11-13-2017

Budget Truck Sales, LLC v. Tilley Respondent's Brief Dckt. 45082

IN THE SUPREME COURT FOR THE STATE OF IDAHO

BUDGET TRUCK SALES, LLC, an Idaho limited liability company, Plaintiff/Counterdefendant/ Appellant, v. KENT H. TILLEY, Defendant/Counterclaimant/ Respondent,	Supreme Court Docket No. 45082-2017 Cassia County Case Nos. CV-2013-316 and CV-2015-719 (Consolidated)
KENT H. TILLEY, Plaintiff/Respondent, v. BREK A. PILLING; and BRIAN L. TIBBETS, Defendants/Appellants.	Supreme Court Docket No. 45083-2017 Cassia County Case Nos. CV-2012-1257

RESPONDENT'S BRIEF

Appeal of the District Court of the Fifth Judicial District of the State of Idaho
In and For the County of Cassia
Honorable Robert J. Elgee, District Judge Presiding

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I. STATEMENT OF THE CASE

A. Nature of Case

This litigation involves three separate cases between the parties, the earliest dating back to 2012, regarding business ventures for the purchase and sale of heavy duty trucks and equipment. The parties reached a global settlement, and the terms were recited on the record in open court. Appellants ("Budget Truck Parties") refused to honor the settlement agreement and claimed fraud in the inducement in opposing Respondent Kent Tilley's ("Kent") motion to enforce the settlement. The trial court issued an order enforcing the settlement agreement and entered a judgment against the Budget Truck Parties which is now the subject of this appeal.

B. Course of Proceedings

Brek Pilling initiated a lawsuit against Kent Tilley on December 27, 2012, Cassia County Case No. CV-2012-1257. Aug. R. p. 1-5. Kent filed an Answer, Counterclaim, and Third Party Claim on February 1, 2013, adding as defendants Jim Cottom and High Mark Rentals, LLC ("Cottom Case"). Aug. R. p. 6-17. This case involved a dispute over ownership and use of certain heavy duty trucks and equipment. *Id.*

Budget Truck Sales, LLC, ("Budget Truck") filed a lawsuit against Kent on April 9, 2013, Cassia County Case No. CV-2013-316. Aug. R. p. 28-34. Budget Truck alleged that Kent Tilley owed it money on an open account for loans it provided to Kent. *Id.* Kent filed an Answer and Counterclaim denying the debt and alleging Budget Truck owed him his share of the profits from the business venture to buy and sell heavy duty trucks, trailers, and equipment. Aug. R. p. 30-43.

Kent filed a lawsuit against Brek Pilling and Brian Tibbets on August 17, 2015, Cassia County Case No. CV-2015-719. Aug. R. p. 99-105. Kent alleged that he entered into a joint

venture agreement with Brek Pilling and Brian Tibbets to buy and sell heavy duty trucks, trailers, and equipment, and they personally owed him for his share of the profits from the venture which they turned into Budget Truck,[1] without Kent's knowledge or approval. *Id.* On October 8, 2015, the two cases involving the Budget Truck dispute were consolidated ("Consolidated Cases"). R. p. 19-20.

On December 13, 2016, a trial on the Consolidated Cases commenced. R. p. 15. On the second day of trial, the parties reached a global settlement agreement ("Agreement") to resolve all three cases as well as some issues outside of the litigation. Tr. p. 1-16 (Dec. 14, 2016)[2]. Tilley filed a motion to enforce the settlement on January 23, 2017. Aug. R. p. 44-45. All three cases were consolidated for purposes of this motion. Tr. p. 14, L. 3-6. The trial court entered an Order enforcing the settlement and a Judgment on May 2, 2017. R. p. 124-129; Aug. R. p. 95-98.

C. Statement of Facts

After the parties reached a global resolution of all cases and disputes between them, the district court had the parties recite the material terms of their agreement on the record in open court to ensure that there was a binding and enforceable agreement before vacating the trial. Tr. p. 5, L. 18 – p. 15, L. 22 (Dec. 14, 2016). Prior to doing so, the court advised the parties as follows:

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[1] The members of Budget Truck Sales, LLC, are Brek Pilling, Brian Tibbets, and Mike Tilley. Aug. R. p. 29. Mike Tilley and Kent Tilley are brothers.

[2] There are three transcripts in the record: 1) December 14, 2016, transcript from the trial when the parties recited the settlement terms on the record; 2) February 6, 2017, transcript of the hearing on Kent's motion to enforce the settlement; and 3) April 17, 2017, transcript of the hearing regarding the proposed judgment. The transcripts all begin with page number 1 and are not consecutively numbered. Therefore, citations to the transcripts each include the date of the transcript for easy reference.

THE COURT: ...So what I want the parties to know, or what I want to tell them how I'm going to envision this, I want to make sure they understand how this is going to work when we put this on the record, because I'm going to come back and ask you when this is done.

Mr. McRae is going to recite terms of the stipulation and Mr. Schmitz is going to say, Yup, that's it, we agree, or there's some other things, whatever. When we get done I'm going to come back to each of the clients and I'm going to say, Is this your deal, Is this final, Do you give your attorney authority to enter into this stipulation. Do you understand that this is final as of today and you cannot add anything to this, you cannot take anything away? This is a done deal, this case will be dismissed based on this.

And if you can go finalize your documents, that's what you should do. You should finalize your documents, get titles, deliver equipment, all those other things. But if you don't agree on the time of day after today, if you can't agree [on] any written documents or any other terms, this settles this case and this case is over on these terms. And whatever you disagree on, you might to have to come back to court and settle the disagreements, if you can't agree on anything else. But whatever you agree on today is done and final.

And I'm going to ask each of you if that's what you intend and if that's what you want to happen. Do you understand that? I just want a nod of head that you understand how this is going to work. Mr. Tilley – Kent Tilley, do you understand?

