1-14-2020

Investor Recovery Fund, LLC v. Hopkins Appellant's Reply Brief 1 Dckt. 46247

IN THE SUPREME COURT OF THE STATE OF IDAHO

INVESTOR RECOVERY FUND, LLC, an Idaho limited liability company,

Plaintiff-Appellant-Cross-Respondent,

vs.

RANDALL H. HOPKINS, an individual; BRIAN MURPHY, an individual; HOPKINS FINANCIAL SERVICES, INC., an Idaho Corporation,

Defendants-Respondents-Cross-Appellants,

DOES I-V, whose true names are unknown,

Defendants.

Supreme Court Docket No. 46247-2018

Ada County District Court
Case No. CV-OC-2014-22941

CROSS-APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho,
in and for the County of Ada, Case No. CV-OC-2014-22941
Honorable Richard D. Greenwood, Presiding

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The cross-appeal involves three straightforward questions:

1. Is Investor Recovery Fund's lawsuit one to recover in commercial transactions within the meaning of I.C. § 12-120(3)?

2. If so, are defendants Randy Hopkins, Brian Murphy and Hopkins Financial Services, Inc. (collectively, the "Hopkins Associates") entitled to recover their attorney's fees under section 12-120(3) even though they were not parties to the contracts that underlay the transactions?

3. Did the district court abuse its discretion in cutting the Hopkins Associates' attorney's fees in half on the basis of its cursory, inaccurate analysis?

The answers are likewise straightforward: Yes; Yes; and Yes.

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

First, this Court must decide whether the Individual Investors'[1] substantial investments of cash into a pooled investment fund managed by professionals constitutes a "commercial transaction" or a transaction for "personal or household purposes." Second, if such investments do constitute commercial transactions, are fees awardable only when the transacting parties themselves are litigating, or is it sufficient that a transacting party's agents are the litigants?

An informed analysis of this Court's case law provides obvious answers to these questions.

This lawsuit involves a commercial transaction because the Individual Investors invested in the fund to generate income for themselves.

[1] The "Individual Investors" were the persons who originally invested in the Hopkins Northwest Fund, L.L.C. and then assigned their fraud claims to plaintiff Investor Recovery Fund, LLC ("Investor Recovery").

And the fact that the Hopkins Associates did not transact directly with the plaintiff's assignors is irrelevant. In two opinions, this Court has squarely held that where an individual engaged in a commercial transaction with a business, and the individual alleged that the business's agent engaged in fraud in connection with the transaction, this Court awarded the prevailing party its attorney's fees under section 12-120(3).

II. ARGUMENT

A. Conducting its Free Review, this Court Should Find that Investor Recovery's Entire Civil Action is One to Recover in a Commercial Transaction within the Meaning of Idaho Code Section 12-120(3).

1. The District Court's One-Third/Two-Thirds Allocation Cannot Stand.

The district court ruled that one-third of the Hopkins Associates' fees satisfied the "commercial transactions" requirement of section 12-120(3) but two-thirds did not. Both sides of the lawsuit appealed this ruling.

The parties' briefs confirm they agree that the district court's cryptic split-the-baby conclusion constituted reversible error. In its Cross-Appellants' Brief, at 52-54, the Hopkins Associates argued that the district court's one-third/two-thirds allocation was completely arbitrary and without foundation.

Investor Recover does not spend a single word in its Reply Brief trying to explain or justify the district court's one-third/two-thirds allocation. Investor Recovery agrees that the district court's allocation was "incorrect." *Appellant's Reply Br.* at 20.

2. The Individual Investors' Investment in the Fund Was for Commercial Purposes.

a. *Investor Recovery Has Offered Two Theories to Escape the Reach of Section 12-120(3).*

Cognizant of the risk, Investor Recovery's assignors—the Individual Investors—collectively invested $1.4 million of disposable income in Hopkins Northwest Fund, L.L.C. (the

"fund"), which had historically earned very high returns. The Hopkins Associates contend this was a commercial transaction. Investor Recovery disagrees.

Investor Recovery has made two distinct arguments.

In its opening brief, Investor Recovery, in reliance on *Carillo v. Boise Tire Co.*, 152 Idaho 741, 274 P.3d 1256 (2012), argued that the Court should find that the Individual Investors had no commercial objective. The investments were for "personal purposes," such as the construction of a house. *Appellant's Br.* at 41-42.

