

7-8-2009

Beco Const. Co., Inc. v. J-U-B Engineers Clerk's Record v. 1 Dckt. 35873

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IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

BECCO CONSTRUCTION CO.,
an Idaho corporation,

Plaintiff and

Appellant,
VS.

J-U-B ENGINEERS, INC., and DOES

1 - 15, whose true names are Unknown,

Defendants and

Respondents.

HONORABLE PETER D. McDERMOTT District Judge

Appealed from the District Court of the Sxith
Judicial District of the State of Idaho, in and
for Bannock County.

Bryan D. Smith

Attorney for Appellant

C. Tom Arkoosh

Attorney for Respondent

Filed this	day	by
FILED - COPY		
20	.	
JUL - 8 2009		
Supreme Court	Court of Appeals	Clerk
Entered on	by	Deputy

35873

IN THE SUPREME COURT OF THE STATE OF IDAHO

BECO CONSTRUCTION CO., INC.,)	
an Idaho corporation,)	
Plaintiff-Appellant,)	
)	
vs.)	Supreme Court Case No. 35873
)	
J-U-B ENGINEERS, INC., and)	
DOES 1 – 15, whose true names are)	
Unknown,)	
)	
Defendant-Respondent.)	

CLERK'S TRANSCRIPT ON APPEAL

Appeal from the District Court of the Sixth Judicial District of the State of Idaho
in and for the County of Bannock.

HONORABLE PETER D. McDERMOTT, District Judge

Bryan D. Smith	C. Tom Arkoosh
P. O. Box 50731	P. O. Box 32
Idaho Falls, Idaho 83405	Gooding, Idaho 83330-0032
Attorney for Plaintiff-Appellant	Attorney for Defendant-Respondent

TABLE OF CONTENTS

	<u>Page</u>
Register of Actions	4
Motion for Release of Cash Deposit.....	16
Remittitur, filed 5/30/08	18
Affidavit of Daniel A. Nevala in Support of Memorandum in Opposition to Motion for Release of Cash Deposit.....	19
Memorandum in Opposition to Motion for Release of Cash Deposit, filed 6/4/08.....	33
Memorandum Decision and Order, filed 6/12/08.....	37
Minute Entry and Order, filed 6/12/08	44
Brief in Opposition to an Award of Attorney’s Fees.....	46
Memorandum in Support of Determination and Award of Attorney’s Fees to Defendant	53
Memorandum of Fees, filed 6/23/08	60
 NOTE: BRIEF IN REPLY TO DEFENDANTS’ MEMORANDUM IN OPPOSITION TO PLAINTIFF’S PETITION IS A <u>SUPREME COURT</u> DOCUMENT AND IS NOT A PART OF THE DISTRICT COURT APPEAL RECORD. <u>THEREFORE, IT IS NOT IN THE CLRK’S RECORD.</u>	
Memorandum Decision and Order, filed 11/3/08.....	65
Notice of Appeal, filed 11/14/08	68
NOTE: REPORTER’S TRANSCRIPT VOLUME ONE OF ONE PAGES 1 – 33	73

	<u>Page</u>
Clerk's Certificate of Appeal, filed 11/17/08	82
Clerk's Certificate.....	84
Certificate of Clerk to Original Exhibits	85
Certificate of Service	86

I N D E X

	<u>Page</u>
Affidavit of Daniel A. Nevala in Support of Memorandum in Opposition to Motion for Release of Cash Deposit.....	19
Brief in Opposition to An Award of Attorney’s Fees	46
NOTE: BRIEF IN REPLY TO DEFENANTS’ MEMORANDUM IN OPPOSITION TO PLAINTIFF’S PETITION IS A <u>SUPREME COURT DOCUMENT AND IS NOT A PART OF THE DISTRICT COURT APEAL RECORD. <u>THEREFORE, IT IS NOT IN THE CLERK’S RECORD</u></u>	
Certificate of Clerk to Original Exhibits	85
Certificate of Service	86
Clerk’s Certificate of Appeal, filed 11/17/08	82
Clerk’s Certificate.....	84
Memorandum in Opposition to Motion for Release of Cash Deposition, filed 6/4/08	33
Memorandum Decision and Order, filed 6/12/08.....	37
Memorandum in Support of Determination and Award of Attorney’s fees to Defendant.....	53
Memorandum of Fees, filed 6/23/08	60
Memorandum Decision and Order, filed 11/3/08.....	65
Minute Entry and Order, filed 6/12/08	44
Motion for Release of Cash Deposit.....	16
Notice of Appeal, filed 11/14/08	68

	<u>Page</u>
Register of Actions	4
Remittitur, filed 5/30/08	18
NOTE: REPORTER'S TRANSCRIPT VOLUME ONE OF ONE	
PAGES 1 – 33.....	73

BECO Construction Company, Inc vs. City Of Pocatello, J-U-B Engineers, Inc.

Date	Code	User		Judge
3/30/2005	NCOC	LINDA	SUPREME COURT APPEAL; Sent file to Sande for Limited Clerk's Record	Peter D. McDermott
	SMIS	LINDA	Summons Issued (?)	Peter D. McDermott
		LINDA	Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: Trout Weeks & Nemece Receipt number: 0011142 Dated: 03/30/2005 Amount: \$77.00 (Check)	Peter D. McDermott
	COMP	CINDYBF	Verified Complaint and Demand for Jury Trial.	Peter D. McDermott
	DFJT	CAMILLE	Demand For Jury Trial	Peter D. McDermott
3/31/2005	ATTR	CAMILLE	Plaintiff: BECO construction Company, Inc Attorney Retained Kim J Trout	Peter D. McDermott
4/27/2005	NOTC	CAMILLE	Notice of service of BECOS first set of Discovery req to JUB; aty Kim Trout for plntfs	Peter D. McDermott
	NOTC	CAMILLE	Notice of service of BECOs first set of discovery req to the City of Pocatello; aty Kim Trout for plntfs	Peter D. McDermott
5/4/2005	AFFD	CAMILLE	Affidavit of service - J-U-B Engineers, Inc. served Summons & Complaint, BECO's First Set of Discovery Requests, and Notice of Service of BECO's First Set of Discovery Requests, to JUB Engineers thru Paul Fisk on 4-27-05	Peter D. McDermott
5/6/2005		LINDA	Filing: 11A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Arkoosh Law Offices Receipt number: 0015923 Dated: 05/06/2005 Amount: \$47.00 (Check)	Peter D. McDermott
	NOAP	CAMILLE	Notice Of Appearance ; aty Jay Kiiha for defendant JUB Engineers, Inc.	Peter D. McDermott
	ATTR	CINDYBF	Defendant: J-U-B Engineers, Inc. Attorney Retained Jay Kiiha	Peter D. McDermott
5/9/2005	SMRT	CAMILLE	Affidavit of Service- Summons & Complaint and Beco's First Set of Discovery Requests to City of Pocatello and Notice of Service of Discovery- served City of Pocatello thru Rhonda Johnson, City Clerk on 4-29-08.	Peter D. McDermott
5/18/2005	NOTC	CAMILLE	Notice of service, First set of Interrog and Req for Production of documents to Plntf- by pltf BECO thru aty Tom Arkoosh for Def.	Peter D. McDermott
	NOTC	CAMILLE	Three day notice of intent to take default: aty William Smith for Plntf	Peter D. McDermott
5/19/2005	ANSW	CAMILLE	Answer and Demand for Jury Trial- by JUB Engineers thru aty Jay J Kiiha.	Peter D. McDermott
	DFJT	CAMILLE	Demand For Jury Trial	Peter D. McDermott
5/26/2005	HRSC	CAMILLE	Order- Hearing Scheduled Jury Trial set 04/11/2006 09:00 AM. s/McDermott 5-24-05.	Peter D. McDermott
6/3/2005	NOTC	CAMILLE	Notice of service of plntfs resp to defs Jub Engineers, Incs firs Interrog and Req for production of Documents- thru Smith aty for BECO construction Company	Peter D. McDermott

BECO Construction Company, Inc vs. City Of Pocatello, J-U-B Engineers, Inc.

Date	Code	User		Judge
6/8/2005	NOTC	CAMILLE	Notice of service of plntfs Resp to Def Jub Engineers, Incs first Interrog. and Req for Production of Documents: aty Kim Trout for plntf	Peter D. McDermott
6/16/2005	NOTC	CAMILLE	Notice of service plntfs Supplemental Resp to Def Jub Enginerrrs, Inc's 1st set of Interrog. and REq for Production; aty William Smith for plntf	Peter D. McDermott
7/5/2005	NOTC	CHRISTY	Notice of Service of Defendant J-U-B Engineers, Inc's., Responses to Beco's First Set of Discovery Requests to J-U-B; Atty for Def J-U-B Engineers, Inc. C. Tom Arkoosh	Peter D. McDermott
7/29/2005	MOTN	CAMILLE	Def JUB Engineers, Incs Motion for Summary Judgment, aty Tom Arkoosh for Def.	Peter D. McDermott
	AFFD	CAMILLE	Affidavit of Dale Baune in support of Def JUB Engineers Incs Motion for Summary Judgment,	Peter D. McDermott
	BRFS	CAMILLE	Def JUB Engineers, Incs Memorandum in support of Motion for summary Judgment	Peter D. McDermott
	HRSC	CAMILLE	Notice of Hearing- Hearing Scheduled (Motion 08/29/2005 01:30 PM) (Arkoosh)	Peter D. McDermott
8/12/2005	MISC	CAMILLE	Def JUB Engineers, Incs Memorandum in support of motion for leave to file first supplemental and amended Answer; aty Tom Arkoosh for Def.	Peter D. McDermott
	HRSC	CINDYBF	Notice of Hearing- Hearing on JUB's motion for leave to file first supplemental and amended answer- set 8-29-05 at 1:30 (Arkoosh)	Peter D. McDermott
8/16/2005	BRFS	CAMILLE	BECO's Brief in Resp to Jubs Motion for Summary Judgment; aty William Smith	Peter D. McDermott
	AFFD	CAMILLE	Affidavit of Kenneth C Wright in Opposition to JUB Engineers Motion for Summary Judgment, aty William Smith fc: plntf	Peter D. McDermott
8/22/2005	MISC	CAMILLE	Def JUB Engineers Incs Reply to BECOS Brief in resp to JUBS Motin for Summary Judgment- by DA Arkoosh.	Peter D. McDermott
8/31/2005	INHD	CAMILLE	ME&O- Hearing on Defendant's Motion for Summary Judgment and Dfdt's Motion to File Amended Answer Held 8-29-05. Defs Motion for Summary Judgment is Taken Under Advisement. Parties stipulated to the amended answer. s/J Mcdermott 8-29-05	Peter D. McDermott
10/27/2005	DEOP	CAMILLE	Memorandum Decision, Order and Judgment- JUB Motion for Summary Judgment is Denied. s/Mcdermott 10-27-05	Peter D. McDermott
	CSTS	CAMILLE	Case Status Changed: : closed	Peter D. McDermott
11/14/2005	NOTC	CAMILLE	Notice of service - Def JUB's first set of Supplemental Interrog to plntf. aty Tom ARkoosh for Def.	Peter D. McDermott
11/28/2005	NOTC	CAMILLE	Notice of Service Plntfs Resp to Def Jub Engineers, Incs first set of Supplemental Interrog- by PA Smith.	Peter D. McDermott

BECO Construction Company, Inc vs. City Of Pocatello, J-U-B Engineers, Inc.

Date	Code	User		Judge
12/7/2005	NOTC	CAMILLE	Notice of service - Def JUBs Request for Admissions; aty Tom Arkoosh for Def.	Peter D. McDermott
1/5/2006	NOTC	CAMILLE	Notice of failure to respond to requests for admissions- by dfdt thru DA Arkoosh;	Peter D. McDermott
	AFFD	CAMILLE	Affidavit of Daniel Nevala in support of DEf JUB Engineers Incs Motion to continue trial;	Peter D. McDermott
		CAMILLE	Defs JUB Engineers, Incs Motion to continue Trial- by DA Arkoosh;	Peter D. McDermott
1/9/2006	NOTC	CAMILLE	Notice of Service Plaintiff's Responses to Def Jub Engineers, Incs Request for Admission- by PA Trout.	Peter D. McDermott
	NOTC	CAMILLE	Notice of hearing;- Motion to Continue Trial set 1-30-06 at 1:15 pm: aty Jay Kiiha for Def.	Peter D. McDermott
	HRSC	CAMILLE	Hearing Scheduled (Hearing Scheduled 01/30/2006 01:15 PM)	Peter D. McDermott
1/27/2006	STIP	CAMILLE	Stipulation to Continue Trial Date; aty Tom Arkoosh for Def and Smith for Pltf.	Peter D. McDermott
	ORDR	CAMILLE	Order Resetting Jury Trial- rest for 1-23-07 at 9:00 am. s/Mcdermott 1-27-06	Peter D. McDermott
	HRSC	CAMILLE	Hearing Scheduled (Jury Trial 01/23/2007 09:00 AM)	Peter D. McDermott
2/2/2006	ORDR	CAMILLE	Order (proposed) that 4-11-06 trial date be contintued to 1-23-07. s/Mcdermott 1-31-06	Peter D. McDermott
2/10/2006	AFFD	CAMILLE	Affidavit of Thane Smith in support of Def JUB Engineers Incs second motion for summary judgment,	Peter D. McDermott
	AFFD	CAMILLE	Affidavit of Jay Kiha in support of Def JUB Engineers Incs second Motion for summary judgment,	Peter D. McDermott
		CAMILLE	Def JUB Engineers, Incs Memorandum in support of second Motion for summary judgment,	Peter D. McDermott
	NOTC	CAMILLE	Notice of hearing- Dfdt JUB Second Motion for Summary Judgment- set 2-27-06 at 1:30 pm: (Arkoosh)	Peter D. McDermott
	HRSC	CAMILLE	Hearing Scheduled (Motion for Summary Judgment 02/27/2006 01:30 PM)	Peter D. McDermott
	MOTN	CAMILLE	Def JUB Engineers Inc. second motion for summary judgment	Peter D. McDermott
2/21/2006		DCANO	Amended Notice of Hearing; C. Tom Arkoosh, Atty for Dfdt. JUB Engineers, Inc- set 3-20-06 at 1:30 am. on Second Motion for Summary Judgment.	Peter D. McDermott
	HRSC	DCANO	Hearing Scheduled (Hearing Scheduled 03/20/2006 01:30 PM); Second Motion for Summary Judgment	Peter D. McDermott
3/7/2006	MOTN	CAMILLE	Motion to shorten time; aty Kim Trout	Peter D. McDermott

BECO Construction Company, Inc vs. City Of Pocatello, J-U-B Engineers, Inc.

