

2-23-2016

## Stevens v. Eyer Respondent's Brief Dckt. 43532

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

KENNETH EYER and SALLY EYER, husband  
and wife,

Third Party Plaintiffs/  
Appellants

vs.

IDAHO FOREST GROUP, LLC.

Third Party Defendant/  
Respondent.

**Supreme Court**  
**Docket No. 43532-2015**

**RESPONDENT IDAHO FOREST GROUP, LLC'S BRIEF**

Appeal from the District Court of the First Judicial District  
of the State of Idaho, in and for the County of Bonner

\* \* \* \* \*

Honorable Barbara A. Buchanan, District Judge, Presiding

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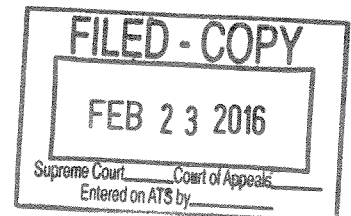


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## STATEMENT OF THE CASE

### I. Nature of the Case

This is an appeal from the district court's post-jury verdict award of attorneys' fees to Respondent Idaho Forest Group, LLC ("IFG") in the amount of \$95,608.99. The district court awarded attorneys' fees to IFG upon a finding that: (1) IFG was the prevailing party; (2) the claims of Appellants Kenneth and Sally Evers ("the Evers") against IFG involved a commercial transaction as defined in Idaho Code § 12-120(3); and (3) the commercial transaction formed the gravamen of the Evers' claims against IFG.

### II. Statement of Facts

In August 2009, Evers and IFG entered into a Log Purchase Agreement. (R., Ex. E). IFG agreed to purchase cut timber from the Evers. *Id.* Evers agreed to deliver cut timber to the IFG mill. *Id.* The Evers' neighbors, Russell and Laura Stevens, filed a lawsuit against the Evers alleging timber trespass. (R., p. 32–38). The Stevens alleged that Evers removed logs from the Stevens' property. *Id.* Evers sued IFG alleging two alternative claims against IFG: indemnification of Stevens' claims against Evers and contribution. (R., p. 44–47).

### III. Course of Proceedings

The district court dismissed both of Evers' claims by summary judgment. (R., p. 153–55, 183–84). After granting summary judgment, the district court granted Evers leave to file an Amended Complaint against IFG alleging a new cause of action for negligence. *Id.* at 209–15.

In the amended complaint, Evers alleged that IFG assumed a duty to locate the property line between the Evers' and Stevens' property. (R., p. 217–21). Evers' claims against IFG were tried by a jury on April 27–28, 2015. The jury found that IFG had not assumed a duty. *Id.* at 293–96. Consequently, the district court entered judgment on April 29, 2015 awarding nothing to the Evers. *Id.* at 297–99.

IFG filed a *Motion for Award of Costs and Attorney Fees* and supporting memorandum on May 13, 2015 requesting \$95,608.00 in attorneys' fees pursuant to Idaho Code § 12-120(3). (Supp. R., p. 27–45)<sup>1</sup>. The Eyers filed an *Objection to IFG's Memorandum of Fees and Costs* on May 27, 2015. Eyers argued that there was no “commercial transaction” and, even if there was, the commercial transaction was not the gravamen of the Eyers' *Amended Complaint*. *Id.* at 113–20.

In its July 13, 2015 *Memorandum Decision & Order re: Idaho Forest Group's Motion for Costs and Attorneys' Fees*, the district court granted IFG's Motion and awarded IFG \$95,608.00 in attorneys' fees pursuant to Idaho Code § 12-120(3). (R., p. 305-311). The district court relied on *Bridge Tower Dental, P.A. v. Meridian Computer Center, Inc.* 153 Idaho 569, 272 P.3d 541 (2012) and found:

a commercial transaction formed the gravamen of the Eyers' lawsuit against IFG because the Eyers' ‘assumed duty’ negligence claim arose out of the commercial transaction between the Eyers and IFG for the purchase of cut timber under the parties' 2009 Log Purchase Agreement. Jeff Berend traveled to the Eyers' property in furtherance of the parties' Log Purchase Agreement. Had there been no commercial transaction between the parties for the cutting and sale of timber, Jeff Berend would not have been on the Eyers' property to—as the Eyers allege—voluntarily assume a duty to identify the property lines before logging.