Tr. p. 3, L. 12 – p. 4, L. 16 (Dec. 14, 2016) (emphasis added). The material terms of the Agreement which were recited on the record are as follows:

1. A $100,000 payment to Kent Tilley the day after the delivery of a CAT 950 loader and a Clark loader, which were the subject of dispute in the Cottom Case, to a place designated by Brek Pilling. The remainder of the items in dispute in that case would be retained by Kent Tilley;

2. $300,000 paid to Kent Tilley over a term of three (3) years, pursuant to a promissory note, and personally guaranteed by Budget Truck Sales, LLC, Brek Pilling, Mike Tilley and Brian Tibbets, with no interest and quarterly payments beginning February 1, 2017;

3. Kent Tilley to receive $6,000 being held by Schows pending production of the title for a 1997 Ford truck. Kent Tilley's attorney, Jeff Rolig, would prepare the necessary paperwork to obtain the title and Mr. McRae would sign any stipulation needed;

4. Kent Tilley would immediately prepare the necessary documents to obtain a default judgment against Jim Cottom in the Cottom Case;

5. Kent Tilley would be entitled to receive the $24,500 being held by the Court in Case No. CV-2013-316;

6. Kent Tilley would assume the debt owed by Budget Truck Sales, LLC, to June Tilley[3];

7. Kent Tilley agreed not to seek any civil remedy from Brandon Tilley[4] for the vandalism of Kent's property;

8. Budget Truck Sales, LLC, Brek Pilling, Brian Tibbets, and Mike Tilley would deliver any and all titles in their possession for Kent Tilley's personal trucks and equipment and if duplicate titles are needed, that would be worked out.

Id. p. 5, L. 18 – p. 15, L. 22. After the terms were recited, the court asked each individual party and their attorneys if they stipulated to those terms, knowing that they could not add to nor subtract from them. The Court started with Mike Tilley and the following colloquy occurred:

> THE COURT: All right. Now let me start with – I don't care – Mike Tilley. Were you able to hear the agreement placed on the record by the attorneys?
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> MIKE TILLEY: Yes.
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> THE COURT: Was there anything left out of that to your knowledge?
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> MIKE TILLEY: No.
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> THE COURT: Do you intend for this to be a full and final disposition of this case?
>
> MIKE TILLEY: Yes.
>
> THE COURT: And do you give your attorney authority to enter into this stipulation on your behalf?
>
> MIKE TILLEY: Yes.
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> THE COURT: And you understand the result of this is this case will be over and you cannot add anything to this agreement or take anything away from this agreement, and at least as far as what's recited on the record, this case is – that's a final agreement. Do you understand that?

[3] June Tilley is Mike and Kent's mother.
[4] Brandon Tilley is Mike's son.

MIKE TILLEY: Yes.

THE COURT: You might have documents to prepare and some stipulations and somethings to deliver and some other things to be done, but as far as you're concerned this is over; am I right?

MIKE TILLEY: Correct.

Id., p. 9, L. 19 – p. 10, L. 18 (emphasis added). The court had the same exchange with all of the parties, except Brek Pilling who was absent and for whom Mr. McRae was authorized to speak. *Id.*, p. 12, L. 16 – p. 13, L. 3.

Pursuant to the Agreement recited above, the very next day, December 15, 2016, Mr. Rolig, Kent's attorney in the Cottom Case, prepared and sent to Mr. McRae a proposed Stipulation for Order Directing Issuance of New Title for the Ford truck sold at Schows, along with a proposed Order Directing Issuance of New Title. R. p. 45-51. Also, pursuant to the Agreement, Mr. Rolig immediately filed a proposed Order for Entry of Default against Jim Cottom, which the district court signed on December 19, 2016. R. p. 271-272.

On December 28, 2016, having received no response to his email, Mr. Rolig again sent a copy of the proposed Stipulation and Order to Mr. McRae to get a new title for the truck sold at Schows. Also on December 28, 2016, Mr. Schmitz requested from Mr. McRae certain information to include in the settlement documents, including the location for delivery of the loaders and how the $100,000 payment would be made to Kent Tilley. Mr. McRae responded that he would check with his clients and be in touch the next day. Aug. R. p. 53.

On January 3, 2017, Mr. Schmitz again requested identification of the location for delivery of the loaders and requested the specific amount Budget Truck Sales owed to June Tilley for inclusion in the settlement documents. Aug. R. p. 54-55. Even though Mr. McRae and

his clients had not provided any of the requested information, on January 4, 2017, Mr. Schmitz sent the proposed Mutual Release and Settlement Agreement ("Release") to Mr. McRae. Since Brek Pilling had not yet designated a location for delivery of the loaders, the location was identified in the Release as Kodiak America, which is where Mr. McRae had indicated on the record was to be the likely delivery site. Tr. p. 5, L. 19-24 (Dec. 14, 2016). Mr. McRae was further advised that if a response was not received by January 10, 2017, it would be assumed that delivery to Kodiak America was acceptable and the loaders would be delivered by Thursday, January 12, 2017, making the first payment of $100,000 due by Friday, January 13, 2017. Aug. R. p. 56-58. Mr. McRae thereafter indicated that the loaders should be delivered to Budget Truck Sales' lot. *Id.*

On January 6, 2017, Mr. Schmitz advised Mr. McRae that Kent Tilley would deliver the loaders to Budget Truck Sales on January 10, 2017. Aug. R. p. 59-60. As advised, the Clark loader was delivered to Budget Truck Sales on January 10, 2017. Also on January 10, 2017, Mr. McRae sent an email to Mr. Schmitz raising new issues that his clients would like to see addressed in the Release. Aug. R., p. 62. These new issues were: 1) a non-disclosure provision; 2) a representation that the loaders were in "workable condition"; 3) a no-contact provision; and 4) a provision barring Kent from using the name "Budget" in any business. *Id.*

On January 11, 2017, after the Clark loader had been delivered, Mr. McRae sent another email indicating that his clients were seeking a final written agreement before the loaders could be delivered and before they would submit payment. Aug. R. p. 63-64. As previously advised, the CAT 950 loader was already scheduled to be delivered and was in fact delivered to Budget Truck Sales on January 11, 2017. *Id.* Mr. McRae and his clients were referred to the Agreement placed on the record before the Court and advised that the loaders were being delivered pursuant

to that Agreement. *Id.* Mr. McRae was also reminded of the Court's numerous instructions to the parties that they could not add anything to the Agreement or take anything away from it. *Id.* Mr. Schmitz further advised that if payment of the $100,000 was not received by the following day, a motion to enforce the settlement agreement would be filed. *Id.*

On January 12, 2017, even though both loaders had been delivered, the Budget Truck parties refused to pay Kent. Mr. McRae reiterated that his clients would not pay the $100,000 or proceed with the Agreement unless Kent agreed to the new additional terms demanded by his clients. Aug. R. p. 65-66. Mr. Schmitz again advised Mr. McRae that if his clients would not comply with the Agreement and pay the $100,000 by the next day, the matter would be brought to the court. *Id.*

On January 13, 2017, Mr. McRae confirmed that his clients would not honor the Agreement. Aug. R. p. 69-70. These actions led to the motion and order enforcing the Agreement.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

A. When there was substantial evidence to support the trial court's ruling, should this Court support the finding that the condition of the CAT 950 loader was not a material term of the settlement agreement, given that the heavy burden of showing that the finding was clearly erroneous has not been met?