Date	Code	User		Judge
3/7/2006	MOTN	CAMILLE	Motion to vacate hearing and for enlargement of time; aty Kim Trout for plntf	Peter D. McDermott
	AFFD	CAMILLE	Affidavit of Kim Trout; aty Kim Trout for plntf	Peter D. McDermott
3/9/2006	ORDR	CAMILLE	Order shortening Time- motion set 3-13-06 at 1:30 pm. s/Mcdermott 3-9-06	Peter D. McDermott
3/10/2006		CAMILLE	Second Amended Notice of Hearing- Dfdts Second Motion for Summary Judgment set 3-27-06 at 1:30 pm. (Arkoosh)	Peter D. McDermott
	HRSC	CAMILLE	Hearing Scheduled (Motion for Summary Judgment 03/27/2006 01:30 PM)	Peter D. McDermott
3/16/2006	AFFD	CAMILLE	Affidavit of Delynn Ziterkopf	Peter D. McDermott
	AFFD	CAMILLE	Affidavit of Billy Berry; aty William Smith for plntf	Peter D. McDermott
	AFFD	CAMILLE	Affidavit of Leon Pack ; aty W/ Smith for plntf	Peter D. McDermott
	AFFD	CAMILLE	Second Affdt of Kenneth Wright; aty W/ Smith for plntf	Peter D. McDermott
	RESP	CAMILLE	BECO's Resp Brief in Opposition to JUB's second Motion for sumary judgment; aty W/Smith for plntf	Peter D. McDermott
3/23/2006		LINDA	Defendant JUB Engineers, Inc.'s Reply to Beco's Brief in Response to JUB Second Motion For Summary Judgment; aty Daniel Nevala	Peter D. McDermott
	AFFD	LINDA	Affidavit of Alan Soderling in Support of Defendant JUB Engineers Inc.'s Second Motion For Summary Judgment; aty Daniel Nevala	Peter D. McDermott
3/24/2006	NOTC	CHRISTY	Third amended notice of hearing; C. Tom Arkoosh aty for def J-U-B Engineering- Hearing on second motion for summary judgment- set 4-10-06 at 1:15 pm.	Peter D. McDermott
3/25/2006	HRSC	CHRISTY	Hearing Scheduled (Motion for Summary Judgment 04/10/2006 01:15 PM)	Peter D. McDermott
3/31/2006	MOTN	CINDYBF	Plaintiff's Motion to Order Mediation- by pltf BECO thru aty Smith.	Peter D. McDermott
4/4/2006	RESP	CINDYBF	Defendant JUB Engineers Response to Plaintiff's Motion to Order Mediation- by dfdt thru DA Arkoosh.	Peter D. McDermott
4/7/2006	STIP	CINDYBF	Stipulation to Mediate s/PA Smith & DA Newala. CH	Peter D. McDermott
4/17/2006	INHD	CAMILLE	Minute Entry & Order- hearing on Dfdts Second Motion for Summary Judgment held 4-11-06. Motion is taken under advisement. Pltfs Motion for Mediation will be granted if dfdts is not successfull on motion for summary judgment. s/J Mcdermott 4-10-06	Peter D. McDermott
5/17/2006	INHD	CAMILLE	Memorandum Decision and Order- Dfdts Second Motion for Summary Judgment is GRANTED. Jury trial set 1-23-07 is vacated. Dfdt awarded costs. DA to prepare judgment. s/Mcdermott 5-17-06	Peter D. McDermott

BECO Construction Company, Inc vs. City Of Pocatello, J-U-B Engineers, Inc.

Date	Code	User		Judge
6/9/2006	MOTN	CAMILLE	Motion for reconsideration; aty Kim Trout for BECO	Peter D. McDermott
		CINDYBF	Notice of Change of Firm Name and Address- show William Smith- Trout, Jones, Gledhill & Furhman, 225 N. 9th St Ste 820, PO Box 1097, Boise, ID 83701, 208-331-1170.	Peter D. McDermott
6/16/2006	MOTN	CAMILLE	Motion for Attorney's Fees and Sanctions- by dfdt thru DA Arkoosh.	Peter D. McDermott
	MEMO	CAMILLE	Memorandum in Support of Motion for Attorney Fees and Sanctions- by DA Arkoosh.	Peter D. McDermott
	MEMO	CINDYBF	Memorandum of Costs and Fees- by DA Arkoosh.	Peter D. McDermott
6/19/2006	ORDR	CAMILLE	Judgment- Pltf's Negligence claim entered for dfdt against pltf. Pltf's Intentional Interference entered for dfdt against pltf. Pltf's breach of contract claim, pltf has w/drawn and claim is dismissed. Dfdt JUB is prevailing party and is awarded costs. s/ Mcdermott 6-19-06.	Peter D. McDermott
6/20/2006	NOTC	CAMILLE	Notice of hearing- motion for attorneys fees and sanctions- set 7-10-06 at 1:30 pm; aty Tom Arkoosh for Def.	Peter D. McDermott
6/21/2006	AFFD	CAMILLE	2nd Affidavit of Billy Berry; aty Kim Trout	Peter D. McDermott
6/22/2006	MOTN	CINDYBF	Renewed Motion for Reconsideration- by BECO thru aty Smith.	Peter D. McDermott
	HRSC	CAMILLE	Notice of Hearing- Motion for Reconsideration & Renewed motion for consideration- Hearing Scheduled (Motion 07/10/2006 01:30 PM) (Smith)	Peter D. McDermott
6/23/2006		CAMILLE	Memorandum in support of motion for reconsideration and renewed motion for reconsideration- by PA Smith.	Peter D. McDermott
6/30/2006	MOTN	CAMILLE	Motion to disallow costs and fees; aty Kim Trout for BECO	Peter D. McDermott
		CAMILLE	Memorandum in support of motion to disallow costs and fees- by PA Smith.	Peter D. McDermott
7/3/2006	AFFD	CAMILLE	Affidavit of Counsel Regarding Memorandum of Costs and Fees- by DA Arkoosh. :	Peter D. McDermott
		CAMILLE	Memorandum in Opposition to motion for reconsideration and renewed motion for reconsideration- by DA Arkoosh	Peter D. McDermott
	AFFD	CAMILLE	Affidavit of Cam Purchase in Support of Memorandum in Opposition to Motion for Reconsideration and Renewed Motion for Reconsideration- by DA Arkoosh.	Peter D. McDermott
	NOTC	CINDYBF	Notice of Opposition to Motion for Attorney Fees and Sanctions- by BECO thru PA Smith.	Peter D. McDermott
7/5/2006	MOTN	CAMILLE	Motion to Strike- by aty Kim Trout for BECO	Peter D. McDermott
	MOTN	CINDYBF	Motion to Shorten Time- by PA Smith.	Peter D. McDermott

BECO Construction Company, Inc vs. City Of Pocatello, J-U-B Engineers, Inc.

Date	Code	User	Judge
7/7/2006	AFFD	CAMILLE	Affidavit of Jodi Paoli (Smith)
	AFFD	CAMILLE	Affidavit of William L Smith (Smith)
	HRSC	CAMILLE	Amended Notice of Hearing- Motion for Attys Fees and Sanctions- Hearing Scheduled (Motion 08/08/2006 02:00 PM) (Nevala)
7/12/2006	HRSC	CAMILLE	Notice of Hearing- Pltf's Motion to Strike & Motion to Disallow Costs and Fees- Hearing Scheduled (Motion 08/07/2006 02:00 PM) (Smith)
	AFFD	CAMILLE	Affidavit of counsel regarding memorandum of costs and fees;
	HRHD	CINDYBF	ME&O- Pltf's Motion for Reconsideration and Renewed Motion for Reconsideration held 7-10-07. Pltf w/drew Motion to Strike and Motion to Shorten Time. Pltf's Motion to Reconsider & Renewed Motion to Reconsider taken under advisement. s/McDermott 7-10-06.
7/16/2006	MOTN	CAMILLE	Motion for attys fees and sanctions;
7/28/2006	MEMO	CAMILLE	Memorandum in Opposition to motin to strike; aty Tom ARkoosh for Def.
7/31/2006	APSC	CAMILLE	BECO's Notice of Appeal- Appealed To The Supreme Court; (NOTICE OF APPEAL FILED, CLERKS REC REQ, NO TRNSCRPT IS REQ: ALL MONEY WAS PAID \$9.00, \$86.00 AND \$100.00: ATY KIM TROUT
8/2/2006		ELLA	Filing: T - Civil Appeals To The Supreme Court (\$86.00 Directly to Supreme Court Plus this amount to the District Court) Paid by: Trout, Jones, Gledhill Receipt number: 0029267 Dated: 8/2/2006 Amount: \$15.00 (Check)
8/11/2006	DEOP	CAMILLE	Memorandum Decision and Order; J U B is hereby awarded a total Judgment of \$75,398.42: J Mcdermott 8-10-06
		CAMILLE	Memorandum Decision and Order- Court hereby DENIES Becos Motion for reconsideration and renewed motion for reconsideration. s/McDermott 8-8-06.
		CAMILLE	Amended Judgment- for JUB for \$75,398.42. s/McDermott 8-10-06.
8/17/2006	INHD	CAMILLE	Minute Entry & Order-Hearing held 8-7-06 on Pltf's Motion in Opposition to atty fees and dfdt's Affidavit regarding attys and Dfdts Motion for Sanctions and atty Fees and Sanctions against PA. Dfdt's Motion for Sanctions against pltf is DENIED. Motion in Opposition and Dfdts Motion for Atty Fees is taken under advisement: J Mcdermott 8-7-06
8/24/2006	MISC	CAMILLE	Request for Additional Transcript- by DA Arkoosh. Peter D. McDermott

BECO Construction Company, Inc vs. City Of Pocatello, J-U-B Engineers, Inc.

Date	Code	User		Judge
8/24/2006	MISC	CAMILLE	NOTICE OF APPEAL- FILED IN SC, FILED, DOCKET #33378, CLERKS REC & REPT TRNSCRT MUST BE FILED ON OR BEFORE 9-25-06	Peter D. McDermott
9/1/2006	BNDC	CINDYBF	Bond Posted - Cash (Receipt 33778 Dated 9/1/2006 for 102541.86)	Peter D. McDermott
	MOTN	CAMILLE	Motion for stay of execution; aty Kim Trout	Peter D. McDermott
		CAMILLE	Notification of cash deposit; aty Kim Trout	Peter D. McDermott
9/5/2006		CAMILLE	BECO's Amended Notice of Appeal- by PA Smith	Peter D. McDermott
	ORDR	CAMILLE	Order staying execution- execution on Amended Judgment stayed until further order. /Mcdermott 9-5-06	Peter D. McDermott
10/30/2006	MISC	CAMILLE	CLERK'S RECORD LODGED; 10-30-06	Peter D. McDermott
11/6/2006	MISC	CAMILLE	FILING OF CLERKS CERTIFICATE- filed in SC 11-2-06.	Peter D. McDermott
11/20/2006	MISC	CAMILLE	RECEIVED PAYMENT OF \$1068.75 FROM McGRATH, MEACHAM & SMITH FOR CLERK'S RECORD ON APPEAL 11-20-06	Peter D. McDermott
1/31/2007	MISC	CAMILLE	mailed clerks record to counsel (Kim Trout/ C Tom Arkoosh) 01-31-07; to mail to supreme court 02-28-07	Peter D. McDermott
2/7/2007	MISC	CAMILLE	Arkoosh Law Office called 02-07-07. The Request for Additional Transcripts filed on 08-24-06 by their law firm was not sent to the court reporter, Stephanie Davis. The transcript is now being prepared. faxed copy of the "Request" to Supreme Court, attn Shelley.	Peter D. McDermott
2/12/2007	MISC	AMANDA	CLERKS RECORD and REPORTERS TRANSCRIPT DUE DATES RESET; filed by supreme court-- due date 04-11-07	Peter D. McDermott
	MISC	AMANDA	REPORTERS TRANSCRIPT lodged on 2-12-07 -- on dfdt's motn for atty fess and sanctions, pltf motn to disallow fees and costs, pltf motn to strike affd of counsel on 08-07-06 -- mailed to counsel 02-12-07. Called Dan Nevela w/Arkoosh Law to let him know that the transcripts were being mailed as per his request	Peter D. McDermott
2/14/2007	MISC	AMANDA	"NOTICE OF TRANSCRIPT LODGED" filed by supreme court	Peter D. McDermott
3/1/2007		LINDA	Plaintiff's Objection to Settling Record on Appeal and Request for Addition to Appellate Record- by pltf BECO thru atty Bryan Smith	Peter D. McDermott
	AFFD	LINDA	Affidavit of Bryan Smith: atty Bryan Smith	Peter D. McDermott
3/5/2007	MISC	AMANDA	mailed CLERKS RECORD and REPORTERS TRANSCRIPT to supreme court	Peter D. McDermott

BECO Construction Company, Inc vs. City Of Pocatello, J-U-B Engineers, Inc.

