

9-11-2009

Beco Const. Co., Inc. v. J-U-B Engineers Appellant's Brief Dckt. 35873

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/
idaho_supreme_court_record_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

Recommended Citation

"Beco Const. Co., Inc. v. J-U-B Engineers Appellant's Brief Dckt. 35873" (2009). *Idaho Supreme Court Records & Briefs*. 38.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/38

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law.

IN THE SUPREME COURT OF THE STATE OF IDAHO

BECO CONSTRUCTION COMPANY, INC., an Idaho corporation,

Plaintiff/Appellant,

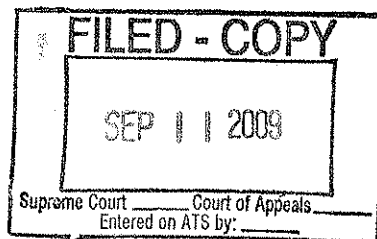
v.

J-U-B ENGINEERS, INC., an Idaho corporation,

Defendant/Respondent.

Supreme Court No. 35873

APPELLANT'S BRIEF



Appeal from the District Court of the Sixth Judicial District for Bannock County.
Honorable Peter D. McDermott, District Judge, presiding.

Bryan D. Smith, Esq., residing at Idaho Falls, Idaho, for Appellant.
C. Tom Arkoosh, Esq., residing at Gooding, Idaho, for Respondent.

TABLE OF CONTENTS

	Page
<u>STATEMENT OF THE CASE</u>	3
<u>STATEMENT OF FACTS</u>	3
<u>COURSE OF PROCEEDINGS</u>	6
<u>ISSUES ON APPEAL</u>	8
<u>ARGUMENT</u>	9
I. <u>THE DISTRICT COURT ABUSED ITS DISCRETION AWARDING J-U-B \$35,600 IN ATTORNEY’S FEES</u>	9
II. <u>THE DISTRICT COURT ABUSED ITS DISCRETION AWARDING J-U-B \$5,540 IN ADDITIONAL ATTORNEY’S FEES.</u>	12
III. <u>J-U-B SHOULD NOT RECOVER ANY ATTORNEY’S FEES BECAUSE J-U-B HAS NOT SUBMITTED SUFFICIENT EVIDENCE TO SUPPORT ANY AMOUNT OF ATTORNEY’S FEES.</u>	14
IV. <u>THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT ORDERED THAT BECO’S CASH DEPOSIT PAID IN CONNECTION WITH THE PRIOR APPEAL BE USED TO SATISFY THE NEW ATTORNEY’S FEES AWARD OF \$41,140.</u>	17
V. <u>BECO IS ENTITLED TO RECOVER ITS COSTS ON APPEAL PURSUANT TO IDAHO APPELLATE RULE 40.</u>	18
<u>CONCLUSION</u>	19

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

CASES:	Pages
<i>BECCO Const. Co., Inc. v. J-U-B Engineers, Inc.</i> , 145 Idaho 719 (2008)	3, 6
<i>Bouten Const. Co. v. H.F. Magnuson Co.</i> , 133 Idaho 756, 767 (1999).....	9
<i>Brinkman v. Aid Ins. Co.</i> , 115 Idaho 346, 351 (1988)	10
<i>Brooks v. Gigray Ranches, Inc.</i> , 128 Idaho 72 (1996).....	14, 16
<i>Building Concepts, Ltd. v. Pickering</i> , 114 Idaho 640 (Ct. App. 1988).....	12
<i>Cheney v. Smith</i> , 108 Idaho 209 (Ct. App. 1985)	12
<i>Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.</i> , 141 Idaho 716, 720 (2005).....	12
<i>Evans v. Sawtooth Partners</i> , 111 Idaho 381, 387 (Ct. App. 1986).....	12
<i>Payne v. Foley</i> , 102 Idaho 760 (1982).....	15
<i>Platt v. Brown</i> , 120 Idaho 41 (Ct.App.1991).....	15
<i>Robison v. Bateman-Hall, Inc.</i> , 139 Idaho 207, 210 (2003)	17
<i>Rockefeller v. Grabow</i> , 136 Idaho 637, 645 (2001).....	15
<i>Sanders v. Lankford</i> , 134 Idaho 322 (Ct.App.2000).....	12
<i>Spidell v. Jenkins</i> , 111 Idaho 857 (Ct. App. 1986).....	12
<i>State v. Larios</i> , 129 Idaho 631 (1997).....	17
<i>Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.</i> , 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).....	10
<i>Weaver v. Searle Bros.</i> , 129 Idaho 497, 502 (1996).....	15
 STATUTES AND RULES:	
Idaho Appellate Rule 13(b)(15).....	17, 18
Idaho Code Section 12-120.....	12
I.C. §12-120(3).....	6,
14-15	

