hunting v. Clark County School Dist. No. 161,* 129 Idaho 634, 931 P.2d 628 (1997). Although the partial judgments previously entered by the district court resolved counts one, two, four, and five of the second amended complaint and the counterclaims, there was no final judgment until a judgment was entered resolving count three [of malicious prosecution] of the second amended complaint. That judgment was not entered until May 23, 2002. Therefore, the amended memorandum of costs filed by the Ditch Company on December 22, 1999, was timely. Although it was filed before entry of a final judgment, a

> memorandum of costs prematurely filed is considered timely. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 36 P.3d 218 (2001); IDAHO R. CIV. P. 54(d)(5).

Id. 368, 55 P.3d 322 (footnote omitted).

The separate judgment requirement was also recently considered by this Court in *In re Universe Life Ins. Co.*, --P.3d --, 2007 WL 914049, Idaho 2007, Opinion No. 31194. Therein, the district court made two partial rulings via summary judgment and this Court found neither constituted "a final judgment because neither it nor the earlier memorandum decision and order constituted a judgment. They were simply orders granting summary judgment." *Id.* at p. 9. Specifically, this Court stated:

> An order granting summary judgment does not constitute a judgment. *Camp v. East Fork Ditch Co., Ltd., 137 Idaho 850, 55 P.3d 304 (2002)*; *Hunting v. Clark County School Dist. No. 161,* 129 Idaho 634, 931 P.2d 628 (1997). "Every judgment shall be set forth on a separate document." I.R.C.P. 58(a); *accord, Hunting v. Clark County School Dist. No. 161,* 129 Idaho 634, 931 P.2d 628 (1997).

In this case, the district court's April 2, 2007, document entitled "Order" was not a judgment. Neither party treated it as an appealable Order. Respondent moved for entry of judgment following the April 2, 2007 Order. It was simply an order denying Appellant's Motion for Reconsideration and no language in the order states the case is resolved. R., pp. 294-297

For there to have been a final judgment in this case the district court, as in *Camp*, had to file a document that specifically ended the lawsuit, declared the entire subject matter of the controversy adjudicated, and represented a final determination of the rights of the parties. *Davis v. Peacock,* 133 Idaho 637, 991 P.2d 362 (1999). This was not done by the district court despite the fact that both parties requested a judgment be entered.

This case is analogous to *Camp* and *In re Universe Life Ins. Co.* The April 2, 2007, Order was not a "separate document" that signaled the type of finality that I.R.C.P. 58(a) envisions as triggering the time for appeal. Goodman's appeal is timely.

b) The District Court Erred In Dismissing Bart & Alane McKnight As Respondents.

The district court dismissed Bart and Alane McKnight as Respondents in the case because it found "...that Plaintiff has not shown that the Court should pierce the corporate veil..." and hold them individually responsible for the acts of Duro-Bilt. *See* R., p. 81. The district court's order dismissing McKnights individually was based upon the courts belief that Goodman had failed to present evidence which would justify "piercing the corporate veil" of Respondent Duro-Bilt. R., p. 81.

Count I of the Complaint alleges a breach of the Property Owner's Vacation Agreement dated August 2, 1995 between Goodman and Defendant Duro-Bilt. McKnight was not a party to this agreement. Paragraph 3 of Goodman's Complaint alleges that "...Defendants McKnight were the alter egos of Defendant Duro-Bilt." R., p. 2. This allegation was denied by Defendants. R., p. 38.

The other three counts of Goodman's Complaint are tort theories alleging interference with contract. The contract interfered with was not the Property Owner's Vacation Agreement referred to in Count I. The contract interfered with is the Goodman/Wylie Purchase and Sale Agreement dated July 28, 2004. The tortious interference allegations of Counts II, III and IV are made against all Respondents. R., pp. 6-10. These tortious theories of recovery have their own elements and do not include "piercing the corporate veil."