B. When the circumstances of this case show there was no support to find the Budget Truck Parties justifiably relied upon any representation regarding the condition of the loaders and the condition of the loaders was not a material term of the settlement, should this Court uphold the trial court's ruling that the Budget Truck Parties failed to make a sufficient showing of fraud in the inducement as a matter of law.

C. Are the Budget Truck Parties estopped from arguing fraud in the inducement in seeking to rescind the settlement agreement when they individually agreed to the terms on the record and accepted all the benefits of the bargain?

D. Is Kent Tilley entitled to attorney fees on appeal?

III. STANDARD OF REVIEW

The parties disagree on which standard applies to this appeal. The Budget Truck Parties assert that "A motion for the enforcement of a settlement agreement is treated as a motion for summary judgment when no evidentiary hearing has been conducted." *Vanderford Co. v. Knudson*, 150 Idaho 664, 671, 249 P.3d 857, 864 (2011). However, the standard of review depends in part upon the procedural posture of the case. *Goodman v. Lothrup*, 143 Idaho 622, 625, 151 P.3d 818, 821 (2007). "In order to make that determination, it is first necessary to establish what sort of proceeding occurred below." *Id.*, at 626, 822. Other cases that are more on point address enforcement of settlement agreements utilizing a "clearly erroneous" standard more akin to the appellate standard of review for evidentiary findings or findings of fact. This case is procedurally different from *Vanderford* and *Goodman* and the clearly erroneous standard should apply.

In *Vanderford*, the parties attended a court ordered mediation. *Vanderford Co. v. Knudson*, 150 Idaho 664, 667, 249 P.3d 857, 860 (2011). Afterwards, Knudson filed a notice that mediation failed. *Id.* The other parties, Vanderford and Greifs, disagreed because they contended Knudson had granted Vanderford authority to negotiate a settlement and agreed to join in that settlement. *Id.*, at 667-68, 860-61. The Greifs filed a motion to enforce the settlement and dismiss Knudson's claims under Rule 12(b)(6). *Id.*, at 668, 861. The parties submitted opposing affidavits and the district court heard oral argument on the motions. Afterward, the district court found that Knudson and Vanderford reached a settlement that included, among other things, the assignment of Knudson's rights against the Greifs in the lawsuit to Vanderford. The court granted the Greifs' motion and dismissed Knudson's claims. *Id.*, at 670, 863. Citing *Goodman*

for its similar procedural process, this Court indicated that the motion to enforce functioned as a motion to dismiss which, when the court considers material outside the pleadings, is treated as one for summary judgment. *Id.*, at 671, 864.

Goodman involved a property line dispute. The parties were ordered into mediation and appeared to have reached a settlement. *Goodman v. Lothrup*, 143 Idaho at 624-25, 151 P.3d at 820-21. Following mediation, one of the parties repudiated the agreement. Goodman filed a motion to enforce which the court initially denied, but granted on reconsideration. *Id.*, at 625, 821. On appeal, this Court distinguished the procedural posture of *Goodman* from *Caballero v. Wikse*, 140 Idaho 329, 92 P.3d 1076 (2004). In *Caballero*, the district court ordered enforcement of a disputed mediation agreement after a bench trial to determine the validity and terms of that agreement. *Caballero v. Wikse*, 140 Idaho at 332, 92 P.3d 1079; *Goodman*, 143 Idaho at 625, 151 P.3d at 821. Because appellate review in *Caballero* followed a bench trial to determine the validity and terms of the agreement, it was appropriate to uphold the district court's findings of fact if they were not clearly erroneous. *Goodman*, 143 Idaho at 626, 151 P.3d at 822. However, unlike *Caballero*, in *Goodman*, the memorandum decision and order did not follow a trial, it followed a motion to enforce which functioned as a motion to dismiss under I.R.C.P. 12(b)(6). *Id.*

Neither *Vanderford* nor *Goodman* are procedurally similar to this case because they did not involve a situation where the parties informed the court during trial that they reached a settlement and then recited the terms of the settlement on the record in open court. Instead, this case is procedurally more similar to *Caballero*, since reciting the settlement terms on the record and stipulating to them functioned as an evidentiary hearing on the terms of the agreement. Moreover, this case is factually and procedurally identical to *Kohring v. Robertson*, 137 Idaho

94, 44 P.3d 1149 (2002), and *Conley v. Whittlesey*, 126 Idaho 630, 888 P.2d 804 (Ct.App. 1995), where this Court and the Court of Appeals applied the "clearly erroneous" standard.

In *Kohring*, the parties were members of a closely-held family corporation. *Kohring v. Robertson*, 137 Idaho at 95, 44 P.3d at 1150. A dispute arose pertaining to three parcels of land, farm equipment, and some personal property. *Id.* At the time originally set for trial, the parties orally stipulated to a settlement agreement on the record in open court. *Id.*, at 97, 1152. Kohring's attorney placed the parties' stipulation on the record with the Robertson's attorney clarifying one issue regarding water usage because the method of irrigation was of great importance. *Id.* Disputes arose between the parties as they attempted to reduce the agreement to writing. *Id.* The next month, Kohring filed a motion to enforce and clarify the settlement agreement. She argued that the Robertsons were not adhering to the stipulation as to how the land would be irrigated. *Id.* at 98, 1153. The district court heard oral argument on the motion and held that the stipulation pertaining to water usage was merely an "agreement to agree," because the intent of the parties was to enter a subsequent agreement. *Id.* The district court held the agreement was unenforceable, and a trial was held on the original claims. *Id.*

On appeal, this Court used the following standard of review:

> "Findings of fact cannot be set aside on appeal unless they are clearly erroneous, i.e. not supported by substantial, competent evidence." *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 241-42, 869 P.2d 554, 558-59 (1993). Likewise, the "trial court's findings and conclusions which are based on substantial although conflicting evidence will not be disturbed on appeal." *Sun Valley Shamrock Resources, Inc. v. Travelers Leasing Corp.*, 118 Idaho 116, 118, 794 P.2d 1389, 1391 (1990). Since it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses, "the trial court's findings of fact will be liberally construed in favor of the judgment entered." *Id.*

Id., at 98-99, 1153-54 (*quoting Beard v. George*, 135 Idaho 685, 687, 23 P.3d 147, 149 (2001)). Even though there was no evidentiary hearing or bench trial held specifically as to the enforcement of the settlement agreement, this Court used the clearly erroneous standard to reverse the district court and find that the settlement agreement was enforceable based upon the parties' stipulation on the record. Thus, the stipulation on the record functioned as an evidentiary hearing for purposes of determining the validity and terms of the parties' agreement.