STATEMENT OF THE CASE

This case is back on appeal after this Court's decision in *BECO Const. Co., Inc. v. J-U-B Engineers, Inc.* 145 Idaho 719 (2008) where this Court remanded this matter for a determination and award of attorney's fees J-U-B incurred in defending only BECO's contract claim that BECO voluntarily withdrew on August 15, 2005. As of August 15, 2005 J-U-B incurred a total of \$33,661.92 in attorney's fees that included defending not only the contract claim, but also two tort claims for which this Court held J-U-B cannot recover any attorney's fees. On remand, the district court awarded \$35,600 in attorney's fees, which is \$1,938.98 more in attorney's fees than J-U-B had even incurred as of August 15, 2005 in defending all claims. The district court also awarded J-U-B \$5,540 in attorney's fees for briefing the attorney's fees issue on remand and opposing BECO's Petition For Writ of Mandate. Finally, this appeal also involves the district court's order that \$41,140 of BECO's cash deposit from the first appeal to stay execution of the money judgment this Court vacated be paid to J-U-B to satisfy the amended judgment entered on the attorney's fees order after remand.

STATEMENT OF FACTS

For purposes of this appeal, the factual background begins with this Court's decision in *BECO Const. Co., Inc. v. J-U-B Engineers, Inc.* 145 Idaho 719 (2008). This decision vacated the portion of the judgment awarding J-U-B attorney's fees. This decision holds that BECO is liable only for attorney's fees to J-U-B for its work defending against a breach of contract claim, not for defending against BECO's claims for negligence and intentional interference with contract. Because BECO withdrew its

breach of contract claim on August 15, 2005, this Court remanded the matter to the district court to determine an award of attorney's fees attributable to J-U-B's defending the breach of contract claim before August 15, 2005.

On remand, BECO moved to have its cash deposit in the amount of \$102,541.86 released to BECO because this Court had vacated that part of the judgment awarding attorney's fees.¹ BECO reasoned that this Court had vacated the money portion of the judgment thus leaving no money judgment for J-U-B to satisfy and thus no security needed to stay execution pending appeal.² BECO further reasoned that once the district court entered a new order for attorney's fees BECO could pay the amount ordered or appeal and post a new cash deposit.

The district court denied BECO's motion stating that the district court would award J-U-B attorney's fees and that the award of attorney's fees would be paid out of the cash deposit with the balance being returned to BECO.³ Ultimately, the district court concluded that "most of the work performed by counsel for J-U-B prior to August 15, 2005, involved defending the breach of contract claim pursued by BECO Construction" and awarded \$35,600 in attorney's fees for defending BECO's contract claim⁴ even though a mere mathematical calculation of all attorney's fees J-U-B presented to the district court for time incurred on or before August 15, 2005 yields an amount of \$33,661.92.⁵

¹ This brief shall reference the Clerk's Record after remand as "(Clerk's Record After Remand)" because the Clerk's Record After Remand has no volume designation. See Clerk's Record After Remand, p. 16.

² See Clerk's Record After Remand, p. 16.

³ R Vol. IV, p. 66.

⁴ See Clerk's Record After Remand, pp. 65-66.

⁵ R Vol. IV, pp. 687-695.