*Id.* at 309.

On August 7, 2015, the district court affirmed its award of attorneys' fees following the Eyers' motion to alter or amend the judgment. *Id.* at 317–23. In its *Memorandum Decision and Order Denying Defendants-Third Party Plaintiffs' Motion to Alter or Amend*, the district court explicitly rejected the Eyers' argument that the Log Purchase Agreement could not be a commercial transaction because Eyers used the money from the timber sale to pay medical bills. *Id.* at 321–22.

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<sup>1</sup> Costs were also requested but are not at issue in this appeal.

## ATTORNEYS' FEES ON APPEAL

IFG requests an award of attorneys' fees and costs on appeal pursuant to I.A.R. 41 and Idaho Code § 12-120(3). I.A.R. 41 allows this Court to make a determination "as to whether or not the party claiming attorneys fees has a legal right thereto" and award fees and costs on appeal when available by contract or statute. Here, Idaho Code § 12-120(3) allows for an award of attorneys' fees. As is set forth below, this case involves a commercial transaction that was the gravamen of the Eyers' *Complaint* from which this appeal arises. Accordingly, IFG requests attorneys' fees incurred in responding to the appeal.

### ARGUMENT

#### I. Standard of Review

"Whether there is a commercial transaction is a question of law over which the Supreme Court exercises free review." *Am. W. Enterprises, Inc. v. CNH, LLC*, 155 Idaho 746, 755, 316 P.3d 662, 671 (2013). In its review, the Court will not re-visit and re-decide factual determinations made by the district court. *Brown v. Greenheart*, 157 Idaho 156, 167, 335 P.3 1, 12 (2014). In *Brown*, the district court awarded fees pursuant to Idaho Code § 12-120(3). *Id.* at 167, 335 at 12. On appeal, the appellant argued that the evidence was insufficient to show that a commercial transaction existed. *Id.* The appellant's invitation to second-guess the district court's findings as to whether the action was a commercial transaction did not sit well with this Court:

The thrust of Greenheart's arguments invite this Court to revisit and re- decide factual determinations already made by the district court. This we will not do.

We conclude the district court did not err when it found that Greenheart and the Browns entered into their agreement as a commercial transaction. The district court's finding that the Brown's sale of a portion of their property to Greenheart constituted a transaction for a commercial purpose is supported by the evidence. The Browns owned 320 acres that they used for ranching and farming— operations on which the Browns relied to derive income.

*Id.* at 168, 335 P.3d at 13.

Under Idaho Code § 12-120(3), “[a] trial court’s findings of fact will not be set aside on appeal unless they are clearly erroneous” and “[f]actual findings are not clearly erroneous if they are supported by substantial and competent evidence, which is evidence that a reasonable trier of fact could accept and rely upon in determining that such facts have been proved.” *Id.* (quoting *VanderWal v. Albar, Inc.*, 154 Idaho 816, 821, 303 P.3d 175, 180 (2013)).

## **II. The Eyers Had a Commercial Purpose for Entering into the Log Purchase Agreement with IFG**

“Commercial transactions are all transactions except for personal or household purposes.” *Am. W. Enterprises, Inc.*, 155 Idaho at 755, 316 P.3d at 671 (emphasis added).

“Where a party alleges the existence of a contractual relationship of a type embraced by section 12–120(3) . . . that claim triggers the application of [I.C. § 12–120(3)] and a prevailing party may recover fees even though no liability under a contract was established.” *Id.* (quoting *Farmers Nat’l Bank v. Shirey*, 126 Idaho 63,73, 878P.2d 762, 772 (1994)). “This same principle applies where the action is one to recover in a commercial transaction, regardless of the proof that the commercial transaction alleged did, in fact, occur.” *Id.* (quoting *Magic Lantern Prods. v. Dolsot*, 126 Idaho 805, 808, 892 P.2d 480, 483 (1995)).

