

8-2-2016

# The Watkins Company v. Estate of Storms Appellant's Reply Brief Dckt. 43649

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/  
idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"The Watkins Company v. Estate of Storms Appellant's Reply Brief Dckt. 43649" (2016). *Idaho Supreme Court Records & Briefs*. 6121.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/6121](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/6121)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

RECEIVED  
IDAHO SUPREME COURT  
COURT OF APPEALS  
2016 AUG -2 AM 8:25

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

THE WATKINS COMPANY, LLC, an Idaho Limited Liability Company,

Plaintiff/Appellant,

v.

THE ESTATE OF MICHAEL STORMS and BROWNSTONE COMPANIES, INC.,

Defendants/Respondents.

Supreme Court Docket No. 43649

**APPELLANT'S REPLY BRIEF**

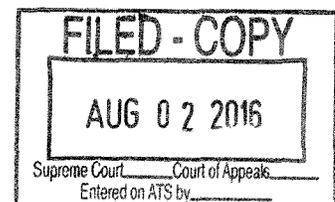
---

Appeal from the District Court of the Seventh Judicial District for Bonneville County.  
Honorable Darren B. Simpson, District Judge, presiding.

---

B. J. Driscoll, Esq., residing at Idaho Falls, Idaho, for Plaintiff/Appellant,  
The Watkins Company, LLC

Dean C. Brandstetter, Esq., residing at Idaho Falls, Idaho, for Defendants/Respondents  
The Estate of Michael Storms and Brownstone Companies, Inc.



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

THE WATKINS COMPANY, LLC, an Idaho Limited Liability Company,

Plaintiff/Appellant,

v.

THE ESTATE OF MICHAEL STORMS and BROWNSTONE COMPANIES, INC.,

Defendants/Respondents.

Supreme Court Docket No. 43649

**APPELLANT'S REPLY BRIEF**

---

Appeal from the District Court of the Seventh Judicial District for Bonneville County.  
Honorable Darren B. Simpson, District Judge, presiding.

---

B. J. Driscoll, Esq., residing at Idaho Falls, Idaho, for Plaintiff/Appellant,  
The Watkins Company, LLC

Dean C. Brandstetter, Esq., residing at Idaho Falls, Idaho, for Defendants/Respondents  
The Estate of Michael Storms and Brownstone Companies, Inc.

TABLE OF CONTENTS

	Page
<u>ARGUMENT IN REBUTTAL</u> .....	3
I. <u>THE STANDARD OF REVIEW IS WHETHER THE DISTRICT COURT’S FINDINGS ARE SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE.</u> .....	3
II. <u>THE ISSUE OF THE APPORTIONMENT BETWEEN STORMS AND BROWNSTONE’S RECOVERABLE AND UNRECOVERABLE ATTORNEY’S FEES IS PROPERLY BEFORE THE COURT FOR REVIEW</u> .....	4
III. <u>STORMS AND BROWNSTONE’S REMAINING ARGUMENTS ARE INAPPOSITE</u> .....	8
IV. <u>THIS COURT SHOULD AWARD WATKINS ITS ATTORNEY’S FEES AND COSTS AS THE PREVAILING PARTY ON APPEAL</u> .....	11
<u>CONCLUSION</u> .....	11