As for the work J-U-B incurred before August 15, 2005, BECO filed the Complaint on March 30, 2005,⁶ and J-U-B filed its Answer and Demand for Jury Trial on May 19, 2005.⁷ The next substantive filing occurred on July 29, 2005 when J-U-B filed a Motion for Summary Judgment,⁸ a 16-page Memorandum in Support of Motion for Summary Judgment,⁹ and an affidavit in support of the motion for summary judgment.¹⁰ J-U-B dedicated four pages of its memorandum (pages 6, 7, 8 and 9) addressing the breach of contract issue.¹¹ The remaining portion of the brief (the other 12 pages or “most of the work performed by counsel for J-U-B”) addressed the two tort claims.¹² The only other substantive filing before August 15, 2005 occurred on August 12, 2005 when J-U-B filed a First Supplemental and Amended Answer and Demand for Jury Trial addressing all BECO’s claims.¹³

On remand, the district court further concluded that J-U-B was entitled to another \$5,540 for having to file a brief arguing the amount of attorney’s fees J-U-B should recover¹⁴ and that J-U-B should be compensated by BECO whose interim Petition for Writ of Mandate against the district court caused J-U-B to incur additional attorney’s fees.¹⁵ The district court ordered that J-U-B be paid \$41,140 from BECO’s cash deposit BECO paid in connection with the first appeal to stay execution of the judgment that this Court vacated.¹⁶

⁶ R Vol. I, p. 12.

⁷ R Vol. I, p. 25.

⁸ R Vol. I, p. 33.

⁹ R Vol. I, pp. 36-52.

¹⁰ R Vol. I, p. 54.

¹¹ R Vol. I, p. 41-4433.

¹² R Vol. I, pp. 36-52.

¹³ R Vol. II, p. 444.

¹⁴ See Clerk’s Record After Remand, pp.. 65-66.

¹⁵ See Clerk’s Record After Remand, pp. 65-66.

¹⁶ See Clerk’s Record After Remand, p. 66.

COURSE OF PROCEEDINGS

Appellant BECO filed a verified complaint on March 29, 2005.¹⁷ BECO's complaint alleged (1) breach of contract; (2) negligence; and (3) intentional interference with contract.¹⁸ On May 19, 2005, J-U-B filed an Answer denying BECO's allegations.¹⁹ J-U-B then filed its first Motion for Summary Judgment on July 29, 2005.²⁰ On August 15, 2005, BECO served its brief opposing J-U-B's motion for summary judgment in which BECO withdrew its breach of contract claim.²¹ Ultimately, the district court granted summary judgment for J-U-B on the remaining negligence and intentional interference with contract claims and awarded J-U-B \$75,351.42 in attorney's fees under I.C. §12-120(3).²² On May 2, 2008, this Court entered its decision in *BECO Const. Co., Inc. v. J-U-B Engineers, Inc.* 145 Idaho 719 (2008) in which this Court affirmed entry of summary judgment but vacated the attorney's fee award and remanded the case for determination and award of the amount of attorney's fees J-U-B incurred defending BECO's contract claim.

On May 29, 2008, BECO filed a Motion for Release of Cash Deposit requesting that the district court enter an order returning to BECO its \$102,541.86 cash deposit BECO had paid into the court pending resolution of the first appeal.²³

On June 4, 2008, J-U-B filed the Affidavit of Daniel A. Nevala and a memorandum opposing the motion to release BECO's cash deposit.²⁴ J-U-B requested that the district court not release any of the cash deposit until after making a

¹⁷ R Vol. I, pp. 1-23.

¹⁸ R Vol. I, pp. 19-22.

¹⁹ R Vol. I, pp. 25-29.

²⁰ R Vol. I, pp. 33-35.

²¹ R Vol. IV, p. 832.

²² R Vol. IV, p. 804.

²³ See Clerk's Record After Remand, p. 16.

²⁴ See Clerk's Record After Remand, pp. 19 and 33.

determination of a new fee award after which the court could order that the new fee award be paid from the cash deposit and the remaining balance released to BECO.²⁵

On June 9, 2008, the matter came before the court pursuant to BECO's Motion to Release Cash Deposit.²⁶

On June 12, 2008, the district court entered a Memorandum Decision and Order denying BECO's motion for release of cash deposit.²⁷ The court further ordered that (1) it would award a new amount of attorney's fees to J-U-B for defending BECO's contract claim; (2) it would order that the new award of attorney's fees be paid out of BECO's cash deposit; and (3) any remaining balance of BECO's cash deposit would be returned to BECO.²⁸ The district court further entered a Minute Entry and Order awarding additional attorney's fees to J-U-B for its time preparing and submitting a brief on the attorney's fees issue.²⁹

On June 19, 2008, BECO filed a Verified Petition for Writ of Mandamus and Brief in Support of Verified Petition for Writ of Mandamus, Ex Parte Application for Temporary Stay and Application for Stay.