Date	Code	User		Judge
3/8/2007	ORDR	DCANO	Order; Stephanie Davis, Official court Reporter, Shall lodge in the appellate record of this case the transcript of the proceedings held before the Court on 8-7-6; s/J. McDermott on 3-8-07	Peter D. McDermott
		DCANO	Defendant JUB Engineers, Inc's Objection to Reporter's Transcript and Request for Correction; C. Tom Arkoosh, Atty for Dfdt. JUB Engineers	Peter D. McDermott
	NOTC	DCANO	Notice of Hearing- Dfdt JUB Objection to Reporters Transcript and Request for Correction- set 4-2-07 at 1:30 p.m. C. Tom Arkoosh, Atty for Dfdts.	Peter D. McDermott
	HRSC	DCANO	Hearing Scheduled (Hearing Scheduled 04/02/2007 01:30 PM) Telephonically call for Dfdts. Objection to Reporter's Transcript	Peter D. McDermott
3/12/2007	MISC	AMANDA	CLERKS RECORD and REPORTERS TRANSCRIPT received by and filed in supreme court 3-7-07. Applt brief due 4-11-07.	Peter D. McDermott
4/16/2007	INHD	CAMILLE	Minute Entry & Order- hearing held 4-2-07 on JUB Objection to Reporters Transcript and Request for Correction. Objection is GRANTED. Court reporter to advise whether a correction is necessary. s/J McDermott 4-2-07	Peter D. McDermott
4/24/2007		CAMILLE	Letter filed by Stephanie Davis advising no corrections to be made.	Peter D. McDermott
5/25/2007	MISC	DCANO	ORDER DISMISSING APPEAL; Counsel had 14 days from 4-26-07 to submit Appellant's Brief. If the briefs are not submit on time no extension of time will be granted for any reason. No Appellant's Brief has been filed as of this date, therefore, Order Conditionally Dismissing Appeal is Affirmed and appeal is Dismissed.	Peter D. McDermott
	REMT	DCANO	Remittitur; Order Dismissing this appeal as of 5-22-07	Peter D. McDermott
5/30/2007	MISC	DCANO	IDAHO SUPREME COURT; Transmittal of Document, Order Dismissing Appeal	Peter D. McDermott
	MISC	DCANO	IDAHO SUPREME COURT; Acknowledgment of Receipt - Remittitur	Peter D. McDermott
	ORDR	CINDYBF	Order- Based upon the Remittitur from SC, the Clerk shall release \$80,277.11 from funds prev deposited to dfdt/resp JUB. Balance to be retained until further order. s/McDermott 5-30-07.	Peter D. McDermott
5/31/2007	MISC	DCANO	**SUPREME COURT** Order withdrawing orderdismissing appeal and remittitur. This appeal shall now proceed. Appellant's Brief shall be on or before 35 days from the date of this order, 5-31-07	Peter D. McDermott

BECO Construction Company, Inc vs. City Of Pocatello, J-U-B Engineers, Inc.

Date	Code	User		Judge
6/1/2007	ORDR	CAMILLE	Order - Crts Order releasing \$80,277.11 to Def./Resp (per their request) is hereewith Rescinded as the Supreme Court has reinstated the appeal. s/Mcdermott 6-1-07	Peter D. McDermott
6/4/2007	MISC	DCANO	IDAHO SUPREME COURT; Briefing Resumed - Appellant Brief (s). Appellant's Brief must be filed 7-5-07	Peter D. McDermott
6/11/2007	MISC	DCANO	IDAHO SUPREME COURT; Documents filed in Supreme Court on 6-5-07, Defendant-Respondent JUB Engineers, Inc. Motn for Reconsideration of May 31, 2007 Order Withdrawing Order Dismissing Appeal and Remittitur; Memorandum of Law in Support	Peter D. McDermott
6/21/2007	MISC	DCANO	IDAHO SUPREME COURT; Document Filed with supreme court on 6-19-07. Appellant's Response to Respondent's Motn. for Reconsideration of May 31,2007 Order withdrawing order dismissing appeal and remittitur.	Peter D. McDermott
7/5/2007	MISC	DCANO	IDAHO SUPREME COURT; Briefing Due Dates Suspended until further notice.	Peter D. McDermott
	MISC	DCANO	ORDER (from Supreme Court) DENYING MOTION FOR RECONSIDERATION OF MAY 31, 2007 ORDER WITHDRAWING ORDER DISMISSING APPEAL AND REMITTITUR IS HEREBY denied.	Peter D. McDermott
	MISC	DCANO	ORDER(from Supreme Court) GRANTING MOTION FOR SUSPENSION OF BRIEFING SCHEDULE OR ALTERNATIVELY FOR EXTENSION OF TIME TO FILE APPELLATE BRIEF.	Peter D. McDermott
5/5/2008	MISC	DCANO	IDAHO SUPREME COURT; Acknowledgment of Receipt of opinion signed and mailed back to SC on 5-5-08.	Peter D. McDermott
	MISC	DCANO	IDAHO SUPREME COURT; Opinion filed 5-2-08 Summary Judgment order is AFFIRMED. FEE AWARD IS VACATED.	Peter D. McDermott
5/29/2008	MOTN	CAMILLE	Motion for release of cash deposit; aty Bryan Smith for plntf	Peter D. McDermott
	MOTN	CAMILLE	Motion to shorten time; aty Bryan Smith for plntf	Peter D. McDermott
	AFFD	CAMILLE	Affidavit of BJ Driscoll; aty Bryan Smith for plntf	Peter D. McDermott
	HRSC	CAMILLE	Notice of Hearing- Hearing Scheduled (Motion 06/09/2008 01:30 PM)	Peter D. McDermott
5/30/2008	MISC	DCANO	IDAHO SUPREME COURT; Acknowledgment of Receipt - Remittitur. Signed and mailed back to SC on 5-30-08.	Peter D. McDermott
	REMT	DCANO	REMITTITUR; Opinion filed 5-2-08 is now final.	Peter D. McDermott

BECO Construction Company, Inc vs. City Of Pocatello, J-U-B Engineers, Inc.

Date	Code	User		Judge
6/4/2008	AFFD	CAMILLE	Affidavit of Daniel Nevala in support of Memorandum in opposition to motion for release of cash deposit; aty Daniel Nevala for def JUB Engineers, Inc.	Peter D. McDermott
	MEMO	CAMILLE	Memorandum in opposition to motion for release of cash deposit; aty Daniel Nevala	Peter D. McDermott
6/12/2008		CAMILLE	Minute Entry & Order- Hearing held 6-9-08 on Pltfs Motion to Release Cash Deposit. Court advised atty fee issued had been remanded to this court by SC. Ordered each atty shall file a simultaneous brief on the atty fee issue w/ the court on 6-23-08: Plntfs motion for release of cash deposit is Taken Under Advisement: J Mcdermott 6-12-08	Peter D. McDermott
	MEMO	CAMILLE	Memorandum Decision and Order- Court Denies BECO's motion for release of cash deposit, because this court has been ordered to determine and award the fees JUB incurred in defending BECO's contract claim, it would be inappropriate to release the cash deposit forthwith, after a final judgment awarding the proper fee award has been issued, this court will release any remaining balance of the cash deposit to BECO's counsel as requested: J Mcdermott 6-12-08	Peter D. McDermott
6/23/2008		CAMILLE	Memorandum in support of determination and award of attorney fees to defendant; aty Daniel Nevala for def	Peter D. McDermott
	MEMO	CAMILLE	Memorandum of fees; aty Daniel Nevala for def JUB	Peter D. McDermott
	BRFS	CAMILLE	Brief in opposition to an award of attorneys fees; aty Bryan Smith for plntf	Peter D. McDermott
11/3/2008	ORDR	CAMILLE	Memorandum Decision and Order; Cash Bond of (\$102,541.86) Bannock County Auditor shall, from said funds, remit a check in the sum of (\$41,140.00), to counsel for JUB, David A Nevala, and remit the balance of said fund, including interest, to counsel for BECO, Bryan Smith: J Mcdermott 10-29-08	Peter D. McDermott
11/14/2008		DCANO	Filing: T - Civil Appeals To The Supreme Court (\$86.00 for the Supreme Court to be receipted via Misc. Payments. The \$15.00 County District Court fee to be inserted here.) Paid by: Bryan D. Smith Receipt number: 0042723 Dated: 11/14/2008 Amount: \$15.00 (Check) For: BECO Construction Company, Inc (plaintiff)	Peter D. McDermott
	MISC	DCANO	IDAHO SUPREME COURT; Order Denying Verified Petition for Writ of Mandamus.	Peter D. McDermott
	MISC	DCANO	Notice of Appeal- by Plaintiff BECO Construction thru Bryan D. Smith.	Peter D. McDermott

Date: 1/8/2009
Time: 12:45 PM
Page 11 of 11

Sixth Judicial District Court - Bannock County

User: DCANO

ROA Report

Case: CV-2005-0001355-OC Current Judge: Peter D. McDermott
BECO Construction Company, Inc vs. City Of Pocatello, etal.

BECO Construction Company, Inc vs. City Of Pocatello, J-U-B Engineers, Inc.

Date	Code	User		Judge
11/14/2008	MISC	DCANO	Received \$15.00 check 7396 for Appeal Fee, \$200.00 check 7397 for Clerk's Record. Bryan D. Smith sent a \$86.00 check that I returned because it was made payable to Supreme Court. I notified his office and they are sending a new check made payable to Bannock County for the fee.	Peter D. McDermott
	MISC	DCANO	CLERK'S CERTIFICATE OF APPEAL; Signed and Mailed to Counsel on 11-14-08.	Peter D. McDermott
11/17/2008		DCANO	Miscellaneous Payment: Supreme Court Appeal Fee (Please insert case #) Paid by: Bryan D. Smith Receipt number: 0043031 Dated: 11/17/2008 Amount: \$86.00 (Check)	Peter D. McDermott
	MISC	DCANO	Received \$86.00 Supreme Court Fee from Bryan D. Smith check 7472 on 11-17-08.	Peter D. McDermott
11/21/2008		CINDYBF	Bond converted per Judge McDermott's Order- \$41,140.00 ck #60925 mailed to David Nevala, PO Box 32, Gooding, ID 83330 & \$61,401.86 to Bryan Smith, PO Box 50731, Idaho Falls, ID 83405. CH	Peter D. McDermott
12/1/2008	MISC	DCANO	IDAHO SUPREME COURT: Notice of Appeal received in Sc on 11-17-08. Docket No. #35873-2008. Clerk's Record must be filed in SC by 1-23-09.	Peter D. McDermott
1/6/2009	MISC	DCANO	Request for Additional Reporter's Transcript for Supreme Court Appeal; Daniel A. Nevala, Atty for JUB Engineers, Inc.	Peter D. McDermott

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Bryan D. Smith, Esq., ISBN 4411
B. J. Driscoll, Esq., ISBN 7010
McGRATH, SMITH & ASSOCIATES, PLLC
P. O. Box 50731
414 Shoup Avenue
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Telefax: (208) 529-4166

2006 MAY 29 AM 9:26
BY: [Signature]
DEPUTY CLERK

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

BECO CONSTRUCTION COMPANY,)
INC., an Idaho corporation,)
)
Plaintiff,)
)
v.)
)
THE CITY OF POCATELLO, J-U-B)
ENGINEERS, INC., and DOES 1-15,)
Whose true names are unknown,)
)
Defendants.)

Case No. CV-05-1355 OC
**MOTION FOR RELEASE OF
CASH DEPOSIT**

COMES NOW Plaintiff, BECO Construction Company, Inc. ("BECO"), by and through counsel of record, and pursuant to Idaho Appellate Rule 13(b)(15) and 48 and Idaho Rules of Civil Procedure 67 and 79(e) hereby moves the court for an order releasing the plaintiff's cash deposit in the principal amount of \$102,541.86, plus interest as has accrued and as allowed by law, and directing the immediate payment of said principal and interest to the McGrath, Smith & Associates, PLLC Trust Account.

This motion is made on the grounds and for the reasons that on September 1, 2006, as part of its motion for stay of execution on appeal, BECO deposited with the clerk of the court a cashier's check numbered 36178 in the principal amount of

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\$102,541.86 and directed the clerk of the court to place the funds in an interest bearing account. The appeal has now been resolved by the Supreme Court of Idaho in 2008 Opinion No. 59, Docket No. 33378, cited as 08.10 ISCR 462, filed May 2, 2008. As the appeal has been resolved, the court should now release the funds BECO posted as security to stay execution pending appeal.

This motion is based on this Motion, the Notice of Hearing, the Motion to Shorten Time, and the Affidavit of B. J. Driscoll filed concurrently herewith and the court's records and files herein.

Plaintiff requests oral argument on said motion.

DATED this 28 day of May, 2008.

McGRATH, SMITH & ASSOCIATES, PLLC



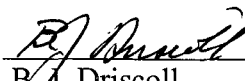
B. J. Driscoll
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28 day of May, 2008, I caused a true and correct copy of the foregoing **MOTION FOR RELEASE OF CASH DEPOSIT** 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.
Arkoosh Law Offices, Chtd.
P. O. Box 32
301 Main Street
Gooding, Idaho 83330-0032



B. J. Driscoll

S

In the Supreme Court of the State of Idaho

BECO CONSTRUCTION COMPANY, INC.,)
)
Plaintiff-Appellant,)
)
v.)
)
J-U-B ENGINEERS, INC.,)
)
Defendant-Respondent.)

REMITTITUR
NO. 33378

CU-05-1355-0C

MAY 30 9 26
CLERK OF DISTRICT COURT

TO: SIXTH JUDICIAL DISTRICT, COUNTY OF BANNOCK.

The Court having announced its Opinion in this cause May 2, 2008, which has now become final; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Opinion, if any action is required; and,

IT IS FURTHER HEREBY ORDERED that inasmuch as no memorandum of costs was filed, costs on appeal awarded to Respondent are hereby waived.

DATED this 21st day of May, 2008.

Stephen Kenyon
Clerk of the Supreme Court
STATE OF IDAHO

cc: Counsel of Record
District Court Clerk
District Judge

S

C. Tom Arkoosh, ISB #2253
 Daniel A. Nevala, ISB #6443
 CAPITOL LAW GROUP, PLLC.
 301 Main Street
 Post Office Box 32
 Boise, ID 83701-2598
 Telephone: (208) 934-8872
 Facsimile: (208) 934-8873

FILED
 BANNOCK COUNTY
 CLERK
 2008 JUN -4 PM 4:54
 BY *[Signature]*
 DEPUTY CLERK

Attorneys for Defendant J-U-B Engineers, Inc.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

BECO CONSTRUCTION COMPANY,)
 INC., an Idaho corporation,)
)
 Plaintiff,)
)
 v.)
)
 J-U-B ENGINEERS, INC.,)
)
 Defendant.)

Case No. CV 05-1355 OC

AFFIDAVIT OF DANIEL A. NEVALA
 IN SUPPORT OF MEMORANDUM IN
 OPPOSITION TO MOTION FOR
 RELEASE OF CASH DEPOSIT

MeD.

STATE OF IDAHO)
)ss.
 County of Ada)

Daniel A. Nevala, being first duly sworn upon his oath and upon his personal knowledge and belief, deposes and states:

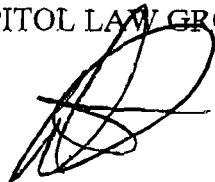
1. I am counsel for the defendant in the above-captioned matter.
2. Attached to this Affidavit as Exhibit "A" is a true and correct copy of the Reporter's Transcript for the hearing before the Honorable Peter D. McDermott on August 7, 2006 in this case.

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Respectfully Submitted,

DATED this 4th day of June, 2008.

