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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

KENWORTH SALES COMPANY, a Utah corporation, doing business in the state of Idaho, **Plaintiff/Petitioner/Respondent** **vs.** **SKINNER TRUCKING, INC., an Idaho corporation;** **JAMES E. SKINNER, an individual; and** **DAVID C. SKINNER, an individual;** **Defendants/Appellant**	**Supreme Court Docket No: 45883** **Twin Falls County No. CV42-16-2539**

APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls.

Honorable Jon J. Shindurling, Presiding.

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I. INTRODUCTION AND STATEMENT OF THE CASE

Skinner Trucking, Inc. ("Skinner") is a business engaged in the commodity transportation business. (Vol. 1, pp. 185-186.) Kenworth Sales Company ("Kenworth") is a licensed dealer who is engaged in the business of buying and selling commercial trucks. (Vol. 1, p. 185.) GE and Skinner entered into a lease on or about August 18, 2011, in which Skinner selected three new Kenworth trucks to lease. (Vol. 1, p. 186, 114.) GE Trust ("GE"), a financing entity and a subdivision of General Electric Capital Corporation, arranged lease financing with Kenworth. (Vol. 1, p. 186.) Kenworth sold the three trucks that Skinner had purchased to GE, who then leased the trucks to Skinner, pursuant to a Terminal Rental Adjustment Clause (TRAC) lease. (Vol. 1, p. 186.) The lease was to last for four years. (Vol. 1, p. 114.)

The lease provided that at the end of the four years, Skinner would return the trucks to GE. (Vol. 1, p. 99.) After the trucks are returned, GE would sell the trucks and if the net sales amount was less than the residual value, then Skinner would owe the difference to GE. (Vol. 1, p. 99.) On the contrary, if the net sale proceeds were more than the residual value, GE would owe that amount to Skinner. (Vol. 1, p. 99.)

Skinner was able to turn in two of the trucks to GE on October 30, 2015, when the four-year lease was up. (Vol. 1, p. 114.) Skinner then returned the third truck on December 22, 2015. (Vol. 1, p. 114.) The residual value of each truck was $58,051.20. (Vol. 1, p. 187.) Skinner then waited for the eventual sale of the trucks and the Final Adjustment. (Vol. 1, p. 99.) Without an agreement and unbeknownst to Skinner, Kenworth purchased the first two trucks on October 30, 2015, by paying GE the full residual value of the Skinner lease as well as the payments that Skinner owed to GE. (Vol. 1, p. 115, 187.) Kenworth then purchased the third truck from GE on December 2, 2015. (Vol. 1, p. 115.) In January 2016, Kenworth sent Skinner a bill for the

difference between their appraised value of the vehicles and their respective residual values, as well as the lease payments Kenworth made for Skinner, which totaled $55,226.77. (Vol. 1, p. 187.) That amount was based off of the sale price of $16,051.20 per truck (lease residual of $58,051.20 minus dealer resale allowance of $42,000.00), plus a late lease payment charge of $7,073.17. (Vol. 1, p. 24.)

Kenworth filed suit against Skinner on July 26, 2016, in an attempt to recover the $55,226.77. (Vol. 1, p. 14.) After contentious discovery, both parties filed a Motion for Summary Judgment, each of which were denied. (Vol. 1, pp. 20-21, 48-49.) Skinner made an offer of judgment to Kenworth on July 12, 2017, in the amount of $7,500.00. (Vol. 1, pp. 153-154.) Kenworth did not accept. (Vol. 1, p. 143.)

District Judge Randy J. Stoker issued his Findings of Fact and Conclusions of Law and the judgment on December 19, 2017. (Vol. 1, pp. 185-196.) Kenworth's claim of unjust enrichment was denied because there was no benefit conferred upon Skinner by Kenworth and the case was dismissed with prejudice. (Vol. 1, p. 195, 205.) Additionally, the Court found that Kenworth voluntarily purchased the vehicles, voluntarily paid the past due lease amounts, and was an "officious intermeddler" in this case. (Vol. 1, p. 193.) Each party was ordered to bear their own costs. (Vol. 1, p. 195.)