On June 23, 2008, BECO filed its Brief in Opposition to J-U-B's Award of Attorney's Fees,³⁰ and J-U-B filed a Memorandum in Support of Determination and Award of Attorney's Fees to Defendant.³¹ J-U-B also filed a Memorandum of Fees seeking \$5,540 for preparing its five-page brief.³²

²⁵ See Clerk's Record After Remand, pp. 33-34.

²⁶ See Clerk's Record After Remand, p. 44 and Tr Vol. I, p. 8.

²⁷ See Clerk's Record After Remand, pp. 37-42.

²⁸ See Clerk's Record After Remand, pp. 37-42.

²⁹ See Clerk's Record After Remand, pp. 44-45.

³⁰ See Clerk's Record After Remand, p. 46.

³¹ See Clerk's Record After Remand, p. 53.

³² See Clerk's Record After Remand, p. 61.

On June 25, 2008, this Court entered an Order Granting Ex Parte Application for Temporary Stay and Application for Stay.

On September 18, 2008, J-U-B filed a Memorandum and Amended Memorandum in Opposition to Plaintiff's Petition.

On October 10, 2008, this Court entered an Order Denying Verified Petition and Writ of Mandamus.

On November 3, 2008, the district court entered a Memorandum Decision and Order awarding J-U-B attorney's fees in the amount of \$35,600 for its work in defending BECO's contract claim before August 15, 2008.³³ The district court also awarded J-U-B \$5,540 in attorney's fees pursuant to the memorandum of fees J-U-B filed on June 23, 2008.³⁴ The district court stated that J-U-B should be compensated for having incurred additional legal research due to BECO's Petition for a Writ of Mandate against the court "and counsel [for J-U-B] should be compensated by BECO for this work necessitated by the pleadings filed by BECO."³⁵ Finally, the district court ordered that the Bannock County Auditor pay \$41,140 to counsel for J-U-B, David A. Nevala, and remit the balance to counsel for BECO.³⁶

On November 11, 2008, BECO filed a Notice of Appeal.³⁷

ISSUES ON APPEAL

1. Did the district court abuse its discretion in awarding J-U-B \$35,600 in attorney's fees for defending against BECO's contract claim that BECO withdrew on August 15, 2005 where J-U-B's attorney's fees through August 15, 2005 total \$33,661.42

³³ See Clerk's Record After Remand, pp. 65-67.

³⁴ See Clerk's Record After Remand, p. 66.

³⁵ See Clerk's Record After Remand, p. 66.

³⁶ See Clerk's Record After Remand, p. 66.

³⁷ See Clerk's Record After Remand, p. 68.

which amount includes work defending BECO's negligence and intentional interference with contract claims for which this Court has held J-U-B could recover no attorney's fees?

2. Did the district court abuse its discretion in awarding J-U-B another \$5,540 in attorney's fees for (1) its work in arguing over the amount of attorney's fees the district court should award; and (2) its work opposing BECO's Petition for a Writ of Mandate against the district court?

3. Should this Court hold as a matter of law that J-U-B can recover no attorney's fees because J-U-B failed to present the district court with a record that isolates or apportions its work among the claims for breach of contract, negligence, and intentional interference with contract?

4. Did the district court commit reversible error when it ordered that BECO's cash deposit paid in connection with the prior appeal be used to satisfy the new attorney's fees award of \$41,140 where this Court vacated the district court's prior money judgment and BECO has now appealed the Memorandum Decision and Order awarding a new amount of attorney's fees?

5. Is BECO entitled to an award of costs on appeal?

ARGUMENT

I.

THE DISTRICT COURT ABUSED ITS DISCRETION AWARDING J-U-B \$35,600 IN ATTORNEY'S FEES.