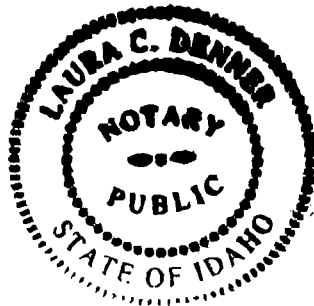
CAPITOL LAW GROUP, PLLC



Daniel A. Nevala
Attorney for Defendant J-U-B Engineers, Inc.

30

SUBSCRIBED AND SWORN to before me this 4th day of June, 2008



Laura C. Denner
NOTARY PUBLIC for Idaho
Residing at: Base, Idaho
My Commission Expires: 5/16/2014

S

CERTIFICATE OF SERVICE

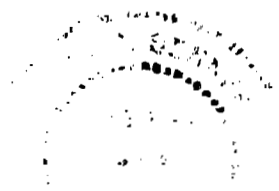
I hereby certify that on the ____ day of June, 2008, I served a true and correct copy of the foregoing document on the person listed below, in the manner indicated

Bryan D. Smith
McGrath, Smith & Associates, PLLC
Post Office Box 50731
414 Shoup Avenue
Idaho Falls, Idaho 83405
Facsimile: (208) 529-4166

United States Mail, Postage Prepaid
Overnight Courier
Via Facsimile
Hand Delivered



Daniel A. Nevala



IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

--o0o--

BECO CONSTRUCTION COMPANY, INC.,)
an Idaho Corporation,)

Plaintiff,)

vs.)

Case No.
CV05-13550C

J.U.B. ENGINEERS, INC.,)

Defendant.)

The above-entitled matter came on for hearing
on the dates and times indicated herein at the
Bannock County Courthouse, Pocatello, Idaho.

BEFORE: The Honorable PETER D. MCDERMOTT

APPEARANCES:

For the Plaintiff: William Smith, Esq.
TROUT, JONES, GLEDHILL,
FUHRMAN, P.A.
Attorneys at Law
225 N. 9th Street, Ste. 820
Boise, Idaho 83701

For the Defendant: Tom Arkoosh, Esq.
ARKOOSH LAW OFFICES, CHTD.
Attorneys at Law
301 Main Street
Gooding, Idaho 83330

COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS

I N D E X

	PAGE	LINE
MONDAY, AUGUST 7, 2006	7	1

Deft's Mot. for Atty Fees & Sanctions;
 Plntf's Mot. to Disallow Fees & Costs;
 Plntf's Mot. to Strike Af. of Counsel.

JOHN BAILEY	20	4
Direct Ex. - Mr. Arkoosh	20	11
Cross-Ex. - Mr. Smith	29	12
Further Cross - Mr. Smith	37	4
Redirect Ex. - Mr. Arkoosh	39	14

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BECCO V. JUB

POCATELLO, IDAHO; MONDAY, AUGUST 7, 2006

8:30 A.M.

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4
5 THE COURT: All right.
6 Let's take up BECCO Construction versus
7 JUB Engineers.
8 MR. ARKOOSH: Good afternoon,
9 Your Honor.
10 THE COURT: Good afternoon.
11 MR. ARKOOSH: Tom Arkoosh appearing
12 for J.U.B.
13 MR. SMITH: William Smith appearing
14 for BECCO Construction Company.
15 THE COURT: Yes, Mr. Smith. Thanks.
16 We're here for hearing on defendant's
17 motion for attorney's fees and sanctions and
18 plaintiff's motion to disallow fees and costs and
19 plaintiff's motion to strike the affidavit of
20 counsel regarding the memorandum of fees and
21 costs.
22 So, I suppose, let's take up first --
23 I suppose we ought to take up, first, the motion
24 to strike the affidavit; okay?
25 MR. SMITH: Thank you, Your Honor.

10
1 motion to disallow the fees also at the same
2 time.
3 I think before we do, though,
4 Mr. Arkoosh, on what basis are you claiming
5 attorney's fees?
6 MR. ARKOOSH: Your Honor, as set out in
7 the memorandum of costs and fees.
8 THE COURT: Yeah. I read that, but
9 under 12-120(3), how does this case fit in there,
10 do you think?
11 MR. ARKOOSH: This was a contract
12 claim, Your Honor, that we had to brief, that
13 brought it to hearing for summary judgment, and
14 it was a contract for services. And that's
15 directly under 120(3).
16 THE COURT: Now, your contract is with
17 the City of Pocatello though?
18 MR. ARKOOSH: Correct. And they sued
19 us on that contract.
20 THE COURT: But you don't have a
21 contract with them?
22 MR. ARKOOSH: We do not. They sued
23 us. And the first element they have to show
24 is contract. And we filed summary judgment
25 on that element, and they dismissed the day of

24
8
1 This is a very simple motion. We just
2 believe that the affidavit that was filed on or
3 about July 3rd, 2006, is not relevant; it doesn't
4 state that the billing entries are true and
5 correct. It doesn't state that that time was
6 actually incurred. It doesn't state that the
7 statements made in the memorandum of costs are
8 true and correct. And on that basis, we would
9 ask that the affidavit of counsel be
10 disregarded.
11 THE COURT: All right. Thank you
12 very much, Mr. Smith.
13 Mr. Arkoosh?
14 MR. ARKOOSH: If it please Your Honor,
15 counsel pointed out -- and probably correctly
16 so -- under Rule 54, not under 12-120 but under
17 Rule 54, that it had to be affied on the
18 memorandum of costs.
19 We were still within the fourteen days.
20 I adopted the memorandum of costs and fees in it
21 entirely and affied it, so its relevance -- or the
22 objection isn't well-taken.
23 THE COURT: All right. Thank you.
24 Mr. Smith?
25 MR. SMITH: We just ask that you look

11
1 the hearing.
2 The summary judgment -- there are
3 two Idaho Supreme Court cases -- I didn't realize
4 there was a question in Your Honor's
5 mind -- there are two Idaho Supreme Court cases
6 that say that if you show the contract doesn't
7 exist, that is winning a 12-120(3) claim for the
8 contract amount, Your Honor.
9 MR. SMITH: Your Honor, there is no
10 12-120(3) request in the motion for memorandum of
11 costs and fees. There is 12-123, frivolous and
12 Rule 11 and 56(g) -- but no 12-120.
13 MR. ARKOOSH: That is in the
14 memorandum of costs and fees, Your Honor. There
15 are two separate applications here. One is the
16 memorandum of costs and fees, and the other is
17 costs and fees and sanctions under a series of
18 statutes and rules that we have to --
19 THE COURT: Let me get something
20 straight here before we go too much further.
21 The Court is going to -- and it will
22 be followed up with a written decision -- the
23 Court is going to deny the Motion to Reconsider.
24 filed by Becco, the plaintiff, so judgment will be
25 entered for JUB Engineers and JUB Engineers will

9
1 very carefully at the affidavit of counsel and
2 the statements contained therein that he did swear
3 to.
4 He swears what the basis for computation
5 of the fees were, but he doesn't say those fees
6 were incurred; that those are his billing
7 statements; that was the time expended; he just
8 says the basis for computation, and on that basis,
9 he hasn't laid the foundation for asking for all
10 of those fees, Your Honor.
11 THE COURT: All right.
12 With regard to the memorandum letter of
13 fees and costs filed with counsel, I'm going to
14 deny the motion to strike.
15 The Idaho Appellate Court has held
16 in CAMP versus JIMINEZ (phonetic) 107 Idaho 878,
17 even a failure to verify a memorandum of costs
18 and attorney's fees, it renders it on timely
19 objection, but does not render it jurisdictionally
20 defective.
21 I think the way it has been filed,
22 I guess, meets the standard so -- deny the motion
23 to strike.
24 So let's take up your motion for
25 attorney fees. And we'll take up the plaintiff's

12
1 be the prevailing party.
2 Okay. Now, as far as attorney fees go,
3 though, in the memorandum of fees and costs on
4 the second page, you're requesting attorney fees
5 under 12-120(3) and 12-121 in conjunction with
6 Idaho Civil Rules of Procedure 54(e)(1);
7 right?
8 MR. ARKOOSH: Yes, Your Honor.
9 THE COURT: Okay.
10 So, again, how do you believe this falls
11 into 12-120(3)?
12 MR. ARKOOSH: The first count in
13 the Complaint was for contract, 12-123 states
14 that if you prevail in a contract claim and
15 it is a collection contract for services, leaving
16 out the intervening language, which this was
17 precisely, then it's under 12-120.
18 The cases go on to state that if
19 the gravamen of the case is contract, then
20 you're entitled to recovery of fees under
21 12-120(3).
22 THE COURT: Well, this isn't a case
23 that would recover on a contract, though,
24 is it?
25 MR. ARKOOSH: Yes, Your Honor.

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BECO V. JUB

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1 We were sued in contract for recovery.
 2 THE COURT: Well, you were sued
 3 for intentional interference with contract.
 4 MR. ARKOOSH: We were sued in three
 5 counts -- contract negligence and intentional
 6 interference in contract --
 7 THE COURT: But that's the contract
 8 that BECO had with the City of Pocatello?
 9 MR. ARKOOSH: Correct. It was the
 10 wrong plaintiff. We didn't have a contract,
 11 but we were, indeed, sued upon contract.
 12 THE COURT: Well, so you got anything
 13 else you want to say on that?
 14 MR. ARKOOSH: Not on the contract
 15 claim, Your Honor.
 16 THE COURT: Okay.
 17 Then on 12-121, in order to be
 18 entitled to -- in order to be entitled to attorney
 19 fees under that statute or provision, this Court
 20 would have to find that BECO brought -- pursued
 21 the lawsuit frivolously, without foundation,
 22 before you would be entitled to attorney fees
 23 under that section; right?
 24 MR. ARKOOSH: That's correct,
 25 Your Honor.

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1 THE COURT: So you're asking for
 2 attorney fees under both sections?
 3 MR. ARKOOSH: Only on the contract
 4 portion. And I haven't divided the fees, but we
 5 did ask for that because up to the first summary
 6 judgment, that was part and parcel under 12-121
 7 under the memorandum of costs and fees.
 8 And under Rule 54, it's for a frivolous
 9 action, Your Honor. And for the affirmative
 10 motion for sanctions in this case, we have asked
 11 for attorney fees and sanctions against both the
 12 party and counsel under 12-123 and Rule 11,
 13 Your Honor.
 14 And I think that the showing is
 15 very, very similar for 12-121 and the
 16 affirmative claim for sanctions. The only
 17 difference that I can see in 123 is you can
 18 also collect sanctions for failure to properly
 19 investigate.
 20 THE COURT: Well, I guess, first of
 21 all, as the prevailing party, you're entitled
 22 to your costs. And the way your costs were set
 23 out, I can't make heads or tails out of whether
 24 you're asking -- which ones are costs as a matter
 25 of right, which are discretionary costs -- other

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1 than your filing fee.
 2 MR. ARKOOSH: I concur with that,
 3 Your Honor. I think there has been a failure to
 4 itemize those. And I think they got backwards in
 5 the memorandum what was discretionary and what
 6 was nondiscretionary. I think that's
 7 backward.
 8 THE COURT: Okay.
 9 So -- going to award you your costs
 10 incurred as a matter of right for filing fee of
 11 \$47 and that's it.
 12 And the others were not set out
 13 properly, I don't think. I don't have a clue
 14 what the Litigation Document Group is. You're
 15 asking for payment on that. Must be -- I don't
 16 know what it is -- but copies and postage and
 17 all of that stuff. I'm not going to award you
 18 costs on that.
 19 MR. ARKOOSH: Yes, Your Honor.
 20 THE COURT: So give you \$47 bucks.
 21 MR. ARKOOSH: Yes, Your Honor.
 22 THE COURT: But you should -- in your
 23 cost bill, you should put out costs incurred as a
 24 matter of right and state what they are, and then
 25 you should put discretionary costs and state what

16

1 they are.
 2 MR. ARKOOSH: I agree. That was not
 3 correctly set out.
 4 THE COURT: All right.
 5 So we'll give you \$47 for a filing
 6 fee.
 7 And another thing before you get into
 8 a filing fee, you got a bunch of fees here
 9 charged to the litigation with BECO and the City
 10 of Pocatello, which was settled, but I don't think
 11 it should be in this, should it?
 12 MR. ARKOOSH: We were not involved
 13 in this case, Your Honor. Those are charged to
 14 this case. BECO versus the City of Pocatello is
 15 not an action in which JUB was involved.
 16 THE COURT: Well, let's see, there's
 17 quite a few of them here. You got 5/26 letter
 18 to Pocatello counsel. There is no Pocatello
 19 counsel, is there?
 20 MR. ARKOOSH: If I might explain?
 21 THE COURT: Then on the next page
 22 you got -- telephone call to attorney, City of
 23 Pocatello.
 24 MR. ARKOOSH: Correct.
 25 THE COURT: E-mail Bybee and

17

1 RE: City/BECO settlement.
 2 Next down, correspondence with clients.
 3 Telephone call for City of Pocatello.
 4 Next down little bit -- phone call with
 5 client, Kirk Bybee, City. And --
 6 MR. ARKOOSH: Correct.
 7 THE COURT: Okay.
 8 How do you figure that out to be charged
 9 to these guys in this lawsuit?
 10 MR. ARKOOSH: Your Honor, in the
 11 memorandum in opposition to attorney fees filed,
 12 one of the things cited by counsel for BECO is the
 13 fact they were able to settle their case with
 14 Pocatello. And they used that as an argument
 15 that this was not a frivolous lawsuit.
 16 We did a great deal of investigation
 17 with the Pocatello Development Authority, with the
 18 City of Pocatello, and discovery to try and figure
 19 out why we were being sued.
 20 Those calls were on this case.
 21 We're not in the BECO versus Pocatello case or
 22 vice-versa. We were just trying to learn what
 23 was going on, and we couldn't tell that from the
 24 Complaint. And we didn't get discovery as
 25 Your Honor knows, until later in this case.