Skinner timely filed a Motion for Fees and Costs on December 29, 2017, accompanied by a supporting memorandum. (Vol. 1, pp. 148-149.) On the same date, Skinner also filed a Motion for Reconsideration, accompanied by a supporting memorandum and declaration. (Vol. 1, pp. 159-168.) On January 8, 2018, District Judge Stoker passed away. On January 26, 2018, Kenworth filed a Notice of Appeal with Twin Falls County District Court. (Vol. 1, pp. 180-184.) On February 28, 2018, District Judge Jon J. Shindurling issued a Memorandum Opinion Denying

Defendant's Motion to Reconsider. (Vol. 1, pp. 197-201.) Soon after, on March 13, 2018, Judge Shindurling issued a Corrected Memorandum Opinion Denying Defendant's Motion to Reconsider and Partially Granting Defendant's Motion for Attorney's Fees and Costs. (Vol. 1, pp. 204-210.) In his Corrected Memorandum Opinion, Judge Shindurling granted costs for Skinner under I.R.C.P. 54(d), at an amount to be determined at hearing. (Vol. 1, p. 208.)

II. ADDITIONAL ISSUES ON APPEAL

According to Appellant's Notice of Appeal filed on January 26, 2018, the issues which the Petitioner intend to raise on appeal include:

> (1) Whether the trial court erred in both considering and then applying the affirmative defense of "officious intermeddler," which was never pled by the Defendant's in their Answer or asserted either at trial or in any brief filed by the Defendants/Respondents prior to their closing brief filed after trial;
> (2) Whether the trial court erred in its analysis/application of the elements of Appellant's unjust enrichment claim;
> (3) Whether the trial court erred in its analysis/application of the "officious intermeddler" defense, including whether or not the court improperly shifted the burden to Petitioner to disprove such defense.

(Vol. 1, p. 181.) Skinner has yet to receive a brief from Kenworth outlining these arguments. The only appellate issue, in addition to those stated by Appellant, is Skinner's claim for attorney's fees on appeal. Skinner claims costs and fees on appeal pursuant to Idaho Appellate Rules 35, 40, and 41, Idaho Rules of Civil Procedure 54, and 68, and Idaho Code Sections 12-120, and 12-121. Additionally, *BECO Const. Co., Inc. v. J-U-B Engineers Inc.* very plainly states that if a party is entitled to fees upon an action in the lower court, then, because an appeal, even just regarding propriety of fees, is simply a continuation of that action, attorney's fees on appeal should also be awarded. *BECO Const. Co., Inc. v. J-U-B Engineers Inc.,* 149 Idaho 294, 298 (2010).

III. STANDARD OF REVIEW

"The determination whether a party is a prevailing party is committed to the discretion of the trial court" and is reviewed for abuse of discretion. *Mihalka v. Shepard*, 145 Idaho 547, 549, 181 P.3d 473, 474 (2008). "The party appealing the trial court's award of attorney's fees bears the burden of demonstrating a clear abuse of discretion." *Id.*

"Whether a district court has correctly determined that a case is based on a commercial transaction for the purpose of [Idaho Code section] 12-120(3) is a question of law over which th[e] Court exercises free review. *Garner v. Povey*, 151 Idaho 462, 469, 259, P.3d 608, 615 (2011).

"For an award of attorney fees under [Idaho Code section 12-121] to be appropriate, [the] entire defense of this action would have to have been frivolous, unreasonable, or without foundation." *Thomas v. Madsen*, 142 Idaho 635, 639, 132, P.3d 392, 396 (2006). "If there is a legitimate, triable issue of fact or a legitimate issue of law, attorney fees may not be awarded under this statute even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation." *Id.* An award of attorney fees under Idaho Code §12-121 is reviewed under an abuse of discretion standard. *Id.*

All issues review for abuse of discretion require the application of a three-part test. *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803, P.2d 993, 1000 (1991). The inquiry asks: "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Id.*

IV. ARGUMENT

A) THE TRIAL COURT ERRED IN FINDING THAT EACH PARTY SHALL BEAR ITS OWN COSTS

1. The Trial Court Improperly Denied Costs and Fees to Defendant Under I.R.C.P. Rule 68.

The Trial Court denied costs under I.R.C.P. Rule 68, stating that, "An award of costs is only allowed under I.R.C.P. when an offer made by a defendant is more favorable than a judgment obtained by a plaintiff (citations omitted). In the present case, the plaintiff is not the prevailing party, as judgment was entered for Skinner on all claims. As such, I.R.C.P. 68 does not apply, and costs cannot be awarded to Skinner under I.R.C.P. 68." (Vol 1., p. 208.)