In its Reply Brief, Investor Recovery changes tack. It now argues that section 12-120(3)'s focus on commerce requires that the litigant have been "[a]ctively engaging in commerce, i.e. proactively participating in a business." *Appellant's Reply Br.* at 19. Investor Recovery contrasts an "active[]" or "proactive[]" investment, which mandates an award under section 12-120(3), with a passive investment, which does not support an award. *Id.* at 18-20. Investor Recovery argues that rather than proactively engaging in commerce, the Individual Investors were "passively" investing in a "passive savings investment[]" akin to a "savings account . . . ." Investor Recovery argues that since in the investors had "no say or control in the use of the funds," no commercial transaction within the meaning of section 12-120(3) took place. *Id.* at 19-20.

b. *Investor Recovery's New Argument that Section 12-120(3) Distinguishes between Active and Passive Investments Has No Merit.*

This Court cannot consider Investor Recovery's new argument. Investor Recovery did not raise the active/passive argument in its opening brief appealing the district court's application of section 12-120(3). Accordingly, it cannot raise it in its reply brief. *See Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005) (Appellant cannot raise an argument for the first time in her reply brief.)

In an abundance of caution, the Hopkins Associates will nonetheless address Investor Recovery's new active/passive argument. It is wholly unpersuasive. Investor Recovery has invented it out of whole cloth.

Section 12-120(3) provides that the "term 'commercial transaction' is defined to mean all transactions except transactions for personal or household purposes." The statute's clear focus, then, is upon the "purpose" of the transaction, not the extent of the litigant's effort in the transaction. Nor does any Idaho case law suggest that the level of the litigant's activeness is a relevant factor, much less the determinative factor. Investor Recovery does not persuasively cite to a single Idaho opinion in support of the materiality of a distinction between an active and passive investment.

Indeed, the most relevant cases demonstrate that this supposed distinction has no relevance. For example, the third-party plaintiffs (the Eyers) in *Stevens v. Eyer* undertook *no action* in connection with their contract permitting a logging company to harvest timber from their land. This Court nonetheless upheld an award of attorney's fees against them, because their purpose was "to earn income." 161 Idaho 407, 412, 387 P.3d 75, 80 (2016). That the Eyers, like the Individual Investors here, did not engage in any activity in connection with the transaction was completely irrelevant to the application of section 12-120(3).

Meyers v. Hansen is very similar. 148 Idaho 283, 221 P.3d 81 (2009). In *Meyers*, the plaintiffs were a married couple who invested in "an investment scheme orchestrated by the [defendant-]appellant . . . ." The plaintiffs "believed" they were investing in a "legitimate attempt to build a revenue-generating program," but the defendant's purported business turned out to be a fraud. 148 Idaho at 293, 286, 221 P.3d at 91, 84. This Court upheld an award of attorney's fees in favor of the prevailing plaintiffs. 148 Idaho at 293, 221 P.3d at 91. There is

absolutely nothing in *Meyers* supporting Investor Recovery's bifurcation between active and passive investing. That simply is not a relevant distinction. Furthermore, by contrasting plaintiffs' "belie[f]" about their investment with the actual facts, this Court's opinion suggests that the Meyers had no active involvement in the business in which they invested. 148 Idaho at 293, 221 P.3d at 91.

The Hopkins Associates do not disagree with Investor Recovery's contention that a lawsuit involving a bank savings account would likely not constitute a lawsuit involving a commercial transaction. However, as the parties' briefs demonstrate, the Individual Investors' investments in the fund were nothing like savings accounts at a bank. A savings account is a safe and liquid investment, federally insured, bearing very low or no interest, which a person accesses often to manage her personal cash needs and for household purchases. The Individual Investors' investments in the funds were higher risk and higher reward, with the goal to generate income. The Individual Investors could access their money without penalty only upon 120 days' written demand.

c. *Investor Recovery's Original Argument that the Transactions Were for the Individual Investors' Personal Purposes is Unavailing.*

Investor Recovery's focus on active versus passive investing is an unilluminating detour.

"This Court has previously characterized transactions as commercial when the purpose for entering into the transaction was to generate income." *Stevens*, 161 Idaho at 412, 387 P.3d at 80 (citing *Watson v. Watson*, 144 Idaho 214, 216, 159 P.3d 851, 853 (2007)). *See also Brown v. Greenheart*, 157 Idaho 156, 168, 335 P.3d 21, 13 (2014) (Quiet title lawsuit involved a commercial transaction even though plaintiffs resided on a different portion of the contested land they sold to defendants.).

