12-22-2015

Bryan Trucking, Inc. v. Gier Respondent's Brief 1 Dckt. 43461

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRYAN TRUCKING, INC., Plaintiff-Appellant, v. TERRY GIER, Defendant-Respondent, and NEIL RING, individually, and NEIL RING TRUCKING, INC., Defendants.	)	Supreme Court Docket No. 43461-2015 Twin Falls County No. CV-2014-3201

RESPONDENT'S BRIEF

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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I. STATEMENT OF CASE

A. NATURE OF THE CASE

This is an appeal of the trial court's decision to award attorney's fees against the plaintiff under Idaho Code § 12-120(3). In its Complaint, the plaintiff alleged that several claims relating to the purchase of a long-haul truck. Plaintiff alleged breach of contract claims against the alleged sellers. Plaintiff also alleged fraud against the alleged sellers, and the same claim of fraud against the appellee in this appeal, alleging that the appellee was the sellers' agent and was essentially selling the long-haul truck for the sellers. After the case was dismissed, the district court awarded costs and fees to appellee based upon the commercial transaction of the long-haul truck purchase. Plaintiff appealed.

B. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Terry Gier ("Gier") is a member of Gier Jammer's Diesel Repair, LLC ("Gier Jammer's"). R. at 95, ¶ 2. In August 2012, Gier Jammer's overhauled the motor in a 2005 Kenworth (the "Truck") for Niel Ring Trucking, Inc. ("Ring Trucking"). R. at 95, ¶¶ 4, 6. In approximately November 2013, Niel Ring ("Ring") informed Gier that Ring Trucking was selling the Truck. R. at 95, ¶ 7. In approximately late November or December 2013, Ty Bryan ("Bryan") of Bryan Trucking, Inc. ("Bryan Trucking"), asked Gier if he knew of anyone that was selling a used truck. R. at 95, ¶ 8. Gier told him that Ring Trucking was selling a truck. R. at 95, ¶ 8. Bryan asked Gier several questions about the Truck over the next couple weeks. R. at 95, ¶ 9. Gier answered many of the questions. R. at 95, ¶ 10. On December 11, 2013, Bryan asked Gier, via text message, "Does

overhUl [sic] come with any warranty?" R. at 95-96, ¶ 11; R. at 99. Gier responded the same day in text, stating, "Ha no can only warranty as long as cat does there parts." *Id.* Gier then stated, "But I could sell you one!" *Id.* Bryan responded, "Lol." *Id.*

Bryan purchased the Truck from Ring Trucking on January 9, 2014. R. at 96, ¶ 15. Over the next few months, Bryan drove the Truck throughout southern Idaho, and between Idaho and Washington state. R. at 148-152. Then Bryan drove the Truck to New Berlin, New York. *Id.* Between Laramie and Cheyenne there is a stretch of about 30 miles where those traveling west are constantly pulling at an incline for about 30 miles. R. at 91, ¶¶ 6-7. After passing Cheyanne and before reaching Laramie, Bryan called Herb Assel ("Assel") and told him that the Truck was overheating. R. at 91, ¶ 5. Bryan did not stop immediately. R. at 91, ¶ 8. Assel estimates that Bryan continued to pull for about 25 miles with the Truck overheating. *Id.* Bryan finally stopped in Laramie on April 13, 2014. R. at 91, ¶ 5-8. The next morning, Bryan called Assel from Laramie reporting that there was liquid on the side of the motor and guessing that the motor was leaking fuel. R. at 91, ¶ 9. Assel informed Bryan that if there was liquid on the side of the motor, it was either oil or coolant. *Id.* Bryan informed Assel that he found a fuel line damaged elsewhere and would have it replaced. *Id.* That same day, Bryan had the Boss Shop in Laramie, Wyoming replace a fuel line. R. at 96, ¶ 19; R. at 102. On April 15, 2014, two days after arriving in Laramie, Bryan left Laramie and arrived in Meridian. R. at 152.

On April 16, 2014, Bryan took the Truck to Western States CAT. R. at 122, pp. 11-12. CAT found that the head was cracked between several valves and the head gasket was blown. R. at 123, p. 17. Specifically, in reference to the blown head gasket, the head gasket failed in that the firing

rings were blown out between cylinders No. 2, 3, 4, 5, and 6. *Id.* Any one of those failures would cause coolant to leak. R. at 124, p. 21, Ll. 3-23.

Dethorne called Bryan and reported what he had found. R. at 125, pp. 24-25. Dethorne gave Bryan the option to replace the cylinder head, cut the counterbores, and replace two cylinder packs. *Id.* Bryan elected instead to do have an overhaul performed. R. at 129, P. 62, Ll. 12-16. CAT offers four different levels of overhauls, bronze, silver, gold, and platinum. R. at 126, pp. 26-27. Only gold and platinum overhauls replace the cylinder head with a remanufactured cylinder head. R. at 126, p. 27, Ll. 4-9. Dethorne did not recommend that Bryan purchase a certain overhaul. R. at 129, p. 62, Ll. 7-11. Bryan chose the particular overhaul he chose so that he could get a warranty. *Id.* Specifically, at Bryan's deposition, the following colloquy transpired:

> Q. Okay. Are you asking Terry [Gier] to pay you for the entire amount of that invoice?
> A. Correct.
> Q. Is it your position that everything in that invoice is something that he should be responsible for?
> A. Correct.
> Q. And tell me why.
> A. Because of the engine failure. If the engine hadn't failed, I wouldn't have been at Cat.
> Q. Well, it's my understanding -- and I am -- I stand to be corrected by you -- that not everything in that invoice relates back to Terry Gier. Do you disagree with that?
> A. Yes.
> Q. Okay. Tell me why.
> A. I think I stated that I wouldn't have had to have an engine overhaul if the workmanship would have been done properly.
> Q. Did you need an engine overhaul or did you choose to get an engine overhaul?
> A. It was recommended to get all the work done.
> Q. Could you have gotten by with less?
> A. I don't know. Possibly.
> Q. Did you discuss that with Cat?
> A. Yes.