"In reviewing a district court's award of attorney fees," this Court applies "an abuse of discretion standard where a dispute concerns the amount of attorney fees that have been properly awarded." *Bouten Const. Co. v. H.F. Magnuson Co.*, 133 Idaho

756, 767 (1999) citing *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 351 (1988). In determining whether the trial court has abused its discretion, this Court applies the three-factor test fashioned in *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). These three factors are “(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.*

Here, the district court did not act within the outer boundaries of its discretion in awarding \$35,600 in attorney’s fees for defending BECO’s contract claim. As of August 15, 2005, J-U-B incurred \$33,661.92 in attorney’s fees. This Court has held that J-U-B can recover attorney’s fees only for defending BECO’s contract claim that BECO withdrew on August 15, 2005. This means that J-U-B cannot recover attorney’s fees incurred after August 15, 2005. Necessarily, then, the district court cannot award more than \$33,661.92 in attorney’s fees because \$33,661.92 is the total amount of attorney’s fees incurred through the applicable period for which J-U-B can recover some attorney’s fees for defending against the contract claim.

Moreover, it is beyond dispute that BECO alleged three claims against J-U-B: One for breach of contract, one for negligence, and one for intentional interference with contract. It is further beyond dispute that J-U-B prepared an answer and a motion for summary judgment that addressed all three claims, not just the contract claim. Therefore, the actual amount of attorney’s fees attributable to defending only against the contract claim must be less than \$33,661.92, not \$1,938.98 greater than \$33,661.92.

Neither did the district court “reach its decision by an exercise of reason.” The district court concluded that “most of the work performed by counsel for J-U-B prior to August 15, 2005, involved defending the breach of contract claim pursued by BECO Construction.”³⁸ However, the pleadings J-U-B filed before August 15, 2005 show that most of the work performed by counsel for J-U-B prior to August 15, 2005 involved defending the negligence and intentional interference with contract claims. Specifically, J-U-B filed an Answer and Demand for Jury Trial on May 19, 2005³⁹ and a First Supplemental and Amended Answer and Demand for Jury Trial on August 12, 2005.⁴⁰ Both of these pleadings dedicate two thirds effort addressing the negligence and intentional interference with contract claims and one third effort addressing the contract claim. On July 29, 2005, J-U-B filed a Motion for Summary Judgment,⁴¹ a 16-page Memorandum in Support of Motion for Summary Judgment,⁴² and an affidavit in support of the motion for summary judgment.⁴³ J-U-B dedicated four pages of the memorandum (pages 6, 7, 8 and 9) addressing the breach of contract issue.⁴⁴ The remaining portion of the memorandum (the other 12 pages or “most of the work performed by counsel for J-U-B”) addressed the two tort claims.⁴⁵ Importantly, J-U-B’s attorney billings do not isolate or segregate time spent on the various claims making it impossible to conclude that most of J-U-B’s work involved defending against BECO’s contract claim.⁴⁶

³⁸ See Clerk’s Record After Remand, pp. 65-66.

³⁹ R Vol. I, p. 25.

⁴⁰ R Vol. II, p. 444.

⁴¹ R Vol. I, p. 33.

⁴² R Vol. I, pp. 36-52.

⁴³ R Vol. I, p. 54.

⁴⁴ R Vol. I, p. 41-4433.

⁴⁵ R Vol. I, pp. 36-52.

⁴⁶ R Vol. IV, pp. 687-695.

In short, the district court did not act “within the outer boundaries of its discretion” and did not reach “its decision by an exercise of reason.” Therefore, the district court abused its discretion in awarding \$35,600 in attorney’s fees.

II.

THE DISTRICT COURT ABUSED ITS DISCRETION AWARDING J-U-B \$5,540 IN ADDITIONAL ATTORNEY’S FEES.