In *Conley v. Whittesley*, 126 Idaho 630, 888 P.2d 804 (Ct. App. 1995), the subject of the litigation was an easement located on Moscow Mountain conveyed to Conley. On the first day scheduled for trial, the parties advised the district court they had reached a settlement and set forth on the record the agreed upon terms. *Conley*, 126 Idaho at 632, 888 P.2d 806. The court vacated the trial and directed the parties to enter a written agreement within a reasonable time, or the court would set a new trial date. *Id.* After the parties failed to enter a written agreement, the court issued a *sua sponte* order directing the parties to show cause why they failed to execute a written agreement in conformity with the terms expressed on the record. *Id.* At the show cause hearing, Whittlesey indicated his proposed draft went beyond the scope of the pleadings and included more detail than the terms discussed on the record. *Id.* Conley submitted that the parties never said on the record that the agreement was final. *Id.* The district court concluded that the parties had entered a binding stipulation and ordered them to prepare a written agreement to conform with what had been placed on the record. *Id.*

On appeal, with respect to the standard of review, the Court of Appeals stated:

> ...we examine the transcript of the July 10, 1989, hearing to determine whether there is substantial evidence to support the district court's finding that the parties intended the settlement terms which were recited on the record to be their final agreement. We will defer to the district court's findings unless they are not supported by the evidence.

Id., at 634, 808.

As in both *Kohring* and *Conley*, this case involves a situation in which the parties stipulated and recited the terms of their settlement on the record. When the parties tell the district court that they have reached a settlement and then place all the terms of that settlement on the record, with the individual parties affirming their stipulation on the record, it functions as an evidentiary hearing on the validity and terms of the agreement. In those situations, there is no need for the court to conduct another evidentiary hearing, nor does a summary judgment standard of review apply. Placing the terms of the settlement on the record allows the district court to make findings of fact based upon the representations placed on the record, and those findings should be upheld unless they are "clearly erroneous." Therefore, the Court should use the clearly erroneous standard to review the district court's decision.

IV. ARGUMENT

At the outset, it helps to understand what is NOT being challenged here, as it may be dispositive: 1) the Budget Truck Parties are NOT challenging the enforceability of the Agreement, other than arguing fraud in the inducement as to the condition of the CAT 950 loader; and 2) the Budget Truck Parties are NOT challenging the district court's finding that the condition of the CAT 950 loader was not a material term of the Agreement.[5] Instead, they only challenge the district court's summary of the law on fraud in the inducement. However, the

[5] These issues have never been raised, either in Appellants' Brief, or in front of the district court and, therefore, are waived on appeal. *See Michalk v. Michalk*, 148 Idaho 224, 229, 220 P.3d 580, 585 (2009) ("It is well established that a litigant may not remain silent as to claimed error during a trial and later raise objections for the first time on appeal."); *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010) ("We will not consider an issue not 'supported by argument and authority in the opening brief.'").

district court's order enforcing the settlement, and the judgment, should be affirmed for four reasons: 1) there is substantial evidence to support the district court's ruling that the condition of the loader was not a material term of the Agreement; 2) the district court's ruling on fraud in the inducement was correct under the circumstances; 3) the Budget Truck Parties failed to challenge all of the bases for the district court's ruling; and 4) the doctrine of quasi-estoppel bars the Budget Truck Parties from claiming that the condition of the loader was a material term of the Agreement recited on the record.

A. The trial court's order enforcing the Agreement and its judgment should be upheld because there is substantial, competent evidence to support its finding that the condition of the CAT 950 loader was not a material term.

Before the parties placed their stipulated terms on the record, the court cautioned and advised them that it was going to be their one and only opportunity to set forth all the material terms of their Agreement. Afterwards, they would not be able to add or subtract from the stipulated Agreement.

> THE COURT: ...So what I want the parties to know, or what I want to tell them how I'm going to envision this, I want to make sure they understand how this is going to work when we put this on the record, because I'm going to come back and ask you when this is done.
>
> Mr. McRae is going to recite terms of the stipulation and Mr. Schmitz is going to say, Yup, that's it, we agree, or there's some other things, whatever. When we get done I'm going to come back to each of the clients and I'm going to say, Is this your deal, is this final, Do you give your attorney authority to enter into this stipulation. Do you understand that this is final as of today and you cannot add anything to this, you cannot take anything away? This this is a done deal, this case will be dismissed based on this.
>
> And if you can go finalize your documents, that's what you should do. You should finalize your documents, get titles, deliver equipment, all those other things. But if you don't agree on the time of day after today, if you can't agree [on] any written documents or any other terms, this settles this case and this case is over on these terms. And whatever you disagree on, you might to have to come back to court and settle the disagreements, if you can't agree on anything else. But whatever you agree on today is done and final.

> And I'm going to ask each of you if that's what you intend and if that's what you want to happen. Do you understand that? I just want a nod of head that you understand how this is going to work. Mr. Tilley – Kent Tilley, do you understand?

Tr. p. 3, L. 12 – p. 4, L. 16 (Dec. 14, 2016) (emphasis added). Mr. McRae then recited the terms of the Agreement to the Court, as set forth in the Statement of Facts above. *Id.* at p. 5, L. 18 – p 15, L. 22. The Budget Truck Parties' argument on appeal is that Kent misrepresented the condition of the CAT 950 loader, which was just one of the two loaders he was to deliver, and which was only one aspect of the Agreement. They contend the district court should have held an evidentiary hearing on the alleged misrepresentation so they could rescind the Agreement. Appellants' Brief, p. 6, 10. According to the Budget Truck Parties, Kent supposedly represented that the loader "worked great" and was in "great working condition." Appellants' Brief, p. 10. This is itself a misrepresentation of the Budget Truck Parties' position prior to this appeal. Prior to the appeal, the Budget Truck Parties claimed that Kent advised Mr. McRae that the loader had some hydraulic problems, but that Kent would repair those problems and deliver the loader in working condition. On the same day that Kent delivered the first loader, the Clark loader, Mr. McRae sent an email requesting new and additional terms be added to the draft Release. Aug. R. p. 62. One of those new terms pertained to the condition of the loaders. Mr. McRae stated:

> During settlement discussions, Kent represented to me that there were improvements that he could easily make to the loaders. In particular, he stated that there were some "hydraulic issues" that he could easily cure. As such, we would like a representation as to the condition of the loaders upon delivery, that they are in workable condition.

