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Bryan Trucking, Inc. v. Gier Appellant's Brief Dckt. 43461

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In the Supreme Court of the State of Idaho

BRYAN TRUCKING, INC.,

Plaintiff-Appellant,

v.

NEIL RING, individually, and TERRY
GIER, individually, AND NEIL RING
TRUCKING, INC.,

Defendant-Respondent.

) Supreme Court Docket No. 43461
) Twin Falls County Case No. CV-DR-2014-3201
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Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the
County of Twin Falls

HONORABLE RANDY J. STOKER, District Judge presiding

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In the Supreme Court of the State of Idaho

BRYAN TRUCKING, INC.,)	APPELLANT'S OPENING BRIEF
)	
Plaintiff-Appellant,)	Supreme Court Docket No. 43461
)	Twin Falls County Case No. CV-DR-2014-3201
v.)	
)	
NEIL RING, individually, and TERRY)	
GIER, individually, AND NEIL RING)	
TRUCKING, INC.,)	
)	
Defendant-Respondent.)	

The above-named Plaintiff/Appellant, Bryan Trucking, Inc., by and through its counsel of record, Ron R. Shepherd of the law firm of R. Shepherd Law, PLLC, submits the following Opening Brief.

I. STATEMENT OF THE CASE

A. Nature of the Case

This is a fraud case. Appellant, Bryan Trucking, Inc. ("Bryan Trucking"), brought a lawsuit against Respondent, Terry Gier ("Gier"), for fraud based upon statements and representations Gier made to Bryan Trucking that induced Bryan Trucking to purchase a truck

from a third party. The fraud claim, which was the only claim brought against Gier, was dismissed pursuant to a stipulation of the parties. Gier was subsequently awarded costs and attorney's fees. By this appeal, Bryan Trucking seeks review of the District Court's award of attorney's fees made pursuant to Idaho Code § 12-120(3).

B. Course of Proceedings

In August 2014, Bryan Trucking filed a complaint in district court against Niel Ring ("Ring") and Gier. R. pp. 13-18. The complaint alleged four counts: Count I (Fraud) against Ring and Gier; Count II (Breach of Contract) against Ring only; Count III (Breach of Covenant of Good Faith and Fair Dealing) against Ring only; and Count IV (Unjust Enrichment) against Ring only. R. pp. 15-18. Gier filed an answer to the complaint in September 2014. R. pp. 23-27. In such answer, Gier acknowledges his understanding that Counts II through IV of the complaint do not apply to him. R. p. 24 at ¶ 5. Gier also affirmatively alleges that "there was no privity between Plaintiff and Defendant Gier". R. pp. 25-26 at ¶ 10. On November 12, 2014, Bryan Trucking filed its First Amended Complaint and Demand for Jury Trial. R. pp. 28-35. This amendment added Defendant Niel Ring Trucking, Inc. ("Ring Trucking"). It made no changes to the allegations of the original complaint as it relates to Gier.

Bryan Trucking's case against Gier was based upon statements Gier made to Bryan Trucking regarding a truck that was for sale by Ring Trucking. R. pp. 29-32 at ¶¶ 7-24. Bryan Trucking never alleged or sought recovery for any agreement, arrangement or other

transaction between Bryan Trucking and Gier. There was no transaction between Bryan Trucking and Gier as it relates to any allegations in this case.¹

On April 21, the case against Gier was dismissed by stipulation entered between Gier and Bryan Trucking. R. pp. 42-43. The claims against Ring and Ring Trucking had previously been dismissed by stipulation of Bryan Trucking, Ring and Ring Trucking.

On May 5, 2015, Gier filed a Memorandum of Costs, Disbursements and Attorney Fees, together with supporting documents. R. pp. 44-178. On the same date, the Memorandum of Costs and supporting documents were emailed to Bryan Trucking's counsel, albeit after 5 p.m. R. pp. 73, 182-183. Gier did not make or attempt any other method of delivery of the Memorandum of Costs and supporting documents on or before May 5.