The leading cases remain *Stevens v. Eyer* and *Meyers v. Hansen*. In *Stevens*, the Eyers sought to make money when they let someone cut timber on their land. In *Meyers*, the Meyers sought to make money when they invested it in Hansen's supposed entrepreneurial venture. These transactions were made by individuals for their own personal benefit to generate income. The prevailing party won its attorney's fees in both cases. This was the case even though in *Stevens*, the Eyers were planning on spending the income they hoped to realize on their own personal medical bills. 161 Idaho at 409, n.2, 411-412, 387 P.3d at 77, n.2, 79-80. All of the ostensibly personal details did not matter. If the litigants' purpose was to earn income, section 12-120(3) applied. Here, the Individual Investors' goal was to earn income. *Cross-Appellants' Br.* at 45-47.

3. The Hopkins Associates' Failure to Conduct an Allocation in the Trial Court is Without Significance.

The parties to this appeal both regard allocation of the Hopkins Associates' fees between commercial transactions and other transactions to be unnecessary. Unsurprisingly, each side wants the attorney's fee issue to be decided 100% in its favor.

Nonetheless, in the very unlikely event that this Court concludes that some but not all of Investor Recovery's claims involve commercial transactions, the issue of allocation will arise. How much of the Hopkins Associates' attorney's fees should be allocated to the "commercial transactions"? On what basis should the allocation take place?

The Hopkins Associates contend that the allocation, if necessary, should be conducted by the district court on remand, on the basis of an instruction from this Court that the allocation must be made on the basis of the dollar value of the transactions characterized by commercial purposes, and the dollar value of the transactions supposedly characterized by household or personal purposes. *Cross-Appellants' Br.* at 53-54.

In its Reply Brief, Investor Recovery argues instead that the Hopkins Associates have waived their right to request an allocation, because their memorandum of costs and fees in the trial court did not allocate. *Appellant's Reply Br.* at 20-21. Investor Recovery relies on *Brooks v. Gigray Ranches, Inc.*, 128 Idaho 72, 77-78, 910 P.2d 744, 749-50 (1996).

Investor Recovery's argument is without merit. *Gigray Ranches* has no bearing on this lawsuit.

In *Gigray Ranches*, the plaintiff asserted a claim for breach of a commercial contract and the defendant asserted a tort counterclaim. Both claims arose out of the same transaction. 128 Idaho 72, 73-74, 901 P.2d 744, 745-46. The defendant prevailed. The defendant sought fees. The district court did not award fees. The trial court held that the defendant was entitled to its fees for defending the contract claim, but was not entitled to fees for prosecuting the tort claim. However, the trial court ultimately ruled that because the prevailing litigant did not allocate its fees between the claim subject to section 12-120(3) and the claim not subject to 12-120(3) in its memorandum for fees and costs, the court lacked the information necessary to make any award to the prevailing defendant. 128 Idaho at 77-78, 901 P.2d at 749-51. This Court affirmed.

Gigray Ranches is inapplicable here, for three reasons.

First, this Court has since rejected the central premise of the *Gigray Ranches* decision that contract claims fall under section 12-120(3) but tort claims do not. *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728-29, 152 P.3d 594, 599-600 (2007). *See also Bryan Trucking, Inc. v. Gier*, 160 Idaho 422, 374 P.3d 585 (2016) (Court awards fees in fraud case.). If *Gigray Ranches* were to be decided today, the prevailing defendant/counterclaimant would recover all of its fees. One clear indication that this would be the case is that *Gigray Ranches* cited to, and relied on, *Fuller v. Wolters*, 119 Idaho 415, 807 P.2d 633 (1991). 128 Idaho at 78-

79, 901 P.2d at 750-51. In *Fuller*, this Court held that no fees could be awarded in a lawsuit alleging attorney malpractice. Now, however, Idaho law is to the contrary. *Ciccarello v. Davies*, ___ Idaho ____, ___ P.3d ____, ___, 2019 WL 7043516 at * 8-9 (Dec. 23, 2019) (An attorney malpractice case supports a fee award under section 12-120(3)); *City of McCall v. Buxton*, 146 Idaho 656, 664-65, 201 P.3d 629, 637-38 (2009) (same).

