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"Kenworth Sales Co. v. Skinner Trucking, Inc. Appellant's Reply Brief Dckt. 45883" (2018). *Idaho Supreme Court Records & Briefs, All*. 7470.

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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 REPLY 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, District Judge Presiding.

Bren E. Mollerup
Benoit, Alexander, Harwood, High & Mollerup, PLLC
126 2nd Ave. North
PO Box 366
Twin Falls, ID 83301
mollerup@benoitlaw.com
Attorney for Kenworth Sales Company

Joe Rockstahl
Rockstahl Law Office, Chtd.
510 Lincoln St.
Twin Falls, ID 83301
service@joerockstahl.com
Attorney for Skinner Trucking, Inc

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RECORD

Clerk's Record = Vol 1.

I. STATEMENT OF THE CASE

Please see the Statement of the Case section found in Appellant's initial brief.

II. ADDITIONAL ISSUES ON APPEAL

Please see the Additional Issues on Appeal section found in Appellant's initial brief.

III. STANDARD OF REVIEW

Please see the Standard of Review section found in Appellant's initial brief.

IV. ARGUMENT

A. The Matter of Costs Does Not Lack Ripeness

Kenworth claims that the matter of costs lacks ripeness on appeal. *Res. Mem. 5*.

Appellant disagrees. Ripeness is one element that must be satisfied for there to be a live case or controversy appropriate for judicial review. *Gibbons v. Cenarrusa*, 140 Idaho 316, 317, 92 P.3d 1063, 1064 (2002). "Ripeness asks whether there is any need for court action at the present time." *Miles v. Idaho Power Co.*, 116 Idaho 635, 642, 778 P.2d 757, 764 (1989).

Appellant argues that the trial court abused its discretion when ruling that each party shall bear their own costs. (Vol. 1, p. 193.). When examining whether a district court abused its discretion, this Court considers whether the district court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of that discretion and consistently within the applicable legal standards; and (3) reached its decision by an exercise of reason. *Shore v. Peterson*, 146 Idaho 903, 915, 204 P.3d 1114, 1126 (2009).

The matter of costs is still ripe because the trial court abused its discretion when it chose to deny Appellant's *Motion for Reconsideration* and attorneys' fees under I.R.C.P 68 in the *Corrected Memorandum Opinion Denying Defendant's Motion to Reconsider and Partially*

Granting Defendant's Motion for Attorney's Fees and Costs, issued on March 13, 2018. (Vol. 1, p. 208). Even though the Trial Court did grant costs in this case under I.R.C.P. 54(d), stating, "...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. (Vol. 1, p. 208).

The issue of costs is still ripe, as the trial court abused its discretion and the hearing to determine costs has yet to be held as Judge Shindurling ordered. In addition, as both parties have now filed appeals, costs for both parties will grow and the issue will need to be addressed as the case progresses.

B. Skinner is Entitled to Fees Under I.C. §12-120(3)

Kenworth claims that Appellant continues to misunderstand the law under I.C. §12-120(3). Kenworth first argues that I.C. §12-120(3) does not entitle a party to fees based solely on the existence of a commercial transaction tangentially related to the case. *Res. Mem. p. 6*. Appellant's understand this point. Appellant is not arguing that the the commercial transaction is *tangentially* related to the case, but instead that a commercial transaction existed between the parties (emphasis added). Contrary to Kenworth's assertion, there is evidence in the record of a commercial transaction between the parties.

Kenworth further argues, "The fact that there was no commercial transaction between Respondent and the Appellants upon which the Respondent's claim for relief was based is dispositive under the statute." *Res. Mem. p. 7*. Appellant disagrees. Kenworth is arguing that because they themselves did not include an element in their own claim for relief, Appellant should be unable to make the assertion in the case. There is no relative case law to support this assertion.

Appellant argues that since a commercial transaction did exist between the parties, even with the absence of a contract, attorney fees should be granted under Idaho Code §12-120(3).

C. Skinner is Entitled to Fees Under I.C. §12-121

Kenworth asserts that their case was not pursued frivolously, citing the Trial Court's decision that Kenworth had a good faith, factual basis for their suit. *Res. Mem. p. 9*. Appellant understands that a denial of fees under I.C. §12-121 is only reviewed for abuse of discretion. *Lowery v. Bd. of Cty. Comm'rs for Ada Cty.*, 115 Idaho 64, 68, 764 P.2d 431, 435 (Ct. App. 1988). Appellants believe that the Trial Court did abuse its discretion when it found that Kenworth did not pursue the case frivolously. As found in the *Findings of Fact and Conclusions of Law*, Kenworth purchased the trucks from GE at the full residual value. (Vol 1, p. 128.) Kenworth did not enrich the Appellants in the form of debt relief or otherwise. *Id.* Therefore, Kenworth's attempt to demand the return value of the gifted payments was unwarranted and resulted in needless litigation. Kenworth was only trying to save its relationship with Defendants at the time.

Therefore, if the Court somehow denies an award of fees under Rule 68 and Section §12-120(3), the Court should still award Defendants their fees under §12-121 for having to defend against an unfounded lawsuit.

D. Skinner is Entitled to Fees Under I.R.C.P. 68

Kenworth argues that Appellant's claim for fees under Rule 68 should be denied because I.R.C.P. 68 is not a basis for fees under Idaho law. *Res. Mem. p. 9*. Kenworth cites to *Vulk v. Haley*, which states, "Rule 68 is intended to protect a defendant against a plaintiff's claim for costs where the defendant has made a reasonable offer of judgment and where the verdict recovered by the plaintiff is less favorable than the offer. Rule 68 does not include attorney fees."

Vulk v. Haley, 112 Idaho 855, 859, 736 P.2d 1309, 1313 (1987). However, the issue of attorney fees under Rule 68 has been interpreted differently since this 1987 case. For example, in *Czerwinsky v. Lieske*, the Idaho Court of Appeals held, “For purposes of Rule 68, the offer of judgment is “deemed to include all claims recoverable including *any attorneys fees allowable by contract or the law* and costs then accrued.” *Czerwinsky v. Lieske*, 122 Idaho 96, 99, 831 P.2d 564, 567 (Ct. App. 1992), citing to I.R.C.P. 68 (emphasis added). The Court in *Czerwinsky* did not award attorneys fees in that case, but only did not do so because the Trial court had determined not to award fees and therefore they couldn’t be included in the judgment to be weighed against the offer. *Id.*

Here, Appellant is entitled to attorneys fees under §12-120 and §12-121, which therefore indicates that Appellant is entitled to attorneys fees and costs under I.R.C.P. 68.

V. FEES AND COSTS ON APPEAL


Please see the Fees and Costs on Appeal section found in Appellant’s initial brief.

VI. CONCLUSION

For the foregoing reasons, Appellant respectfully requests 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 Appellant. In addition, Appellant respectfully requests that the Trial Court’s decision to grant costs under I.R.C.P. 54(d) be upheld.

DATED this 8th day of August, 2018.

ROCKSTAHL LAW OFFICE, CHTD.

By: 

JOE ROCKSTAHL
Attorney for Defendants/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 2018, I caused a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** to be served upon the following attorney(s) in the following manner:

Attorneys for Plaintiffs/Respondents

Bren E. Mollerup
Michael D. Danielson
Benoit, Alexander, Harwood, High & Mollerup, PLLC
126 2nd Ave. North
PO Box 366
Twin Falls, ID 83301
mollerup@benoitlaw.com
danielson@benoitlaw.com

First Class Mail
 iCourt eFile
 Hand Delivery
 Facsimile
 electronic

By: 
JOE ROCKSTAHL or Legal Assistant