8-20-2012

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

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 RESPONDENT'S BRIEF

RESPONDENT'S 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

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I. STATEMENT OF CASE

Appellants' Statement of the Case is largely accurate, but with one serious omission.

Appellants' Brief states that on November 30, 2009, the Respondent, Bald, Fat & Ugly, LLC ("BFU") filed a pleading ". . . requesting the court enter an order confirming the arbitration awards..." Appellants' Brief, p. 2. This is partially true, but incomplete.

The Application and Motion for Confirmation of Arbitration Award (R., pp. 12-36) did seek the entry of an order confirming the arbitration award. It also explicitly sought entry of a judgment:

> WHEREFORE, BFU respectfully prays, and does move the Court pursuant to Idaho Code § 7-916, as follows:
>
> 1. The Court enter an order confirming the Arbitration Awards pursuant to Idaho Code § 7-911.
>
> 2. After confirmation of the Arbitration Awards, judgment be entered in favor of BFU in the following amounts:
>
> a. As to Award No.1, the principal sum of TWO HUNDRED NINETY TWO THOUSAND NINE HUNDRED FORTY-ONE and 011100 DOLLARS ($292,941.01), plus interest at $66.57 per diem from October 1, 2009 until paid.
>
> b. As to Award No.2, the principal sum of ONE HUNDRED FIFTY NINE THOUSAND SEVEN HUNDRED SIXTY-TWO and 001100 DOLLARS ($159,762.00) under certain restrictions as set forth in the Arbitration Award, plus interest as allowed by law.

(R., p. 15.) (Emphasis added.)

This same request was reiterated in the Amended Application and Motion for Confirmation of Arbitration Award (R. pp. 37-41) filed on February 17, 2010.

Appellants, Richard and Lisa Keane, Keane and Co. Construction, Inc., and R&L Developments, LLC (collectively "Keane") and their then counsel, Manderson Miles, filed a Reply to the Application and Motion for Confirmation of Arbitration Award on March 16, 2010. (R. p. 2.) This reply was not identified as a document for the record before this Court. A hearing was held on March 18, 2010, and the trial court's Order Confirming Arbitration Awards (R. pp. 43-68) and judgment was entered on May 3, 2010. The trial court's order both confirmed the arbitration awards and entered money judgments as prayed for in BFU's applications (R., pp. 12-36 and R. pp. 37-41). The trial court held:

> IT IS HEREBY ORDERED, ADJUSTED AND DECREED AS FOLLOWS:
>
> 1. The Arbitration Awards dated November 18, 2009, a true copy of which is attached as Exhibit "A," and the Clarification Order of the Arbitrator dated January 20, 2010, a true copy of which is attached as Exhibit "B," is hereby confirmed pursuant to Idaho Code § 7-914.
>
> 2. Bald Fat and Ugly LLC, have and recover from Richard A. Keane and Lisa A. Keane, husband and wife; R&L Developments, LLC, an Idaho Limited Liability Company, and Keane and Co. Construction, Inc., an Idaho Corporation, jointly and severally, a money judgment in the sum of ONE HUNDRED FIFTY FOUR THREE HUNDRED FORTY -SIX and 49/100 DOLLARS ($154,346.49), plus interest at eight percent (8%) from December 22, 2009 until paid.
>
> 3. Bald Fat and Ugly LLC, have and recover from Richard A. Keane and Lisa A. Keane, husband and wife; R&L Developments, LLC, an Idaho Limited Liability Company, and Keane and Co. Construction, Inc., an Idaho Corporation, jointly and severally, a money judgment in the sum of ONE HUNDRED FIFTY NINE THOUSAND SEVEN HUNDRED SIXTY-TWO and 00/100 DOLLARS ($159,762.00) under certain restrictions as

set forth in the Arbitration Award, plus interest at eight percent (8 %) from November 18, 2009.

(R. p. 44.) (Emphasis added.)

II. ADDITIONAL ISSUES ON APPEAL

A. Whether Keane improperly raised the issue of the trial court's Order as an enforceable judgment for the first time on appeal.

B. Whether BFU is entitled to attorney's fees and costs on appeal per contract and/or Idaho Code § 12-120 or Idaho Code § 12-120 (3).

