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Bald, Fat, & Ugly, LLC Appellant's Brief Dckt. 39451

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IN THE SUPREME COURT OF THE STATE OF IDAHO

RICHARD A. KEANE and LISA C. KEANE,
and KEANE AND CO. CONSTRUCTION,
INC., and R & L DEVELOPMENTS, L.L.C.,

Claimants/Respondents-
Appellants,

and

KEANE & TAYLOR LLC and KEANE
LAND CO., LLC,

Claimants,

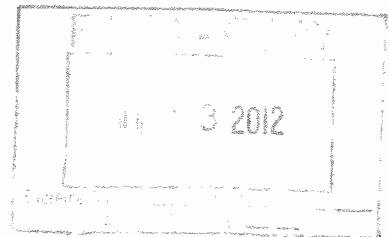
v.

BALD, FAT & UGLY, LLC,

Respondent/Claimant-Respondent on
appeal.

Docket No. 39451

APPELLANTS' BRIEF



APPELLANTS' BRIEF

Appeal from the District Court of the Second Judicial District of the State of Idaho,
in and for the County of Nez Perce, Honorable Jeff M. Brudie, District Judge, Presiding

Jeffrey A. Thomson (ISB #3380)
ELAM & BURKE, P.A.
251 E. Front Street, Suite 300
P.O. Box 1539
Boise, Idaho 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844

Attorneys for Appellants

David R. Risley (ISB #1789)
Risley Law Office, PLLC
P.O. Box 1247
Lewiston, ID 83501
Telephone: (208) 743-5338
Facsimile: (208) 743-5307

Attorneys for Respondents

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I. STATEMENT OF THE CASE

A. Nature of the Case.

Claimants/Respondents/Appellants on appeal Richard and Lisa Keane, Keane and Co. Construction, Inc., and R&L Developments, LLC (collectively “the Keanes”), appeal from the district court’s judgment finding Richard Keane in contempt of an Order Confirming Arbitration Awards.

B. Course of Proceedings and Statement of Facts.

The Keanes and Respondent/Claimant/Respondent on appeal Bald, Fat & Ugly, LLC’s (“BFU”) entered into a Mediated Settlement Agreement (“MSA”) on June 8, 2005, arising out of disputes between the parties relating to “the course of dealing with contractual relationships regarding the sale, purchase, construction, repair and related matters regarding the parties’ interest in the HOUSTON PROFESSIONAL PLAZA located in Lewiston, Idaho.” (R., p. 24.) A subsequent dispute then arose as to the terms and conditions of that MSA. (R., p. 14.)

The parties agreed to submit the dispute to arbitration and, on November 18, 2009, the arbitrator rendered Arbitration Awards. (R., pp. 18–23.) Two separate rulings were made in the Arbitration Awards in relation to the two key disputes identified by the arbitrator: (1) the Keanes agreed to pay BFU \$180,000, together with interest thereon (relates to Arbitration Award No. 1); and (2) the Keanes agreed to the performance of remediation work in respect to the exterior common areas of the project (relates to Arbitration Award No. 2). (R., p. 19.)¹ The arbitrator

¹The Keanes have made payment on Arbitration Award No. 1 and no Motion for Contempt has sought as to this Arbitration Award. (R., p. 180.) Only Arbitration Award No. 2 is

found the best evidence regarding the value of the remedial work to be a bid prepared by Progressive Engineering in the amount of \$229,887.00, but also found HPP had offered the Keanes \$70,125.00 in exchange for an agreement to perform some of the work outlined, ruling that only \$159,762.00 of the bid represented the remediation work originally agreed to by the Keanes. (R., p. 20.) The arbitrator also found that BFU only has a one-third interest in the exterior common area; yet, ultimately decided that the Keanes owed the entirety of the \$159,762.00 to BFU. (R., p. 20.) To protect the Keanes from having to pay for the repairs twice, the arbitrator determined they should pay the \$159,762.00 to BFU and its attorney, David Risley, to be held in trust by Mr. Risley and, if the repairs were performed for less than \$229,887.00, the savings were to be returned to the Keanes with an accounting. (R., p. 21.)