Id. This was the Budget Truck Parties' first description of Kent's alleged representation.[6]

[6] Kent denies making any representation that the loaders were in great working condition or that he would make any repairs or improvements to the loaders. Aug. R. p. 63, 65, 69.

This is far from Kent representing that the loaders were in "great working condition" and is clearly an after-thought request, not something that was material to the Agreement. By Mr. McRae's own statement, Kent did not represent the loader was "working great" or in "great working condition." The alleged representation was that he could make some "improvements" to the loaders, and that there were some "hydraulic issues." At most, this would be an indication that Kent would be willing to make some improvements or repairs, not that the loader was working great. It was not until after the CAT 950 loader was delivered that Mr. McRae changed the alleged representation to Kent informing him that the CAT 950 "would be in working order with just some simple hydraulic issues that he would fix." Aug. R. p. 68. Then the allegation changed to Kent representing that the CAT 950 was "working great" with only "a minor hydraulic issue" that Kent assured Mr. McRae would be fixed before delivering the loader. Aug. R. p. 66. Now, apparently, the representation has become that the loader already "worked great" and "was in great working condition." Appellants' Brief, p. 2.

Not only did Kent's alleged misrepresentation evolve over time, but that evolution actually supports the conclusion that the condition of the loaders was not a material part of the Agreement recited to the court. Mike Tilley asserted in his affidavit to the district court that had the Budget Truck Parties known the CAT 950 was not in working condition, they would not have entered the Agreement. R. p. 152. If that is true, then the condition of the CAT 950 would have been one of, if not the most, material term of the Agreement to them. If that is also true, then the condition precedent that Kent repair the loader and deliver it in working condition should have been important enough for the Budget Truck Parties to put that requirement on the record as a material term. This is especially so considering the court's warning that the parties would not be able to add or change the terms in any way, that the case would be settled on the

terms recited, and considering that the alleged fraudulent statement was made prior to placing the terms of the Agreement on the record. The condition of the loaders was never mentioned as a material term on the record. Instead, the Budget Truck Parties all individually affirmed that all Kent had to do was "deliver" the loaders that were in his possession. The discussion regarding the loaders was as follows:

> MR. MCRAE: Budget Truck Sales will pay the sum of $400,000 to Kent Tilley. The first $100,000 payment will be made the day after the delivery – and this involves that other case – a CAT 950 loader and a Clark loader, to a place designated by Brek Pilling. I believe it will be at the Kodiak America lot here in Burley.
>
> The remaining $300,000 will be paid over a term of three years, pursuant to a promissory note, personally guaranteed by Budget Truck Sales, Brek Pilling, Mike Tilley and Brian Tibbets. Did I also say at one percent? Amortized over a period of three years at one percent.
>
> ...
>
> MR MCRAE: Yes. There's one other term in the 1257 case. I had mentioned the CAT 950 loader and the Clark loader going to Brek Pilling. The remainder of the items there, as I recall there's about ten other items of significantly less value, will go to – or Mr. Tilley will be able to retain those items: Kent Tilley.
>
> THE COURT: All other equipment in the 1257 case except for the Clark loader and the 950 loader go to Mr. Kent Tilley; is that right?
>
> MR. MCRAE: Correct. Two other terms –
>
> THE COURT: And Mr. Kent Tilley is going to deliver that Clark loader and the 950 loader and that's when the payment's going to start.
>
> MR. MCRAE: That's correct. That's when the $100,000 will be paid within the next day.

Tr. p. 5, L. 19 – p. 6, L. 4; p. 7, L. 18 – p. 8, L. 7 (Dec. 14, 2016). At no point was it mentioned that Kent would repair the loaders or that he would deliver them in great working condition. With respect to the equipment, this Agreement was a division of assets. Brek was getting the loaders and Kent was getting the rest of the items in dispute. The agreement that Kent was simply going to deliver the loaders was affirmed by all parties. They all also affirmed that

nothing was left out of the terms as recited by their attorney. The court started with Mike Tilley and the following colloquy occurred:

> THE COURT: All right. Now let me start with – I don't care – Mike Tilley. Were you able to hear the agreement placed on the record by the attorneys?
>
> MIKE TILLEY: Yes
>
> THE COURT: Was there anything left out of that to your knowledge?
>
> MIKE TILLEY: No.
>
> THE COURT: Do you intend for this to be a full and final disposition of this case?
>
> MIKE TILLEY: Yes.
>
> THE COURT: And do you give your attorney authority to enter into this stipulation on your behalf?
>
> MIKE TILLEY: Yes.
>
> THE COURT: And you understand the result of this is this case will be over and you cannot add anything to this agreement or take anything away from this agreement, and at least as far as what's recited on the record, this case is – that's a final agreement. Do you understand that?
>
> MIKE TILLEY: Yes.
>
> THE COURT: You might have documents to prepare and some stipulations and somethings to deliver and some other things to be done, but as far as you're concerned this is over; am I right?
>
> MIKE TILLEY: Correct.

Id., p. 9, L. 18 – p. 10, l. 18 (emphasis added). The court carefully had the same exchange with all of the parties, except Brek Pilling who was absent, and for whom Mr. McRae was authorized to speak. *Id.*, p. 12, L. 16 – p. 13, L. 3. All of the parties represented to the court that they agreed with the terms of the Agreement and that they understood it was a final agreement of the terms which they could not later add to or alter. *Id.*, p. 9, L. 18 – p. 15, L. 6. Not only was the

condition of the loaders never mentioned as a term, neither was the affirmative duty of repairing or improving the loaders; only delivery of the loaders.