Q. Tell me about that discussion.
A. I believe the conversation was, "You can do a patchwork job for somewhere around $10,000, $11,000 or get it done correct" because they found defects in the workmanship and recommended it.
Q. And then it was your choice -- is that right -- as to which way you would go?
A. Yes.
Q. And you chose to go with the complete overhaul?
A. Correct.
Q. And do you recall what level of overhaul you chose?
A. The Platinum, I think -- whatever the highest level is.
Q. Is that fair to Terry?
A. I believe so.
Q. Because, if I heard you correctly, you could have done some patchwork and fixed, for example, the head gasket and whatever may have caused that to blow --
A. Correct.
Q. -- and the truck could have been back out on the road.
A. Correct.
Q. And that would have been $10,000 or $11,000?
A. Correct.
Q. And instead, you chose the Platinum, which was -- how much was that -- $26,000 or $27,000, something like that?
A. Roughly, yes.
Q. And you think it's fair to ask Terry to pay for that?
A. I do.
...
Q. There are, but do you recall any other conversations?
A. I don't. Just Don.
Q. So he was your primary contact?
A. Correct.
Q. And did he recommend that you do less than the Platinum?
A. No. He didn't make a recommendation particularly on the Platinum or not. I chose the one that had the best warranty.
Q. He gave you your options, and you chose the one with the best warranty?
A. Correct.
Q. So, in essence, by paying $26,000 you were walking out of Cat with a warranty?
A. Correct.
Q. And that's something you didn't have when you bought it from Neil Ring.
A. Correct.
Q. So you improved your situation?
A. Correct.

R. at 114 p 85, L. 23 through R. at 115, p. 89, L. 10.

On April 19, 2014, Bryan asked Gier to work something out with the Truck. R. at 99. On April 23, 2014, Bryan texted, "You will be receiving a letter from my attorney this week or first if [sic] next just wanted to give you heads up." R. at 99. Between April 23, 2014, and January 25, 2015, Bryan sent several text messages to Gier regarding this suit.[1] R. at 99-101. On April 30, 2014, Bryan asked Gier, "Have you contacted your insurance company yet? Your [sic] busy I will contact them today." R. at 99.

Bryan made demands on Gier and when those were unsuccessful, filed this suit. Shortly thereafter, Bryan sent unsolicited text messages to Assel, asking questions such as, "You know I didn't get that motor hot, right?" R. at 92, ¶ 10. Assel did not ask Bryan about the Truck overheating or say anything that would have prompted those texts. *Id.* Assel did not respond to those texts. *Id.*

After this lawsuit was filed, Ring propounded the following Interrogatory:

> Interrogatory No. 11: Please identify the weights of all loads hauled by the 2005 Kenworth since its purchase from Defendant Niel Ring. Set forth the starting location, destination, description of load, name of customer, and name of driver on each load. Set forth if there were mechanical problems with the truck on each trip or load.

Bryan Trucking responded:

> Answer to Interrogatory No. 11: Plaintiff is legally licensed to haul 80,000 lbs. of cargo. Plaintiff states that all loads hauled by the 2005 Kenworth were under 80,000 lbs. with and 50% of the runs being empty. Plaintiff hauled loads from Boise, Idaho to Quincy, Washington and from Boise, Idaho to Heyburn, Idaho.

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[1] Gier invites the Court to review these messages. To Gier, they appear designed to harass and bully Gier into paying for the damage Bryan caused. In these messages, Bryan threatens a class-action suit and inquires as to how Gier's attorney budget is doing approximately three months after Bryan Trucking's counsel sent the first demand letter to Gier.

R. at 135-36. No mention was made as to the trip to New Berlin, New York despite 1) it being the most recent trip before the Truck was taken to CAT, 2) it was the trip in which Bryan noticed the engine leaking coolant, and 3) the trip spanned 4,835 miles, more than one-third of the total miles Bryan Trucking put on the Truck before taking it to CAT. *See* R. at 148-52. Bryan Trucking also did not disclose the fuel line repair done in Laramie, Wyoming. *Id.* Bryan Trucking did not supplement this response. R. at 104, ¶ 4.

Gier followed up Ring's inquiry, propounding a discovery request for trip reports, trip-related documents, daily load reports, and other documents regarding to Bryan Trucking's use of the Truck. R. at 139. Gier also asked for invoices for all repairs done on the Truck in 2014. R. at 140. Bryan Trucking objected to both requests "on the bases that it is not reasonably calculated to lead to the discovery of admissible evidence and is propounded to harass, annoy and cause Plaintiff unnecessary expense in the operation of his business," and still did not disclose any aspect of his trip to New York. R. at 139-140. Gier filed a motion to compel and Bryan Trucking objected. R. at 7-8. Finally, on the eve of the hearing, Bryan Trucking disclosed a "Drivers Trip and Fuel Report," that includes the date, state, odometer reading, and a vague description of where the truck traveled. R. at 142-152. Bryan Trucking also disclosed two CAT invoices for maintenance done in February and March 2014. R. at 153-164. While Bryan's trip to New Berlin, New York is included in the travel log, the fuel line repair in Laramie was not included. No other travel documents were provided despite Gier's numerous requests.