On November 20, 2009, BFU filed an Application and Motion for Confirmation of Arbitration Award, requesting the court to enter an order confirming the arbitration awards entered on November 18, 2009. (R., pp. 12–36.) On December 4, 2009, the Keanes made a Motion to Amend Arbitration Award, and the arbitrator issued a letter of clarification on January 20, 2010. (R., pp. 67–68.) In regard to Arbitration Award No. 2, the letter stated as follows:

The Award of \$159,762.00 (paragraph 7 of the Awards) is in the nature of a monetary Award in respect to the repair of the exterior common area. I did not order or direct that Keane perform (or even be allowed to perform) the work in question, and *I leave that up to the parties to work out.* . . .

(R., p. 68.) (Italics added.)

at issue on appeal.

The district court entered its Order Confirming Arbitration Awards (“Order”) on May 3, 2010, confirming the award to BFU of \$159,762.00, plus 8% interest from November 18, 2009. (R., p. 44.) There was no judgment entered. Nevertheless, BFU’s First Order for Writ of Execution was granted September 1, 2011, and served on the Keanes, with a return on October 12, 2010. (R., p. 80.) A Partial Satisfaction of Judgment was filed by BFU on April 1, 2011, in the amount of \$93,680.90. (R., pp. 94–95.)

BFU filed its Motion for Contempt (Arbitration Award No. 2) on May 4, 2011. (R., pp. 97-99.) A hearing was held on the motion on May 26, 2011. (Tr., Vol. 1.) At the May 26, 2011, hearing, the following dialogue took place between counsel for the Keanes and the court:

Court: Mr. Richardson, what’s your client’s position relative to that contempt request?

Mr. Richardson: He denies it, your Honor. Pursuant to rule 75(g), I believe we now have 14 days to be able to prepare an answer, file the answer and then we will need to schedule it for trial.

Court: Yes, given that denial being entered it will be necessary to schedule this motion then for trial on the requested contempt. And, again, I’ll probably just set this matter for a scheduling conference with counsel so we can get that trial date set.

(Tr., Vol. 1, p. 8, l. 19–p. 9, l. 6.) The Keanes filed affirmative defenses in their Response to Motion for Contempt on June 9, 2011, fourteen (14) days later, the deadline as they understood it following the Motion for Contempt hearing on May 26, 2011. (See R., pp. 152–56.) In July 2011, the Keanes paid BFU another \$45,000.00. (R., p. 180.)

Following a court trial on September 9, 2011, the court entered its Findings of Fact, Conclusions of Law, and Order on Court Trial for Contempt on October 31, 2011. (R.,

pp. 178–87.) (“Findings, Conclusions and Order”).) The court found that the Keanes’ affirmative defenses were barred as untimely, that the Keanes were in contempt of the court’s Order Confirming Arbitration Awards, and Richard Keane must pay the balance of Arbitration Award No. 2. (R., pp. 178-87.) The court found that the Keanes have the ability to comply because the Keanes own real property and other assets, including an airplane, airplane hangar and motorhome, and the Keanes had “done little to liquidate” the assets. (R., p. 185.) On January 5, 2012 the only Judgment entered was the Judgment on the contempt. (R., pp. 193-195.)²

A Notice of Appeal was filed on November 30, 2011. (R., pp. 188-192.) The district court entered its Opinion and Order on Motion for Attorney Fees and Costs, filed January 8, 2012, awarding BFU \$5,000.00 in attorney fees as the prevailing party on the Motion for Contempt. (R., pp. 196-200.) After the judgment was filed an Amended Notice of Appeal was filed on January 11, 2012. (R., pp. 201-208.)