Idaho law is well-established that Idaho Code Section 12-120 applies only to issues of entitlement to attorney’s fees. Section 12-120 does not apply when the dispute involves the amount of attorney’s fees awarded. *Sanders v. Lankford*, 134 Idaho 322 (Ct. App. 2000) citing *Building Concepts, Ltd. v. Pickering*, 114 Idaho 640 (Ct. App. 1988); *Spidell v. Jenkins*, 111 Idaho 857 (Ct. App. 1986); and *Cheney v Smith*, 108 Idaho 209 (Ct. App. 1985). Also, “[t]he court ‘may not use the award or denial of attorney fees to vindicate his sense of justice beyond the judgment rendered on the underlying dispute between the parties.’” *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.* 141 Idaho 716, 720 (2005) quoting *Evans v. Sawtooth Partners*, 111 Idaho 381, 387 (Ct. App. 1986).

Here, the district court awarded J-U-B \$5,540 “in attorney’s fees pursuant to the memorandum of fees filed June 23, 2008.”⁴⁷ The June 23, 2008 memorandum of fees with accompanying documents shows that J-U-B incurred the \$5,540 in attorney’s fees in addressing the *amount* of fees it should recover and not addressing the *entitlement* issue that this Court already resolved on appeal.⁴⁸ BECO submits that the district court did not act “within the outer boundaries of its discretion” when it awarded attorney’s fees (presumably under Section 12-120) for work involved in addressing the amount of

⁴⁷ See Clerk’s Record After Remand, p. 66.

⁴⁸ See Clerk’s Record After Remand, pp. 60-64.

attorney's fees. Otherwise, lawsuits theoretically might never end because parties would be encouraged to litigate the reasonableness of an award of attorney's fees because they could recover more attorney's fees whose amount they could continue to litigate expecting to recover more attorney's fees. This process of litigating attorney's fees could conceivably continue forever.

Moreover, the district court's decision indicates that the district court's "own sense of justice" influenced the \$5,540 award of attorney's fees. The district court stated, "[d]ue to the objections raised by counsel for BECO and their *Petition for a Writ of Mandate against this court* it was indeed necessary for counsel for J-U-B to incur additional legal research and time . . . and [J-U-B's] counsel should be compensated by BECO for this work necessitated by the pleadings filed by BECO."⁴⁹ BECO's Petition for Writ of Mandate was "beyond the underlying dispute between the parties" before the district court. The Petition for Writ of Mandate involved a dispute between the parties and sought relief from this Court, not the district court. Yet, the district court was influenced to award attorney's fees to J-U-B apparently to vindicate its own sense of justice on the writ of mandate issue before this Court.

In short, this Court already determined on appeal that J-U-B is entitled to attorney's fees it incurred defending on the contract action and remanded to the district court to determine the amount of the award. Under well-established Idaho law, the district court could not award J-U-B any attorney's fees incurred for responding to BECO's challenge regarding the amount of attorney's fees the district court should award. Moreover, the district court appears to have awarded the \$5,540 in part out of a vindication of its own sense of justice rather than on the issues before the district court

⁴⁹ See Clerk's Record After Remand, p. 66; emphasis added.

and between the parties. Accordingly, BECO submits that the district court abused its discretion in awarding J-U-B \$5,540 in attorney's fees.

III.

J-U-B SHOULD NOT RECOVER ANY ATTORNEY'S FEES
BECAUSE J-U-B HAS NOT SUBMITTED SUFFICIENT EVIDENCE
TO SUPPORT ANY AMOUNT OF ATTORNEY'S FEES.

A court cannot award attorney's fees where the memorandum of costs is insufficient to isolate the fees recoverable on and attributable to a breach of contract claim from fees not recoverable on but attributable to a tort claim. *Brooks v. Gigray Ranches, Inc.*, 128 Idaho 72 (1996). In *Brooks*, the defendant prevailed on the defense of a contract claim and on its counterclaim for conversion. The district court denied the defendant's request for attorney's fees because the district court could not determine from the record before it those fees properly recoverable in defending the contract claim from those fees it incurred prosecuting the conversion action for which the defendant could not recover fees. The district court clearly explained that the "defense of the breach of contract action was inseparably intertwined with and at least partially attributable to the intentional tort claim for conversion" for which the defendant could not recover attorney's fees:

The Court looked at the attorney fees to see if I could distinguish which ones were used on the intentional tort and which ones were used on the defending of the contract. And I was unable by this affidavit to make those findings, so the Court would not grant attorney fees in this particular case on these Memorandum of Costs. And with regard to conversion it does not fall within the contract and it does not fall within the statutory authority of Idaho Code Section 12-120(3), so there would be no attorney fees at all entitled under the conversion. The Court is unable to determine which attorney fees were used for the conversion and which were used for the contract action.