After the trip logs were finally disclosed, Bryan was asked in his deposition, "Where did you go from January to April—just as best you can recall?" He answered, "A lot of back and forth

from Nampa, Caldwell, to Heyburn. A few times from over—get deadhead over to Othello, Washington, and then come back over to Caldwell." R. at 111, p. 51, Ll. 19-24. Bryan only spoke about his trip east when it was specifically asked about. R. at 111, pp. 51-52.

In the "Driver's Trip and Fuel Report," it shows that Bryan arrived in Laramie, Wyoming on April 13, 2014, and left April 15, 2014. R. at 152. In Bryan's deposition, Bryan alleged that the April 15, 2014 date was incorrect, and that he left Laramie the day after he arrived. R. at 50. Additionally, Bryan was asked, "Did you request any work be done while you were there [in Laramie]?" Bryan responded, "No," despite having had a fuel line replaced while there. R. at 112, p. 57, Ll 5-10.

Approximately nine days after the first summary judgment hearing in this case, where Bryan Trucking asked the Court for more time to obtain the deposition of its own expert witness in its defense of summary judgment, Bryan sent Gier a text that read, "It is illegal to mess with emission equipment on motors. It is a big fine. You have messed with neil and his brothers truck. Hope you don't get turned in." R. at 6, 101. Aff. Gier, ¶ 18, Exh. A. The next day, Bryan Trucking sent Gier discovery requests which read:

> Interrogatory No. 20: Please identify the date and nature of the services you or Gier Jammers performed for Niel or Niel Ring Trucking, Inc. within the past two (2) years.
> Interrogatory No. 21: Please describe in detail any service or repair you or Gier Jammers has performed on any trucks owned or previously owned by Niel Ring or Niel Ring Trucking, Inc. within the past two (2) years that in any way relates to modifying, repairing or altering the emission system on such trucks.
> ...
> Request for Production No. 5: Please produce the work orders, invoices or other documentation showing the parts and labor provided for all services you or Gier

> Jammers provided to Niel Ring or Niel Ring Trucking, Inc. within the past two (2) years.
> ...
> Request for Admission No. 1: Admit that you or Gier Jammers has modified the emissions on trucks owned by Niel Ring or Niel Ring Trucking so as to enhance the performance of the trucks.
> Request for Admission No. 2: Admit that you or Gier Jammers modified the emissions on the 2005 Kenworth at issue in this case to enhance its performance.
> No other requests were made. Bryan Trucking had previously requested information regarding all services Gier or Gier Jammers provided to the Truck via interrogatory (#19), and request for production No. 4.

R. at 170-72. No other interrogatories or requests were included. *See, Id.* Bryan Trucking had previously asked about the services Gier and Gier Jammer's had provided on the Truck in Bryan Trucking's First Set of Interrogatories and Request for Production of Documents to Defendant, Terry Gier.[2] R. at 175-176.

In Bryan's deposition, Bryan acknowledged that he told Assel that he would "burn Terry down." R. at 116, p. 98, Ll. 11-15. Then the following colloquy occurred:

> Q. ...Summarize for me why you believe that Terry should be responsible in this case. What did Terry do wrong?
> **A. Workmanship of the motor.**
> **Q. Okay. So you felt he didn't do a good job on the overhaul?**
> **A. Correct.**
> **Q. And is that it?**
> **A. That's it.**
> ...
> Q. Okay. What did he not do that he said he did?
> A. We'll have to see at trial, I guess.
> Q. Well, what's your belief, as we sit here today?
> **A. Basically, the workmanship of the motor was not done correct.**
> ...

[2] See, Plaintiff's First Set of Interrogatories and Request for Production of Documents to Defendant, Terry Gier ("Interrogatory No. 19: Please identify the date and describe the services provided for each and every instance of work you or Gier Jammer's provided to the 2005 Kenworth." and "Request for Production No. 4: Please produce a true and correct copy of all records you or Gier Jammer's, LLC kept relating in any way to the 2005 Kenworth.").

Q. Do you believe that Terry did not, quote/unquote "overhaul" the motor?
A. Properly, yes.
Q. Okay, I didn't add the word "properly," though—you did.
A. Correct.
Q. I mean, did he do that work, as far as you know?
A. As far as I know.
....
Q. Do you contend that the engine was overheated prior to you purchasing it?
A. I believe it's possible.
Q. Do you have any objective evidence to suggest it had overheated before you bought it?
A. No.
Q. Are you aware of any such evidence out there?
A. No.
Q. Do you believe that Terry knew it had overheated prior to your purchase of it?
A. Possibly.
Q. And on what would you base that belief?
A. He does all the work for Neil Ring.
Q. Okay. When you say, "Possibly," it sounds like you are speculating. Do you know whether—
A. No.
Q. Terry knew?
A. No.
Q. Do you have any evidence that Terry knew it was overheating before he worked on it?
A. I have no evidence.
...
Q. Do you contend that the truck was not in great shape when you purchased it?
A. No.
Q. How would you describe its condition at the time you purchased it, generally?
A. Good condition.
Q. Do you feel that Terry Gier was deceitful in some way when speaking with you about the truck?
A. I'm not sure.
Q. Do you have any evidence that he was deceitful?
A. No.
...
Q. Do you have any evidence that Terry was concealing anything with his representations to you?
A. About—
Q. The truck that you bought--

A. Oh.
Q. --the 2005 Kenworth?
A. No.

R. 116-18 (emphasis added). Bryan also emphasized repeatedly that this suit was filed because of Gier's poor workmanship. R. at 113, p. 80, Ll. 24-25; R. at 115, p. 86, Ll. 13-15; R. at 115, p. 87, Ll. 1-2; R. at 116, p. 99, Ll. 10-18; R. at 116, p.100, Ll. 1-2; R. at 117, p. 102, Ll. 4-11; R. at 119, p. 114, Ll. 12-15.