II. ISSUES PRESENTED ON APPEAL

- A. Whether the district court erred in finding the Keanes in contempt of the court’s Order Confirming Arbitration Awards?
- B. Whether the district court erred in striking the Keanes’ affirmative defenses to the motion for contempt?
- C. Whether the district court erred in granting attorney fees to BFU as the prevailing party on its Motion for Contempt?
- D. Whether the Keanes are entitled to attorney fees on appeal per contract and/or Idaho Code § 12-120(3)?

²This Judgment was filed after this Court suspended the appeal and remanded it to the district court to enter a judgment.

III. ARGUMENT

The district court erred in finding the Keanes in contempt. The district court found Richard Keane to be in contempt of its Order Confirming Arbitration Awards for failing to pay Arbitration Award No. 2 in full and in compliance with the direction of the arbitrator. (R., p. 194.) A party can only be found in contempt for failing to do what the party had previously been ordered by the court to do. Prior to the judgment resulting from the contempt, there was no valid order to pay the Arbitration Award. The Arbitration Award merely established an amount owed by the Keanes to BFU. An arbitrator's power is limited to making an award and cannot order its payment. The only order made by the district court was an order confirming the arbitration awards. That order is not, by definition, an order to pay the amount awarded. While the district court has the power to enter a judgment after confirming the arbitration award, no such judgment was entered. Consequently, the Keanes could not be in contempt because they had not previously been ordered by the court to pay the arbitration award.³

In addition, the court erred in striking the Keanes' affirmative defenses because the Keanes filed their affirmative defenses within fourteen (14) days of entering their plea, the amount of time they believed was authorized by the court. Because the court did not consider the

³Even if a judgment had been entered, contempt proceedings are not the vehicle to enforce such a judgment. A judgment merely states the relief to which a party is entitled but is not itself an order to pay a money judgment. An order to pay a money judgment comes only through enforcement proceedings on the judgment such as execution, attachment and garnishment. Without a judgment, however, none of these "orders to pay" were available.

Keanes' affirmative defenses in reaching its determination on contempt the Keanes were deprived of due process.

Even if the district court correctly struck the Keanes' affirmative defenses, the form of the contempt order was in error; the contempt proceedings were erroneously used to enforce a contract and collect on a judgment when other remedies were available and BFU waived contempt as a remedy. The district court's judgment of contempt should be vacated.

A. Standard of Review.

"The sanction or penalty imposed under a contempt order is reviewed under an abuse of discretion standard." *In re Matter of Weick*, 142 Idaho 275, 278, 127 P.3d 178, 181 (2005). The abuse of discretion inquiry examines: (1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of its discretion consistently with the applicable legal standards; and (3) whether the court reached its decision through an exercise of reason. *Id.* at 282, 127 P.3d at 185.

B. Analysis.

1. The District Court Erred in Finding the Keanes in Contempt of the Court's Order Confirming Arbitration Awards.

Trial courts have the judicial power of contempt to vindicate their jurisdiction and proper function. *State v. Abracadabra Bail Bonds*, 131 Idaho 113, 119, 952 P.2d 1249, 1255 (Ct. App. 1998). "[T]o impose a civil sanction, the court must find, by a preponderance of the evidence, that all of the elements of contempt have been proven and that the contemnor has the present ability to comply with the order violated, or with that portion of it required by the sanction."

I.R.C.P. 75(j)(1). Civil contempt is only appropriate where the order is both specific and definite. *Conley v. Whittlesey*, 126 Idaho 630, 636, 888 P.2d 804, 810 (Ct. App. 1995); *see also Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461 (9th Cir. 1989). If a sanction is issued, “the order must specify precisely what the contemnor must do in order to avoid that sanction or have it cease.” I.R.C.P. 75(l)(3).

Contempt is viewed by Idaho courts to be an extraordinary proceeding, to be exercised with great caution. *Weick*, 142 Idaho at 281, 127 P.3d at 184. The power is

readily susceptible of abuse and fraught with danger not only to personal liberties but to the respect and confidence which our courts must maintain. Although such a power is universally recognized as essential to an orderly and effective administration and execution of justice, it should be exercised with utmost caution.