III. STANDARD

On appeal from a finding of contempt, this Court does not weigh the evidence, but rather reviews the trial court's factual findings to determine if they are supported by substantial and competent evidence. *Steiner v. Gilbert*, 144 Idaho 240, 243, 159 P.3d 877, 880 (2007). The determination of whether a sanction or penalty should be imposed is within the discretion of the trial court and is only reviewed for abuse of discretion. *Id.*

IV. ARGUMENT

A. Summary of Argument.

1. Keane was in Contempt of the Trial Court's Order and Judgment.

In 2005, Keane entered into a Mediated Settlement Agreement (R. pp. 59-65) obligating him to pay certain moneys to BFU and to perform certain work on a building contract dated in 2002.

Keane's failure to perform as promised under that Mediated Settlement Agreement (R. pp. 59-65) led to the arbitration before Lynden O. Rasmussen (R. pp. 53-57). Mr. Rasmussen's Arbitration Awards (R. pp. 18-23 and 67-68) obligated Keane to pay the money he agreed to pay in 2005 and also pay additional funds to finish the work he was bound to do. Keane failed to perform as agreed in 2005 by Mr. Rasmussen or as ordered by the trial court in 2009.

The trial court confirmed Mr. Rasmussen's Arbitration Awards in its Order Confirming Arbitration Awards (R. pp. 43-68) and, in separate paragraphs, awarded a money judgment against Keane for the purely monetary award and a judgment against him for funds to complete the repairs. (R. p. 44.)

Keane still refused to honor the Mediated Settlement Agreement (R. pp. 59-65); Mr. Rasmussen's Arbitration Awards (R. pp. 18-23 and 67-68), and the trial court's Order Confirming Arbitration Awards (R. pp. 43-68), leading to the contempt proceedings.

Keane is a very wealthy man and conceded he had the ability to pay as ordered by the trial court (TR., Trial on Contempt Motion of September 9, 2011, pp. 165-178).

Given that Keane had knowingly refused to abide by the trial court's Order Confirming Arbitration Awards (R. pp. 43-68), when he clearly had the ability to pay, the trial court found Keane in contempt and gave him additional time to pay the arbitration awards (R. pp. 178-187).

B. Trial Court Did Enter Money Judgments Against Keane.

As discussed below, BFU believes this is an unnecessary issue – a so-called red herring, because any order may be the subject of a finding of contempt. However, for full treatment of the issues on appeal, BFU offers the following analysis.

Under analyses of this Court, the Order Confirming Arbitration Awards (R. pp. 43-68) may indeed be a "judgment." Recently, this Court sought to clarify its definition of what constitutes a judgment, at least in general terms, making it clear that formalities of form and style were not determinative. The Court said:

> As a general rule, a final judgment is an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties. It must be a separate document that on its face states the relief granted or denied. Although it would be better practice to entitle the document 'Judgment' in order to avoid any confusion, the title is not determinative. Whether an instrument is an appealable order or judgment must be determined by its content and substance, and not by its title.

Spokane Structures, Inc. v. Equitable Inv., LLC, 148 Idaho 616, 620, 226 P.3d 1263, 1267 (2010) (Emphasis added). Although the Court referred to generalized formalities as to language and exclusion of reasoning in judgments, it expressly provided that technical formatting does not control, and the Court did not reverse or mention its 2009 decision in an arbitration judgment case, *Storey Const. Inc. v. Hanks*, 148 Idaho 401, 409, 224 P.3d 468, 476 (2009) (as opposed to other cases it expressly mentioned and disavowed or criticized).

In *Storey Construction*, this Court confirmed that the title or specific formatting of an arbitration confirmation order does not control the "judgment" analysis. The Court appeared

satisfied that the trial court's Order Affirming Arbitration Award was a judgment, because it resolved the substance of the matter, and, in part, because the order was prefaced with "the Court does now ORDER, ADJUDGE and DECREE as follows," before going on to adopt and affirm the arbitration award. *Storey Const. Inc. v. Hanks*, 148 Idaho 401, 409, 224 P.3d 468, 476 (2009). The Court noted that "[t]he wording 'order, adjudge, and decree' is typically used in judgments, and then went on to analyze the matter under the assumption that the order confirming the arbitration award was therefore a "judgment." *Id.* at 410, 477.