**TABLE OF CASES AND AUTHORITIES**

<b>CASES:</b>	<b>Pages</b>
<i>Advanced Medical Diagnostics, LLC, v. Imaging Center of Idaho, LLC</i> , 154 Idaho 812 (2013) .....	10
<i>Bank of Commerce v. Jefferson Enterprises, LLC</i> , 154 Idaho 824 (2013).....	4
<i>BECO Const. Co., Inc. v. J-U-B Engineers Inc.</i> , 149 Idaho 294 (2010).....	11
<i>Brooks v. Gigray Ranches, Inc.</i> , 128 Idaho 72 (1996).....	9-10
<i>Devine v. Cluff</i> , 110 Idaho 1 (1985).....	10
<i>Fagen, Inc. v. Rogerson Flats Wind Park, LLC</i> , 159 Idaho 624 (2016).....	7
<i>Freeman &amp; Co. v. Bolt</i> , 132 Idaho 152 (Ct.App. 1998).....	10
<i>Garner v. Bartschi</i> , 139 Idaho 430 (2003).....	4
<i>Inland Group Of Companies, Inc. v. Obendorff</i> , 131 Idaho 473 (1998) .....	8
<i>Johannsen v. Utterbeck</i> , 146 Idaho 423 (2008) .....	4
<i>Kolar v. Cassia County Idaho</i> , 142 Idaho 346 (2005) .....	4, 6
<i>Manookian v. Blaine County</i> , 112 Idaho 697 (1987) .....	4
<i>McPheters v. Maile</i> , 138 Idaho 391 (2003).....	4-5
<i>Moore v. Omnicare, Inc.</i> , 141 Idaho 809 (2005).....	5-6
<i>Peterson v. Gentillon</i> , 154 Idaho 184 (2013) .....	3
<i>Rockefeller v. Grabow</i> , 136 Idaho 637 (2001) .....	10
<i>Skinner v. U.S. Bank Home Mortg.</i> , 159 Idaho 642 (2016) .....	4
<i>Tapadeera, LLC v. Knowlton</i> , 153 Idaho 182 (2012) .....	7
<i>Weaver v. Searle Bros.</i> , 129 Idaho 497 (1996).....	10

**STATUTES AND RULES:**

Idaho Rule of Civil Procedure 54 .....	9
Idaho Appellate Rule 40.....	11
Idaho Appellate Rule 41.....	11
Idaho Code Section 12-120(3) .....	11

## ARGUMENT IN REBUTTAL

I.

### THE STANDARD OF REVIEW IS WHETHER THE DISTRICT COURT'S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE.

With no analysis, Storms and Brownstone proffer that abuse of discretion is the applicable standard of review.<sup>1</sup> This is incorrect. As explained in its opening brief, Watkins does not challenge the *fact* of the attorney's fee award. Rather, Watkins argues the district court correctly determined that Storms and Brownstone could recover fees incurred in their defense of Watkins' claims, but could not recover fees incurred pursuing their counterclaim.<sup>2</sup>

More accurately, Watkins challenges the adequacy of the evidence in the record to support the district court's finding that 90% of Storms and Brownstone's attorney's fees were attributable to their defense of Watkins' claims rather than the pursuit of their counterclaim. Because Watkins challenges the district court's *finding* to support the fee award and not the decision to make the award itself, the correct standard of review is whether the findings are supported by substantial and competent evidence. *Peterson v. Gentillon*, 154 Idaho 184, 188 (2013).

//

//

//

---

<sup>1</sup> See p. 9 of Brief of Respondents on file herein.

<sup>2</sup> See p. 3 of Appellant's Brief on Appeal on file herein.

II.

THE ISSUE OF THE APPORTIONMENT BETWEEN STORMS AND BROWNSTONE'S RECOVERABLE AND UNRECOVERABLE ATTORNEY'S FEES IS PROPERLY BEFORE THE COURT FOR REVIEW.

On appeal, Watkins challenges the district court's apportionment between recoverable and unrecoverable attorney's fees. Storms and Brownstone's primary response is that the issue was not properly preserved for appellate review.<sup>3</sup> However, a look at the applicable case law and the record below establish the issue was properly preserved for this Court's review.