Id. (quoting *People v. Bernard*, 394 N.E. 2d 819, 823-24 (Ill. App. 1979).)

Contempt cannot be used as a mere debt-collecting device. 17 Am. Jur. 2d Contempt § 124; *see also Nab v. Nab*, 114 Idaho 512, 517, 757 P.2d 1231, 1236 (Ct. App. 1988). In addition, the contempt power “is generally not available for the enforcement of contracts between parties and money judgments.” *Abracadabra*, 131 Idaho at 119, 952 P.2d at 1255; *see also Annest v. Conrad-Annest, Inc.*, 107 Idaho 468, 470, 690 P.2d 923, 925 (1984). Inability to comply is further a defense to contempt. *Weick*, 142 Idaho at 282, 127 P.3d at 185.

- a. There Was No Judgment Against the Keanes Ordering Them to Pay and Therefore There Can Be No Contempt.

The Keanes were found to be in contempt of the district court’s Order Confirming Arbitration Awards. (R., pp. 185; 194.) No judgment has been entered in conformity with the

order granting confirmation of the arbitration awards.⁴ Because payment of the arbitration awards can be enforced only through a judgment and because there was no judgment order such payment there can be no contempt. In other words, the Keanes were found to be in contempt for failing to pay part of an arbitration award which has been confirmed but for which no judgment exists. Because the Keanes can be in contempt only for failing to follow some valid directive to pay the arbitration award, and because the only valid directive to pay must be based on a judgment, and because there was no judgment, the Keanes could not be in contempt.

A judgment is a separate document entitled “judgment” or “decree” stating the relief to which a party is entitled. I.R.C.P., Rule 54(a). Entry of a judgment occurs upon the filing of a judgment by the court as provided in Rule 5(e) or the placing of the clerk’s filing stamp on the judgment. I.R.C.P., Rule 54(a). A judgment is not effective before such entry. *Id.* A judgment cannot include a recital of the pleadings or the court’s legal reasoning, findings of fact, or conclusions of law. I.R.C.P., Rule 54(a). A judgment can also be final if it has been certified as final pursuant to Rule 54(b)(1). *Id.*

There was no entry of a separate document entitled judgment prior to the contempt proceedings requiring the Keanes to pay the arbitration awards. The document upon which the district court based its Contempt Order is not a judgment. It is entitled “Order Confirming

⁴The only “judgment” entered in this action is the judgment entered upon the Contempt Order itself, which was entered only after the Keanes had been found in contempt. (R., p. 194.) Although this “judgment” purports to require payment of the arbitration award, the judgment was not entered until January 5, 2012, over two months after the Keanes were found in contempt on October 31, 2011. (R., pp. 193; 178.)

Arbitration Awards.” (R., p. 43.) Although the document purports to order a judgment, there is no separate document doing so. (R., p. 44.) Indeed, this document attaches two relatively lengthy exhibits. (R., pp. 46-68.) Consequently, there was no judgment against the Keanes for payment of the arbitration awards.

Upon the granting of an order confirming an arbitration award, a judgment shall be entered in conformity therewith and enforced as any other judgment. Idaho Code § 7-914. An arbitration award is not self-enforcing. *Bingham County Comm. v. Interstate Electric Co.*, 108 Idaho 181, 697 P.2d 1195, (Ct. App. 1985). Such an award requires the imprimatur of a court before it can be enforced. *Id.* An arbitration award only becomes enforceable when a court enters judgment on the award. *Id.* This is true of any money judgment. An award of money cannot be enforced until after the entry of judgment. I.R.C.P., Rule 62(a). There was, therefore, no enforceable document upon which to require the Keanes to pay any amount.