Second, the parties in *Gigray Ranches* knew they were litigating one breach of contract claim and one intentional tort claim. The defendant could have, and should have, anticipated in 1996 that its fees on the contract claim would be recoverable under section 12-120(3) but that its fees on the intentional tort would not be recoverable. *Compare Sims v. Jacobson*, 157 Idaho 980, 985, 342 P.3d 907, 912 (2015) ("When various statutory and common law claims are separable, a court should bifurcate the claims and award fees pursuant to § 12-120(3) only on the commercial transaction."). Accordingly, the trial court and this Court appropriately held the defendant's failure to allocate against it. 128 Idaho at 78, 79, 910 P.2d at 750, 751.

Here, to the contrary, Investor Recovery's complaints asserted only tort claims. Investor Recovery did not plead any contract claims. CR 43-64, 2048-2080. It was accordingly not possible for the Hopkins Associates, when they filed their memorandum of costs and fees, to have anticipated that the district court might find some of their fees to fall within section 12-120(3) and some to fall without. Even Investor Recovery has not contended that the district court's allocation is supported by Idaho law.

In the unlikely event that this Court remands to the district court for an allocation, this Court will provide instructions on how the allocation should have been performed. The Hopkins Associates will perform the allocation in connection with the remand.

B. The Hopkins Associates Can Recover Their Fees Notwithstanding that Their Participation in the Relevant Commercial Transaction Was as Agents for a Disclosed Principal.

Investor's Recovery main argument in its Reply Brief is the same as the argument it asserted in its Appellant's Brief—namely, that the Hopkins Associates are not entitled to fees under section 12-120(3) because the Individual Investors did not contract directly with the Hopkins Associates. Investor Recovery introduces two new variations on this argument in its Reply Brief. First, it relies on a recent opinion from this Court, *First Bank of Lincoln v. Land Title of Nez Perce County, Inc.*, 165 Idaho 813, 452 P.2d 835 (2019), which this Court issued since Investor Recovery filed its opening brief. *Appellant's Reply Br.* at 16-18. Second, Investor Recovery, in its Appellant's Brief, tried to distinguish the key case *Bryan Trucking, Inc. v. Gier*, 160 Idaho 422, 374 P.3d 585 (2016). *Appellant's Br.* at 41. In its Reply Brief, Investor Recovery reverses itself and now simply argues that the Court's opinion in *Bryan Trucking* "makes no sense." *Appellant's Reply Br.* at 17.

Investor Recovery's new arguments are unavailing.

1. This Court's Opinion in *First Bank of Lincoln* Has No Applicability Here.

In its Reply Brief, Investor Recovery argues as if *First Bank of Lincoln*, 165 Idaho 813, 452 P.3d 835 (2019) both represents a notable development in Idaho case law and clearly requires that this Court reverse the district court. *Appellant's Reply Br.* at 16-20. Neither of these things is accurate.

In *First Bank of Lincoln*, a borrower (on loan 1) was itself a creditor on a different loan (loan 2). The borrower pledged to its lender (on loan 1) a security interest in the borrower's beneficial interest as creditor in loan 2. When there was a payoff on loan 2, borrower's escrow agent distributed the payoff proceeds from loan 2 to the borrower, not to the lender on loan 1,

notwithstanding the security interest. The lender on loan 1, "First Bank," sued the escrow agent, "Land Title," because Land Title failed to distribute the loan payoff proceeds to it. 165 Idaho at 817-18, 452 P.3d at 839-40.

Land Title, the escrow agent, prevailed. This Court affirmed the trial court. 165 Idaho at 818-23, 452 P.3d at 840-45. Land Title sought its appellate attorney's fees under section 12-120(3). This Court rejected Land Title's request for fees. 165 Idaho at 823-26, 452 P.3d at 845-48.

First Bank of Lincoln is inapposite here. As this Court stated in its description of the dispute, "First Bank and Land Title [i.e., the litigants] *did not themselves have any relationship*." 165 Idaho at 823, 452 P.2d at 845 (emphasis added). This Court's opinion suggests strongly that there was not a single communication of any form between First Bank and Land Title. First Bank was not a party to the escrow agreement between First Bank's borrower and Land Title. First Bank never even recorded with Land Title a collateral assignment of its borrower's escrow account. As a result, this Court held, the parties had no commercial relationship. 165 Idaho at 823, 452 P.3d at 845.