Shortly after Bryan's deposition wherein Bryan admitted he had no evidence supporting his claim against Gier, Bryan sent Assel text messages asking Assel, to whom Bryan had admitted he had overheated the Truck in Wyoming, to confirm that Assel had Bryan's back. R. at 92, ¶ 12. Assel did not respond. *Id.* Assel felt like Bryan was trying to bully him based upon recent text messages he received. R. at 92, ¶ 11. Shortly after Bryan did not receive the reassurance from Assel, this case was dismissed.[3] *See* R. at 92, ¶ 12, R. at 9.

Throughout the proceedings, Bryan Trucking refused to allow Gier or his expert to inspect the Truck. When the initial request was made, Bryan Trucking required Gier to articulate the purposes of the inspection and compensation. R. at 52. After Gier asked for authority supporting such an obligation, Bryan Trucking served its response to the request accusing Gier of propounding such a request to harass and annoy Bryan Trucking. *Id.* The same day that response was served,

[3] It should be noted that Gier propounded a discovery request on November 20, 2014, seeking copies of all documents, e-mails, text messages, or the like that pertained to the Truck. The obligation to supplement was deemed ongoing. Bryan Trucking responded stating that a request had been submitted to its cellular provider and that the response would be supplemented. Despite many of the texts from Bryan to Assel post-dating this discovery request, no text messages were disclosed by Bryan Trucking.

Gier sent a letter asking a third time for an opportunity to inspect the Truck. *Id.* No response was received. *Id.*

Gier filed a motion to compel to be able to inspect the Truck. R. at 7. On April 7, 2015, after the Court's order on the motion, and the day after Bryan's deposition, Bryan Trucking sent a letter to Gier stating that Bryan Trucking would only produce the Truck at CAT as long as Gier coordinated with CAT because Bryan Trucking would only allow CAT technicians to connect to and review the ECM. R. at 178. Despite Bryan Trucking's counsel's prior representation to the Court that CAT had instructed Dethorne not to talk to him unless subpoenaed (R. at 52), Gier's counsel contacted CAT in an effort to make arrangements so that Gier and Van Dyk could inspect the Truck. R. at 105, ¶ 10. Unsurprisingly, Jim King, of CAT, informed Gier's counsel that CAT would not be willing to participate. *Id.* Gier's counsel informed Bryan Trucking on April 9, 2015, about CAT's position and asked for alternative suggestions so that the Truck could be inspected. R. at 53. No response was received. R. at 105.

According to Bryan Trucking's expert, Dethorne, the work performed by Gier Jammer's was an overhaul, based upon industry standards. R. at 129, p. 63, Ll. 22-25. Dethorne also stated that the Truck was originally 475 horsepower and was turned up to 550 horsepower. R. at 129, p. 65, Ll. 17-23.

Ivan Van Dyke ("Van Dyke"), a diesel repair mechanic who has worked on diesel motors since 1974 and has owned his own diesel repair business since 1983, opined that, based upon the pictures of the cylinder head disclosed by Bryan Trucking in discovery, the report produced by Dethorne, and Dethorne's deposition wherein he clarified that the head gasket failure consisted of

blown out firing rings between cylinders No. 2, 3, 4, 5, and 6, the overheating that caused this severe damage occurred immediately prior to the motor leaking coolant. R. at 87, ¶¶ 8-12. Van Dyk is of the opinion that the damage could only have occurred where a driver had pushed the engine beyond the designed limit. R. at 88, ¶ 13.

Fourteen days after judgment was entered in this case, Gier filed a memorandum of costs and fees. R. at 9. Tr. P. 34, L. 12. The district court awarded fees and Bryan Trucking appealed.

II. ADDITIONAL ISSUES ON APPEAL

A. Whether the award of attorney fees may be affirmed on alternative grounds.

B. Whether Gier is entitled to attorney fees on appeal under Idaho Code sections 12-120 or 12-121.

III. STANDARD OF REVIEW

The Idaho Supreme Court exercises free review over whether an action is based on a commercial transaction. *Intermountain Real Properties, LLC v. Draw, LLC*, 155 Idaho 313, 320, 311 P.3d 734, 741 (2013).

IV. ARGUMENT

A. THE TIMING OF SERVICE OF THE MEMORANDUM OF COSTS AND AFFIDAVIT OF ATTORNEY FEES DOES NOT BAR THE AWARD FOR COSTS AND FEES.

The request for costs and fees was timely. Idaho Rules of Civil Procedure ("I.R.C.P.") 54(d)(5), which provides the timing guidelines for a party seeking an award of costs, states, 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 costs, 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.

(Emphasis added). I.R.C.P. 54(e)(5) provides that claims for attorney fees shall be "processed in the same manner as costs and included in the memorandum of costs...." While I.R.C.P. 54(d)(5) explicitly contemplates filing and serving, the time restriction is only with regards to the actual filing, not the serving, of the memorandum. The memorandum was timely filed on May 5, 2013, fourteen days after judgment was entered in this case.