"To properly raise an issue on appeal there must be ***either an adverse ruling by the court below or*** the issue must have been raised in the court below." *McPheters v. Maile*, 138 Idaho 391, 397 (2003) (citation omitted) (emphasis added); *see also Skinner v. U.S. Bank Home Mortg.*, 159 Idaho 642, 650 (2016); *Bank of Commerce v. Jefferson Enterprises, LLC*, 154 Idaho 824, 828 (2013); *Johannsen v. Utterbeck*, 146 Idaho 423, 429 (2008); *Garner v. Bartschi*, 139 Idaho 430, 436 (2003). To determine if an issue was properly raised, this Court must distinguish "between issues not formally raised [which are nonetheless subject to appellate review] and issues that 'never surfaced' below [which are not subject to appellate review]." *Kolar v. Cassia County Idaho*, 142 Idaho 346, 354 (2005) (quotation omitted). "Issues not formally raised may be considered if they are tried by the express or implied consent of the parties, Idaho R. Civ. P. 15(b)..." *Id.* To be considered on appeal, the issue need not be raised by formal motion. *Manookian v. Blaine County*, 112 Idaho 697, 700 (1987).

---

<sup>3</sup> See p. 9-13 of Brief of Respondents on file herein.

The appellant and the trial court need not use exact language or citations to preserve an issue for review on appeal. Rather, the appellant or the trial court need only reference the “key language” of the issue. In *Moore v. Omnicare, Inc.*, 141 Idaho 809, 817 (2005), this Court observed that the appellant and the district court did not discuss the particular statute argued on appeal, but that the district court “sufficiently referenced the key language” of the issue for the Court to consider it on appeal.

Here, the issue Watkins raises on appeal is the propriety of the district court’s apportionment of Storms and Brownstone’s attorney’s fees between the defense of Watkins’ claim, which fees are recoverable, and the pursuit of their counterclaim, which fees are not recoverable.<sup>4</sup> The district court ruled on this exact issue, adversely to Watkins, concluding that 90% of the fees were recoverable while only 10% of the fees were not recoverable.<sup>5</sup> Because the record clearly establishes “an adverse ruling by the court below” on the same issue Watkins now challenges on appeal, Watkins “properly raise[s]” the issue for this Court’s review on appeal. *McPheters, supra*, at 397.

Further, Watkins did raise the issue of recoverable versus unrecoverable attorney’s fees to the district court.<sup>6</sup> Watkins went on to argue that Storms and Brownstone were not the prevailing parties and that, “[i]n the alternative,”<sup>7</sup> the district court should reduce the award,

---

<sup>4</sup> See pp. 8 and 9-18 of Appellant’s Brief on Appeal on file herein.

<sup>5</sup> R Vol. I, pp. 233-234.

<sup>6</sup> R Vol. I, pp. 210-213.

<sup>7</sup> R Vol. I, p. 217.

but the first argument focused on the impropriety of the court awarding Storms and Brownstone their attorney's fees for pursuing their counterclaim. Of course, Watkins did not initially challenge the correctness of the district court's *apportionment* of the fees because the district court had not yet made any apportionment. However, after the district court ruled adversely to Watkins on this issue, the matter became ripe for appellate review. Again, the issue need not be "formally raised." *Kolar, supra*.

Idaho case law is replete with cases where the appellant attempts to impermissibly raise a completely new issue on appeal where there is no mention of the issue, statute, or rule anywhere in the record below. But here, the fact that Watkins challenges the district court's finding, which finding is set forth in the record, establishes that the district court addressed the issue below, ruled adversely to Watkins, and that this Court may now properly review the issue on appeal. Clearly, the district court "sufficiently referenced the key language," *Moore, supra*, of the attorney's fee apportionment issue when it found that 90% of the fees were recoverable. Thus, as Watkins raised and the district court ruled adversely on the issue, this Court may properly consider the issue on appeal.

For their part, Storms and Brownstone do not discuss the law that an issue may be preserved for appeal by the adverse ruling of the district court on the issue. They do not cite it at all.