For these reasons, *First Bank of Lincoln* does not apply here. Here, to the contrary, the defendants, the Hopkins Associates, were corporate agents of the party with whom the plaintiff contracted, with all of the legal ramifications to which such an agency relationship gives rise. The Hopkins Associates argued expressly in their Cross-Appellants' Brief, at 55-56, that Investor Recovery on numerous occasions admitted that Randy and Brian were agents of the fund, with whom the Individual Investors transacted. Investor Recovery did not challenge that conclusion in its Appellant's Reply Brief. The facts in this lawsuit are the plaintiff's predecessors-in-interest (the Individual Investors) communicated often and regularly with defendants Randy and

Brian. The latter were acting in their capacity as agents of the party with whom the Individual Investors had transacted. There was a direct commercial relationship between the litigants lacking in *First Bank of Lincoln*.

In addition to being inapposite, *First Bank of Lincoln*'s holding regarding attorney's fees also is unremarkable. Its holding is in no meaningful way different than the holding of this Court in *Lincoln Land Co. v. LP Broadband, Inc.*, 163 Idaho 105, 408 P.3d 465 (2017). Like the litigants in *First Bank of Lincoln*, the litigants in *Lincoln Land* had a commercial dispute but were not parties to a contract. Specifically, the plaintiff in *Lincoln Land* was a lessor of real property and the defendant was the sublessee. As was the case in *First Bank of Lincoln*, the defendant was not a corporate agent of the intermediate contracting party (here, the lessee/sublessor). There is nothing in the opinion to indicate that the litigants had any direct dealings with one another. 163 Idaho at 107-08, 408 P.3d at 468-69. Accordingly, the district court refused to award fees under section 12-120(3) and this Court affirmed. 163 Idaho at 111-13, 408 P.3d at 472-74. *First Bank of Lincoln* and *Lincoln Land* stand for the exact same principle.

2. This Court's Opinion in *Bryan Trucking* is Well-Reasoned and is Controlling.

First Bank of Lincoln and *Lincoln Land*, on the one hand, contrast with *Bryan Trucking v. Gier,* 160 Idaho 422, 374 P.3d 585 (2016) and *Meyers v. Hansen*, 148 Idaho 283, 221 P.3d 81 (2009), on the other hand. In the former cases, there was no award under section 12-120(3) because the litigating parties had no direct commercial relationship. In the latter cases, there was an award under section 12-120(3) because of the litigants' very close commercial relationship, even though the plaintiff actually contracted with the individual defendant's principal, not the individual himself. The Hopkins Associates rely on this latter pair of cases.

The distinction between the two sets of cases is that in *Bryan Trucking* and *Meyers*, the non-contracting party was an express agent of the contracting corporate party, and was intimately involved in the commercial transaction with the plaintiff in that capacity. Thus, the defendant individual, as an agent of the contracting party, became a party to the transaction sufficiently for the purposes of section 12-120(3) in respect of the agency relationship when it acted on behalf of the corporate principal in consummating the deal.

Bryan Trucking, *Meyers* and this case feature this same basic fact pattern.

In *Bryan Trucking*, Bryan Trucking sued Gier, an individual, for fraud in connection with Bryan Trucking's purchase of a truck from Niel Ring Trucking, Inc. Bryan Trucking alleged that Gier was an agent of the seller Neil Ring Trucking and played an active role in the fraud. Gier recovered his attorney's fees from Bryan Trucking under section 12-120(3) even though Neil Ring Trucking, not Gier himself, sold the truck. 160 Idaho at 423-24, 426-27, 374 P.3d at 586-87, 589-90.

In *Meyers*, the Meyers sued Hansen, an individual, for fraud in connection with the Meyers' investment of $300,000 in Ideal Consultants, a business enterprise. This Court expressly rejected Hansen's contention that the Meyers' advance was loan to Hansen personally. 148 Idaho at 292-93, 221 P.3d at 90-91. Although this Court did not expressly hold that Hansen was Ideal Consultant's agent, it stated much the same thing when it noted in its opinion that Hansen "orchestrated" the fraud but Ideal Consultants was the beneficiary of the fraud. 148 Idaho at 286, 293, 221 P.3d at 84, 91. The Meyers recovered their attorney's fees from Hansen under section 12-120(3) even though Ideal Consultants, not Hansen personally, actually received the Meyers' money. 148 Idaho at 292-93, 221 P.3d at 90-91.