The process to enforce the payment of money is generally a writ of execution upon a final, appealable judgment or a Rule 54(b) partial judgment. I.R.C.P., Rule 69; Idaho Code § 11-104. However, only a party in whose favor judgment is given may have a writ of execution issued for its enforcement. Idaho Code § 11-101. Moreover, the form of the writ of execution must refer to the judgment. Idaho Code § 11-102. In addition, only monies or property of a judgment debtor are liable to execution. Idaho Code §§ 11-201; 11-301. The scope of the execution is then limited to so much of the proceeds “as will satisfy the judgment.” Idaho Code § 11-301 (emphasis added.) Any excess in proceeds over the judgment must be returned. *Id.*

Without a judgment, there was no valid, available process that could be used by the court to require the Keanes to pay the Arbitration Award.

Consequently, neither Arbitration Award No. 2 nor the Order Confirming Arbitration Awards can be enforced to require payment of a monetary award. Only after entry of judgment can the arbitration award be enforced against the Keanes. The district court could not, therefore, order payment of an arbitration award based on an Order Confirming Arbitration Awards. Because there was no enforceable document requiring the Keanes to pay the arbitration award, the district court had no contempt power to order such payment because the Keanes had not previously been ordered and then failed to pay. The district court therefore abused its discretion in finding the Keanes to be in contempt.

- b. The Civil Contempt Sanction Imposed Upon the Keanes was Improper Because the Keanes Had Not Failed to Do What They Had Previously Been Ordered to Do.

“A civil sanction can only be imposed if the contempt consists of failing to do what the contemnor had previously been ordered by the court to do.” I.R.C.P., Rule 75(a)(b). The Keanes were found to be in contempt for failing to pay Arbitration Award No. 2 in the amount of \$159,762.00 “in full and in compliance with the direction of the Arbitrator. . . .” (R., pp. 185-186.) The district court had never previously ordered the Keanes to pay that award. The court had only confirmed the award. The Keanes therefore did not fail to do that which the court had previously ordered them to do. Because a civil sanction can only be imposed for failing to comply with a court order, the district court abused its discretion in finding the Keanes in

contempt by failing to act within the outer boundaries of its discretion and by failing to rule consistent with the applicable legal standards.

Neither the district court nor the arbitrator had the power to require payment of the arbitration awards. An arbitrator's powers are limited to making an award of a sum of money. Idaho Code § 7-908. An arbitrator has no power to order or compel payment of the award. *See* Idaho Code § 7-909 (Arbitrator's powers limited to modifying or correcting an award based on limited grounds). Consequently, the arbitrator did not and could not order the Keanes to pay the arbitration awards. Here, the arbitrator merely made an award of \$159,762.00 (Award No. 2). (R., p. 23.)⁵

While a court has the power to confirm an arbitration award, it does not have the power to order payment without further proceedings. *See* Idaho Code § 7-911. Confirming an arbitration award in no manner constitutes a judgment to pay the arbitration award. This is evidenced by several factors. First, an order confirming an arbitration award is interlocutory; it cannot be executed upon or be used in any other manner to enforce payment of the award. Second, enforcement of the order confirming arbitration awards by statute requires another step – entering a judgment. This additional step was not taken. *See* Idaho Code § 7-914. Third, the Order Confirming Arbitration Awards at issue here does not order the Keanes to pay the arbitration awards. (R., pp. 43-45.) It merely confirms the arbitration awards. Although the Order does

⁵Even if the arbitrator had issued such an order to pay, contempt sanctions cannot be imposed for failing to obey that order because they can only be imposed if a party fails to obey a “court.” I.R.C.P., Rule 75(a)(6).

order a judgement and decree that BFU “have and recover from” the Keanes a money judgment, it is not itself a judgement or decree that the Keanes pay the money judgments and no such judgment was entered.

The district court could not issue an “order” to pay the arbitration awards. The court did not issue a judgment. Without such the Keanes were not previously ordered to pay Arbitration Award No. 2. With no previous, valid order to pay, there can be no civil sanctions imposed. The district court abused its discretion in granting the Contempt Order.

c. The Contempt Order Was Issued For Improper Purposes.