In this case, the trial court's Order Confirming Arbitration Awards (R. pp. 43-68) resolved the core matter at issue and was prefaced with "IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS." (R. p. 44.) Even though the designation of "judgment" is not necessary for contempt purposes, this was, in reality, a judgment; particularly given where the word "judgment" can be found in the trial court's grant of the requested relief. (R. p. 44.)

C. Contempt May Be Found for Violation of Any Order or Process of the Court, Even If There was No Judgment.

1. The Contempt Power of the Court is Broad and Encompasses Any Judgment, Order or Process of the Court.

Idaho Code § 7-601, in recognizing the existing contempt power of the court, specifically recognizes that "[t]he following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: . . . . Disobedience of any lawful judgment, order or process of the court." *Id.* (Emphasis

added.) As the statute clearly recognizes, failure to comply with an order or process of the court constitutes contempt, wholly independent of whether there is a "judgment," which is listed in the disjunctive with order and process. The trial court's Order Confirming Arbitration Awards (R., pp. 43-68) was clearly an "order," and the entire mechanism for infusing an arbitration award with judicial authority is clearly a "process," both of which require compliance by the parties.

The scope and purpose of the contempt power is discussed in *In re Contempt of Reeves*, 112 Idaho 574, 579, 733 P.2d 795, 800 (Ct. App. 1987). The Court of Appeals stated:

> Contempt orders frequently result from the refusal of the contemnor to obey the express order of a court. As we have explained, the contemnor may challenge the procedure by which the contempt is adjudicated. He may argue that there is no substantial evidence to support the finding that he knowingly violated a court order. He may even challenge the penalties imposed. However, he may not knowingly ignore an order of the court, even though he believes it to be incorrect, and then contest the validity of the underlying order on appeal from a finding of criminal contempt. *See Barnett v. Reed, supra; Mathison v. Felton, supra.* This rule is based upon sound foundations of public policy. A trial court may make numerous rulings and issue a substantial number of orders during the course of a lawsuit. If a party were free to disobey any order with which he or she disagreed, the entire judicial process would break down. As the United States Supreme Court explained in *Maness v. Meyers,* 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975):
>
> > We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an

> order believes that order is incorrect the remedy is to appeal, but absent a stay, to comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.... Such orders must be complied with promptly and completely, for the alternative would be to frustrate and disrupt the progress of the trial with issues collateral to the central questions in litigation. This does not mean, of course, that every ruling by a presiding judge must be accepted in silence. Counsel may object to a ruling. An objection alerts opposing counsel and the court to an issue so that the former may respond and the latter may be fully advised before ruling. [Citations omitted.] But, once the court has ruled, counsel and others involved in the action must abide by the ruling and comply with the court's orders.... Remedies for judicial error may be cumbersome but the injury flowing from an error generally is not irreparable, and orderly processes are imperative to the operation of the adversary system of justice.

Id. (Footnote omitted.)

Of critical importance is the fact that Idaho Code § 7-919 expressly makes "[a]n order confirming or denying confirmation of an award" an appealable order. *Id.* (Emphasis added.) No more is needed to confirm that an order confirming an arbitration award has all the finality and judicial authority needed to bring to bear the trial court's broad contempt power. Therefore, however styled, the Order Confirming Arbitration Awards (R. pp. 43-68) had the exact same effect as a document styled as a "judgment" would have, for the purposes of contempt.

Additionally, as referenced above, the court's inherent contempt power is merely recognized by, and not restricted to, even the broad language of Idaho Code § 7-601, making it even more clear the contempt power exists without a "judgment." The Court's broad inherent contempt power is clearly not limited by Idaho Code § 7-601, or any other statutory authority, because, "[w]hile this power has been recognized by statute, . . . its source lies in the Constitution, ID. Const. art. 5, § 2, and the common law." *Marks v. Vehlow*, 105 Idaho 560, 566, 671 P.2d 473, 479 (1983); *see also, Watson v. Weick (In re Weick)*, 142 Idaho 275, 278, 127 P.3d 178, 181 (2005) . Therefore, no tortured construct Keane poses regarding Idaho's writ and collection statutes, or any other statute or rule, can alter the court's inherent authority to coerce compliance with its directives, however those directives are styled.