Bryan Trucking's emphasis and reliance on the memorandum's date of service is misplaced and unsupported by law. As noted above, no part of the relevant rules references the timing of service. In order to evade this obvious fact, Bryan Trucking cites to old cases which stand for the position that a memorandum must be served within a specific time limit. Appellant's Opening Brief, pp. 8-9. The fact that those cases are old does not disqualify their application; the fact that they rely upon a statute that has since been repealed and replaced with different language does. The cases Bryan Trucking relied upon at the district court, and again here, were interpreting a statute that read:

> The party in whose favor the judgment is rendered and who claims his costs, must, **within five days** after the verdict or notice of the decision of the court or referee, **file** with the clerk, **and serve** upon the adverse party or his attorney, a copy of a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct and the disbursements have been necessarily incurred in the action or proceeding

Emphasis added. Depending on the age of the case, this statue was either codified as Idaho Code section 12-113 or Rev. Codes section 4912. Idaho Code section 12-113 replaced Rev. Codes section 4912 and was eventually repealed in 1975. The very noticeable difference between the old statute and the current rule is that the old statute required a party to file and serve within a time period while the current rule requires only filing within a certain time period while expressly contemplating service. Whether I.R.C.P. 54(d)(5) is read by is clear language or the maxim *expressio unius est esclusio alterius* is applied to it, the result is the same: the timing deadline in the rule pertains only to when the memorandum was filed and in this case, and the memorandum was filed timely.[4]

B. THE AWARD OF ATTORNEY FEES PURSUANT TO IDAHO CODE SECTION 12-120(3) WAS APPROPRIATE.

Bryan Trucking does not contend that a commercial transaction was not the gravamen of this case, but simply that Gier was not a party to the commercial transaction at issue. However, Bryan Trucking's stated claims assert that Gier was a part of the commercial transaction or at least compel an exception to the universal ban that nonparties cannot recover under Idaho Code section 12-120(3). Additionally, Bryan Trucking's actual claims imply a commercial transaction involving Gier.

[4] Additionally, there is a presumption, with statutes, that when a statute is amended by changing the language, "a change in application was intended." *State ex rel. Anderson v. Rayner*, 60 Idaho 706, 96 P.2d 244, 246 (1939). Applying said presumption to a situation in which a rule replaces a statute, the change in the reference of filing and serving in the repealed statute to only filing in the rule should be given effect that the time limits only apply to the timing of the filing.

1. Bryan Trucking's stated claims provide that Gier may recover attorney fees pursuant to Idaho Code section 12-120(3).

Bryan Trucking does not dispute that this case was about a commercial transaction. Bryan Trucking's only argument as to the applicability of Idaho Code section 12-120(3) is that Gier was not a party to the transaction. *See* Appellant's Opening Brief, pp. 10-12. In support of that position, Bryan Trucking raises *Brower v. E.I. DuPont de Nemours & Co.*, 117 Idaho 780, 792 P.2d 345 (1990). Not only does *Brower* involve very different facts, but the facts alleged in this case show Bryan Trucking alleged that Gier was a party to the transaction or, at the very least, that the facts alleged compel an exception to the ban on recovery for nonparties to commercial transactions.

First, *Brower* is unlike the present case. In *Brower*, a plaintiff brought suit against the manufacturer of a product the plaintiff purchased and used. *Id.* at 780-81, 792 P.2d at 345-46. The manufacturer was the only defendant and the only claim alleged was fraud. *Id.* In the case, the Court concluded:

> 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 the 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).

117 Idaho at 784, 792 P.3d at 349. The Court looked at the relationship between Brower and DuPont and determined that the relationship was independent of the commercial transaction

between Brower and the co-op such that the transaction between Brower and the co-op could not be the commercial transaction for which attorney's fees could be awarded under I.C. § 12-120(3). There were no allegations of a relationship between DuPont and the co-op as part of the sale, or that DuPont was selling the chemicals for the co-op. *See generally, id.* In fact, as portrayed by the Court in its opinion, DuPont's participation in the sale was nonexistent. *See generally, id.*

In contrast, Bryan Trucking went to great lengths in its allegations to make Gier a party to the sale of the truck. Bryan Trucking alleged that Gier was "acting as an agent in fact for Ring" while, essentially, attempting to sell the truck to Bryan Trucking. *See* R. at 15-16, 29-32 (alleging that Gier informed Bryan Trucking about that the truck in question was for sale and "intended for Bryan Trucking to act…by purchasing a truck."). Bryan Trucking alleged that Gier went so far as to warranty the truck during these discussions. R. at 66. Bryan Trucking did not isolate Gier as a distant third-party, unaware of the transaction, as was the case in *Brower*, but alleged that Gier was on the front lines, doing all he could to sell the truck to Bryan Trucking. Bryan Trucking also named Ring and Ring Trucking as parties in the suit and claimed fraud and breach of contract claims against them, with the fraud claim being the exact same fraud claim alleged against Gier. The facts alleged and circumstances in this case are very different than those in *Brower*.

Second, even if the Court determines that Bryan Trucking's allegations did not rise to the level of making Gier a party to the transaction, the allegations compel an exception to the across-the-board ban on nonparties recovering attorney fees when sued on commercial transactions. In *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728-29, 152 P.3d 594, 599-600 (2007), the

Supreme Court addressed whether attorney fees could be recovered on fraud claims pursuant to Idaho Code section 12-120(3). The Court stated:

> From time to time the Court has denied fees under I.C. § 12–120(3) on the commercial transaction ground either because the claim sounded in tort or because no contract was involved. The commercial transaction ground in I.C. § 12–120(3) neither prohibits a fee award for a commercial transaction that involves tortious conduct, nor does it require that there be a contract. Any previous holdings to the contrary are overruled.