18

1 THE COURT: Well, let me ask you this:
 2 On page three, the third item down,
 3 initial research and review regarding City of
 4 Pocatello tax increment financing and community
 5 development commission.
 6 MR. ARKOOSH: Yes, Your Honor.
 7 THE COURT: \$112 bucks -- what is that
 8 for?
 9 MR. ARKOOSH: That is to learn about
 10 the three-way contract that we were being sued
 11 under.
 12 We were trying to figure out why
 13 this contract was with Pocatello Development
 14 Authority, who Pocatello Development Authority
 15 was, and we were trying to learn whether or not
 16 the allegations in the Complaint were true -- that
 17 we had a contract with the contractor. Because
 18 that is the usual way --
 19 THE COURT: Well, you had a copy of
 20 the contract, didn't you?
 21 MR. ARKOOSH: We did, Your Honor.
 22 THE COURT: I mean the contract says
 23 what it says; right?
 24 MR. ARKOOSH: It does, Your Honor.
 25 THE COURT: So what difference does

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BECO V. JUB

19

1 all of that other stuff make?
 2 MR. ARKOOOSH: Well, at the time we
 3 felt it was important, Your Honor. We were
 4 trying to learn the parameters of the case based
 5 upon what was going on in the allegations of the
 6 Complaint.
 7 We didn't bring this Complaint.
 8 We didn't raise this confusion. We just had
 9 to sort it out. That's why we're here asking for
 10 fees.
 11 It may look broader than it needs to
 12 be, Your Honor. But Your Honor has to remember,
 13 we got sued and couldn't make heads or tails
 14 with our understanding of what had happened;
 15 why on earth we were being sued. And we couldn't
 16 get discovery timely.
 17 THE COURT: Well, okay.
 18 So you're standing on the memorandum of
 19 fees you submitted then?
 20 MR. ARKOOOSH: Yes, Your Honor.
 21 THE COURT: Okay.
 22 Well, let's go ahead then.
 23 MR. ARKOOOSH: Your Honor, I have
 24 some evidence to present, if I may.
 25 THE COURT: Okay.

20

1 MR. ARKOOOSH: I would call
 2 Mr. John Bailey.
 3
 4 JOHN BAILEY
 5
 6 a witness called on behalf of Defendant
 7 herein, after having been first duly and
 8 regularly sworn, testifies as hereinafter
 9 follows:
 10
 11 DIRECT EXAMINATION
 12
 13 BY MR. ARKOOOSH:
 14 Q. Would you state your name,
 15 please, sir.
 16 A. John Bailey.
 17 Q. And spell your last.
 18 A. B-a-i-l-e-y.
 19 Q. And what is your work address,
 20 Mr. Bailey?
 21 A. 201 East Center. Pocatello,
 22 Idaho.
 23 Q. And by whom are you
 24 employed?
 25 A. Racine, Nye, Olson, Budge, and

21

1 Bailey.
 2 Q. What does that firm do?
 3 A. We're a firm involved in -- at
 4 least in my part of the world -- in litigation
 5 and defense and plaintiff's work here in
 6 Pocatello.
 7 Q. So you're a firm of
 8 lawyers?
 9 A. Yes. Easy answer.
 10 Q. Mr. Bailey, did you review
 11 materials in preparation for giving testimony in
 12 this motion here today?
 13 A. Yes, I did.
 14 Q. What did you review?
 15 A. I reviewed -- in varying degrees --
 16 the bulk of this file that you have involved in
 17 the litigation with JUB and with BECO.
 18 Q. And why did you --
 19 A. Some in greater detail than
 20 others.
 21 Q. Why did you do that?
 22 A. In an effort to be able to voice
 23 an opinion as to whether or not the fees were
 24 reasonable and whether or not the work was
 25 incurred.

22

1 Q. Okay.
 2 How long have you practiced law,
 3 Mr. Bailey?
 4 A. Twenty-six years.
 5 Q. Okay.
 6 And in what courts are you licensed
 7 to practice?
 8 A. All the state courts of Idaho,
 9 and the federal court in the Ninth Circuit Court
 10 here.
 11 Q. Okay.
 12 And, again, wasn't listening closely
 13 enough, what kind of practice do you have in the
 14 firm?
 15 A. Primarily a litigation practice.
 16 Q. Are you familiar with memorandums
 17 of costs and fees similar to the ones filed
 18 here?
 19 A. Yes.
 20 Q. Have you done the type of
 21 litigation that this case, BECO versus JUB,
 22 entails?
 23 A. Yes. In fact, several cases
 24 involving BECO -- on the opposite side.
 25 Q. Could you tell me your experience

23

1 with litigation and BECO.
 2 A. It usually is more time consuming.
 3 My first case was one that, ultimately, went to
 4 the Supreme Court -- Bannock Paving versus
 5 BECO.
 6 Since that experience -- and, in fact,
 7 just recently, we had one that we took over
 8 from Mike Gaffney involving Mickey Ross-Kelly and
 9 BECO.
 10 And we told Mr. Ross-Kelly that he could
 11 expect this to be about twice as expensive as any
 12 other defendant normally is.
 13 Q. Why is that?
 14 A. It's just because of the
 15 difficulties we have with the BECO group and
 16 trying to get things done expeditiously. They
 17 don't like to agree to anything. They won't
 18 agree to anything. And it just takes more
 19 time.
 20 Q. You've done representation
 21 of either construction companies or
 22 design professionals in construction
 23 cases?
 24 A. Yes.
 25 Q. Okay.

24

1 When there is an allegation, in your
 2 experience, that the design professional or the
 3 construction company committed professional
 4 malpractice, what is the usual response?
 5 A. Well, I mean, they're concerned
 6 about the repercussions on their reputation --
 7 as is any professional. They get worried
 8 about -- what is this going to do to the business,
 9 whether it's justified or not. And what is it
 10 going to do to their ability to earn a living in
 11 the future.
 12 So it's a -- it's a heightened reaction,
 13 I guess, to what most defendants experience.
 14 Q. Is "zeal" a fair label?
 15 A. Well, that's what is expected
 16 of us as representing them a lot of times,
 17 yeah.
 18 Q. Okay.
 19 Did you, in review of the materials
 20 that concerned this case, form an opinion
 21 regarding whether -- there were pleadings and
 22 filings in this case, whether the pleadings and
 23 filings in this case followed upon a reasonable
 24 inquiry into the facts and law?
 25 A. I did form an opinion on

26

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BECO V. JUB

25

1 that.
 2 Q. Would you state that opinion,
 3 please.
 4 A. I felt that it was a reasonable
 5 approach. Unfortunately, these things --
 6 especially when you're dealing with large
 7 construction projects -- just have an awful lot
 8 of detail involved in them and they are more
 9 time consuming.
 10 And, as I say, I do have to say
 11 from prior experience in dealing with BECO,
 12 that gets heightened or magnified because of the
 13 way they approach the litigation -- that I have
 14 been involved in with them.
 15 Q. And the converse, did you form
 16 an opinion regarding whether this Complaint was
 17 reasonably investigated prior to the time it was
 18 filed?
 19 A. I did.
 20 Q. What is that opinion, please.
 21 A. I didn't believe that it was.
 22 It was apparent to me that they didn't even
 23 realize that there wasn't a contract between
 24 JUB and the plaintiff.
 25 Q. Did you believe that the

26

1 Complaint in this action was warranted by the
 2 underlying facts after having read the two summary
 3 judgment opinions?
 4 A. I thought those were very
 5 well-decided decisions.
 6 No, I didn't think it was, frankly.
 7 Q. And did you believe that the
 8 Complaint in pursuing that action was warranted
 9 by existing law?
 10 A. You know, I didn't do -- I have
 11 to be a bit limited in how I answer that. I
 12 didn't do any research beyond what was presented
 13 in the briefing by both sides. But based upon
 14 that, no, I didn't.
 15 Q. Overall, given your review of
 16 the file and the amount of material involved
 17 in discovery and the necessity to bring a second
 18 summary judgment motion, do you have an opinion
 19 whether the overall fee charged in this case
 20 was reasonable in your experience?
 21 A. I do -- and consistent with
 22 similar cases that we have had involving other
 23 contractors, as well as the cases I have referred
 24 to involving BECO.
 25 Q. And do you have an opinion

27

1 regarding whether the fee rate expressed as
 2 \$125 to \$200 an hour is reasonable in this area
 3 for this type of litigation?
 4 A. It is. And consistent, again, with
 5 cases that the federal court has just awarded us
 6 fees on.
 7 Bill Parsons and myself recently had
 8 a case, again, recently had a case against the
 9 federal government wherein the fee was ultimately
 10 compromised, but we charged \$175 an hour. That
 11 was the basis from which we negotiated with the
 12 United States Government.
 13 MR. SMITH: Objection, Your Honor.
 14 Nonresponsive to the question that was
 15 proffered.
 16 THE COURT: Objection is noted.
 17 Answer will stand.
 18 Go ahead.
 19 MR. ARKOOOSH: I have nothing further.
 20 Thank you.
 21 THE COURT: All right.
 22 Go ahead, sir.
 23 MR. SMITH: Your Honor, we object
 24 and move to strike this entire line of
 25 testimony.

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1 Apparently, Mr. Bailey is an expert
 2 witness who has never been disclosed. We have
 3 never had any notice of intent to produce this
 4 testimony. Never disclosed in the discovery
 5 response, which we served well over a year ago.
 6 Certainly, notice, at the very least, is proper
 7 in this situation, Your Honor.
 8 THE COURT: All right.
 9 Objection is noted for the record
 10 and denied. If you want to cross-examine him,
 11 you may do so.
 12 I think this is a separate hearing
 13 as opposed to the litigation itself.
 14 You had no idea he was going to be
 15 called?
 16 MR. SMITH: Not until he just called
 17 him, Your Honor.
 18 THE COURT: Okay. Well --
 19 MR. ARKOOOSH: Your Honor, I will
 20 say that I canceled the hearing with counsel's
 21 firm and expressed to them the purpose for
 22 canceling was to be sure that Your Honor had
 23 time to hear evidence.
 24 It may not have gotten to this
 25 counsel, but I did -- we reset this

29

1 hearing.
 2 THE COURT: Well, I do think you
 3 said at the last hearing it might be a couple
 4 of hours long because you were going to call
 5 witnesses but -- anyway, Mr. Smith, your
 6 objection is certainly noted but -- going to
 7 deny it.
 8 You can go ahead and cross-examine
 9 Mr. Bailey; okay.
 10 MR. SMITH: Thank you, Your Honor.
 11
 12 C R O S S - E X A M I N A T I O N
 13
 14 BY MR. SMITH:
 15 Q. Mr. Bailey, you recall referencing
 16 a "BECO group"?
 17 A. I did.
 18 Q. And who -- exactly who or what
 19 exactly is entailed in the BECO group?
 20 A. Well, really, that was loose
 21 language on my part. I have dealt with
 22 Doyle Beck, both as an expert witness in
 23 cases where he has appeared, and I have dealt
 24 with his construction company, BECO, Inc., in
 25 at least three cases that come to mind right

30

1 away.
 2 Q. And were you always in opposition
 3 to the BECO group?
 4 A. Yes, sir.
 5 Q. Is it possible that you have some
 6 type of prejudice based on your history with the
 7 BECO group?
 8 A. Well, no. I mean, it's possible --
 9 certainly, anything is possible -- but I don't
 10 think I really have a problem.
 11 We have been on the better side of
 12 all three of the cases.
 13 Q. What precisely did you review
 14 in preparing for your testimony today?
 15 A. As I say, in greater or lesser
 16 degree, I reviewed the whole file. There is --
 17 I think I concentrated most probably on the
 18 summary judgments, both the briefing and the
 19 decision, and the two summary judgments and
 20 the affidavits and supporting information
 21 there. Reviewed the Complaint and Answer,
 22 of course.
 23 You know, the correspondence was --
 24 I did not spend any significant time with that
 25 aspect of it. But with regard to the

S

BECO V. JUB

31

1 pleadings, I spent a fair amount of time with
 2 those.
 3 Q. Who is Billy Berry?
 4 A. He was an expert that you
 5 provided -- I think at least two affidavits
 6 from in an attempt to discuss the testing of
 7 the asphalt
 8 Q. And did you --
 9 A. -- as I recall.
 10 Q. And did you review those
 11 affidavits?
 12 A. I did, yes.
 13 Q. Did you review the Complaint?
 14 A. I did.
 15 MR. SMITH: That's all I have,
 16 Your Honor. Thank you.
 17 THE COURT: All right, Mr. Smith.
 18 Mr. Arkoosh?
 19 MR. ARKOOSH: No redirect, Your Honor.
 20 Thank you.
 21 THE COURT: Okay.
 22 Mr. Bailey, just going to ask you a
 23 question here, if you don't mind.
 24 THE WITNESS: Sure, Judge.
 25 THE COURT: Have you reviewed the

32

1 memorandum of costs filed in this case?
 2 THE WITNESS: I did, Judge,
 3 yes.
 4 THE COURT: And do you have any
 5 comments regarding the memorandum of costs with
 6 respect to whether or not you believe they're
 7 reasonable?
 8 And I know you have already been
 9 asked an hourly rate, so I don't want to ask you
 10 that, but it seems like a lot of time and a lot of
 11 money.
 12 THE WITNESS: Absolutely, Judge.
 13 I mean, I understand the Court's concern. And I
 14 understand that it is -- maybe by way of
 15 comparison, I can tell you that the other case
 16 referred to of Sheriff Ross Kelly's case with
 17 BECO, that got through one summary judgment and
 18 was still pending -- hadn't had a trial. I think
 19 it only had one deposition, and the costs that
 20 Mr. Gaffney's firm had run up, costs and fees,
 21 had run up on that case to that point were some
 22 \$45,000 when we took it over. And that was, as I
 23 said, one deposition and only one summary judgment
 24 hearing.
 25 And that was part of the Complaint

33

1 that Mr. Gaffney had was defense counsel -- and
 2 I have to say this for Mr. Smith's benefit, it was
 3 not his firm. So I'm not pointing at their firm
 4 for this, Judge. But the problem, I think, has
 5 been with the approach that BECO takes to
 6 litigation. And, doggone it, in any one of
 7 these cases, it has been very arduous.
 8 It's surprising how much time does
 9 get to be involved. I guess, you kind of asked
 10 me an open-ended question, if I might, Judge,
 11 I might comment on a couple of questions that
 12 you asked counsel about.
 13 One of the things, at least that
 14 occurred to my mind, is I would have been talking
 15 to the City as well on this thing early on. And I
 16 think I'd have been trying to get a chance to
 17 visit with their witnesses. But I don't think
 18 either of these counsel would dare have gone to
 19 the witnesses directly where they were represented
 20 or sued in the beginning. They probably did have
 21 to work through counsel's office over there at the
 22 City.
 23 THE COURT: I think you said
 24 something earlier about -- let's see, maybe I
 25 misunderstood you -- I think you said that the