The plain reading of the rule does not contain any language regarding whether the offering party needs to be a plaintiff or a defendant and vice versa. The Court made an error in this regard. I.R.C.P. Rule 68 states, in pertinent part,

> (a) Making an offer; Judgment on an accepted offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party, but not file in court, an offer to allow judgment on specified terms, which offer is deemed to include all costs and fees accrued…
>
> (b) Unaccepted offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.
>
> * * *
>
> (d) **Paying costs after an unaccepted offer.**
>
> > (1) Claims for monetary damages. In cases involving claims for monetary damages, any costs under Rule 54(d)(1) awarded against the offeree must be based upon a comparison of the offer and the 'adjusted award.'
> >
> > (B) Adjusted award less than offer. If the adjusted award obtained by the offeree is less than the offer, then:
> >
> > > (i) **the offeree must pay those costs of the offeror as allowed under Rule 54(d)(1), incurred after the making of the offer;**

((I.R.C.P. 68) (emphasis added)).

The wording of the Rule, taken with the application of the rule in the following cases, shows that the Trial Court erred by denying costs for multiple reasons.

The Idaho Court of Appeals discussed a similar application of I.R.C.P. 68 in *Evans v. Sawtooth Partners*. In *Evans*, sellers of a highly desirable tract of land brought suit against a partnership who had purchased the land for an alleged deficiency. *Evans v. Sawtooth Partners*, 111 Idaho 381, 387-88, 723 P.2d 925, 931-32 (Ct. App. 1986). The partnership made two offers of judgment, both more favorable than the result obtained by the sellers at trial. *Id.* Nevertheless, the District Judge refused to award costs, explaining that he felt Rule 68 was discretionary. *Id* at 387, 931. The Court of Appeals found that the Judge's order regarding costs must be put aside, and instructed the Judge on remand to award the partnership the costs it incurred after the first offer of judgment was rejected, pursuant to Rule 68. *Id* at 388, 932.

This application shows that it is possible that costs be awarded to a Defendant if they are the party that made the offer. Sawtooth Partners, the Defendants, made two offers of judgment, and since they prevailed at trial, the Court of Appeals ordered they receive costs on remand. In our present case, Respondents made an offer of judgment, and Kenworth had a burden to accept the offer or to recover more in damages at trial. Kenworth failed to do either, and is now required to pay Respondents' fees and costs incurred after the offer.

Additionally, the Idaho Supreme Court stated in *Odziemek v. Wesley*, "I.R.C.P. 68 clearly provides that a party tendering offer of judgment is entitled to those costs accrued following his offer of judgment where, as here, the damages awarded are less than the offer of judgment." *Odziemek v. Wesely*, 102 Idaho 582, 582, 634 P.2d 623, 623 (1981). The *party* distinction shows no finding relevant to plaintiffs and/or defendants (emphasis added). "When the conditions of

Rule 68 are satisfied, the award of costs incurred after the offer is made is mandatory." *Masters v. Dewey,* 109 Idaho 576, 580, 709 P.2d 149, 153 (Ct. App. 1985).

District Court Judge Shindurling cited to *Zenner v. Holcomb* in his *Corrected Memorandum Opinion Denying Defendant's Motion to Reconsider and Partially Granting Defendant's Motion for Attorney's Fees and Costs*. While *Zenner* does discuss at length the intricacies of Rule 68, it is very different from the case at hand. In *Zenner,* a dispute arose surrounding the construction of a house. *Zenner v. Holcomb,* 147 Idaho 444, 450, 210 P.3d 552, 558 (2009). The defendants, the Holcombs, made an offer of judgment which was declined, and the plaintiffs, the Zenners, prevailed. *Id.* However, the verdict given to the Zenners was not less favorable than the offer. *Id.* The Holcombs' offer of judgment was for $35,000, which the district court found to include costs and attorney's fees, and the jury verdict was for $40,000 without costs and attorney's fees. *Id*. Here, Kenworth received no verdict and was not the prevailing party.

The Trial Court was wrong in their application of I.R.C.P. 68, and Kenworth should now be required to pay Respondent's fees and costs incurred after Skinner's offer of judgment. The failure of the Trial Court to correctly apply the rule should not prevent the party who made an offer in good faith from recovering their fees and costs.

2. <u>The Trial Court Properly Granted Costs to Defendant Under I.R.C.P 54(d).</u>

The Court has already granted costs in this case under I.R.C.P. 54(d). (Vol. 1, p. 208.) In the *Corrected Memorandum Opinion Denying Defendant's Motion to Reconsider and Partially Granting Defendant's Motion for Attorney's Fees and Costs*, issued March 14, 2018, Judge Shindurling stated, "…under *Masters,* a prevailing party may receive justified costs under I.R.C.P. 54(d) (citations omitted). These costs have been briefed, but not argued in court. As such, the Court

directs Skinner to notice up for hearing and determination the issue of costs under I.R.C.P. 54(d)." (Vol. 1, p. 208.) There are no further issues to be determined in regard to I.R.C.P. 54(d).