Id. Similarly, Idaho Code section 12-120(3) does not "prohibit a fee award for a commercial transaction" for nonparties to the transaction when they are sued based upon that commercial transaction and their participation therein. In this case, Bryan Trucking's case is entirely regarding a commercial transaction and Bryan Trucking did all it could to make Gier a party to the transaction, alleging he was an agent of Ring—essentially selling the truck for Ring—and that Gier warrantied the truck as part of the sale. Bryan Trucking also sued Ring and Ring Trucking alleging the same claim of fraud as with Gier, along with breach of contract claims.[5]

In fact, as a practical matter, Gier should be entitled to recover under Idaho Code section 12-120(3). Bryan Trucking alleged fraud against Gier. Bryan Trucking alleged the exact same claim of fraud against Ring and Ring Trucking, along with breach of contract claims. Undoubtedly, Ring and Ring Trucking would be able to recover fees as prevailing parties under Idaho Code section 12-120(3) for the fraud claim. *See Lettunich v. Key Bank Nat. Ass'n.*, 141 Idaho 362, 368-69, 109 P.3d 1104, 1110-11 (2005) (holding that prevailing party could recover fees

[5] When it comes to attorney fees pursuant to Idaho Code section 12-120(3), it is not whether there was an actual commercial transaction between the parties, but whether the nonprevailing party alleged that the prevailing party was a party to the transaction. *DAFCO LLC, v. Stwart Title Guar. Co.*, 156 Idaho 749, 758, 331 P.3d 491, 500 (2014).

for fraud claim when that claim was alleged alongside breach of contract claims, stating that "[t]he fraud claim is simply another aspect of [plaintiff]'s claim that he purchased the cattle at the sale as a result of KeyBank's representations.") It would be impractical to conclude that Ring and Ring Trucking could recover their attorney fees for the fraud claim and Gier could not when the allegations for the fraud claim were the exact same for all three defendants.

Bryan Trucking alleged Gier was part of the commercial transaction. At the very least, the facts alleged and circumstances in this case compel an exception to the nonstatutory ban on nonparties recovering attorney fees for commercial transactions.

2. Bryan Trucking's allegations imply a commercial transaction occurred between Gier and Bryan Trucking.

In addition to Bryan Trucking's attempts to make Gier a party to the purchase and sale transaction, Bryan Trucking's allegations against Gier implied commercial transactions between Bryan Trucking and Gier for which Bryan Trucking sought to recover.

Bryan Trucking's alleged representation for the fraud claim was that Gier stated that he had performed an overhaul on the truck. Bryan Trucking took issue with this representation, alleging that the truck had not been overhauled "properly." In Bryan's deposition, he made it clear that, despite the stated claim of fraud, Bryan Trucking was not alleging that the work was not performed, but that the quality of the work performed was not proper.

The appropriate claim for such a charge implies a commercial transaction between the parties. The actual claim for which Bryan Trucking was trying to recover regarded the quality of the work performed and therefore was not fraud, but a breach of warranty or breach of contract.

In order to recover on such claims, it is imperative that there was a transaction between the parties—either a contract for services or a warranty pursuant to services. Without such a relationship, one cannot recover for deficient work performed. By alleging deficient work and attempting to recover for that deficient work, Bryan Trucking was implicitly alleging that there was a transactional relationship between Gier and Bryan Trucking that would allow Bryan Trucking to recover for that deficient work.

In the same vein, and as noted above, Bryan Trucking alleged that Gier warrantied the truck as part of the sale.[6] Providing a warranty on a long-haul truck is undoubtedly a commercial transaction.

Therefore, while Bryan Trucking now alleges that there was no commercial transaction between Bryan Trucking and Gier, Bryan Trucking's allegations implied that there were commercial transactions between it and Gier for which Bryan Trucking sought recovery.

C. IDAHO CODE § 12-121 PROVIDES AN ADDITIONAL GROUND FOR THIS COURT TO AFFIRM THE AWARD OF ATTORNEY FEES.

Gier sought an award of attorney fees pursuant to both Idaho Code section 12-120(3) and 12-121. R. 59-67. At the hearing, the district court determined that Idaho Code section 12-120(3) applied and, because of that, an evaluation of fees under Idaho Code section 12-121 was unnecessary. Tr. 36, Ll. 2-10. This Court can "uphold the decision of a trial court if any alternative legal basis can be found to support it," which alternative legal basis may include fees under Idaho

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[6] It should be noted that Bryan asked Gier via text whether Gier was warranting the Truck and Gier answered no. R. at 37, ¶ 11; R. at 41. Bryan Trucking asserted that Gier had warrantied the Truck even though the physical evidence demonstrated otherwise.

Code section 12-121. *Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 369-70, 816 P.2d 320, 325-26 (1991).

I.C. § 12-121 and I.R.C.P. 54(e), in conjunction with each other, provide that in a civil action, a court may award attorney's fees and costs to the prevailing party when the court finds that "the case was brought, pursued or defended, frivolously, unreasonably or without foundation." "An award of attorney's fees under I.C. §12-121 is discretionary...." *Sunshine Min. Co. v. Metropolitan Mines Corp., Ltd.*, 111 Idaho 654, 659, 726 P.2d 766, 771 (1986).