34

1 plaintiff didn't realize there was a contract
 2 between them and JUB.
 3 THE WITNESS: No. My understanding
 4 was that they filed this lawsuit claiming a breach
 5 of contract but didn't investigate and find out
 6 that, in fact, there was no contract between
 7 JUB and BECO at all -- at least none that I could
 8 see in my review, which seems to me to be kind of
 9 a basic thing you should figure out before you
 10 file a claim for breach of contract. And I didn't
 11 understand the Complaint to argue that there was
 12 some verbal contract.
 13 THE COURT: All right.
 14 So, in your opinion, then, based on the
 15 review of the pleadings and, I guess, a cursory
 16 view of the correspondence and stuff like that,
 17 you believe these fees are reasonable?
 18 THE WITNESS: I do, Judge. Yes, sir.
 19 THE COURT: And you have gone over
 20 each item?
 21 THE WITNESS: Yeah. I think I did
 22 that very early on. I don't know that I can
 23 recall each and every item but --
 24 THE COURT: Well, yeah.
 25 THE WITNESS: Yeah. But I did go over

35

1 it in pretty good detail, yes, sir.
 2 THE COURT: There is some travel in
 3 here to go to Coeur D'Alene to review documents;
 4 do you think that is reasonable?
 5 THE WITNESS: You know, I expect it
 6 was probably unavoidable. You know, the problem
 7 I run into on those sorts of things is -- and I'm
 8 struggling with it myself on this right now --
 9 I have got a case where Jedd Manwaring has got
 10 eleven boxes up in Boise of documents.
 11 I don't know whether to just have all
 12 eleven boxes sent to me or whether to go up there
 13 and look at them and kind of bear it down. So I
 14 elected to do the latter. And, you know, I don't
 15 know that there is a good way one way or the
 16 other, I suppose.
 17 THE COURT: Well, on page four -- and I
 18 know you don't have this in front of you, it says,
 19 6/22/2005 -- travel to Coeur D'Alene to review
 20 files -- twelve hours -- \$2100.
 21 I guess that's -- I guess it's unfair
 22 of me to put you on the spot on that one.
 23 You think that's the call of counsel
 24 then?
 25 THE WITNESS: You know, it's one of

36

1 judgment calls. It's stuff -- you can always say,
 2 well, create copies and copy all of the boxes and
 3 maybe you spend a bunch of money killing trees.
 4 I never know which is the better way to go myself
 5 a lot of times.
 6 THE COURT: If you're going to do
 7 that -- if you're going to do that, go out
 8 of town to review files, do you normally take
 9 another attorney with you and charge for both
 10 of you?
 11 THE WITNESS: Sometimes. Normally,
 12 I would say probably not always, but it does
 13 happen.
 14 THE COURT: Because here two of them
 15 went. It was \$875 for Dan -- looks like travel to
 16 Coeur d'Alene, back to Boise, and then CTA travel
 17 to Boise \$2100.
 18 I just -- well, okay. I don't think
 19 I have any more questions, Mr. Bailey. Thanks.
 20 Mr. Arkoosh, do you have any more?
 21 MR. ARKOOSH: No. Thank you,
 22 Your Honor.
 23 THE COURT: Mr. Smith, would you like
 24 to ask him some more?
 25 MR. SMITH: Just a few, Your Honor.

28

S

BECO V. JUB

37

1 If I may.
 2 THE COURT: Okay. Go ahead.
 3
 4 FURTHER CROSS EXAMINATION
 5
 6 BY MR. SMITH:
 7 Q. A moment ago you indicated that
 8 you weren't sure what the basis was for
 9 the breach of contract claim; do you recall
 10 that?
 11 A. Well, no. I don't think I said
 12 that. I think what I said was -- that I felt
 13 that more investigation was probably due from
 14 plaintiff's side of this thing to determine
 15 whether or not there was a written contract or
 16 not that existed between JUB and BECO.
 17 Q. And you're quite certain that
 18 the basis for that was this mystery written
 19 contract?
 20 A. Well, I'm not sure that I know
 21 what the basis was, but it seems to me that
 22 that was kind of crucial in the end when the
 23 summary judgment rolled around.
 24 Q. But you reviewed the Complaint;
 25 correct?

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38

1 A. Yes.
 2 Q. Let me read a paragraph to you
 3 from the Complaint. Maybe you can figure it out
 4 this time.
 5 MR. ARKOOSH: Objection, Your Honor.
 6 That's argumentative.
 7 THE COURT: Well, yeah, you're right,
 8 but go ahead and ask the question, please.
 9 BY MR. SMITH:
 10 Q. And this is from Count II --
 11 THE COURT: Which page are you
 12 on?
 13 MR. SMITH: Breach of Contract,
 14 page nine, is where it begins. And then actually
 15 at paragraph five on page ten.
 16 BY MR. SMITH:
 17 Q. "The general contractor for the
 18 project was the intended and express third-party
 19 beneficiary of the design contract."
 20 Does that help illuminate what the
 21 basis was for what that breach of contract claim
 22 was?
 23 A. Well, no, not really.
 24 Q. So you don't understand what
 25 "third-party beneficiary" means in the context

39

1 of the law?
 2 A. Certainly, I understand what a
 3 "third-party beneficiary" is.
 4 Q. Are you being paid for your
 5 time today, Mr. Bailey?
 6 A. I am, sir.
 7 MR. SMITH: All right. Thank you,
 8 Your Honor. That's all I have.
 9 THE COURT: Mr. Arkoosh, do you have
 10 anything further?
 11 MR. ARKOOSH: I do. I just have one
 12 area that I want to talk to counsel about.
 13
 14 REDIRECT EXAMINATION
 15
 16 BY MR. ARKOOSH:
 17 Q. Mr. Bailey, I'm going to ask
 18 you essentially what is a hypothetical question.
 19 I want you to suppose that you had a client
 20 that was served a Complaint in the magnitude of
 21 this one -- and it's -- I can't recall how much
 22 each count had \$20,000 or \$60,000 or \$40,000
 23 each alleged breach; do you recall that?
 24 A. Yes, sir.
 25 Q. Okay.

29

40

1 You have a client that is served
 2 with that. Your client says to you, we didn't
 3 do any of this stuff. Your job is to understand
 4 us, our business, this contract, and win this
 5 case.
 6 You wouldn't be surprised to hear that
 7 from a client?
 8 A. No. No.
 9 Q. Because, as you indicated,
 10 if some of this were true, it would be pretty
 11 poor performance on the part of JUB Engineers?
 12 A. Oh, for certain, if that were
 13 proven to be true.
 14 Q. And the repercussions in the
 15 engineering community would be what?
 16 A. It would damage their business
 17 and damage their future prospects.
 18 Q. Would it be something your
 19 firm would refuse to do if told to do and
 20 authorized to do by your client, going
 21 to your client's office handling this matter,
 22 review their files and spend an eight-hour
 23 day with the project manager and understand the
 24 case?
 25 A. No. I mean, you would be

41

1 obligated ethically to do that if they asked
 2 you to do that.
 3 MR. ARKOOSH: I have nothing further,
 4 Your Honor.
 5 THE COURT: All right.
 6 Mr. Smith, sir?
 7 MR. SMITH: Nothing further,
 8 Your Honor. Thank you.
 9 THE COURT: Okay. Thanks.
 10 Well, I guess you're off the hook,
 11 Mr. Bailey.
 12 THE WITNESS: Thanks, Judge.
 13 MR. ARKOOSH: Your Honor, he is still
 14 under oath if he has questions he wants to answer
 15 about other areas.
 16 THE COURT: We don't have enough
 17 time.
 18 THE WITNESS: That's why I said,
 19 behave, you guys.
 20 THE COURT: Okay.
 21 Mr. Arkoosh, any other evidence you
 22 want to present?
 23 MR. ARKOOSH: I have no other evidence.
 24 I have a few comments.
 25 THE COURT: All right.

42

1 You may proceed then.
 2 MR. ARKOOSH: If it please the
 3 Court, the underlying basis to those hypothetical
 4 questions was precisely what we were faced with,
 5 without the context, my client would have sued for
 6 defamation for this Complaint.
 7 Further, they didn't understand why
 8 they were being sued. And I couldn't tell from
 9 the Complaint.
 10 As indicated, Your Honor,
 11 discovery wasn't very quick to come. That's
 12 why we had to file the second summary judgment
 13 motion when we found out that the affidavits in
 14 the first motion, based upon BECO's own files, was
 15 incorrect.
 16 Your Honor, when you get sued like
 17 this, you can either pick the form or the cost,
 18 and my job was to go win this case, if I could.
 19 And I was told by the client to do that.
 20 Pushing the other way, Your Honor,
 21 we have a litigious client that evidently doesn't
 22 win a lot but isn't afraid to make allegations,
 23 however groundless.
 24 Your Honor, I would point out that
 25 the appeal filed in this case is indicative.

S

BECO V. JUB

43

1 The appeal says the District Court --
 2 if the District Court awards JUBB's attorney fees
 3 and costs, it will have erred. And if they award
 4 the attorney fees and costs, it will have erred
 5 in the amount of such fees.
 6 So, they don't know if you're going
 7 to give a dime or \$100. They don't. But you
 8 already made a mistake, and that's what I was
 9 faced with.
 10 THE COURT: What appeal?
 11 MR. ARKOOSH: There has been an
 12 appeal filed in this action.
 13 THE COURT: Oh, I didn't know
 14 that.
 15 MR. ARKOOSH: Yeah. It was filed
 16 two days ago -- three days ago.
 17 THE COURT: Okay.
 18 MR. ARKOOSH: But they are appealing
 19 your decision already today, and you haven't
 20 even made it yet.
 21 That's the kind of thing I have been
 22 faced with in this case. If you add to that a
 23 client whose reputation is their stock in trade
 24 and that the allegations make no sense and that
 25 you can't get discovery, this is probably a

44

1 reasonable amount to spend to bring two summary
 2 judgments in a case of this magnitude and the
 3 materials that we had to go through.
 4 I would request that you award the
 5 fees as requested against both the party and
 6 counsel, Your Honor.
 7 They should have researched this
 8 Complaint. We had to go do it. That's why the
 9 fees are so high. BECO got off cheap so somebody
 10 had to pay the freight to understand the case.
 11 Thank you.
 12 THE COURT: All right. Thank you,
 13 sir.
 14 Mr. Smith?
 15 MR. SMITH: Thank you, Your Honor.
 16 JUB has to provide a statutory
 17 basis for the fees or a contractual basis;
 18 that's Rule 54(e)(5).
 19 We have discussed this a little bit.
 20 They have apparently referenced 121(3) in their
 21 memo of costs. That wasn't verified. Their
 22 separate motion for fees didn't ask for fees
 23 under 12-120(3); it asked for fees under 12-123,
 24 56(g), and Rule 11, all of which are based on
 25 frivolous conduct.

45

1 This is not a frivolous situation,
 2 Your Honor. As counsel has pointed out over
 3 and over, it took him \$80,000 to figure out
 4 that he could win summary judgment on this case.
 5 Are we supposed to incur \$80,000 of fees before
 6 we file it?
 7 Yeah, there is some level of due
 8 diligence that is required before a case is
 9 filed, and we satisfied that. We did the work.
 10 We had witnesses who were saying -- out there on
 11 the project, watching their inspectors saying,
 12 gosh, that guy looks like he is testing to promote
 13 failure.
 14 Now, maybe that's not enough to get
 15 us past summary judgment, but that is certainly
 16 not enough to say that either BECO or our lawyer
 17 firm was engaged in frivolous conduct.
 18 Mr. Arkoosh alleges that the suit
 19 between the City of Pocatello and BECO was a
 20 separate lawsuit. That's not true.
 21 Look at the caption; we sued the City
 22 of Pocatello as part of this lawsuit. And the
 23 City of Pocatello wrote a check for \$650,000.
 24 That is not a frivolous lawsuit -- approximately,
 25 it was round numbers, Your Honor, don't quote

30

46

1 me.
 2 There is simply nothing in the record
 3 to show that the prosecution of this action was
 4 in bad faith or frivolous or merely for the
 5 purpose of delay as the statutory basis for
 6 fees that they're pointing to.
 7 As far as 12-120(3), that's the initial
 8 commercial transaction, and there needs to be a
 9 basis under the contract. They haven't pointed
 10 to a paragraph in any contract that says that they
 11 get their fees awarded.
 12 There are two cases that are instructive
 13 which hold that a case is not frivolous just
 14 because you lost on summary judgment. Those are
 15 both in our brief. I may mispronounce this --
 16 VANVOOREN, 141 Idaho 440, and the TOLLEY case,
 17 140 Idaho 253.
 18 Mr. Arkoosh points to the Notice of
 19 Appeal that we filed more than just two days
 20 ago, a couple of weeks ago, for the allegation
 21 that we're being frivolous by appealing an award
 22 of fees that hasn't been made yet.
 23 We lose that right if we don't appeal
 24 it within forty-two days, and we didn't know what
 25 the Judge was going to do.