Here, Eyers and IFG signed a Log Purchase Agreement. The Log Purchase Agreement stated that IFG would purchase timber from Eyers. Eyers sold timber to IFG and IFG paid the Eyers for the timber. The Log Purchase Agreement created a commercial relationship between Eyers and IFG. Based on this relationship, Eyers asserted that IFG assumed a duty to locate property lines for the Eyers.

It is undisputed that the Eyers entered into the relationship with IFG for the purpose of earning income. Under this Court’s precedent, earning income is a commercial transaction. *See Watson v. Watson*, 144 Idaho 214, 159 P.3d 851 (2007); *Brown v. Greenheart*, 157 Idaho 156,



335 P.3d 1 (2014). In *Watson*, this Court upheld an award of attorneys' fees pursuant to Idaho Code § 12-120(3) in a dispute between two brothers who purchased real property "to use as a family retreat and to supplement their incomes through selective logging." 144 Idaho at 216, 159 P.3d at 853. The brothers purchased the property "in large part for the purposes of logging." *Id.* at 219, 159 P.3d at 856. How the brothers planned to spend their logging income was irrelevant and never mentioned by this Court.

*Watson* is on-point with this case. The Eyers logged their property for the same reason the brothers in *Watson* did—to earn supplemental income. A transaction that earns income is a commercial transaction. It is irrelevant how that income was used. The Eyers are incorrect when they argue that "[f]or a transaction to be 'commercial,' the party's intent must be to put whatever consideration a party receives to a commercial purpose." Appellant's Brief, at 5. First, money is fungible, and therefore there is no way to confirm or dispel the assertion that it was used for non-commercial purposes. Second, evaluating how earned income is spent would require courts to focus on subsequent transactions (i.e., between the Eyers and their medical providers) instead of the one between the parties. That exercise would be futile because, traced far enough, almost any income could eventually be tied to a household purpose since everyone needs money for food, housing, and other personal living expenses. If all that was necessary to fall outside of a "commercial transaction" is that the earned income was eventually used for a non-commercial purpose then the exception would swallow the rule. *See Am. W. Enterprises, Inc.*, 155 Idaho 746, 755, 316 P.3d 662, 671 (2013) ("Commercial transactions are all transactions except for personal or household purposes."). For these reasons, the subsequent use of income earned from a transaction is not and cannot be the test of whether a commercial transaction exists.

*Brown v. Greenheart* also establishes that a transaction made for the purpose of earning income is a commercial transaction. *Brown* involved a quiet title action between the parties to a real estate purchase and sale. 157 Idaho 156, 335 P.3d 1 (2014). The district court ruled that the real estate transaction was commercial, even though the sellers resided on the property, because the sellers ranched and farmed the land in order to derive income.<sup>2</sup> *Id.* at 167–68, 335 P.3d at 13–14. This Court upheld the award of attorneys’ fees pursuant to Idaho Code § 12-120(3).

The cases cited by the Eyers—*Carrillo v. Boise Tire Co., Inc.* and *Frontier Devel. Group, LLC v. Caravella*—are factually distinguishable from this case. In *Carrillo*, the Carrillos did not transact with Boise Tire Company in order to earn income. 152 Idaho 741, 274 P.3d 1256 (2012). To the contrary, the Carrillos paid money, and Boise Tire Company received money. The Carrillos received tires (and installation services) for their personal vehicle. *Id.* at 756, 274 P.3d at 1271. Here, Eyers sold logs to earn income. To sell the logs, the Eyers had to enter into a commercial transaction with IFG.

The same was true in *Frontier Development Group*, where the Caravellas paid money to the plaintiffs to construct a residence for them. 157 Idaho 589, 338 P.3d 1193 (2014). The Caravellas’ purpose in transacting with the plaintiffs was for household purposes—building a house. *Id.* at 599, 338 P.3d at 1203 (“[T]he Caravellas’ purpose for entering into the agreement with Horn and FDG was to construct a house for their personal use; therefore the transaction was not commercial.”). Here, the Eyers did not contract with IFG buy the logs for any household or personal reason. The Eyers contracted with IFG to sell logs to earn income, and earning income is a commercial transaction.