Keane's argument, taken to its logical extension, posits that a party has no duty to act pursuant to court order or process until a document styled as a "judgment" has been entered. If that were true, then no person would be required to comply with a court's temporary restraining order or other rule, process, or order of the court. A party would need not comply with a court's in-court, verbal order to disclose evidence, cease disruptive or abusive conduct, or take or refrain from other action. For example, a court could not impose incarceration on a witness refusing in open court to testify without lawful privilege. After all, such verbal orders could never be styled as "judgments," because they are not in written form at all.

This notion is directly contrary to the notion of the court's inherent powers and Idaho precedent. For example, the Idaho Court of Appeals, in *Conley v. Whittlesey*, 126 Idaho 630, 888 P.2d 804 (Ct. App. 1995), upheld the trial court's finding of contempt where a party failed to comply with the court's interlocutory order to execute a settlement agreement consistent with the settlement the parties had orally articulated on the record. *Id.* Even though the underlying order to execute the agreement was clearly not a judgment, even though the trial court had ruled it was a non-appealable interlocutory order, and even though the Court of Appeals ultimately held the order to execute the agreement was inappropriate, the Court of Appeals nonetheless upheld the finding of contempt and confirmed that a party must comply with orders ultimately found to be improper. *Id.* at 633, 637, 888 P.2d at 807, 811. If a party were free to disobey any order with which he or she disagreed, the entire judicial process would break down. *Id.*

Similarly, the Court of Appeals upheld a finding of contempt based on failure to comply with a temporary restraining order, which was clearly not stylized as a judgment, in *In re Contempt of Reeves*, 112 Idaho 574, 579-80, 733 P.2d 795, 800-01 (Ct. App. 1987). The court, with extended quotation from the United States Supreme Court, made it clear why a party is not free to disregard a court's directives with which the party disagrees, even when the party believes the order is unlawful, or by extension when the party seeks to hide behind a form-over-substance argument about proper styling of the court's order. A party may not do so, because the very foundations of our system of

justice depend on parties respecting the judicial power and all directives, processes, or orders. *Id.*

Finally, Keane's argument regarding the existence of a "judgment" for collection of what Keane would have the court believe is a bare debt, is disingenuous and belied by Keane's own actions. As both parties agree, there were two separate awards contained in Mr. Rasmussen's Arbitration Awards (R. pp. 18-23 and 67-68) – the first was a pure cash award/debt, and the second was a specific directive to pay funds to the Risley Law Office trust account to ensure funding of proper work to be completed by others in a ongoing fashion, with the arbitrator specifically declining to allow Keane to complete the work. (R. pp. 22-23.) Keane now wants to ignore the second award directive and simply argue that what he really owed was a simple money judgment under the first award. Yet, Keane himself testified that he had made large cash payments nearly retiring the first award, and that he had declined to attempt to direct that those payments be applied to anything other than the first award. (TR., Trial on Contempt Motion of September 9, 2011, pp. 163 L.7 – 164 L.5.) If this Court were to accept Keane's "judgment" argument, it would essentially resurrect the bulk of the first arbitration award and make it the core of the case, rather than the second award, which was really the issue driving the contempt finding (R. pp. 178-187).

In partial summary, failure to obey any order or process of the court may be grounds for contempt, regardless of whether a "judgment" has been entered.

D. Keane Was in Contempt Based on Substantial and Competent Evidence Before the Court.

This Court does not weigh the evidence of contempt, but rather reviews the trial court's findings to determine if they are supported by substantial and competent evidence. *Steiner v. Gilbert*, 144 Idaho 240, 243, 159 P.3d 877, 880 (2007).

In this case, a finding of contempt required a finding that Keane: 1) committed "[d]isobedience of any lawful judgment, order or process of the court," Idaho Code § 7-601(5); 2) with knowledge of the order, *Steiner v. Gilbert*, 144 Idaho 240, 243, 159 P.3d 877, 880 (2007); and 3) had the present ability to comply with the violated portion of the order required by the sanction, Idaho Rules of Civil Procedure 75(j).