On May 19, 2015, Bryan Trucking timely filed and served a Motion to Disallow Memorandum of Costs and Attorney fees, together with a supporting memorandum. R. pp. 194-195.

On June 29, 2015, a hearing was held on Bryan Trucking's Motion to Disallow Costs and Attorney Fees, among other things. At the hearing, the Honorable Judge Randy J. Stoker presided. The district court found that Gier's memorandum of costs was timely filed but that "[i]t was not served timely within fourteen days." Tr. p. 34, ll. 12-13. The district held that although Idaho Rule of Civil Procedure 54(d)(5) requires a memorandum of costs to be *filed* with fourteen days from entry of judgment, it does not require that a memorandum of costs be *served* within fourteen days. Tr. p. 34, ll. 3-15.

¹ Gier Jammers had provided diesel mechanic services to Bryan Trucking on other of Bryan Trucking's trucks in the past, but none of those transactions were at issue in this case.

The district court further held this case involves a commercial transaction within the purview of Idaho Code § 12-120(3). Tr. p. 35, L. 14. The district court reasoned as follows:

[C]learly this is not a household sale of property. We're talking about a commercial truck. We're talking about a tort claim related to that truck. I think even the plaintiff, frankly, thought that this was a commercial transaction because I went back and read the complaint in this case, the fee claim that was made was based on 120(3) and 121. Now, I understand [Bryan Trucking's counsel's] argument, you know, well, that's related to Mr. Ring, but not Mr. Gier, but the complaint really doesn't say that. Be that as it may, I just find that this is a commercial transaction

Tr. pp. 35, ll. 19-25 – 36, ll. 1-3.

On July 1, 2015, the district court entered an order and separate Amended Judgment in which Gier was awarded costs in the amount of \$1,647.66 and attorney fees in the amount of \$24,849.00. R. pp. 205-208.

On August 7, 2015, Bryan Trucking filed a timely notice of appeal. R. pp. 209-212.

II. ISSUES PRESENTED

1. Did the District Court err when it held that Gier's failure to timely serve his memorandum of costs did not constitute a waiver of the right to costs and fees under Idaho Rule of Civil Procedure 54(d) and Idaho Rule of Civil Procedure 54(e)?

2. Did the District Court err when it found that this case involved a commercial transaction under Idaho Code § 12-120(3) where there was no transaction of any sort between Bryan Trucking and Gier?

Bryan Trucking is claiming attorney's fees on appeal, pursuant to Idaho Code § 12-121 and Idaho Appellate Rule 41.

III. STANDARD OF REVIEW

The interpretation of the Idaho Rules of Civil Procedure is a matter of law over which this Court exercises free review. *Printcraft Press, Inc. v. Sunnyside Park Utils., Inc.*, 153 Idaho 440, 448, 283 P.3d 757, 765 (2012).

Whether the district court has correctly determined that a case is based on a commercial transaction for the purpose of Idaho Code § 12-120(3) is a question of law over which this Court exercises free review. *Idaho Transp. Dep't v. Ascorp, Inc.*, 357 P.3d 863 (Idaho 2015) (internal citations omitted).

IV. ARGUMENT

1. **Gier Waived Any Right To Costs And Attorney Fees By Failing To Timely Serve Bryan Trucking With A Memorandum Of Costs And Affidavit Of Attorney Fees.**

I.R.C.P. 54(d)(5) reads, in pertinent part:

At any time after the verdict of a jury or a decision of the court, any party who claims costs may file and serve on adverse parties a memorandum of cost, itemizing each claimed expense, but such memorandum of costs may not be filed later than fourteen (14) days after entry of judgment Failure to file such memorandum of costs within the period prescribed by this rule shall be a waiver of the right of costs.

Idaho Rule of Civil Procedure 54(e)(5) provides by reference that the same timeline and process applies to a request for attorney fees.