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<sup>2</sup> The purchaser’s commercial purpose was established by the fact that she never lived on the property, purchased it for its low taxes, own several other properties, i.e., it was an investment on her part. *Brown*, 157 Idaho at 167, 335 P.3d at 12.

In light of this commercial purpose, the district court's award of attorneys' fees pursuant to Idaho Code § 12-120(3) was correct and must be affirmed.

**III. The Commercial Transaction Between the Parties Formed the Gravamen Of The Eyers' Claim Against IFG**

Not only did the Eyers have a commercial purpose when they entered into the Log Purchase Agreement, that commercial transaction was integral to the Eyers' claim against IFG and formed the basis upon which they were attempting to recover. *See, e.g., Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728, 152 P.3d 594, 599 (2007).

It has long been held that “[t]he critical test is whether the commercial transaction comprises the gravamen of the lawsuit; the commercial transaction must be integral to the claim and constitute a basis on which the party is attempting to recover.” *Bingham*, 133 Idaho at 426, 987 P.2d at 1041 (citing *Ervin*, 125 Idaho at 704, 874 P.2d at 515); *see also Sowards v. Rathbun*, 134 Idaho 702, 708, 8 P.3d 1245, 1251 (2000). The commercial transaction must be an actual basis of the complaint, that is, the lawsuit and the causes of action must be based on a commercial transaction, not simply a situation that can be characterized as a commercial transaction.

*Great Plains Equip., Inv. v. NW Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001).

The Eyers' argument that the gravamen of their *Complaint* was based in negligence is unavailing. It is well established that the existence of tortious conduct does not prohibit a fee award under Idaho Code section 12-120(3). *E.g., City of McCall v. Buxton*, 146 Idaho 656, 665, 201 P.3d 629, 638 (2009). In *City of McCall*, this Court explicitly overruled a previous case which held that fees under Section 12-120(3) were never available in a legal malpractice action. *Id.* (affirming that *Blimka* overruled *Fuller v. Wolters*, 807 P.2d 633, 119 Idaho 415 (1991)).

This Court's precedent establishes that it is the facts of a case, not the stated legal theory, that determines whether section 12-120(3) applies. For example, *City of McCall* was a legal malpractice action, and this Court upheld the district court's fee award. Compare that with *Soignier v. Fletcher*, which was also a legal malpractice action, where fees were not awarded.

151 Idaho 322, 326, 256 P.3d 730, 734 (2011) (“The fact that Fletcher owed a narrow duty of care to Soignier as a testamentary beneficiary did not create a commercial transaction between them.”). If the pleaded legal theory were the deciding factor in whether a lawsuit involved a commercial transaction then *City of McCall* and *Soignier*—both legal malpractice lawsuits—would have the same result, but they do not. These cases can be reconciled, however, by acknowledging that the factual differences justified the different outcomes. And as this Court noted in *Brown v. Greenheart*, the district court is in the best position to make factual determinations, and its findings should not be disputed on appeal unless they are clearly erroneous. 157 Idaho 156, 167, 335 P.3d 1, 12 (2014).

In this case, the district court found that a commercial transaction formed the gravamen of the Eyers’ complaint because without the Log Purchase Agreement, “Jeff Berend would not have been on the Eyers’ property to—as the Eyers’ allege—voluntarily assume a duty to identify the property lines before logging.” (R. 309). The district court made this ruling after specifically noting that the allegation of tortious conduct does not prohibit the existence of a commercial transaction. (R. 308). This ruling was supported by the evidence and by Idaho Supreme Court precedent. See *Bridge Tower Dental, P.A. v. Meridian Computer Center, Inc.*, 152 Idaho 569, 272 P.3d 541 (2012).