In a case dealing with similar issues, *Davis v. Professional Business Servs.*, 109 Idaho 810, 813, 712 P.2d 511, 514 (Idaho 1985), substituted opinion at *Magic Valley Radiology Assoc., P.A. v. Professional Business Servs.*, 119 Idaho 558, 808 P.2d 1303 (Idaho 1991), the Idaho Supreme Court distinguished between tort and contract cases with regard to the issue of piercing the corporate veil. "Piercing the corporate veil" is a prerequisite for holding a corporate officer personally liable under a contract with the corporation. In this case issues of piercing the corporate veil apply to Count I.

A *prima facie* case of tortious interference with a contract exists where a plaintiff has established: (a) the existence of a contract, (b) knowledge of the contract on part of the defendant, (c) intentional interference causing breach of the contract, and (d) injury to the plaintiff resulting from the breach. *Barlow v. Int'l Harvester Co.*, 95 Idaho 881, 893, 522 P.2d 1102, 1115 (1974).

Goodman's tortious interference counts are directed at McKnight for his tortious conduct both as an individual and as the alter ego of Duro-Bilt.

It is undisputed that McKnight is the individual who instigated the veto causing the Goodman/Wylie Purchase and Sale Agreement to fail. The district court erred in dismissing McKnight from the case.

c) The District Court Erred In Granting Summary Judgment As To Duro-Bilt.

After the McKnights were dismissed from the case, Duro-Bilt moved for summary judgment in two stages. The district court granted those motions and dismissed the remainder of Goodman's complaint. *See* R., pp. 150-152, pp. 223-224, pp. 294-298.

i. Breach of Contract.

The district court dismissed Goodman's breach of contract claim on the grounds that no breach had occurred as of the time of Duro-Bilt's motion as First Avenue South had not been vacated and because Duro-Bilt was not responsible for the Mayor of Nampa's illegal veto of Ordinance No. 3374. The district court also found that Duro-Bilt's request to the Mayor of Nampa to veto Ordinance No. 3374 and thus sabotage Goodman's deal with Wylie did not breach the covenant of good faith and fair dealing. *See* Reporter's Transcript, January 25, 2007, pp. 104-105. The district court's findings are in error.

There is no dispute that the Mayor of Nampa vetoed Ordinance No. 3374 only because of Respondent's request. The district court's finding is contrary to the facts and stands instead of a decision that should have been made by a jury.

Second, the Vacation Agreement was breached by Duro-Bilt's conduct. On page two of the Vacation Agreement it states that the "parties consent to the City of Nampa's vacation of First Avenue South...." R., p. 18. Duro-Bilt breached the agreement when it withdrew its consent to the vacation of First Avenue South. It was Duro-Bilt's intent and purpose to withdraw its consent and prevent the vacation it had agreed to.

Third, the covenant of good faith and fair dealing was breached. A provision of the Vacation Agreement states that "the parties shall fully cooperate to ensure that the purpose and intent of this agreement shall be accomplished." R., p. 18. Again, it is not disputed that Respondents sought to prevent the vacation of First Avenue South and contacted the Mayor of Nampa to prevent Ordinance No. 3374 from going into effect. A breach of this covenant occurs when a party takes any action which "violates, nullifies, or

significantly impairs" the rights or benefits due under the existing contract. *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 289, 824 P.2d 841, 864 (1991). Respondent's conduct is a breach of the covenant of good faith and fair dealing.

Finally, the district court's finding that First Avenue South had not yet been vacated was also in error. Judge Morfitt entered his decision on the Writ of Mandamus on August 7, 2005 in the companion case of *Goodman v. the City of Nampa*, Case No. CV 04-10007. R., pp. 34-35. On April 27, 2007, Judge Morfitt in the companion case, awarded Goodman $40,000 in attorney's fees and entered a Preliminary Injunction against Nampa prohibiting it from proceeding with obtaining consents, proceeding or scheduling any public hearing or proceeding in any other manner which is inconsistent with previously obtained consents to vacation and completed vacation of First Avenue South between Second and Third Streets South in the City of Nampa. R., pp. 302-315

The time for performance under the Vacation Agreement was August of 2004. Duro-Bilt was asked to meet its contractual obligations by cooperating and consenting to the vacation of First Avenue South. Instead, it refused to cooperate, instigated an illegal veto of Ordinance No. 3374, and has held the development of this downtown Nampa parcel hostage. The district court's ruling that Duro-Bilt's time for performance under the Vacation Agreement was not ripe is wholly erroneous and not supported by the record.