This presentation of facts is not intended to highlight the dispute between the parties, or emphasize an issue of fact. Instead, it is intended to present the information available to the district court, and to show that based on all the evidence presented to it, there was substantial and competent evidence to support its conclusion. Even if later evidence may have been submitted in the form of an affidavit to attempt to show a dispute, it was not clearly erroneous for the court to determine that the evidence did not show reliance or that the dispute did not involve a material term of the Agreement. Based upon the evidence, the district court found that the condition of the loaders to be delivered was not a material term of the settlement.

> They clearly were not made a condition –the condition of the loaders was clearly not made part of the settlement in court. The settlement in court was represented to be the full, final, concluded agreement between the parties. "You can't add anything to this. You can't take away anything from this. Do you under[stand] that?" "Yes, I do." "Do you wish that to be final and binding on you as of now?" "Yes, I do."
>
> ...
>
> So I find that the condition of loaders was not made a material term of this contract, and if I allowed further litigation on that point, it would be adding a term to the contract that was not agreed to and was not placed in the final settlement agreement placed on the record. To me, the contract placed on the record was done, it was final, it was concluded, and it was concluded on the terms placed on the record and that settled and dismisses all the litigation, and the parties cannot add the condition of the loaders as a material term. They didn't do it when they had the chance; they can't do it now. That's going to be my ruling.

Tr. p. 60, L. 24 – p. 61, L. 6; p. 61, L. 15 – p. 62, L. 1 (Feb. 6, 2017). These findings of fact are not clearly erroneous. They are supported by substantial evidence. Therefore, the district court's order enforcing the settlement and Judgment should be affirmed.

B. The trial court did not err in ruling that there was no fraud in the inducement under the circumstances of this case.

The trial court ruled that the showing made was "insufficient as a matter of law in my view to show fraud in the inducement." Tr. p. 60, Ll. 4-5. While the Budget Truck Parties argue that the trial court's characterization of the circumstances where fraud can be shown was too limited, citing *Advance-Rumely Thresher Co., v. Jacobs*, 51 Idaho 160, 4. P.2d 160 (1931), the trial court's ruling is easily supported by reviewing the elements of fraud. The elements of fraud are as follows:

> (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.

Aspiazu v. Mortimer, 139 Idaho 548, 550, 82 P.3d 830, 832 (2003). Even though the trial court did not cite all of these terms in its discussion, it did refer to the element of reliance on a false representation, Tr. p. 59, and alluded to the element of justifiable reliance in making this ruling. Essentially the trial court ruled that there was no support for any finding of justifiable reliance upon any representation regarding the condition or repair of the loaders because the settlement on the record, negotiated by parties who were represented by counsel, did not include any reference to the alleged representation. Even if the Court is persuaded by the Budget Truck Parties' argument that the trial court improperly characterized when fraud in the inducement can occur, the decision finding no fraud as a matter of law can be affirmed because the trial court used the correct elements of fraud in finding that fraud did not exist as a matter of law. This Court has upheld a lower court finding as a matter of law on the element of reliance/justifiable reliance where the circumstances of the case indicate no inferences of reliance could be made.

See Gray v. Tri-Way Construction Services, 147 Idaho 378, 210 P.3d 63 (2009); *King v. Lang*, 136 Idaho 905, 911, 42 P.3d 698 (2002).

Furthermore, to show fraud in the inducement, the Budget Truck Parties must show that the condition or repair of the loaders was a material term of the Agreement. In addition to addressing the element of justifiable reliance, the district court also addressed the element of materiality and found that the condition or repair of the loaders was not a material term. The Budget Truck Parties do not challenge the district court's finding that the condition of the loaders was not a material term of the settlement, and since materiality of the term is a necessary element of fraud, as a matter of law they cannot prove fraud in the inducement. Therefore, the district court's ruling and judgment should be affirmed.

C. Even if the summary judgment standard applies, the district court's ruling must be affirmed because the Budget Truck Parties failed to challenge all the bases for the court's ruling.

As pointed out above, the Budget Truck Parties failed to address any issue or finding of materiality on appeal. The only error asserted by the Budget Truck Parties is that the district court erred by allegedly limiting the circumstances in which fraud in the inducement may be found. Appellants' Brief, p. 6. However, that was only one part of the district court's ruling. The district court also ruled that the condition of the loaders was not a material term of the Agreement. Tr. p. 61-62 (Feb. 6, 2017). The Budget Truck Parties do not discuss or challenge this portion of the court's ruling.

This Court recently explained:

> This Court has held that when a district court grants summary judgment on multiple independent grounds, the appellant must successfully challenge all of those grounds to prevail on appeal. For example, in *Weisel v. Beaver Springs Owners Ass'n, Inc.*, the plaintiff sought to rescind a contract on the ground of mutual mistake. 152 Idaho 519, 524, 272 P.3d 491, 496 (2012). The district court

> granted summary judgment for the defendant on two alternative grounds; first, that no genuine issue of material fact existed and the claim was without merit, and second, that the mutual mistake claim was barred by the statute of limitations. *Id.* at 525, 272 P.3d at 497. We held that "an appellant's failure to address an independent ground for a grant of summary judgment is fatal to the appeal," and declined to consider the claim. *Id.* at 525-26, 272 P.3d at 497-98 (citing *Andersen v. Prof'l Escrow Servs., Inc.*, 141 Idaho 743, 746, 118 P.3d 75, 78 (2005)). Even if the appellant shows that the district court erred in granting summary judgment on some of the grounds, the judgment must be affirmed on the grounds not properly appealed. *Andersen*, 141 Idaho at 746, 118 P.3d at 78 ("[T]he fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the other grounds.") (citation omitted). Thus, if an appellant fails to contest all of the grounds upon which a district court based its grant of summary judgment, the judgment must be affirmed.

AED, Inc. v. KDC Investments, LLC, 155 Idaho 159, 164, 307 P.3d 176, 181 (2013) (emphasis added). As quoted in section A, in addition to indicating its understanding of fraud in the inducement, the district court also ruled that the condition of the loaders was not a material term of the settlement. "So I find that the condition of the loaders was not made a material term of this contract...That's going to be my ruling." Tr. p. 61, L. 15 – p. 62, L.1 (Feb. 6, 2017). The Budget Truck Parties have not challenged that ruling. They failed to show how or why the district court was wrong in concluding that the condition of the loaders was not a material term. Since the Budget Truck Parties failed to challenge all the bases for the court's ruling, the order enforcing the settlement and the judgment must be affirmed.

D. The Budget Truck Parties should be estopped from claiming that the condition of the CAT 950 loader was a material term of the Agreement.