1. Disobedience of the Order Confirming Arbitration Awards.

The Order Confirming Arbitration Awards (R., pp. 43-68) was entered April 30, 2010. A full sixteen months later, at the time of the contempt trial, Keane had failed to undertake serious efforts to liquidate his sizeable assets and make the required payments to the Risley Law Office trust account, seeking instead to attempt to circumvent the Order Confirming Arbitration Awards (R., pp. 43-68) by performing the work himself.

The trial court found that Keane has millions of dollars in equity in assets, many of which he has done little or nothing to sell to satisfy his obligation to pay money into the Risley Law Office trust account. (R., p. 185.) This finding is also well supported by Keane's own testimony. (TR., Trial on Contempt Motion of September 9, 2011, pp. 154. LL. 19 and 166-174.)

Similarly, the evidence supports the trial court's finding of contempt (R. pp. 178-187) and exercise of discretion in ordering compliance with the original order because, by Keane's own testimony (TR., Trial on Contempt Motion of September 9, 2011, pp. 176), he would undertake more urgent efforts to sell property and pay the trust amounts within 30 days if ultimately ordered to do so by the trial court as a result of the September 9, 2011 trial. Essentially, by Keane's own admissions, he had failed to take the directive of the Order Confirming Arbitration Awards (R., pp. 43-68) seriously, and an order of contempt was necessary to prompt him to comply.

In his argument about whether a "judgment" was entered, Keane laments the great detail contained in the Order Confirming Arbitration Awards (R., pp. 43-68); however, it is this very presence of detail and clear personal directive to pay funds to the Risley Law Office trust account that made the Order Confirming Arbitration Awards (R., pp. 43-68) so very directive and which makes the contempt so very clear (R. pp. 178-187). The Order Confirming Arbitration Awards (R., pp. 43-68), which incorporates Rasmussen's Arbitration Awards (R. pp. 18-23), as well as his clarification letter (R. pp. 67-68), and other documents, makes it clear that the relief granted to BFU was a process, rather than a raw dollar amount per se – the process would ensure proper funds were in the Risley Law Office trust account to pay for PROPER repairs by someone other than Keane; allow for prompt payment to avoid mechanics/materialman's liens; prevent BFU from incurring contract liability to third parties, and then allow for reimbursement to Keane in the event the work was less expensive than anticipated. This was a clear personal directive that

was much more complicated and different in nature than an in-rem judgment for money. Keane clearly failed to comply with the Order Confirming Arbitration Awards (R., pp. 43-68).

2. Knowledge of the Order Confirming Arbitration Awards.

Keane acknowledged that he attended the arbitration and was aware that it resulted in two separate awards against him. (TR., Trial on Contempt Motion of September 9, 2011, p. 125, LL. 4-12.) Keane similarly had actual knowledge of the arbitrator's January 20, 2010 Clarification Order. (TR., Trial on Contempt Motion of September 9, 2011, pp. 152-54.) Finally, both the arbitrator's awards (R. pp. 18-23) and clarification letter (R. pp. 67-68) were incorporated by reference in the Order Confirming Arbitration Awards (R., pp. 43-68).

3. Present Ability to Comply with Portions of the Order Directed.

The third element requires that the "contemnor has the present ability to comply with the order violated, or with that portion of it required by the sanction." Idaho Rules of Civil Procedure 75(j) (Emphasis added). The trial court's Findings of Fact on the Trial for Contempt (R. p. 178-187) directed Keane to comply with the original Order Confirming Arbitration Awards (R., pp. 43-68) within 30 days. The trial court's finding that Keane had present ability to comply is supported by substantial and competent evidence. The same facts that bear on the disobedience factor, bear on the ability to comply. Keane simply had not complied with the original Order Confirming Arbitration Awards (R., pp. 43-68) and had not undertaken good faith efforts to comply with it. The

sanction ordered Keane to undertake those efforts and comply. Keane admitted he could comply if he wanted to badly enough. (TR., Trial on Contempt Motion of September 9, 2011, pp 166-74.) In fact, he conceded he could take action if he were ordered to do so by the trial court as a result of the contempt proceedings. (TR., Trial on Contempt Motion of September 9, 2011, p. 176.) He simply offered no explanation as to why he had failed to list or sell the property at a low enough price to ensure prompt sale. (TR., Trial on Contempt Motion of September 9, 2011, p. 140, LL. 1-16.)