This Court has made clear that failure to both file and serve a memorandum of costs constitutes a waiver of the right to fees and cost. *Williams v. Haven*, 92 Idaho 439, 446-47, 444 P.2d 132, 139-40 (1968) (“A failure to both serve and file the itemized memorandum of costs within the time prescribed by the statute is fatal, and costs cannot be allowed where the statute is

not complied with.” (citing *Steensland v. Hess*, 25 Idaho 181, 186 136 P. 1124, 1125 (1913); *Schmelzel v. Board of County Comm’rs*, 16 Idaho 32, 100 P. 106 (1909); *Stickney v. Derry*, 7 Idaho 303, 62 P. 924 (1900); *Riddell v. Harrell*, 71 Cal. 254, 12 P. 67 (1886); *Miller v. Shute*, 55 Or. 603, 107 P. 467 (1910). “The fact that the adverse party has notice that a cost bill has been filed does not constitute service any more than notice that a complaint has been filed would constitute service in an action.” *Steensland*, 25 Idaho at 186, 136 P. at 1125 (1913).

Although, the cases cited above predate I.R.C.P. 54(d)(5) and I.R.C.P. 54(e)(5), there is no indication the adoption of these rules were intended to overrule the clear statement of the law in *Williams*, *Steensland*, and other cases cited. To be sure, although not crystal clear, it is possible that I.R.C.P. 54(d)(5) and I.R.C.P. 54(e)(5) were adopted to confirm these Supreme Court holdings.

In the present case, the Court entered a judgment on April 21, 2015, dismissing Plaintiff’s case with prejudice. Fourteen days thereafter, on May 5, 2015, Defendant filed a Memorandum of Costs, Disbursements and Attorneys [sic] Fees (“Memorandum of Costs”). Defendant did not timely serve Plaintiff with such Memorandum of Costs, however, as the District Court correctly found. Tr. p. 34, ll. 12-13. Such finding has not been challenged on appeal.

Gier’s failure to timely serve his Memorandum of Costs is fatal to his request for costs and attorney fees. The district court’s order awards Gier his costs and attorney fees, and the corresponding judgment should therefore be reversed.

2. **Bryan Trucking's Claim Against Gier For Fraud Was Not Based Upon A Commercial Transaction.**

Idaho Code § 12-120(3) provides for an award of attorney fees to the prevailing party in a case based on a commercial transaction. The term “commercial transaction” means “all transactions, except transactions for personal or household purposes”. *Id.* This Court has made it clear that “the award of attorney’s fees [under Idaho Code § 12-120(3)] is not warranted every time a commercial transaction is remotely connected with the case. Rather, the test is whether the commercial transaction comprises the gravamen of the lawsuit.” *Brower v. E.I. DuPont de Nemours & Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990).

The so-called “gravamen of the lawsuit” test has developed into a two-pronged test, both of which must be present before Idaho Code § 12-120(3) applies. First, a commercial transaction must be integral to the claims of the parties. *See Sims v. Jacobson*, 342 P.3d 907, 912 (Idaho 2015) (citing *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001)); *See also, Sowards v. Rathbun*, 134 Idaho 702, 708, 8 P.3d 1245, 1250 (2000) (citing *Brower v. E.I. DuPont De Nemours & Co.*, 117 Idaho at 784, 792 P.2d at 349 (1990)). Second, the commercial transaction must constitute the basis of the party’s theory of recovery on that claim. *See id.*

“[O]nly the parties to the commercial transaction are entitled to attorney’s fees under Idaho Code § 12-120(3)”. *Printcraft Press*, 153 Idaho at 461, 283 P.3d at 778 (citing *BECO Constr. Co. v. J-U-B Eng’rs, Inc.*, 145 Idaho 719, 726, 184 P.3d 844, 851 (2008); *Soignier v.*

Fletcher, 151 Idaho 322, 327, 256 P.3d 730, 735 (2011); *Harris, Inc. v. Foxhollow Constr. & Trucking, Inc.*, 151 Idaho 761, 778, 264 P.3d 400, 417 (2011)).