In *Bridge Tower Dental*, the plaintiff contracted with the defendant to repair/restore its computer hard drive system. *Id.* at 570, 272 P.3d at 542. When the defendant erased the entire contents of the plaintiff’s hard drive, the plaintiff brought suit for negligence under the law of bailment. *Id.* One of the issues on appeal was whether the defendant had a duty that would support a finding of negligence.<sup>3</sup> *Id.* at 574, 272 P.3d at 546. This Court ruled in the plaintiff’s

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<sup>3</sup> “Patten attempts to excuse his carelessness by claiming that Meridian Computer belongs to an industry that has no duty to back up data. While this may be true, such a standard does not extinguish its duty not to destroy clients’

favor on the issue of duty, and when it came to the issue of attorneys' fees, it held that "[a] commercial transaction formed the gravamen of the lawsuit because the negligence claim arose out of the commercial transaction between Bridge Tower and Meridian Computer to replace the failing hard drive under the warranty agreement." *Id.* at 575, 272 P.3d at 547.

*Bridge Tower Dental* refutes the Eyers' argument that fees should not be awarded because the gravamen of the Complaint turned on the existence of a duty. If a commercial transaction exists, and it is integral to the claims of the lawsuit, then fees are allowed under Idaho Code § 12-120(3). In *Bridge Tower Dental*, the parties' hard drive restoration contract was a commercial transaction that gave rise to the negligence claim. Here, the parties' Log Purchase Agreement was a commercial transaction that gave rise to the negligence claim. The district court noted this when it found that, "Jeff Berend would not have been on the Eyers' property to—as the Eyers' allege—voluntarily assume a duty to identify the property lines before logging." (R., p. 309.) The district court made this ruling after specifically noting that the allegation of tortious conduct does not prohibit the existence of a commercial transaction. R. 308; *see also Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728–29, 152 P.3d 594, 599–600 (2007) ("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.").

This finding is entitled to deference by this Court, and the award of fees pursuant to Idaho Code section 12-120(3) must be upheld.

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data." *Id.* at 574, 272 P.3d at 546.

#### IV. The Eyers Are Not Entitled to Attorneys' Fees on Appeal

The Eyers argue for an award of to attorneys' fees on appeal because it is frivolous and unwarranted for IFG to defend this appeal. The Eyers are wrong. "[A]ttorney fees on appeal are only awarded pursuant to Idaho Code section 12-121 'when this court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation.'" *In re Doe*, 159 Idaho 192, 358 P.3d 77, 85 (2015) (quoting *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979)). IFG's response to the Eyers' appeal urges this Court to affirm the well-reasoned decision made of the district court. Arguably a party's defense of a favorable district court ruling is inherently nonfrivolous, but that is only more true here. The district court's ruling and IFG's argument are based on factually and legally relevant case law, and is therefore not frivolous, unreasonable, or without foundation.

Nor is there a basis for the Eyers' request for attorneys' fees on appeal under Idaho Code § 12-120(3). Attorneys' fees on appeal are only available to the prevailing party. *Davidson v. Wright*, 143 Idaho 616, 621, 151 P.3d 812, 817 (2009). The Eyers' argue that this case does not involve a commercial transaction under section 12-120(3). If the Eyers prevail then there is no commercial transaction and attorneys' fees would be in appropriate under section 12-120(3). There is no outcome that will entitle the Eyers to attorneys' fees. The Eyers' request for attorneys' fees on appeal must be denied.

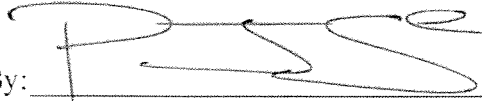
#### CONCLUSION

The Eyers entered into the Log Purchase Agreement to earn income from the sale of logs. The earning of income is a commercial purpose. This commercial transaction formed the gravamen of the Eyers' negligence claim against IFG because, as the district court found, if not for the Log Purchase Agreement, the Eyers would have no basis to argue that IFG had assumed a

duty to locate the Eyers' property lines. The district court's ruling should be affirmed. IFG should be awarded attorneys' fees and costs on appeal.

DATED this 18<sup>th</sup> day of February, 2016.

SMITH + MALEK, PLLC

By:   
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18<sup>th</sup> day of February, 2016, I caused to be served two (2) true and correct copies of this RESPONDENT IDAHO FOREST GROUP, LLC'S BRIEF by the method indicated below, and addressed to all counsel of record as follows:

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