Id. at 77-78.

In affirming the district court's denial of attorney's fees on appeal, this Court stated that "[t]he district court did not award attorney fees on the defense of the contract claim because the memorandum of costs was insufficient to isolate the fees attributable to that defense from the fees attributable to prosecution of the counterclaim for conversion." *Id.*

Where the affidavit of counsel does not isolate the fees attributable to the defense of a contract claim from the defense of a tort claim, attorney's fees cannot be awarded pursuant to Idaho Code Section 12-120(3) for defense of the contract claim. *See, e.g., Rockefeller v. Grabow*, 136 Idaho 637, 645 (2001) (holding that "where fees were not apportioned between a claim that qualifies under Idaho Code Section 12-120(3) and one that does not, no fees are to be awarded.") *Weaver v. Searle Bros.*, 129 Idaho 497, 502 (1996) (upholding the district court's denial of attorney fees because the party requesting fees had not separated the fees attributable to the contract claim and recoverable under 12-120(3) from those attributable to tort claim not recoverable under 12-120(3)).

It is beyond dispute that the district court has discretion in awarding attorney's fees. However, an award of fees must be supported by findings and those findings, in turn, must be supported by the record. *Partout v. Harper*, 183 P.3d 771 (2008). A trial court abuses its discretion in awarding attorney's fees in the absence of a record to support its findings. *Payne v. Foley*, 102 Idaho 760 (1982). An award of attorney's fees in the absence of a supporting record constitutes an abuse of discretion because the award is based on an arbitrary act rather than on facts and principles of justice. *Platt v. Brown*, 120 Idaho 41 (Ct. App. 1991).

Here, J-U-B obviously spent time defending the two contested tort claims before August 15, 2005. Importantly, J-U-B has failed to isolate or apportion through affidavit

or in its memorandum of fees those attorney's fees attributable to the defense of the contract claim from those attributable to the defense of the two tort claims. In this regard, the Affidavit of C. Tom Arkoosh dated July 3, 2006 merely states "that the total of costs and attorney's fees incurred by my clients is \$77,826.42."⁵⁰ The affidavit makes no attempt to apportion any of the attorney's fees. J-U-B's memorandum in support of its motion for attorney's fees contains an itemization of J-U-B's attorney's fees incurred before August 15, 2005.⁵¹ It is impossible to review the itemization itself and come to any reasoned conclusion regarding which fees apply to which of BECO's claims. As stated in *Brooks*, if the court is unable to properly differentiate fees incurred among various claims, then the district court is left without a record that would allow it to award attorney's fees without acting arbitrarily. *Id.* On this record, the district court is unable to determine which attorney's fees were incurred for the tort claims and which were incurred for the contract action. Therefore, any award of attorney's fees would be arbitrary and capricious.

Moreover, J-U-B's time for submitting evidence in support of its motion for attorney's fees and costs has expired. Rule 54(d)(5) of the Idaho Rules of Civil

Procedure states:

At any time after the verdict of a jury or a decision of the court, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense, but such memorandum of costs may not be filed later than fourteen (14) days after entry of judgment.

The district court entered an amended judgment in this case on August 10, 2006.⁵²

Pursuant to IRCP 54(d)(5), J-U-B had 14-days from entry of judgment within which to

⁵⁰ R Vol. IV, p. 780.

⁵¹ R Vol. IV, pp. 687-695.

⁵² R Vol. IV, p. 809.

file its memorandum of fees and costs and any supporting documentation. The time has now elapsed within which J-U-B could file its supporting documents to comprise the record on the attorney's fees issue. No Idaho Rule of Civil Procedure allows a party to file any amended memorandum of costs after 14 days from entry of judgment.