“[E]ven though fees are available in cases involving a tort claim, a commercial transaction *between the parties to the lawsuit* must form the basis of the claim.” *Id.* (emphasis in the original).

Idaho Code § 12-120(3) does not provide a basis for an award of attorney fees where a claim for fraud, and only a claim for fraud, is brought based upon allegations that the defendant made misrepresentations that induced the plaintiff to enter into a commercial transaction with a third party. In *Brower, supra*, the plaintiff alleged that the defendant’s misrepresentations induced plaintiff to enter into an agreement to purchase and apply a certain chemical to plaintiff’s land resulting in damages. The agreement to purchase the herbicide at issue was not between the plaintiff and the defendant - the agreement was between the plaintiff and a third party. Although it was undisputed that the transaction between the plaintiff and the third party was a commercial transaction, this Court held that the claim of fraud as between the plaintiff and the defendant was not a commercial transaction and was not based on a commercial transaction. *See* 117 Idaho at 784, 792 P.2d at 349.

The *Brower* court stated as follows:

In the present case, Brower's complaint alleges that DuPont's representations induced his reliance, causing him to purchase and apply Glean to his land, resulting in damages. The only commercial transaction involved is the purchase by Brower of the DuPont chemicals from a local co-op. If there is any contract involved in this case it is not a contract surrounding that purchase, but one that might have been implied from the facts surrounding

the relationship between DuPont and Brower. We cannot say that this case revolves around a commercial transaction sufficient to implicate the terms of I.C. § 12-120(3).

Id.

In the present case, Bryan Trucking's complaint alleges that Gier's representations induced his reliance, causing Bryan Trucking to purchase a truck resulting in damages. R. pp. 31-32. It is undisputed that Bryan Trucking and Gier never entered into any type of transaction or agreement in this case. There is no principled distinction between the facts and circumstances of this case and the facts and circumstances in *Brower* that would warrant a different legal analysis between the two.

In short, there was no transaction between Bryan Trucking and Gier and, therefore, there cannot be a commercial transaction.

3. **Bryan Trucking Is Entitled To Attorney Fees On Appeal Under Idaho Code § 12-121 Because The Appellate Courts Have Made Clear That The Facts Under Which This Case Comes Before This Court Do Not Authorize An Award Of Attorney's Fees Under Idaho Code § 12-120(3).**

"An award of attorney's fees under I.C. § 12-121 is proper 'only where the Court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation.'" *Chavez v. Barrus*, 146 Idaho 212, 225, 192 P.3d 1036, 1049 (2008) (internal quotations omitted).

The complaint in the present case clearly shows the only claim Bryan Trucking made against Gier is fraud. Conversely, the complaint is silent as to any allegation that there was any type of agreement, contract or other form of transaction between Bryan Trucking and Gier. This Court has provided an abundance of case law and guidance on this issue. The nature and

circumstances of this case and the issue resolved in the *Brower* case are identical to those in this case. *Brower* and its progeny clearly and unequivocally answer the question presented on this appeal -- whether Idaho Code § 12-120(3) forms the basis for recovering attorney fees in this case. The answer is clearly that it does not. As such, Gier's pursuit of attorney fees under Idaho Code § 12-120(3) and the defense of this appeal as it relates to the District Court's award of attorney fees is frivolous, unreasonable and without foundation.

Bryan Trucking is entitled to an award of attorney fees on appeal under Idaho Code § 12-121.

V. CONCLUSION

Based upon the foregoing, Bryan Trucking respectfully requests that this Court reverse the District Court's order and judgment awarding Gier his attorney fees and costs, and award Bryan Trucking its costs and attorney fees incurred in this appeal.

DATED this 23rd day of November, 2015

R. SHEPHERD LAW, PLLC

A handwritten signature in black ink, appearing to read 'R. Shepherd', written over a horizontal line.

RON R. SHEPHERD
Attorney for Plaintiff

CERTIFICATE OF DELIVERY

I hereby certify that on the 23rd day of November, 2015, I caused a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF to be served by the method indicated below, and addressed to the following:

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