Quasi-estoppel provides a fourth basis to affirm the district court's ruling. The Budget Truck Parties agreed to a global settlement and avoided completing the trial on the Consolidated Cases which saved them time, attorney fees, and a potentially larger adverse jury verdict. The Budget Truck Parties' own attorney recited the terms of the Agreement to the trial court. The

Budget Truck Parties individually affirmed on the record that all of the material terms had been properly presented to the court. If the condition or repair of the CAT 950 loader was a material term of the Agreement, it should have been placed on the record. It was not. The Budget Truck Parties then accepted all the benefits of the bargain, causing significant prejudice and hardship to Kent. They should not be allowed to now change their position and argue that the condition of the loader was material in order to avoid paying Kent the hundreds of thousands of dollars owed to him.

"The doctrine of quasi-estoppel 'prevents a party from reaping an unconscionable advantage, or from imposing an unconscionable disadvantage upon another, by changing positions.'" *Silicon Intern. Ore., LLC v. Monsanto Co.*, 155 Idaho 538, 549, 314 P.3d 593, 604 (2013) (quoting *Garner v. Bartschi,* 139 Idaho 430, 437, 80 P.3d 1031, 1038 (2003)).

> [Quasi-estoppel] prevents a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him or her. The doctrine applies where it would be unconscionable to allow a person to maintain a position with one in which he acquiesced or of which he accepted a benefit. The act of the party against whom the estoppel is sought must have gained some advantage to himself or produced some disadvantage to another; or the person invoking the estoppel must have been induced to change his position.

Id. (quoting *E. Idaho Agric. Credit Ass'n v. Neibaur,* 133 Idaho 402, 410, 987 P.2d 314, 322 (1999)).

The Budget Truck Parties took the position on December 14, 2016, that the material terms of the Agreement were those recited on the record in open court. The terms of the Agreement required performance by both parties. It required Kent to perform the following:

1. Kent's attorney, Jeff Rolig, to prepare the necessary paperwork to obtain title for a 1997 Ford truck, for which Schow's was withholding $6,000;
2. Immediately prepare the necessary documents to obtain a default judgment against Jim Cottom in Case No. CV-2012-1257;
3. Assume the debt owed by Budget Truck Sales, LLC, to June Tilley, which

was estimated at between $40,000 - $50,000; and
4. Not seek any civil remedy from Brandon Tilley for the vandalism of Kent's property; and
5. Deliver a CAT 950 loader and a Clark loader to a place designated by Brek Pilling.

Tr. p. 5, L. 18 – p. 15, L. 22 (Dec. 14, 2016).

The Budget Truck Parties were required to do the following:

1. Pay Kent $100,000 the day after delivery of a CAT 950 loader and Clark loader;
2. Pay Kent $300,000 over three (3) years pursuant to a promissory note personally guaranteed by Budget Truck, Brek Pilling, Mike Tilley, and Brian Tibbets;
3. Sign any stipulation needed to obtain title to a 1997 Ford truck so the $6,000 held by Schow's could be released to Kent; and
4. Deliver all titles in their possession for Kent's personal truck and equipment.

Id.

Kent performed each and every one of his obligations. Mr. Rolig prepared a proposed Stipulation for Order Directing Issuance of New Title for the Ford truck the very next day and sent it to the Budget Truck Parties' attorney. R. p. 45-51. Mr. Rolig also immediately filed a proposed Order for Entry of Default against Jim Cottom, which the Court signed on December 19, 2016. R. p. 271-272. A proposed Mutual Release and Settlement Agreement was sent to the Budget Truck Parties' attorney on January 4, 2017. Aug. R. p. 61. Kent assumed the debt owed to June Tilley. The loaders were delivered on January 10 and 11, 2017. Aug. R. p. 62-64. After the first loader was delivered the Budget Truck Parties demanded that Kent agree to four new terms that were not recited on the record on December 14, 2016, before the Budget Truck Parties would perform their obligations. These new terms were: 1) a non-disclosure provision; 2) a representation that the loaders were in "workable condition"; 3) a no-contact provision; and 4) a provision barring Kent from using the name "Budget" in any business. Aug. R. p. 62. Even though Kent had completed his obligations under the Agreement, the Budget Truck Parties

refused to perform any of their previously agreed upon obligations unless Kent would agree to these new terms. Aug. R. p. 65-55, 69-70. They held Kent's payments hostage in order to force him to agree upon new, and unreasonable, material terms.

The Budget Truck Parties obtained the benefit of everything they bargained for in the Agreement with Kent. However, after receiving these benefits, they changed their position from the one stated on the record in open court. They refused to perform their obligations unless Kent agreed to additional, unreasonable, and onerous terms. Then, when Kent moved to enforce the Agreement as recited on the record, the Budget Truck Parties alleged fraud in the inducement in order to rescind the Agreement to avoid paying Kent. This is unconscionable conduct, causing Kent significant disadvantage. He agreed to end the trial on the Consolidated Cases, he no longer has possession of the two loaders, a default was obtained against Jim Cottom, he assumed the June Tilley debt which he cannot pay without payment from the Budget Truck Parties, and he continues to incur attorney fees and expenses trying to force the Budget Truck Parties to honor their Agreement.

The Budget Truck Parties are asserting the right to argue that the condition of the CAT 950 loader was material to the Agreement. That position is inconsistent with their statements to the court on the record. They changed their position after receiving all the benefits of the settlement. By taking this inconsistent position they have caused Kent to suffer a significant disadvantage. It would be unconscionable to allow the Budget Truck Parties to now claim that the condition of the CAT 950 loader was a material term of the Agreement when they did not make that claim at the time all the material terms were recited on the record.

The trial court did not rule on this argument when granting Kent's motion to enforce the settlement, but the argument was raised in oral argument. Tr. p. 43, L. 13 – p. 45, L. 8 (Feb. 6,

2017). Kent did not have time to brief this issue to the trial court because appellants did not respond to Kent's motion to enforce until Friday, February 3, 2017, and the hearing was held on Monday, February 6, 2017. Since the argument was raised below, it is appropriate for this Court to consider it on appeal. The Idaho Supreme Court has regularly stated that,

> A respondent on appeal is not necessarily limited to the issues decided by the trial court or the issues raised by the appellant. The respondent can seek to sustain a judgment for reasons that were presented to the trial court even though they were not addressed or relied upon by the trial court in its decision.