The trial court ordered payment and found payment could have been presently made but was willfully avoided. The court, being the trial court and finder of fact, was in the unique position to assess witnesses and evidence and concluded that contempt had been committed and that sanctions were appropriate. Substantial evidence supports the trial court's findings in light of its unique position to assess the disobedient behavior and/or demeanor of the witnesses and Keane. This Court does not weigh the evidence, but rather reviews the trial court's findings to determine if they are supported by substantial and competent evidence. *Steiner v. Gilbert*, 144 Idaho 240, 243, 159 P.3d 877, 880 (2007). This Court should affirm.

E. Matter and Type of Coercion/Sanction.

The determination of sanctions is committed to the discretion of the trial court. *Steiner v. Gilbert*, 144 Idaho 240, 243, 159 P.3d 877, 880 (2007). In light of the evidence discussed above, the court ordered Keane to comply with the original Order Confirming Arbitration Awards (R., pp. 43-68) within 30 days. As this Court has held, Idaho Code § 7–611 "does not preclude

alternative civil sanctions" and does not circumscribe the trial court's inherent power "to compel obedience to its judgments, orders and process." *Steiner v. Gilbert*, 144 Idaho 240, 247, 159 P.3d 877, 884 (2007). This type of sanction is well within the Court's power.

At this point, Keane offers up another red herring, arguing that the Court's sanction is somehow not "civil" because it is not a conditional sanction of additional penalties if compliance with the original order is not forthcoming. Keane apparently argues the sanction was not bad enough to be civil. Idaho Rules of Civil Procedure 75 civil/criminal sanction distinction simply distinguishes between punitive and rehabilitative sanctions, rather than seeking to limit the way in which a court may fashion a rehabilitative, conditional sanction. In a criminal contempt, the contempt cannot be purged and the sanction cannot be avoided simply by compliance. In this case, the contempt can be purged and additional sanctions avoided by compliance – it just so happens that the "sanction" is the very same thing as the underlying responsibility Keane had under the Order Confirming Arbitration Awards (R., pp. 43-68). This is completely permissible.

In *Steiner*, this Court specifically upheld such a sanction, saying "[i]n this case, the district court simply ordered the parties to continue abiding by the terms of the Stipulated Judgment—terms to which they were already bound. This clearly falls within the judge's authority to compel obedience, and therefore, the order is upheld." *Steiner v. Gilbert*, 144 Idaho 240, 247, 159 P.3d 877, 884 (2007). Similarly, the trial court in this case ordered Keane to do what he had been ordered to do 16 months earlier, and to do so within 30 days.

Keane admitted he could comply if he wanted to badly enough. (TR., Trial on Contempt Motion of September 9, 2011, pp 166-74.). He simply offered no explanation as to why he had

failed to list or sell the property at a low enough price to ensure prompt sale. (TR., Trial on Contempt Motion of September 9, 2011, p. 140, LL. 1-16.)

In light of these circumstances, the trial court properly exercised its discretion and should be upheld.

F. The Order Striking Keane's Affirmative Defenses Was Appropriate.

The decision to strike untimely filings rests within the trial court's discretion and will not be overturned absent abuse of that discretion. *E.g.*, *Arregui v. Gallegos-Main*, 38496, 2012 WL 1557284 (Idaho May 4, 2012) (late filing of an affidavit in opposition to summary judgment motion; not yet released for inclusion in permanent law reports). Here, the trial court did not abuse its discretion. As the black and white transcript of the May 26, 2011, hearing shows, and as the trial court found in light if its superior position borne of having been present to understand not only the text but the context of that hearing, the trial court neither granted an extension of time to file a response or mislead Keane regarding the timeline for filing. Ultimately, it is a party's duty to know the timelines for filing responsive documents, and absent an exercise of the court's discretion to allow a late filing, the party is bound to the timelines set forth in the rules.