Here, Investor Recovery sued Hopkins, Murphy and Hopkins Financial for fraud in connection with the Individual Investors' retention of securities issued by Hopkins Northwest Fund LLC. The Individual Investors' security purchase was a commercial transaction. *Supra* at 5, 6. Investor Recovery alleged that the defendants were agents of Hopkins Northwest Fund, the contracting party, and played an active role in the fraud. *Supra* at 10. The Hopkins Associates are thus entitled to an award of fees under section 12-120(3).

As Investor Recovery notes in its Reply Brief at 17, the key language is the following language from *Bryan Trucking*: "Although [the individual defendant] was not a named defendant on the . . . contract . . . [the plaintiff] nonetheless did allege that [the individual defendant] was a party to the commercial transaction when it alleged that [the defendant] was the [the contracting corporation's] agent, had defrauded [plaintiff], and owed [plaintiff] a duty." 160 Idaho at 427, 374 P.3d at 590.

Just like the plaintiff in *Bryan Trucking*, plaintiff Investor Recovery alleged that the defendants were agents of the contracting party, defrauded it, and owed it a duty. Thus, this Court must hold that the Hopkins Associates are parties to the commercial transactions at issue sufficient to trigger section 12-120(3).

Recognizing that it cannot successfully distinguish *Bryan Trucking* from this case, and that this Court's application of *Bryan Trucking* here means it will lose, Investor Recovery unsubtly concludes that the opinion's language quoted above "makes no sense." *Appellant's Reply Br.* at 17.

In both its opening brief and its Reply Brief,[2] Investor Recovery cites to *General Motors Acceptance Corp. v. Turner Ins. Agency*, 96 Idaho 691, 535 P.2d 664 (1975) in support of its

[2] *Appellant's Br.* at 40, n.3; *Appellant's Reply Br.* at 17.

argument that this Court's analysis in *Bryan Trucking* is flawed. In *General Motors*, this Court identifies the bedrock principal that where an agent, on behalf of a disclosed principal, contracts with a third party, it is the principal who is liable on the contract, not the agent. 96 Idaho at 696-97, 535 P.2d at 669-70. Investor Recovery is arguing, then, that the fact that the principal is the contracting party means that the agent cannot be the contracting party, thus making section 12-120(3) inapplicable.

But as this Court will immediately recognize, Investor Recovery's brittle, unnuanced reading has no relevance. There are three principal reasons for this.

First, Plaintiff is asserting tort liability against the agents, not contract liability. Accordingly, *General Motors* has nothing to do with this case.

Second, insofar as tort liability is concerned, an agent's engagement in the fraud for the principal's benefit does not preclude liability attaching to the agent. In fact, the contrary is the case. Where an agent engages in a tortious act in his capacity as an agent, both he and the principal are liable for the damages caused. *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 303, 796 P.2d 506, 512 (1990). Accordingly, the agent's participation in the tort brings more parties into the mix, not fewer. Although so far as Hopkins Associates can determine this Court has never expressly cited to this principle in its section 12-120(3) jurisprudence, it is reasonable to suppose that it nonetheless underlies the Court's analysis.

Third, Investor Recovery sees a rigidity in the application of section 12-120(3) and the concomitant case law that is not there. If section 12-120(3) and the case law were as certain as Investor Recovery asserts, then the case law would not have evolved over the past two decades as it has. Since section 12-120(3) merely calls for an award of fees when a litigant asserts a claim to recover in a commercial transaction, there is nothing about the language of the statute or

the case law that justifies Investor Recovery's conclusion that the *Bryan Trucking* result is nonsensical. *See, e.g.*, *Bryan Trucking*, 160 Idaho at 427-28, 374 P.3d at 590-91 (Eismann, J., concurring). This Court should follow its precedent that a defendant-agent who allegedly engages in tortious actions directed against the plaintiff in the scope of her duties for her contracting principal is a party to a commercial transaction sufficient for application of section 12-120(3) in her favor. This seems especially clear in cases, like *Bryan Trucking* and here, where the amount of the plaintiff's tort claim equals the exact amount of the plaintiff's loss on its contract.

C. Because Investor Recovery Does not Challenge the Vast Majority of the Hopkins Associates' Contentions that the District Court Abused its Discretion in Determining the Amount of the Attorney's Fees, this Court Must Remand for a New Determination.

The Hopkins Associates have argued that the district court abused its discretion when it found that their attorney's fees were twice has high as a reasonable amount after a cursory, unsupported analysis. *Cross-Appellants' Br.* at 56-58.