District courts have the judicial power of contempt to vindicate their jurisdiction and proper function. *State v. Abracadabra Bail Bonds*, 131 Idaho 113, 119, 952 P.2d 1249, 1255 (Ct. App. 1998). Issuing contempt orders for failing to pay an arbitration award does not fall within these judicial powers. A failure to pay does not threaten the district court’s jurisdiction. The proper function of a district court does not include debt collection (at least not through contempt proceedings). *See below*. The Contempt Order here is, in effect, a vindication of one party over another. The district court abused its discretion by using the Contempt Order that neither vindicated its jurisdiction nor enforced its proper function.

As a general rule, money judgments are not enforceable by contempt proceedings. 17 Am. Jur. 2d, § 124. “We are provided no authority permitting the court to require payment of a money judgment in the circumstances under penalty of contempt.” *Annest v. Annest*, 107 Idaho 468, 470, 690 P.2d 923, 925 (1984). “The circumstances” in *Annest* arose out of an appeal from certain orders of a district court “fixing an amount of judgment” and holding a party in contempt

for failure to satisfy the judgment. *Annest*, 107 Idaho at 468, 690 P.2d at 923. In *Annest*, this Court reversed the contempt order requiring payment of the judgment. *Id.* The contempt order here is one step further removed than the one in *Annest* -- the Order Confirming Arbitration Awards does not require payment of a judgment because there is no judgment. It simply confirms the arbitration award. The district court abused its discretion when it issued the Contempt Order to enforce a judgment that did not exist.

Nor are contempt powers generally available for enforcement of a contract between parties, especially when the contract is enforced through a money judgment. *Abracadabra*, 131 Idaho at 119, 952 P.2d at 1255. Contract remedies are the appropriate tools for enforcing a judgment. *Id.*⁶ Here, the arbitration award arises out of a breach of contract dispute. (R., p. 53.) The district court abused its discretion by using its contempt powers to enforce this contract. *See* 17 CJS Contempt, § 34 (“an interlocutory judgment in an action on contract calling for the payment of money, although not enforceable by execution until rendition of the final judgment, is not enforceable by contempt proceedings.”) This is especially true because there was no judgment upon which to enforce the contract amount.

Because contempt powers should be exercised with caution, they should not be exercised if there are other remedies available. Here, there were other available remedies to enforce payment of the arbitration awards. There are numerous rule and statutory based remedies available to obtain payment of monies owed. These include execution, attachment and

⁶Before pursuing any of the contract remedies, BFU must first obtain a judgment.

garnishment. Idaho Code § 11-101, *et seq.*; Idaho Code § 8-501, *et seq.*; and Idaho Code § 8-507, *et seq.* The district court abused its discretion when it issued a contempt order without first considering and then requiring BFU to exhaust all other reasonable collection remedies.⁷

The district court also abused its discretion in issuing a contempt order as a substitute for a judgment. BFU never sought a judgment on the arbitration awards after the awards were confirmed and before the Keanes were held in contempt. The district court never entered such a judgment. The district court aided BFU in its collection efforts by issuing a contempt order requiring the Keanes to pay a money judgment that did not exist. The district court abused its discretion in issuing a contempt order requiring payment of money without a judgment.

d. The Content of the Contempt Order and Judgment is Legally Deficient.

In order to impose a civil sanction, the district court must find, by a preponderance of the evidence, that the contemnor has the present ability to comply with the order violated. I.R.C.P., Rule 75(j)(1). The district court ruled that BFU proved by a preponderance of the evidence that the Keanes had the current ability to pay Arbitration Award No. 2. (R., p. 185.) The evidence upon which the district court made this finding of fact is described by the court as follows:

BF&U presented evidence through the testimony of Richard Keane showing Keane owns real property and other assets, including an airplane, airplane hangar, and motorhome, that have a combined value of nearly \$3,000,000.00 and that Keane has done little to liquidate some of his assets in order to meet his obligation toward Award #2.