Notably, this Court has dismissed an appeal, and declined to hear an appellant's case for failure to timely file a motion for new trial and notice of appeal, even though part of the reason was error on the part of the clerk of the court. Respondents contend that the appellants' motion for a new trial and their notice of appeal were filed too late and that this appeal should be dismissed accordingly. *Swayne v. Otto*, 99 Idaho 271, 272, 580 P.2d 1296, 1297 (1978).

Even if the trial court abused its discretion, it was harmless error. During the trial on contempt and via Appellants' briefing in this appeal, Keane has essentially sought to put much of the substance of its proposed late response at issue. The trial court found those arguments unpersuasive, and as can be seen from the analysis above, they are largely irrelevant. Therefore, the contempt order (R. pp. 178-187) would have issued and should be sustained on appeal, even considering those arguments. Any error in striking the tardy response was harmless, and this Court should affirm.

V. ADDITIONAL ISSUES ON APPEAL

A. Keane has improperly raised the issue of the trial court's Order as an enforceable judgment for the first time on appeal.

Keane's trial counsel raised written defenses in his Response to Motion for Contempt (R. p. 152-156) that essentially raised three issues: (1) the inability to comply; (2) standing, and (3) that the work to be paid for had already been done by Keane. (R. p. 153.)

During a full day of trial, no suggestion was made that the Order Confirming Arbitration Awards (R., pp. 43-68) sought to be enforced by contempt was not a judgment or was otherwise not an enforceable order.

This Court has noted it will not hear an issue for the first time on appeal, saying: "[T]o properly raise an issue on appeal . . . the issue must have been raised in the court below . . . ." *Garner v. Bartschi*, 139 Idaho 430, 436, 80 P.3d 1031, 1037 (2003) (*citing McPheters v. Maile*, 138 Idaho 391, 397, 64 P.3d 317, 323 (2003). Here, Keane did not raise an argument before the

trial court on whether the Order Confirming Arbitration Awards was enforceable as a judgment. This Court should, therefore, not consider Keane's new argument on appeal.

B. Attorney's Fees and Costs on Appeal.

While the discretionary Uniform Arbitration Act attorney fee provision (Idaho Code § 7-914) controls in the trial court proceedings for confirmation of an arbitration award, it appears the more mandatory provision of Idaho Code § 12-120 (3) applies in all related trial matters not directly involving confirmation of an award, as well as an appeal such as this one. *See, Grease Spot, Inc. v. Harnes*, 148 Idaho 582, 587-88, 226 P.3d 524, 529-30 (2010).

The Court should determine BFU to be the prevailing party in this appeal and should award attorney fees pursuant to Idaho Code § 12-120(3) as well as costs pursuant to Idaho Appellate Rule 40.

VI. CONCLUSION

Keane has delayed performance of his 2002 contract for a decade. He has refused to perform after having reached a mediated settlement agreement; he refused to perform after the arbitrator ordered him to; and he continued to refuse after the trial court confirmed the arbitrator's awards and ordered, adjudged and decreed that he do so, all while declaring himself to be a wealthy man and well able to perform as promised.

His excuse for not paying now is an improper form of the trial court's Order Confirming Arbitration Awards, not its substance.

The trial court judge had competent evidence before him of Keane's willful and knowing disobedience of the Court's Order Confirming Arbitration Awards and properly found him in contempt.

BFU respectfully requests that this Court affirm the trial court's holding, and award BFU its attorney's fees and costs on appeal.

DATED this 17th day of August, 2012.

RISLEY LAW OFFICE, PLLC
Attorney for Respondent

By: _____
DAVID R. RISLEY
ISB #1789

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of August, 2012, I caused a true and correct copy of the foregoing document to be served as follows:

Jeffrey A. Thomson Elam & Burke, P.A. 251 E. Front Street, Suite 300 P.O. Box 1539 Boise, Idaho 83701	_____ _____ X X	U.S. Mail Hand Delivery Federal Express Facsimile (208) 384-5844

_____
DAVID R. RISLEY