Stapleton v. Jack Cushman Drilling, 153 Idaho 735, 742, 291 P.3d 418, 425 (2012). Thus, even though the district court did not determine whether estoppel applied to prevent the Budget Truck Parties from taking a contrary position to the one they took on December 14, 2016, Kent asks this Court to address this issue on appeal.

E. Kent Tilley is entitled to an award of attorney fees on appeal

Pursuant to Idaho Appellate Rules 35(b)(5) and 41, Kent respectfully requests an award of his attorney fees on appeal under Idaho Code §§ 12-120(3) and 12-121. Kent agrees with the Budget Truck Parties that the gravamen of these lawsuits involved commercial transactions and, therefore, if the Court finds that Kent is the prevailing party, he is entitled to an award of attorney fees on appeal. I.C. § 12-120(3); *Taylor v. Riley*, 2017 WL 4228860, __ P.3d __ (Sept. 25, 2017); *Cummings v. Stephens*, 157 Idaho 348, 367, 336 P.3d 281, 300 (2014).

Also, under Idaho Code § 12-121, this Court will award attorney fees when a party's claims are "frivolous or unsupported by argument or authority." *Hopper v. Swinerton*, 155 Idaho 801, 812, 317 P.3d 698, 709 (2013) (quoting *McLean v. Cheyovich Family Trust*, 153 Idaho 425, 432, 283 P.3d 742, 749 (2012)). In this case, the Budget Truck Parties only challenged the trial court's summary as to how fraud in the inducement applies in certain circumstances. However,

the Budget Truck Parties completely ignored and failed to challenge by argument or authority the trial court's ultimate finding which was that the condition of the loaders was not a material term of the Agreement recited on the record in open court back on December 14, 2016. There is no argument, factually or legally, that the court erred in finding that the condition of the loaders was not a material term of the Agreement. The Budget Truck Parties have kept all the benefits of that Agreement without complying with any of their obligations. This appeal is nothing more than a tactic for the Budget Truck Parties to delay or avoid paying Kent the hundreds of thousands of dollars owed him under the Agreement. For those reasons, the Budget Truck Parties have frivolously pursued this appeal and Kent should be awarded his attorney fees on appeal under Idaho Code § 12-121.

F. Appellants are not entitled to attorney fees on appeal.

The Budget Truck Parties ask the Court to award them attorney fees on appeal. Appellant's Brief, pp. 10 – 11. However, even if the Budget Truck Parties prevail on appeal, they will not necessarily be the prevailing party. The Budget Truck Parties request fees under Idaho Code §§ 12-120(3) and 12-121.[7] Both Idaho Code §§ 12-120(3) and 12-121 only allow a "prevailing party" to obtain attorney fees. However, the determination of prevailing party status is not made under these statutes, but instead under the instructions of I.R.C.P. 54. "Idaho Rule of

[7] To the extent a request is made for attorney fees under I.A.R. 35 and/or 41, those rules do not establish a substantive right to attorney fees, but instead, only establish the process for requesting fees under other sources. *See Commer. Ventures, Inc. v. Rex M. & Lynn Lea Family Tr.*, 145 Idaho 208, 219, 177 P.3d 955, 966 (2008); *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 365, 93 P.3d 685, 696 (2004).

Civil Procedure 54(d)(1)(B) guides a court's inquiry on the prevailing party question." *Idaho Military Historical Soc'y, Inc. v. Maslen*, 156 Idaho 624, 630, 329 P.3d 1072, 1078 (2014).[8]

I.R.C.P. 54(e)(1) states that fees are only allowed, "when provided for by any statute or contract." Fees are to be processed in the same way as costs. I.R.C.P. 54(e)(5). When determining who is the prevailing party for purposes of costs, the prevailing party analysis includes consideration of, "the final judgment or result of the action in relation to the relief sought by the respective parties." I.R.C.P. 54(d)(1)(B). Because the issue before this court involves the enforcement of a settlement agreement, there are no amended pleadings or new causes of action. Unlike Kent, where affirmance would result in him being awarded payment under the Judgment, a best-case scenario for the Budget Truck Parties would result in a remand to the district court. Such result would not be the end of the case. Even if the Budget Truck Parties prevailed on appeal, until that remand was resolved, it would be impossible to determine who was the prevailing party on an overall basis.

Idaho appellate courts have addressed similar cases before. In *Evans v. Sawtooth Partners*, the Court of Appeals stated,

> The parties have requested costs and attorney fees on appeal. The partnership clearly has prevailed on the deficiency question, but the ultimate allocation of costs and attorney fees at the trial level awaits a final determination on remand. We cannot yet say whether the partnership should be deemed the prevailing party as to the totality of issues presented on appeal.

Evans v. Sawtooth Partners, 111 Idaho 381, 388, 723 P.2d 925, 932 (Ct. App. 1986). In *Cox. v. City of Sandpoint*, after summary judgment order was vacated and the case was remanded, the Court of Appeals stated,

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[8] *See also Shore v. Peterson*, 146 Idaho 903, 914, 204 P.3d 1114, 1125 (2009); *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005).

> Both parties request an award for attorney fees on appeal. Cox is the prevailing party on appeal but it remains to be seen whether Cox will be the prevailing party in the action, and, therefore, entitled to attorney fees under I.C. § 12-120(3) and I.A.R. 41. The district court, upon final resolution of the case, may consider fees incurred on appeal when it makes an award to the prevailing party.

Cox v. City of Sandpoint, 140 Idaho 127, 133, 90 P.3d 352, 358 (Ct. App. 2003). In this case, a similar result should occur. Because a prevailing party must be determined, and the Budget Truck Parties cannot be a prevailing party from an overall basis as required by I.R.C.P. 54(d)(1)(B) until the case reaches a resolution, the Budget Trucks Parties should not be awarded fees on appeal.

V. CONCLUSION

For the foregoing reason, Kent Tilley respectfully requests that this Court affirm the district court's order enforcing the settlement and the court's judgment. Kent Tilley also respectfully requests that this Court award him his attorneys' fees incurred in responding to this appeal.

RESPECTFULLY SUBMITTED this 13th day of November, 2017.

GJORDING FOUSER, PLLC

By _____
Randall L. Schmitz – Of the Firm
Attorneys for Kent Tilley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of November, 2017, a true and correct copy of the foregoing was served on the following by the manner indicated:

David W. Gadd	☑	U.S. Mail
WORST, FITZGERALD & STOVER, PLLC	☐	Hand-Delivery
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Randall L. Schmitz