⁷A prerequisite to any of these remedies is a judgment.

(R., p. 185.) All assets described were not liquid and would have to be sold (liquidated) before payment could be made. The district court did not identify, however, any evidence presented by BF&U of any liquid assets available to pay the arbitration award. Nor was there a showing, by preponderance of the evidence or at all, that there was an ability to sell any of those assets (i.e., a buyer in the wings). The evidence presented did not support the district court's finding that the Keanes had the present ability to comply.

The error was compounded by the fact that the award had to be paid in full within thirty (30) days of the signing of the Contempt Order. (R., p. 186.) Even if the debtor has the ability to pay the judgment, he is entitled to a reasonable time to pay and cannot be held in contempt until that time elapses. 17 Am. Jur. 2d Contempt at § 124. With no identified liquid assets there was no evidence to support the Keanes' then present ability to comply with the order to pay within thirty (30) days. The district court abused its discretion in issuing the contempt order based on its finding that the Keanes had the present ability to comply with the order to pay the award within thirty (30) days.

The district court also based its determination that the Keanes had a current ability to pay on its finding that the Keanes had done little to liquidate assets in order to meet the obligation to pay the arbitration award. This finding is not supported and ignores the law that there was no obligation to pay the arbitration award absent a judgment. If there was no legal obligation to pay there was no legal obligation to liquidate assets.⁸

⁸Even when a judgment is entered there is no affirmative obligation on the part of the judgment debtor to liquidate assets.

A civil sanction for contempt is one that is conditional. I.R.C.P., Rule 75(a). It is conditional in that the sanction can be avoided entirely or have it cease by doing what the contemnor had previously been ordered by the court to do. *Id.* The contempt order is deficient in that the civil sanction is neither a sanction nor conditional. The district court ordered Richard Keane to pay Arbitration Award No. 2 within thirty (30) days of signing the order. The court's sanction here is not conditional in that the Keanes cannot avoid the sanction entirely or have it cease by doing what had previously been ordered because the Keanes had not previously been ordered to pay the arbitration award.

Nor is the order to pay the arbitration award within thirty (30) days a "sanction." It is instead an assessment of Plaintiffs' damages already awarded by the arbitrator. Rather than assessing damages, a civil sanction should be in the form of a fine. *See Nordick v. Sorenson*, 81 Idaho 117, 338 P.2d 766, (1959). *See also* Idaho Code § 7-610. The district court abused its discretion by issuing a contempt order assessing damages rather than a fine, which is neither a sanction or conditional as required.

2. The District Court Erred in Striking the Keanes' Affirmative Defenses to the Contempt.

Idaho Rule of Civil Procedure 75(h)(1) provides that a written response asserting an affirmative defense to the contempt "must be filed within seven (7) days after entering a plea denying the contempt charged, unless otherwise ordered by the court." I.R.C.P. 75(h)(1). (Emphasis added.) I.R.C.P. 75(g)(2) provides that when the respondent "denies the charge of

contempt, the matter shall be set for a trial. The respondent must be given at least fourteen (14) days to prepare for trial, unless otherwise ordered by the court.” I.R.C.P. 75(g)(2).

The Keanes, through their counsel, denied the contempt charges at a hearing on May 26, 2011. (Tr., Vol. 1, p. 8, L. 1-3.) At that hearing, the following dialogue took place between counsel for the Keanes and the court:

Court: Mr. Richardson, what’s your client’s position relative to that contempt request?

Mr. Richardson: He denies it, your Honor. Pursuant to rule 75(g), I believe we now have 14 days to be able to prepare an answer, file the answer and then we will need to schedule it for trial.

Court: Yes, given that denial being entered it will be necessary to schedule this motion then for trial on the requested contempt. And, again, I’ll probably just set this matter for a scheduling conference with counsel so we can get that trial date set.