This case was filed without a basis in law or fact. This conclusion is supported by many facts. First, Bryan caused the damage for which Bryan Trucking sought recovery. Second, Bryan Trucking alleged fraud even though the allegations did not support such a cause of action. Third, by Bryan's own admission, Bryan Trucking had no evidence that Gier made any false statement or concealed any facts. Fourth, Bryan Trucking actively concealed the evidence pertaining to Bryan's overheating of the truck during this litigation. Fifth, after it became evident that Gier would not give Bryan Trucking any payment for Bryan Trucking's self-inflicted damage, Bryan Trucking upped the strong-arming by insinuating that Gier had broken the law on an unrelated matter, and engaged in discovery to that effect. Finally, after Bryan Trucking learned that a witness that had knowledge about Bryan Trucking's damage to the truck would not testify as Bryan Trucking wished, Bryan Trucking dismissed this case.

1. Bryan caused the damage for which he attempted to recover in this case.

The damage to the truck occurred from overheating. However, it was Bryan Trucking who overheated the truck and caused the damage.

As noted above, Bryan contacted Assel and told him that the Truck was overheating. Additionally, Ivan Van Dyke opined that, based upon the information Plaintiffs disclosed in discovery and Dethorne's deposition, the damage resulted from a severe overheating event and that event occurred within one week or one thousand miles prior to the motor leaking coolant.

The evidence demonstrates that it was Bryan who caused the overheating and the resultant damage. Other facts addressed below demonstrate how Bryan Trucking went to great lengths to conceal the information regarding Bryan's overheating of the truck.

2. Bryan Trucking's claim of fraud was frivolous.

Bryan Trucking's only claim against Gier was unsupported by the allegations. Bryan Trucking alleged fraud against Gier, alleging that the Gier's represented that he had overhauled the motor of the engine. Bryan Trucking did not allege that Gier did not actually perform an overhaul on the engine (which would be the only way to demonstrate that such a representation was false), but that the overhaul was not performed "properly." Such an allegation is not that of fraud, but of a breach of warranty or breach of contract claim. Bryan Trucking attempted to tie the quality of workmanship into a fraud claim which results in a legally baseless claim. There is no question that Gier performed an overhaul on the motor. The only alleged question concerns the quality of that overhaul, which is not appropriate for a fraud claim.

3. Bryan Trucking had no evidence of the most essential element for a claim of fraud.

Additionally, Bryan's deposition demonstrates that Bryan Trucking's claim for fraud was factually baseless. A claim brought without knowledge of or a reasonable expectation to be able to prove a necessary element of a claim supports an award of attorney's fees to the prevailing

defendant under I.C. § 12-121. *See Sunshine Min. Co.*, 111 Idaho at 659, 726 P.2d at 771 (affirming a finding that a case was brought without foundation where the claimant "asserted its claims of ownership to the 'Copper Vein' outside of its intralimital boundaries without having knowledge of or reasonable expectation to be able to prove the location of the apex thereof…").

Bryan admitted in his deposition that he had no evidence that any of Gier's alleged statements were false or that Gier concealed any information. Therefore, there was no legitimate, triable issue of fact on his fraud claim. Additionally, Bryan Trucking had no evidence supporting his actual claim—that of a breach of contract or breach of warranty. The fact that Bryan Trucking had no evidence that the representation was false is, alone, grounds for an award of attorney's fees under I.C. § 12-121, but also demonstrates that this claim was unreasonably pursued.

Even if it is assumed that whether an overhaul was performed "properly" is sufficient to render the representation of an overhaul being performed false, Bryan Trucking's own expert supports the conclusion that the fraud claim was baseless. He testified that the overhaul performed by Gier was done to industry standards.

4. Bryan Trucking concealed evidence.

Bryan Trucking pursued this case unreasonably by concealing evidence in an apparent effort to avoid exposing the lack of any legal or factual basis for its claims. Bryan overheated the Truck in Wyoming while on a return trip from New Berlin, New York. Gier's journey to obtain information pertaining to that trip was much longer.

Bryan Trucking omitted New Berlin trip from its interrogatory answers regarding where the truck went. It did so despite that being the last trip the Truck went on before going to CAT, a trip

that comprised more than one-third of the miles Bryan Trucking put on the Truck, and the very same trip during which Bryan admitted to noticing the leaking coolant which prompted Bryan Trucking to take the truck in to CAT. While Bryan Trucking was complaining about the leaking coolant and apparent necessity for repairs, Bryan Trucking omitted any mention of the trip upon which such issues were observed---which happened to be the same trip Bryan Trucking severely overheated the Truck.

When Gier attempted to obtain the travel logs and other information pertaining to Bryan Trucking's use of the Truck and the repair of the Truck, Bryan Trucking accused Gier of seeking that information in an attempt to harass and annoy Bryan Trucking. After a motion to compel was filed and a Bryan Trucking objection, Bryan Trucking finally disclosed a bare-bones travel log that showed some information regarding the New Berlin trip.

Even after the bare-bones trip logs were disclosed, Bryan avoided mentioning the trip east as best he could in his deposition. He only spoke of it when it was specifically asked. Bryan also affirmatively stated that he did not have repairs performed in Laramie, claiming that his travel logs were incorrect and that he left Laramie the day after he arrived. Bryan Trucking never disclosed the complete set of documents requested pertaining to the trips the Truck went on, and never disclosed the fuel line repair invoice, which Gier was able to independently discover and was incurred by Bryan Trucking in Laramie, Wyoming on April 15, 2014—the day after Bryan arrived there.