Accordingly, this Court should rule that J-U-B has failed to provide the district court with evidence sufficient for the district court to exercise its discretion; that the time to file its evidence in support of an award of fees has now elapsed; and hold that J-U-B cannot recover any amount of attorney's fees because remand on this issue would be futile. Alternatively, if this Court were to remand the attorney's fees issue to the district court for further consideration, the Court should instruct the district court that it may award attorney's fees only to the extent that evidence exists in the record to make a proper allocation to prevent the district court from acting arbitrarily and capriciously in awarding attorney's fees after remand.

IV.

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT ORDERED THAT BECO'S CASH DEPOSIT PAID IN CONNECTION WITH THE PRIOR APPEAL BE USED TO SATISFY THE NEW ATTORNEY'S FEES AWARD OF \$41,140.

"The interpretation of a statute is a question of law over which this Court exercises *de novo* review." *Robison v. Bateman-Hall, Inc.* 139 Idaho 207, 210 (2003). Similarly, the interpretation of a rule is a question of law over which this Court exercises *de novo* review. *State v. Larios*, 129 Idaho 631 (1997).

Idaho Appellate Rule 13(b)(15) states, in pertinent part:

If the appellate court has vacated any money judgment and remanded only for a determination of the amount of the judgment, the district court may continue

or modify the amount of any cash deposit or supersedeas bond posted in connection with the appeal.

Here, this Court vacated the money judgment in favor of J-U-B and remanded only for a determination of the amount of the judgment based on a new award of attorney's fees. Rule 13(b)(15) required that the district court "continue or modify the amount of any cash deposit . . . posted in connection with the appeal." The district court had no authority to determine the amount of the judgment on the order for attorney's fees and then apply the cash deposit in that amount to satisfy the judgment. The obvious purpose of a cash deposit for 136% of a judgment is to stay execution on the judgment pending resolution of an appeal by having money available to satisfy the judgment after appeal, not to pay to the other party pending appeal. *See* I.A.R. 13(b)(15). Under Rule 13(b)(15), the district court was supposed to modify the cash deposit by lowering it to 136% of the \$41,140 judgment amount for attorney's fees rather than paying J-U-B \$41,140 from the cash deposit. This Court should order on remand that J-U-B immediately pay \$41,140 to the Clerk of the Court pending further proceedings on remand.

V.

BECO IS ENTITLED TO RECOVER ITS COSTS ON APPEAL PURSUANT TO IDAHO APPELLATE RULE 40.

Rule 40 of the Idaho Appellate Rules permits the award of costs to the prevailing party on appeal. Rule 40 states, "Costs shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." As the prevailing party on appeal, BECO is entitled to recover its costs pursuant to Rule 40.

CONCLUSION

For all the reasons set forth above, BECO respectfully requests that this Court vacate the judgment for attorney's fees and remand the matter as follows:

1. With instructions that the district court enter a judgment without any award of attorney's fees because J-U-B has not isolated or apportioned the work performed in defending the contract action from defending the two tort claims and the time for submitting such evidence has elapsed; alternatively, with instructions (1) that the district court determine and award attorney's fees for defending the contract claim only; (2) that the amount of attorney's fees must be less than the amount of attorney's fees J-U-B incurred as of the date BECO withdrew its breach of contract claim; (3) that the district court must base its decision on a record that isolates or apportions the work performed in defending the contract action from defending the two tort claims; and (4) that J-U-B cannot submit any further evidence to support its claim for attorney's fees;

2. With instructions that the district court not award any attorney's fees for litigating the amount of attorney's fees; and

3. With an order on remand from this Court directing J-U-B to pay immediately \$41,140 to the Clerk of the Court to be held as BECO's cash deposit pending further proceedings on remand.

RESPECTFULLY SUBMITTED this 10th day of September, 2009.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 


Bryan D. Smith
Attorneys for BECO Construction
Company, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of September, 2009, I caused a true and correct copy of the foregoing **APPELLANT'S BRIEF** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

- U.S. MAIL
- FAX
- Overnight Delivery
- Hand Delivery

C. Tom Arkoosh, Esq.
Daniel A. Nevala
CAPITOL LAW GROUP, PLLC
301 Main Street
P. O. Box 32
Gooding, Idaho 83330-0032


Bryan D. Smith