47

1 We're waiting for the Motion for
 2 Reconsideration. We don't have a decision on
 3 the fees. That's not frivolous conduct. That's
 4 protecting our rights.
 5 Your Honor, this was decided as a tort
 6 case. The breach of contract was voluntarily
 7 dismissed a long time ago. It wasn't awarded on
 8 summary judgment. That was an agreement outside
 9 of this Court. And there is no tort basis for
 10 fees.
 11 You have to find frivolous conduct to
 12 award fees, and there is no showing of frivolous
 13 conduct.
 14 We trust that the Court, in its
 15 discretion, will find appropriately.
 16 Thank you, Your Honor.
 17 THE COURT: All right, Mr. Smith.
 18 Thank you very much.
 19 Mr. Arkoosh?
 20 MR. ARKOOSH: Just a couple of
 21 comments, Your Honor.
 22 As Your Honor well knows, when you
 23 file a memorandum of costs and fees and you're
 24 not seeking sanctions under 123, the burden
 25 is on the other side to come forward and make

48

1 their motions. And we did allege 121, which as
 2 Your Honor pointed out absolutely correctly,
 3 is frivolous conduct.
 4 123, Your Honor, we have to
 5 affirmatively allege and we have to afford counsel
 6 hearing on the question of fees and sanctions
 7 against the party and counsel, and that's
 8 appropriately investigated, unwarranted foundation
 9 and fact, and unwarranted foundation and law.
 10 I want to address those three things
 11 just very quickly with the counts that Your Honor
 12 got rid of on summary judgment, the contract
 13 count.
 14 We were alleged to have had a
 15 contract where there was express -- as counsel
 16 points out -- express third-party beneficiary,
 17 which when the contract says you, contractor,
 18 are not an express third-party beneficiary.
 19 Well, the facts and the law,
 20 as Your Honor points out, were on the face of
 21 the contract.
 22 Second thing, Your Honor, negligence.
 23 Because we didn't have a relationship, it was
 24 merely economic damages that they were seeking.
 25 We weren't responsible for that. And there was a

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BECO V. JUB

49
 1 case in Idaho that says that the engineer doesn't
 2 have that special relationship.
 3 Now, the one that really gets me --
 4 to listen to counsel say we're not entitled --
 5 JUB isn't entitled to recover its fees is the
 6 one about interference with contract.
 7 We lost that first summary judgment on
 8 interference with contract based upon direct
 9 representation to this Court in affidavits that
 10 differed 180 degrees from the construction notes
 11 of the project manager for BECO.
 12 He said, I stopped the contract. I was
 13 told by JUB that you have to get this in writing
 14 from the City, which is exactly what the contract
 15 said.
 16 And then we get an affidavit from BECO
 17 that differed from that. And we can't fix that
 18 or do anything but create a conflict -- genuine
 19 material issue of fact by saying, that ain't true
 20 until we get their discovery.
 21 So with the contract, if they look at
 22 the facts, they wouldn't have brought it with
 23 negligence. If they look at the facts and
 24 the law, they wouldn't have brought it.
 25 And with the intentional interference --

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 1 if they merely look at their own files,
 2 Your Honor, they wouldn't have brought it.
 3 We could hardly be criticized for
 4 trying to save JUB's reputation so they could do
 5 future work.
 6 Thank you.
 7 THE COURT: Okay. Thank you.
 8 Again, under 12-123 -- and I hate to
 9 keep asking you to ride this horse but --
 10 maybe you can explain to me one more time
 11 why you believe you're entitled to fees under
 12 that section.
 13 MR. ARKOOSH: Let me find it in the
 14 briefing, Your Honor.
 15 I don't have it in the briefing,
 16 Your Honor, but my memory says Rule 11 says,
 17 essentially, the same thing. If there is not
 18 foundation --
 19 THE COURT: No, I'm sorry, 12-120(3).
 20 MR. ARKOOSH: Okay. Count I was
 21 contract, Your Honor. I wish I had known -- and
 22 I can send this case -- Judge Carlson, in Burley,
 23 just ruled on this case where we won at trial;
 24 the jury said there was no contract, and
 25 Judge Carlson awarded fees under 12-120(3) based

51
 1 upon two Idaho Supreme Court cases that say if
 2 you allege recovery on a contract for services
 3 and the proof is that there really wasn't a
 4 contract, you're still entitled to recovery under
 5 12-120(3).
 6 I would just represent the law,
 7 Your Honor, and I didn't recognize from briefing
 8 that that was an issue, but I will represent to
 9 the Court that that is my understanding of the
 10 law of the State of Idaho from some fairly recent
 11 briefing and opinions from Judge Carlson.
 12 THE COURT: Okay.
 13 MR. ARKOOSH: And, Your Honor, I
 14 feel remiss for not having that before you;
 15 I didn't realize that was an issue.
 16 THE COURT: All right. Thanks.
 17 Mr. Smith, do you have any other
 18 comments you want to make, sir?
 19 MR. SMITH: No. Thank you, Your Honor.
 20 THE COURT: All right. Thanks.
 21 I guess I will take this under
 22 advisement for awhile. It won't be as long as
 23 the last time; we've just been really busy,
 24 but I appreciate you fellas waiting around for
 25 this.

52
 1 So, I guess I'll make my humble decision
 2 and you can probably file an amended notice of
 3 appeal if it's against you.
 4 If it isn't against you, I guess you
 5 can take that out of your appeal that you filed
 6 already.
 7 So, with that, we'll be in recess.
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(CONCLUSION OF PROCEEDINGS HELD 8/7/06.)

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 2 COURT REPORTER'S CERTIFICATE
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 6
 7 I, STEPHANIE D. DAVIS, CSR, Official Court
 8 Reporter, Sixth Judicial District, State of Idaho,
 9 do hereby certify that the foregoing transcript,
 10 consisting of Pages 1 to 52, inclusive, is a true
 11 and accurate record of the proceedings had on the
 12 dates and at the times indicated therein as
 13 stenographically reported by me to the best of my
 14 ability, and contains all of the material requested.
 15 IN WITNESS WHEREOF, I have hereunto set my hand
 16 this 8th day of February, 2007.
 17
 18
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 24
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STEPHANIE D. DAVIS, CSR
No. 594

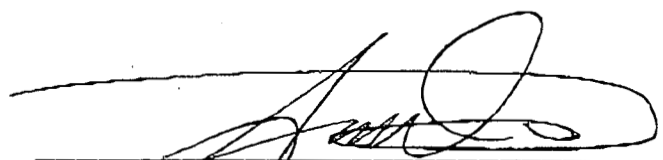
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COURT REPORTER'S CERTIFICATE

I, STEPHANIE D. DAVIS, CSR, Official Court Reporter, Sixth Judicial District, State of Idaho, do hereby certify that the foregoing transcript, consisting of Pages 1 to 52, inclusive, is a true and accurate record of the proceedings had on the dates and at the times indicated therein as stenographically reported by me to the best of my ability, and contains all of the material requested.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of February, 2007.



STEPHANIE D. DAVIS, CSR
No. 594

C. Tom Arkoosh, ISB #2253
Daniel A. Nevala, ISB #6443
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Telephone: (208) 934-8872
Facsimile: (208) 934-8873

FILED
BANNOCK COUNTY
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BY [Signature]
DEPUTY CLERK

Attorneys for Defendant J-U-B Engineers, Inc.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

BECO CONSTRUCTION COMPANY, INC.,)
an Idaho corporation,)
)
Plaintiff,)
)
v.)
)
J-U-B ENGINEERS, INC.,)
)
Defendant.)
)

Case No. CV 05-1355 OC

MEMORANDUM IN OPPOSITION
TO MOTION FOR RELEASE OF
CASH DEPOSIT

COMES NOW Defendant J-U-B Engineers, Inc., by and through its counsel of record, Capitol Law Group, PLLC, and submits this *Memorandum in Opposition to Motion for Release of Cash Deposit*.

On May 29, 2008, BECO filed its *Motion for Release of Cash Deposit* and *Motion to Shorten Time* citing Idaho Appellate Rules 13(b)(15) and 48 and Idaho Rules of Civil Procedure 67 and 79(e), moving the Court for an order releasing the \$102,541.86 cash deposit BECO previously deposited with the Court to BECO's counsel. J-U-B objects to releasing the cash deposit in full to BECO until after the Court has had an opportunity to reconsider and make a final judgment determining the proper award of attorney fees J-U-B is entitled to for defending

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itself against the breach of contract claim brought by BECO. After making that determination, J-U-B would request that the Court respectfully release the appropriate fee award to J-U-B and then release any remaining balance of the cash deposit to BECO's counsel as requested.

In its recent decision of May 2, 2008, the Idaho Supreme Court partially remanded this case for a determination and award of attorney fees to J-U-B for defending against BECO's breach of contract claim. Going back to the August 7, 2006 hearing on J-U-B's motion for attorney fees, this Court heard argument from counsel along with testimony from J-U-B witness, John Bailey, who testified at length regarding J-U-B's request for an award of attorneys fees. Therefore, the record is replete with evidence on this issue. A copy of the transcript for the August 7, 2006 hearing was part of the appellate record and will be filed along with this objection for the Court's convenience.

J-U-B requests that the Court review the record and testimony of Mr. Bailey and reconsider the question that BECO and its counsel acted frivolously in failing to properly investigate the facts and law before filing the Complaint against J-U-B in determining that the Court's award to J-U-B was both reasonable and proper.

In the alternative, J-U-B requests that the Court award J-U-B all of its fees for the work done in defending the lawsuit up to the point when BECO withdrew its breach of contract claim against J-U-B as a reasonable and proper award of fees. This amount equals \$33,661.92 plus interest at the statutory rate from the date of the Court's Order awarding J-U-B its fees. BECO withdrew its breach of contract claim against J-U-B on or about August 15, 2005. This was just prior to the hearing on J-U-B's first summary judgment motion. At this early point in the litigation, counsel for J-U-B was trying to determine why J-U-B had been sued, what the parameters of the lawsuit were, and how to properly defend J-U-B. Without question, all of the

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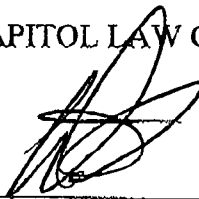
work done by J-U-B's counsel up to this point was done to defend against the breach of contract claim brought by BECO.

In analyzing whether attorney fees can be granted, the threshold questions for the trial court to answer include: 1. Are there proper parties for the award of attorney fees, i.e. can attorney fees be awarded for one party against the opposing party? 2. Is there any underlying basis for the award of attorney fees? 3. Have all of the requirements for attorney fees been met under a statute, rule, or contract? 4. Is there a prevailing party? Once these questions have been satisfied, then the inquiry becomes: What amount of attorney fees should be awarded? See Walters, *A Primer for Awarding Attorney Fees in Idaho*, 38 Idaho L. Rev. Vol. 1, 1-88, at pp. 11 (2001). These questions were all answered in the affirmative in favor of J-U-B.

In conclusion, J-U-B respectfully requests that the Court deny BECO's *Motion for Release of Cash Deposit* at this time, review the record to reconsider the Court's previous award of fees to J-U-B, find that the previous award was a reasonable and proper award to J-U-B for properly defending against BECO's breach of contract claim and for BECO and its counsel's frivolous actions in bringing a lawsuit without properly investigating the facts or law. J-U-B requests that after reviewing the record the Court should properly award J-U-B fees in the full amount of the Court's total judgment of \$75,398.42 plus interest awarded to J-U-B, or in the alternative award J-U-B \$33,661.92 plus interest from the date of the Court's Order granting J-U-B's fee award as a reasonable and proper award in defending against BECO's breach of contract claim. Finally, after the Court has determined the proper award of attorney fees to J-U-B, the Court should then properly release any remaining cash deposit to BECO's counsel as requested.

DATED this 4th day of June 2008.

CAPITOL LAW GROUP, PLLC



Daniel A. Nevala

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2008, I served a true and correct copy of the foregoing document on the person listed below, in the manner indicated:

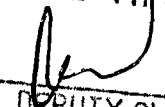
Bryan D. Smith
McGrath, Smith & Associates, PLLC
Post Office Box 50731
414 Shoup Avenue
Idaho Falls, Idaho 83405
Facsimile: (208) 529-4166

United States Mail, Postage Prepaid
Overnight Courier
Via Facsimile
Hand Delivered



Daniel A. Nevala

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 2008 JUN 12 PM 3:25
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**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
 OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK**

BECO CONSTRUCTION CO., INC.,)
)
 Plaintiff-Appellant,)
)
 vs.)
)
 J-U-B ENGINEERS, INC.,)
)
 Defendant-Respondent.)
)
 _____)

**Case No. CV2005-1355-OC
 MEMORANDUM DECISION
 and ORDER**

INTRODUCTION

On March 30, 2005, the Plaintiff in this action, BECO Construction Co., Inc. (hereinafter "BECO"), filed a Verified Complaint and Demand for Jury Trial alleging that conduct by J-U-B Engineers, Inc. (hereinafter "J-U-B") during the construction associated with the Pocatello Downtown Reinvestment Project, rendered J-U-B liable to BECO for breach of contract, negligence and tortious interference with BECO's contract with the City of Pocatello. (BECO's Br. in Resp. to J-U-B's Mot. for Summ. J. (hereinafter "BECO's Reply Brief"), Aug. 16, 2005, 2.)

On July 29, 2005, J-U-B filed a Motion for Summary Judgment as to each of the above three causes of action. Thereafter, BECO withdrew its breach of contract claim. (*Id.* at 2.) This Court issued a Memorandum Decision, Order and Judgment granting J-U-B's Motion for Summary Judgment as to the negligence claim and denying J-U-B's Motion for Summary Judgment as to the claim for intentional interference. J-U-B then filed a Second Motion for

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Summary Judgment. Pursuant to that motion, the Defendant requested this Court reconsider whether J-U-B intentionally interfered with BECO's contract with the City. This Court issued another Memorandum Decision and Order granting J-U-B's request for summary judgment and dismissing BECO's claim of intentional interference with the contract. (Mem. Decision and Order, May 17, 2006, 28.) On June 19, 2006, a Judgment was issued, finding J-U-B to be the prevailing party. Thereafter, BECO submitted a Motion for Reconsideration, requesting this Court reconsider its Memorandum Decision and Order, wherein this Court determined that J-U-B did not intentionally interfere with BECO's contract by conducting pavement testing to promote failure. (*Id.* at 17.) That motion was also denied. This Court then awarded attorney fees to J-U-B pursuant to I.C. § 12-120(3). Thereafter, BECO appealed this Court's grant of summary judgment on its intentional interference claim, as well as the fee award. On May 2, 2008, the Idaho Supreme Court issued a decision affirming the grant of summary judgment, but vacating a portion of the fee award. In accordance with that decision, the Idaho Supreme Court "remand[ed] the attorney fees issue for determination and award of the fees J-U-B incurred in defending BECO's contract claim." *BECO Constr. Co., Inc. v. J-U-B Eng'rs, Inc.*, 2008 Opinion No. 59, Docket No. 33378, 9 (May 2, 2008). A remittitur was issued on May 27, 2008.

On or about May 29, 2008, BECO submitted the subject Motion for Release of Cash Deposit, moving this Court for an order releasing the \$102,541.86 cash deposit BECO previously made with the court to BECO's counsel. J-U-B submitted a Memorandum in Opposition to Motion for Release of Cash Deposit, objecting to the release of the cash deposit in full. This Court heard oral arguments regarding that motion on June 9, 2008, taking the case under

advisement. After reviewing the file, including briefs filed by counsel, this Court enters the following Memorandum, Decision and Order.