Bryan's texts to Assel also demonstrate Bryan Trucking's attempt to conceal information. Knowing he had told Assel about overheating the Truck, Bryan sent several unsolicited text messages to Assel over the next few months following the overheating, seeking reassurance by

asking, "You know I didn't get that truck hot, right?" Additionally, after Bryan's deposition, Bryan sent texts seeking reassurance that Assel had Bryan's back. In fact, Bryan sent many text messages to Assel regarding the Truck and this litigation and Bryan did not disclose any of them, despite many of those text messages occurring after Gier's discovery request for copies of written communications regarding the Truck.

Lastly, Bryan Trucking refused to allow Gier and Van Dyk to perform an inspection of the Truck. When the request was first propounded, Bryan Trucking asked Gier to articulate the purposes of the inspection and to compensate Bryan Trucking. When Gier asked for authority setting forth those requirements, Bryan Trucking served its response to the request accusing Gier of propounding such a request to harass and annoy Bryan Trucking.[7] After a motion to compel, Bryan Trucking stated Gier could only inspect under the supervision of CAT—a requirement Bryan Trucking should have known could not be met based upon Bryan Trucking's own dealing with CAT in this litigation. No real opportunity was ever provided and Gier was unable to inspect the Truck.

Bryan Trucking concealed information regarding Bryan's culpability for the damage Bryan Trucking was asserting was caused by Gier. Such actions are unreasonable and support the conclusion that this case was filed and pursued unreasonably.

5. Bryan Trucking upped the ante with criminal charge insinuations.

After the Rule 56(f) hearing where Bryan Trucking asked for time to take the deposition of its own expert, it was clear that Bryan Trucking did not have a valid case and that Gier was not

[7] It should be noted that many of Bryan Trucking's discovery responses accused Gier of attempting to harass or annoy Bryan Trucking when Bryan Trucking was attempting to conceal relevant and damning evidence.

succumbing to Bryan Trucking's strong-arm tactics. Nine days after that hearing, Bryan Trucking employed the most desperate of tactics: the threat of criminal prosecution. Bryan sent a text to Gier insinuating that Gier had broken the law and could be turned in for a violation entirely unrelated to this case. The next day, Bryan Trucking, through counsel, sent discovery requests asking for information specifically related and directed to the criminal accusations contained in the text. This last-ditch effort to strong-arm Gier supports the conclusion that the case was frivolous and pursued unreasonably.

6. Bryan Trucking only dismissed this case after failing to receive reassurance a witness would lie.

Finally, after exhausting all other legally unsupported schemes to strong arm money from Gier, Bryan sought reassurance from Assel, who was the witness to whom Bryan had admitted overheating the truck, that Assel had Bryan's back. When Assel did not respond with that reassurance, Bryan Trucking dismissed this frivolous suit. This fact does not, by itself, demonstrate that this case was frivolous and pursued unreasonably. However, when combined with the other facts, their totality demonstrate that Bryan Trucking did not have a basis in law or fact and tried its best to conceal the information pertaining to the frivolous nature of the case to the point that when it independently found out that the witness to its admission would not lie, it dismissed the case.

Bryan Trucking caused its own damage, concealed and misrepresented facts to keep the claim alive, and when it appeared that that the claim was dead, implemented the threat of criminal prosecution. Such demonstrate the frivolous nature of this case and that it was pursued

unreasonably, not to mention that they are based upon a claim that is wholly without foundation and for which Bryan Trucking had no supporting evidence.

D. GIER IS ENTITLED TO AN AWARD OF ITS ATTORNEY'S FEES ON APPEAL PURSUANT TO IDAHO CODE SECTIONS 12-120(3) AND 12-121.

Pursuant to Idaho Appellate Rules 35(b)(5) and 41, Gier respectfully requests an award of its reasonable attorney's fees on appeal under Idaho Code §§ 12-120(3) and 12-121.

Attorney fees pursuant to Idaho Code § 12-120(3) are available to the prevailing party on appeal. *Triad Leasing & Fin., Inc. v. Rocky Mountain Rogues, Inc.*, 148 Idaho 503, 515, 224 P.3d 1092, 1104 (2009). This Court should affirm the district court's award and award attorney fees to Gier pursuant to Idaho Code section 12-120(3).

Additionally, attorney's fees on appeal are available the prevailing party pursuant to Idaho Code section 12-121 when the Court "believes that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation." *Mowrey v. Chevron Pipe Line Co.*, 155 Idaho 629, 635, 315 P.3d 817, 823 (2013). This lawsuit was initiated without a basis in law or fact, as evidenced by Bryan Trucking's admission that it had no evidence of wrongdoing on the part of Gier. Filing and pursuing a frivolous claim in an unreasonable manner, as Bryan Trucking did in this case, subjected Gier to unnecessary legal fees. Therefore, Gier respectfully requests that this Court award fees on appeal pursuant to Idaho Code section 12-121.

V. CONCLUSION

For the reasons set forth, above, Gier respectfully requests that this Court affirm the trial court's award of attorney's fees on the grounds that this suit was on a commercial transaction. In

the alternative, Gier respectfully requests that this Court affirm the district court on the basis that fees are appropriate under Idaho Code section 12-121. Additionally, Gier requests that this Court award Interstate its attorney's fees incurred in connection with this appeal.

DATED this 22nd ___ day of December, 2015.

WORST, FITZGERALD & STOVER, PLLC

By: _____
Kirk A. Melton
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of December, 2015, I caused a true and correct copy of the foregoing RESPONDENT'S BRIEF to be served by the method indicated below, and addressed to the following:

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_____
Kirk A. Melton