3. The Trial Court Improperly Denied Fees Under Idaho Code §12-120(3).

For the reasons stated in Section B of this brief, there was a commercial transaction involved. Although there was no contract between Kenworth and Skinner, the commercial transaction test applies even though Kenworth was not the actual lessor of the trucks. Kenworth was responsible for structuring the commercial transactions involved by selling the trucks to GE, who then leased them to Skinner. (Vol. 1, p. 128.) Kenworth also admitted at trial that it acted as GE's representatives in the lease. (Vol. 1, p. 151, 156-158.)

Because of their relationship, Skinner is entitled to attorney's fees and costs under Idaho Code §12-120(3). Idaho Code §12-120(3) states,

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or **services and in any commercial transaction** unless otherwise provided by law, the **prevailing party** shall be allowed a *reasonable attorney's fee to be set by the court, to be taxed and collected as costs*.
>
> The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, **corporation**, association, private organization, the state of Idaho or political subdivision thereof.

((Idaho Code 12-120(3)) (emphasis added)).

Recovery of attorney's fees under IC §12-120(3) requires a commercial transaction between two parties, but it does not require a contract between two parties. *Great Plains Equipment, Inc., v. Northwest Pipeline Corp.,* 136 Idaho 466, 472, 36 P.3d 218, 224 (2001).

4. The Trial Court Improperly Denied Fees Under Idaho Code §12-121.

In the alternative, Respondent should be awarded full attorney fees under Idaho Code §12-121. I.C. §12-121 provides:

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. This section shall not alter, repeal or amend any statute that otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

The Court has discretion under I.C. §12-121 to award attorney's fees for causes brought or pursued frivolously, unreasonably or without foundation. *Hoover v. Hunter*, 150 Idaho 658, 664, 249 P.3d 851, 857 (2011) "Where questions of law are raised, attorney fees should be awarded under I.C. §12-121 only if the non-prevailing party advocates a plainly fallacious, and therefore, not fairly debatable, position. *Lowery v. Board of County Com'rs for Ada County*, 115 Idaho 64, 69, 764 P.2d 431, 436 (Ct. App. 1988) (internal citations omitted).

The Trial Court found that Kenworth presented evidence at trial that supported their allegation that there was an agreement between Kenworth and Skinner and denied attorney's fees under I.C. §12-121. (Vol. 1, pp. 207-208.)

Skinner still believes that Kenworth's claim was frivolous. The Trial Court found that there was no agreement or contract between the two parties and that Kenworth paid GE for the trucks on their own volition. (Vol. 1, p. 207.) Kenworth's decision to purchase the trucks from GE as an attempt to save their relationship with Skinner was a personal choice and was made without regard for Skinner's needs at the time. Kenworth's later regret over this decision and subsequent choice to demand the amount based on unjust enrichment from Skinner is unfounded and frivolous. Therefore, this Court should grant fees to Skinner under I.C. §12-121.

B) THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO COMMERCIAL TRANSACTION IN THIS LITIGATION WHEN DENYING THE DEFENDANT'S MOTION FOR RECONSIDERATION

Skinner should be awarded attorney fees under Idaho Code §12-120(3) because a commercial transaction did exist. The Trial Court was correct when they found that there was no agreement or contract between the two parties, and that Kenworth paid GE for the trucks on Kenworth's own volition. (Vol. 1, p. 207.) However, the Trial Court was incorrect when they stated that this meant there was no commercial transaction. (Vol. 1, p. 207.) This case involves the sale of commercial vehicles by Kenworth. Although there was no contract or agreement between Kenworth and Skinner discussing Kenworth purchasing the trucks back from GE after the lease had ended, this case centers around the original sale of the trucks between Kenworth, GE, and Skinner. Kenworth coordinated the vehicle purchase order, which encompassed the commercial lease terms. The combined order/lease document was not only commercial in nature but also the gravamen of Kenworth's unjust enrichment claims.