Instead, Storms and Brownstone challenge whether the appellant sufficiently raised the issue below by attempting to frame the issue as narrowly as possible in hopes that this Court

will not reach its merits. Storms and Brownstone quote language from *Fagen, Inc. v. Rogerson Flats Wind Park, LLC*, 159 Idaho 624 (2016), requiring that the issue be specifically identified below, but *Fagen* is easily distinguished from the present case. In *Fagen*, the appellant raised an entirely new argument on appeal, challenging the reasonableness of the rate charged by counsel from Minnesota, an issue the appellant did not raise below and that the court did not rule upon. Here, Watkins challenged Storms and Brownstone's right to recover fees for pursuing their counterclaim and the district court ruled adversely to Watkins by finding 90% of the total fees were recoverable.

Likewise, Storms and Brownstone's reliance on *Tapadeera, LLC v. Knowlton*, 153 Idaho 182 (2012), is inapposite. Tapadeera contended on appeal that the district court erred in failing to award it attorney fees under Idaho Code Section 12-120(1), but Tapadeera had not requested that award from the district court, so this Court refused to consider the request on appeal. As Tapadeera had not ever made the request to the district court, the district court had made no ruling on the issue, and there was no decision for Tapadeera to challenge on appeal. *Id.* at 188. Here, the district court found that 90% of Storms and Brownstone's fees were recoverable, a finding made by the district court that Watkins now challenges. There was no record below of Tapadeera's request, so the Court properly refused to consider the request on appeal. But here, there is a record below addressing the issue Watkins now challenges, so the Court may properly review it on appeal.

This Court's decision in *Inland Group Of Companies, Inc. v. Obendorff*, 131 Idaho 473, 475 (1998), is inapplicable for the same reason as *Tapadeera*. The appellant in *Inland* argued on appeal that an affidavit in support of a motion for order to show cause was defective, but the appellant had not raised that issue below and the trial court had not ruled on it. Here, Watkins raised the issue of unrecoverable attorney's fees and the district court ruled on the issue by apportioning 90% of Storms and Brownstone's fees to the recoverable claim. Thus, *Inland* does not apply here.

Clearly, the district court ruled adversely to Watkins on the very issue that Watkins now asserts on appeal when the district court apportioned 90% of Storms and Brownstone's total attorney's fees to the recoverable portion of the case (i.e., the defense of Watkins' claim) and only 10% to the unrecoverable portion of the case (i.e., Storms and Brownstone's counterclaim).

### III.

#### STORMS AND BROWNSTONE'S REMAINING ARGUMENTS ARE INAPPOSITE.

Other than arguing that Watkins has not properly preserved its issue for appeal, Storms and Brownstone offer no substantive opposition. They do argue, without citation to any authority, that this Court "clearly" can award Storms and Brownstone those attorney's fees incurred prior to Storms and Brownstone filing their counterclaim.<sup>8</sup> However, the facts giving rise to Storms and Brownstone's counterclaim all arose at the commencement of the case in

relation to the injunction proceedings. Just because Storms and Brownstone did not actually file their counterclaim until October 23, 2013, does not excuse their failure to distinguish between recoverable and unrecoverable attorney's fees. *Brooks v. Gigray Ranches, Inc.*, 128 Idaho 72 (1996). This is especially true when Storms and Brownstone's billings show work on the counterclaim as early as February 25, 2013,<sup>9</sup> eight months before they actually filed the counterclaim. Without a meaningful segregation in the affidavit of counsel and memorandum of costs, the district court was left to impermissibly guess whether Storms and Brownstone incurred their fees in defense of Watkins' claim or in pursuit of their counterclaim.

Storms and Brownstone also suggest that their failure to distinguish the fees they incurred defending Watkins' claims from pursuing their counterclaim is excused because the district court correctly considered the factors of Idaho Rule of Civil Procedure 54(e)(3) and made a "reasonable" award.<sup>10</sup> However, Watkins does not complain of the district court's application of the Rule 54(e)(3) factors, but of the dearth of evidence to support the district court's finding that 90% of Storms and Brownstone's fees related to the defense of Watkins' claim. Thus, Storms and Brownstone are refuting an argument that Watkins never made. Storms and Brownstone's reliance on the district court's application of Rule 54(e)(3) and the overall "reasonableness" of the district court's award is unavailing.