In the companion case, Judge Morfitt's Order of April 25, 2007 contains the following:

> **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.**
>
> **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.** (emphasis added) R., p. 307, paras. e and d.

In the companion case, Judge Morfitt went so far as to enter a Preliminary Injunction against the City of Nampa from soliciting consents. R., p. 308, paras. e and d; R., pp. 313-314.

This litigation is the result of Duro-Bilt's breach of the contract in which it consented to the vacation of First Avenue South. That is the starting point. Duro-Bilt's breach of the Property Owner's Vacation Agreement led to Duro-Bilt's and McKnight's interference with the Goodman/Wylie Purchase and Sale Agreement. This entire dispute would never have occurred if Duro-Bilt had abided by the contractual terms it agreed to in the Property Owner Street Vacation Agreement. Duro-Bilt's breach of that contract and McKnight's interdiction of Ordinance No. 3374 cause the Goodman/Wylie Purchase and Sale Agreement to fail.

ii. Tortious Interference.

The district court dismissed Goodman's count of tortious interference with contract against Duro-Bilt because it found that the reservation of a 50 foot easement in the Vacation Ordinance was what caused Goodman's deal with Wylie to fail and not the veto of Ordinance No. 3374. Therefore, according to the district court, Duro-Bilt was not responsible for the failure of the Goodman/Wylie deal. *See* Reporter's Transcript, October 24, 2006, pp. 71-72, lns. 5-10.

Goodman contends this was an error. Tortious interference with contract has four elements: (1) the existence of a contract; (2) knowledge of the contract on the part of the defendant; (3) intentional interference causing a breach of the contract; and (4) injury to the plaintiff resulting from the breach. *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 283-84, 824 P.2d 841, 858-59 (1991) (citing *Barlow v. Int'l Harvester Co.*, 95 Idaho 881, 893, 522 P.2d 1102, 1114 (1974)). The district court ruled on the third element, holding as a matter of law that Duro-Bilt did not cause the interference. Yet the issue of causation is usually a question of fact for the jury. *Garrett Freightlines, Inc. v. Bannock Paving Co.*, 112 Idaho 722, 726, 735 P.2d 1033, 1037 (1987). 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.

The district court merely supplanted its judgment for that of a fact finder over a disputed issue, i.e. the cause of the failure of the Goodman/Wylie deal. Indeed, Goodman later successfully had the 50 foot easement removed from Ordinance No. 3374. This Court should reverse the district court and allow this issue to be resolved before a jury.

d) The District Court Erred In Awarding Attorney Fees To Respondents; Goodman Is Entitled To An Award Of Attorney Fees On Appeal.

The district court awarded Duro-Bilt attorney's fees in this case. If Goodman prevails on any of the issues on appeal the award of attorney's fees below must be vacated as the Respondents will no longer be the prevailing party.

Goodman is entitled to an award of attorney fees and costs pursuant to I.C. § 12-120(3) in the event it prevails in this appeal.

V.

CONCLUSION

This Court should reverse the dismissal of Goodman's causes of action (Counts I and II) against Respondents. Goodman should also be awarded attorney fees and costs as the result of this appeal. Finally, the case should be remanded to the district court for further proceedings.

DATED this 21 day of November 2008.

RUNFT & STEELE LAW OFFICES, PLLC

By: /s/ Steele
JON M. STEELE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 21 day of November 2008, a true and correct copy of the **APPELLANT'S BRIEF** was served upon opposing counsel as follows:

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

✓ US Mail
____ Personal Delivery
____ Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: JM Steele
JON M. STEELE
Attorney for Plaintiff