(Tr., Vol. 1, p. 8, L. 19–p. 9, L. 6.) (Emphasis added.) The Keanes filed their affirmative defenses in their Response to Motion for Contempt fourteen (14) days later, the court authorized deadline as they understood it following the Motion for Contempt hearing. (*See R.*, pp. 152–56.) The Keanes noted in their Response their understanding that the court had allowed them to file their responsive pleadings fourteen days after the May 26, 2011, hearing. (*R.*, p. 153.) In its Findings, Conclusions, and Order, the district court stated, however, that it is the responsibility of counsel to seek leave from the court for additional time; there was no request for an extension of time made by Keanes’ counsel; that Keanes’ counsel merely misstated the time limit in the rule; and then struck all of the Keanes’ affirmative defenses as untimely. (*R.*, pp. 181-182.)

The district court abused its discretion in striking all of the Keanes' affirmative defenses when it failed to recognize the timing of the relevant actions and events. It further abused its discretion in failing to make any findings on the reasonableness of the Keanes' counsel's reliance on the court's apparent authorization of an extension of time within which to file those defenses.

By the time the district court ruled that the affirmative defenses were untimely there was no opportunity to request an extension of time or to rectify any misunderstanding. Because the Keanes' counsel was working under a reasonable belief that he had already been authorized to file the affirmative defenses within fourteen (14) days there was no need to file a motion seeking the extension of time he thought he had already obtained. The court used the procedural technicality that was at issue without first determining whether it was reasonable for the Keanes' counsel to assume that the Keanes had fourteen (14) days to act (and not seven (7) as required by the rules). Using a technicality, the absence of which was reasonable, was an abuse of discretion.

Whether the district court intended to grant an extension or not it was reasonable for the Keanes' counsel to rely on what he thought was approval by the court of a fourteen (14) day period within which to file defenses in the Response. (Tr., Vol. 1, p. 8, L. 19-p. 9, L. 6.) Mr. Richardson stated his belief that he had fourteen (14) days, to which the court responded "Yes". *Id.* The Contempt Order should be overturned on the grounds that the Keanes were denied the ability to use any affirmative defenses against the Contempt Order.

3. The District Court Erred in Awarding BFU Attorney Fees as a Prevailing Party.

On January 8, 2012, the district court entered its Opinion and Order on Motion for Attorney Fees and Costs. (R., pp. 196-200.) The court determined that BFU was the prevailing party on its Motion for Contempt and awarded BFU \$5,000.00 in attorney fees. (*Id.* at p. 199.) If, as argued above, the district court abused its discretion in finding the Keanes in contempt then BFU would not be the prevailing party. If this Court vacates the judgment on contempt then the district court's award of attorney fees should also be overturned. In addition, the issue of whether the Keanes are the prevailing party and the amount of attorney fees to be awarded the Keanes should be remanded to the district court.

C. The Keanes Are Entitled to Attorney Fees on Appeal.

Should the Keanes prevail on appeal, they are entitled to attorney fees pursuant to I.C. § 12-120(3). The basis of BFU's claims against the Keanes is a commercial transaction. "The court must always award attorney fees to the prevailing party 'in commercial transactions.'" *Meyers v. Hansen*, 148 Idaho 283, 292, 221 P.3d 81, 90 (2009) (quoting I.C. § 12-120(3)).

IV. CONCLUSION

The Keanes respectfully request that this Court vacate the district court's judgment finding them in contempt of the district court's Order Confirming Arbitration Awards and reverse the award of attorney fees to BFU.

DATED this 23 day of July, 2012.

ELAM & BURKE, P.A.

By: 


Jeffrey A. Thomson, of the firm
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23 day of July, 2012, I caused a true and correct copy of the foregoing document to be served as follows:

David R. Risley
Risley Law Office, PLLC
P.O. Box 1247
Lewiston, ID 83501

U.S. Mail
 Hand Delivery
 Federal Express
 Facsimile


Jeffrey A. Thomson