Investor Recovery devotes only a few sentences to this issue. *Appellant's Reply Br.* at 20. Of the many points that the Hopkins Associates raised, Investor Recovery responded only to one.

Investor Recovery did not respond to these well-founded challenges that the Hopkins Associates raised:

- that the district court abused its discretion in evaluating the novelty of the questions;
- that the district court abused its discretion in evaluating the difficulty of the questions;
- that the district court abused its discretion in characterizing the Hopkins Associates' attorneys' hourly rates as too high;

- that the district court abused its discretion in cutting the fee application for charges that were not in the fee application (trial consultant charges); and
- that the district court abused its discretion in evaluating the results obtained.

Cross-Appellants' Br. at 57-58.

Because Investor Recovery did not address the Hopkins Associates' appeals on these issues, Investor Recovery has waived its challenge to these arguments. *Compare Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 821, 979 P.2d 1174, 1179 (1999) (where party fails to make argument or offer authority as to an issue, he has waived the issue on appeal). This Court should accordingly reverse and remand on all of these grounds.

The only argument that Investor Recovery offers in its Appellant's Reply Brief is that the district court was correct in concluding that the case was over-litigated. *Appellant Reply Br.* at 20. Specifically, Investor Recovery relies on the district court's conclusion that "a case that was days away from trial before current counsel's involvement required nearly as many fees and costs to prepare for trial as all the fees incurred by prior counsel combined." *Appellant's Reply Br.* at 20 (citing CR at 3876-78). Literally on the basis of that single sentence, the district court seemingly did not allow the Hopkins Associates to recover any of their fees, totaling approximately $400,000, for the work that "current counsel" —Holland & Hart—performed between the time it entered in the case in January 2018 through the commencement of trial on June 4, 2018. *Id.*; CR 30.

Notwithstanding Investor Recovery's arguments, the district court's statement constituted an abuse of discretion, for three obvious reasons.

First, prior to the involvement of current counsel, no attorney in the case had identified the dispute as one involving holder claims. As the Hopkins Associates argued in their Cross-Appellants' Brief at 57, the Hopkins Associates believe that their counsel's application of the

holder claim jurisprudence to this case was of substantial value even though the district court failed to recognize that value. If this Court were to agree that the dozens of reported opinions from all over the country addressing this very same fact pattern, Cross-Appellants' Brief at 27-32, are on point, instructive and could have or should have resulted in a dismissal of Investor Recovery's claims well in advance of trial,[3] then the district court's characterization of those efforts as over-lawyering was incorrect. It was an abuse of the district court's discretion to deny the Hopkins Associates any fees for that effort.

Second, Holland & Hart filed a motion to disqualify Investor Recovery's expert witness Raymond Klein, which the district court granted. CR 2885-3026, 3071-3080, TT 121-25. That represented a significant victory that may well have contributed to the directed verdict. It was an abuse of the district court's discretion to essentially deny the Hopkins Associates any fees for that effort.

Third, the district court eschewed *any* detailed consideration of more than 1,000 hours of work underlying a $400,000 fee claim by concluding on the basis of a few words that the work was duplicative. That unsupported conclusion constituted an abuse of discretion. The Court casually held that the case was over-lawyered to the tune of $400,000, but it actually only identified 15 hours (about $5,000 in time) that it regarded as questionable. CR 3877-3878.

III. CONCLUSION

This Court should affirm the district court's granting of Randy and Brian's motion for a directed verdict. This Court should affirm the district court's granting of the summary judgment motion of Hopkins Financial.

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[3] Randy and Brian's motion for summary judgment and on the basis of the holder claim case law, and supporting materials, are found in the record at CR 2336-2742, 2864-2884.

This Court should vacate the district court's rulings on Hopkins Associates' motion for attorney's fees and costs incurred in the district court. It should remand the attorney fee motion to the district court, for proceedings consistent with its opinion that all fees in this lawsuit are entitled to recovery under § 12-120(3). It should remand to the district court a determination of the amount of the fees that would be reasonable.

This Court should hold that Hopkins Associates are entitled to recover their attorney's fees and costs incurred in this appeal.

DATED this 14th day of January, 2020.

HOLLAND & HART LLP

By */s/ Robert A. Faucher*
Robert A. Faucher, of the firm
Sara M. Berry, for the firm

Attorneys for Defendants-Respondents-Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2020, I caused to be served filed and served, via iCourt, a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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