As stated above, a contract does not need to exist for there to be a commercial transaction under I.C. §12-120(3). *Great Plains* at 472, 224. That statute mandates an award of attorney fees to the prevailing party in any civil action to recover on 'any commercial transaction.' *Dennett v. Kuenzli*, 130 Idaho 21, 31, 936 P.2d 219, 229 (Ct. App. 1997). 'Commercial transaction' is defined as 'all transactions except transactions for personal or household purposes.' *Id.* The test for application of this statutory directive is 'whether the commercial transaction comprises the gravamen of the lawsuit, that is, whether the commercial transaction is integral to the claim and constitutes the basis upon which the party is attempting to recover.'" *Id.* (internal citations omitted).

This commercial transaction test applies here. Kenworth's litigation claims were based in

terms of the lease and would not have arisen but-for the existence of the lease. A party is entitled to attorney fees under §12-120(3) where the claim 'would not have arisen absent the claimed commercial transaction.' *Simono v. Turner House,* 160 Idaho 788, 793, 379 P.3d 1058, 1063 (2016). Therefore, Skinner is entitled to Section §12-120(3) fees even if the commercial lease was not ultimately enforceable by Kenworth. In *Lawrence v. Jones*, the Idaho Court of Appeals found, "It is well-settled in Idaho that one who successfully defends against the enforcement of a contract, when the gravamen of the transaction is a commercial transaction, nevertheless may be entitled to attorney fees even though the court has ruled that no contract exists or it is unenforceable." *Lawrence v. Jones*, 124 Idaho 748, 752, 864 P.2d 194, 198 (Ct. App. 1993).

Kenworth argues against the existence of a commercial transaction. In their *Objection to Defendants' Memorandum of Fees and Costs*, Kenworth states, "a commercial transaction between Plaintiff and the Defendants (1) was never alleged by Plaintiff and (2) was vigorously denied by the Defendants. Therefore, the Defendants' argument to the contrary now that fees are on the line is disingenuous at best." (Vol. 1, p. 177.) Once again, there is a firm distinction between the existence of a *contract* and the existence of a *commercial transaction* (emphasis added).

Since a commercial transaction did exist, attorney fees should be granted under Idaho Code §12-120(3).

C) THE TRIAL COURT ERRED IN ITS FINDING THAT I.R.C.P. 68 DOES NOT APPLY BECAUSE PLAINTIFF WAS NOT THE PREVAILING PARTY AND COSTS CANNOT BE AWARDED TO DEFENDANT

As discussed above, the Trial Court erred by denying costs under I.R.C.P. 68. Judge Shindurling stated, "An award of costs is only allowed under I.R.C.P. when an offer made by a defendant is more favorable than a judgment obtained by a plaintiff (citations omitted). In the

present case, the plaintiff is not the prevailing party, as judgment was entered for Skinner on all claims. As such, I.R.C.P. 68 does not apply, and costs cannot be awarded to Skinner under I.R.C.P. 68." (Vol 1., p. 208.) Judge Shindurling made an error in this regard. The plain reading of the rule does not contain any language regarding whether the offering party needs to be a plaintiff or a defendant and vice versa. In addition, case law shows that within Idaho there is no distinction regarding whether or not the offering party needs to be a plaintiff or a defendant and vice versa (see *Evans v. Sawtooth Partners,* 111 Idaho 381, 387-88, 723 P.2d 925, 931-32 (Ct. App. 1986), *Odziemek v. Wesely,* 102 Idaho 582, 582, 634 P.2d 623, 623 (1981), *Zenner v. Holcomb,* 147 Idaho 444, 450, 210 P.3d 552, 558 (2009)). For these reasons and the reasons discussed at length above, the Court should find that I.R.C.P 68 does apply here and award costs to Skinner.

V. ATTORNEY'S FEES ON APPEAL

Skinner claims attorney's fees and costs on appeal pursuant to Idaho Code §12-121. These attorney's fees and costs are proper in this case for the reasons stated in this brief. See I.A.R. 35(b)(5), 40 and 41. Skinner reserves the right to file further statements and assert a claim for attorney's fees when this Court issues a decision on the merits of this appeal.

VI. CONCLUSION

The Respondents respectfully request that the Trial Court's decision to deny reasonable attorney's fees under I.R.C.P. 68, I.C. §12-120(3), and I.C. §12-121, be reversed and attorney's fees and costs be awarded to Respondents. In addition, Respondents respectfully request that the Trial Court's decision to grant costs under I.R.C.P. 54(d) be upheld.

RESPECTFULLY SUBMITTED this 21st day of June, 2018.

ROCKSTAHL LAW OFFICE, CHTD.

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