---

<sup>8</sup> See p. 13 of Brief of Respondents on file herein.

<sup>9</sup> R Vol. I, p. 199.

<sup>10</sup> See pp. 14-17 of Brief of Respondents on file herein.

Finally, Storms and Brownstone rely on *Freeman & Co. v. Bolt*, 132 Idaho 152 (Ct.App. 1998), for the proposition that a percentage-based split of attorney's fees is permissible. This is true within the context of a prevailing party analysis as in *Freeman* where the party is allowed to recover fees *on all claims* and the only question is the extent to which that party prevailed. This is what the trial court did in *Freeman*. However, *Freeman* does not address the issue in this case, namely the apportionment of attorney's fees between a claim for which fees are recoverable and a claim for which fees are not recoverable. *Freeman* does not lend any support to Storms and Brownstone's failure to identify which of their fees were attributable to Watkins' defense and which were attributable to the pursuit of their counterclaim. In fact, Storms and Brownstone's suggested interpretation of *Freeman* is directly contrary to the rule set forth in *Brooks v. Gigray Ranches, Inc.*, 128 Idaho 72 (1996); *Advanced Medical Diagnostics, LLC, v. Imaging Center of Idaho, LLC*, 154 Idaho 812, 815 (2013); *Weaver v. Searle Bros.*, 129 Idaho 497 (1996); *Rockefeller v. Grabow*, 136 Idaho 637 (2001); *Devine v. Cluff*, 110 Idaho 1 (Ct.App. 1986); and the other sources Watkins cites in support of its argument.

The district court acknowledged that "Storms and Brownstone did not clarify the precise amount of time devoted to their counterclaim,"<sup>11</sup> but nonetheless tried to justify its award by estimating that "[n]ot more than ten percent (10%)...pertained to Storms' and Brownstone's counterclaim"<sup>12</sup> and that it spent "approximately ten percent" of its written

---

<sup>11</sup> R Vol. I, p. 234.

<sup>12</sup> R Vol. I, p. 234.

findings and conclusion Storms and Brownstone's counterclaim.<sup>13</sup> This is where the district court committed reversible error because there was no substantial, competent evidence in the record to support the court's finding.

IV.

THIS COURT SHOULD AWARD WATKINS ITS ATTORNEY'S FEES AND COSTS AS THE PREVAILING PARTY ON APPEAL.

Watkins reiterates its request for an award of attorney's fees and costs on appeal pursuant to Idaho Appellate Rule 41(a); Idaho Appellate Rule 40; *BECO Const. Co., Inc. v. J-U-B Engineers Inc.*, 149 Idaho 294, 298 (2010); and Idaho Code Section 12-120(3). As Watkins challenges the amount of the district court's fee award, if Watkins prevails on appeal, the Court should award Watkins its attorney's fees and costs.

**CONCLUSION**

For the reasons set forth herein and in the Appellant's Brief, this Court should grant Watkins all relief requested in the Appellant's Brief.

RESPECTFULLY SUBMITTED this 28 day of July, 2016.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: \_\_\_\_\_



B. J. Driscoll  
Attorneys for Appellant,  
The Watkins Company, LLC

---

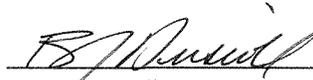
<sup>13</sup> R Vol. I, p. 234. (Italics in original.)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 28 day of July, 2016, I caused a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF ON APPEAL** to be served, by placing the same in a sealed envelope and depositing it in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Dean C. Brandstetter, Esq.  
COX, OHMAN &  
BRANDSTETTER, CHTD  
P.O. Box 51600  
510 "D" Street  
Idaho Falls, ID 83405

U. S. Mail  
 Fax  
 Overnight Delivery  
 Hand Delivery

  
\_\_\_\_\_  
B. J. Driscoll