DISCUSSION

1. Whether BECO is entitled to an order releasing the cash deposit previously deposited with the Court.

Pursuant to its Motion for Release of Cash Deposit, BECO argues: “As the appeal has been resolved, the court should now release the funds BECO posted as security to stay execution pending appeal.” (Mot. for Release of Cash Deposit, May 29, 2008, 2.) BECO contends that since the Idaho Supreme Court partially remanded this case for a determination and award of attorney fees, there is no judgment pending. As such, the Plaintiff argues it is therefore entitled to the release of the bond funds. J-U-B objects to the release of “the cash deposit in full to BECO until after the Court has had an opportunity to reconsider and make a final judgment determining the proper award of attorney fees J-U-B is entitled to for defending itself against the breach of contract claim brought by BECO.” (Mem. in Opp’n to Mot. for Release of Cash Deposit, June 4, 2008, 1-2.)

a. Until this Court makes a final judgment regarding the proper award of attorney fees, it would be inappropriate to release the cash deposit.

Rule 13(b) of the Idaho Appellate Rules (IAR) governs the powers of the district court during the pendency of an appeal. IAR 13(b)(15) is the subsection relevant to this action. It states in pertinent part:

(b) Stay Upon Appeal – Powers of District Court – Civil Actions.

In civil actions, unless prohibited by order of the Supreme Court, the district court shall have the power and authority to rule upon the following motions and to take the following actions during the pendency on an appeal;

...
(15) Stay execution or enforcement of a money judgment upon the posting of a cash deposit ... which must be in the amount of the judgment or order, plus 36% of such amount. ... Any bond filed pursuant to this rule shall state that the company issuing or executing the same agrees to pay on behalf of the appellant all sums found to be due and owing by the appellant by reason of the outcome of the appeal, within 30 days of the filing of the remittitur from the Supreme Court, up to the full amount of the bond or undertaking. ...

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Rule 67 of the Idaho Rules of Civil Procedure (IRCP) provides for the making of cash deposits with the court. That rule states:

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party and by leave of court, may deposit with the court all or any part of such sum or thing. When it is admitted by the pleading, or shown upon the examination of a party, that a party has possession, or control of, any money or other thing capable of delivery, which, being the subject of litigation, is held by the party as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just. Money or any other thing deposited into court under this rule shall be deposited and withdrawn, subject to the further directions of the court, and as provided by the statutes of this state.

Furthermore, IRCP 79(e) provides for the reclamation of property following an appeal. That rule states in relevant part:

At any time after the expiration of the time for appeal, the determination of any appeal, or the determination of a proceeding following an appeal and the expiration of the time for any subsequent appeal, whichever is later, any party or any interested person may apply to the trial court for an order permitting a reclamation by such party of ... property ... considered in connection with the action. The trial court in its discretion may grant such an order on such conditions and under such circumstances as it deems appropriate. ...”

In this case, BECO deposited a cashier's check in accordance with IAR 13(b)(15) to serve as security staying the execution of the Amended Judgment whereby this Court declined to reconsider its previous grant of summary judgment in favor of J-U-B and further determined that J-U-B was the prevailing party, entitled to an award of costs and fees. As explained, the Idaho Supreme Court affirmed this Court's grant of summary judgment, but vacated a portion of the fee award.

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Based upon the Idaho Rules of Civil Procedure and the Idaho Appellate Rules as set forth above, BECO now argues that since the Idaho Supreme Court remanded this case in order to determine the amount of fees J-U-B incurred in defending BECO's contract claim, the judgment of attorney fees has been reversed. As such, BECO contends there is no judgment pending before this court and therefore no reason to have a cash bond in place. However, the issue is not *whether* J-U-B is entitled to an award of attorney fees, but, rather, the *amount* of fees to which J-U-B is entitled. Pursuant to the Remittitur issued on May 30, 2008, the Idaho Supreme Court ordered this Court to "forthwith comply with the Directive of the Opinion [announced May 2, 2008], if any action is required. . . ." (Remittitur, May 30, 2008.) In that opinion, our Supreme Court "remand[ed] this case for determination and award of the amount of fees J-U-B incurred defending BECO's contract claim." *BECO*, 2008 Opinion No. 59, Docket No. 33378, 9. In discussing the calculation of those attorney fees, the Supreme Court stated:

I.C. § 12-120(3) does not provide the basis for a fee award to J-U-B after the point where the contractual claim was dismissed. Up to that point, J-U-B is entitled to its fees for defending against the contract claim. After that point, J-U-B is not entitled to its fees because there is no commercial transaction between the parties.

(Id.)

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This Court must comply with the directive of the Idaho Supreme Court to determine and award the fees J-U-B incurred in defending BECO's contract claim. Therefore, it would be inappropriate to release the cash deposit until after such a determination has been made and a final judgment awarding the proper attorney fees has been issued. Furthermore, pursuant to IRCP 79(e) as set forth above, an order permitting reclamation of property in connection with an action is to be granted in the discretion of the trial court and "under such circumstances as it deems appropriate." After this Court determines the proper award of attorney fees, it will release the appropriate fee award to J-U-B and then release any remaining balance of the cash deposit to BECO's counsel as requested.

CONCLUSION

Based on the foregoing, this Court hereby DENIES BECO's Motion for Release of Cash Deposit. Because this Court has been ordered to determine and award the fees J-U-B incurred in defending BECO's contract claim, it would be inappropriate to release the cash deposit forthwith. After a final judgment awarding the proper fee award has been issued, this Court will release any remaining balance of the cash deposit to BECO's counsel as requested.

IT IS SO ORDERED.

DATED this 12 day of June, 2008.


PETER D. MCDERMOTT
DISTRICT JUDGE

Copies to:

Bryan D. Smith
Daniel A. Nevala

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FILED
BANNOCK COUNTY
CLERK OF THE COURT

2008 JUN 12 PM 3: 25

BY [Signature]
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

BECO CONSTRUCTION CO., INC.,)
)
) **Plaintiff**)
)
 vs.)
)
) **J-U-B- ENGINEERS, INC., and**)
) **DOES 1-15, whose true names are**)
) **unknown,**)
) **Defendant.**)
)

CASE NO. CV2005-1355-OC
MINUTE ENTRY AND ORDER

The above entitled matter came before the Court this 9th day of June, 2008, pursuant to Plaintiff's Motion to Release Cash Deposit. Plaintiff appeared with counsel Bryan D. Smith of the Firm McGrath, Meacham, Smith, PLLC. Defendant appeared by and through counsel Daniel A. Nevala of the Firm Arkoosh Law Offices, Chtd.

The Court advised the attorney fees issue had been remanded to this Court by the Idaho Supreme Court.

The Court thereafter received oral argument of respective counsel.

NOW, THEREFORE, IT IS HEREWITH ORDERED each attorney shall file a simultaneous brief on the attorney fee issue with the Court on June 23,2008, and thereafter the Court will set the amount of fees Plaintiff must pay Defendant for the defending the breach of contract claim. Defendant shall also be awarded attorney fees for his time in preparing and

Case No. CR2005-5754FE
Minute Entry and Order
Page 1

44

submitting the above brief. No oral argument is necessary on this issue.

IT IS FURTHER ORDERED Plaintiff's Motion for Release of Cash Deposit is TAKEN
UNDER ADVISEMENT.

IT IS SO ORDERED.

DATED this 12th day of June, 2008.


PETER D. McDERMOTT
District Judge

Copies to:

Bryan D. Smith
Tom Arkoosh/Daniel A. Nevala

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 2008 JUN 23 PM 3:29
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
 OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

BECO CONSTRUCTION COMPANY,)
 INC., an Idaho corporation,)

Plaintiff,)

v.)

THE CITY OF POCA TELLO, J-U-B)
 ENGINEERS, INC., and DOES 1-15,)
 Whose true names are unknown,)

Defendants.)

Case No. CV-05-1355 OC

**BRIEF IN OPPOSITION TO
 AN AWARD OF ATTORNEY'S
 FEES**

I. INTRODUCTION.

This case is on remand from the Idaho Supreme court after its decision in *BECO Const. Co., Inc. v. J-U-B Engineers, Inc.* -- P.3d --, 2008 WL 1913874 (May 2, 2008).

The Supreme Court held that J-U-B cannot recover attorney's fees incurred for defending against the intentional interference with contract claim or the negligence claim. J-U-B can recover attorney's fees only for defending against the breach of contract claim.

Because this court's award of attorney's fees included fees for the two tort claims, the

Supreme Court remanded this matter for determination and award of fees J-U-B incurred in defending BECO's contract claim.

In this regard, BECO voluntarily dismissed the contract claim on August 15, 2005. Therefore, this court cannot award any attorney's fees to J-U-B incurred after August 15, 2005. As of August 15, 2005, J-U-B incurred a total of \$33,661.92. However, this amount of attorney's fees is the total J-U-B incurred in defending the two tort claims and the contract claim. Therefore, this court must determine how much of the \$33,661.92 in attorney's fees J-U-B incurred in defending just the contract claim and award only that amount to J-U-B.

II. THIS COURT CANNOT AWARD J-U-B ANY 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, the Idaho Supreme 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 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, 2008. In fact, J-U-B spent *more* time defending the two contested tort claims than the uncontested contract claim BECO voluntarily dismissed. For example, J-U-B filed a 17 page brief in support of its motion for summary judgment. J-U-B dedicated only four pages (6, 7, 8 and 9) addressing the breach of contract issue. The remaining portion of the brief (the other 13 pages) addressed the two tort claims. Therefore, J-U-B was incurring a substantial amount of its attorney's fees defending the two tort claims before August 15, 2005.

Importantly, J-U-B has failed to isolate or apportion through affidavit or in its memorandum of 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 states "that the total of costs and attorney's fees incurred by my clients is \$77,826.42." 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 attorneys fees incurred before August 15, 2005. 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, this 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.

III. J-U-B's TIME TO MAKE ITS RECORD HAS EXPIRED.

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 the instant case on August 10, 2006. Pursuant to IRCP 54(d)(5), J-U-B had 14-days from entry of judgment within which to file its memorandum of fees and costs and any supporting documentation. The time has now elapsed within which J-U-B was to file its supporting documents to comprise the record on the attorney's fees issue. Moreover, 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 must make its findings and conclusions based on the record before it.

IV. J-U-B CANNOT RECOVER ANY ATTORNEY'S FEES FOR FILING A SUPPLEMENTAL BRIEF RESPONDING TO BECO'S CHALLENGE REGARDING THE AMOUNT OF ATTORNEY'S FEES THIS COURT SHOULD AWARD.

At the hearing held before this court on June 9, 2008, this court instructed counsel for J-U-B to file a supplemental claim for attorney's fees for work he would do filing a supplemental brief on the issue of attorney's fees. However, this court lacks discretion to award J-U-B additional attorney's fees for addressing the *amount* of attorney's fees this

court will award. In this regard, the law in Idaho is clear that although attorney's fees incurred for challenging the *entitlement* to an award of attorney's fees are recoverable, attorney's fees incurred only for challenging the *amount* of an award are not recoverable. *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. 1984).

Here, the Idaho Supreme Court already determined on appeal that J-U-B is entitled to attorney's fees it incurred defending on the contract action. The Idaho Supreme Court remanded for this court to determine the amount of the award. Accordingly, under well-established Idaho law, this court cannot award J-U-B any attorney's fees incurred for responding to BECO's challenge regarding the amount of attorney's fees this court should award.

V. CONCLUSION.

For all the reasons set forth above, this court should award J-U-B no attorney's fees.

DATED this 20th day of June, 2008.

McGRATH, SMITH & ASSOCIATES, PLLC

By: 

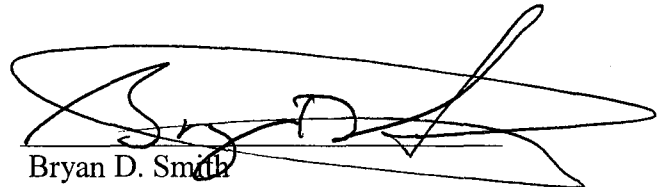
Bryan D. Smith
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of June, 2008, I caused a true and correct copy of the foregoing **BRIEF IN OPPOSITION TO AN AWARD OF ATTORNEY'S FEES** 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:

- 52
- U.S. MAIL
 - FAX
 - Overnight Delivery
 - Hand Delivery

C. Tom Arkoosh, Esq.
Arkoosh Law Offices, Chtd.
P. O. Box 32
301 Main Street
Gooding, Idaho 83330-0032


Bryan D. Smith

C. Tom Arkoosh, ISB #2253
Daniel A. Nevala, ISB #6443
CAPITOL LAW GROUP, PLLC
301 Main Street
Post Office Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2008 JUN 23 PM 2:29
BY *[Signature]*
DEPUTY CLERK

Attorneys for Defendant J-U-B Engineers, Inc.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

BECO CONSTRUCTION COMPANY, INC.,)
an Idaho corporation,)
)
Plaintiff,)
)
v.)
)
J-U-B ENGINEERS, INC.,)
)
Defendant.)
_____)

Case No. CV 05-1355 OC

MEMORANDUM IN SUPPORT OF
DETERMINATION AND AWARD OF
ATTORNEY FEES TO DEFENDANT

COMES NOW Defendant J-U-B Engineers, Inc., by and through its counsel of record,
Capitol Law Group, PLLC, and respectfully submits this *Memorandum in Support of
Determination and Award of Attorney Fees to Defendant.*

I. Introduction

This Court previously declared J-U-B the prevailing party on summary judgment and
awarded costs and fees to J-U-B. BECO appealed. Our Supreme Court affirmed this Court's
grant of summary judgment in favor of J-U-B but vacated a portion of the fee award. Pursuant to
the Remittitur issued on May 30, 2008, the Idaho Supreme Court ordered this Court to "forthwith
comply with the Directive of the Opinion [announced May 2, 2008], if action is required..."

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(Remittitur, May 30, 2008.) In that opinion, our Supreme Court "remand[ed] this case for determination and award of the amount of fees J-U-B incurred defending BECO's contract claim." *BECO*, 2008 Opinion No. 59, Docket No. 33378, 9. During the June 9, 2008 hearing, this Court correctly perceived that the directive from the Supreme Court frames the pending issue as not whether J-U-B is entitled to an award of attorney fees, but, rather, the amount of fees to which J-U-B is entitled. Thus, the only issue before the Court on remand is determining and awarding the proper amount of fees to award to J-U-B.

II. Discussion

Determining the proper award of attorney fees to J-U-B is soundly within the discretion of this Court. Idaho appellate courts have repeatedly stated that determining an award of attorney fees is within the sound discretion of the trial court and will not be disturbed on appeal unless there is an abuse of discretion. To determine whether the trial court abused its discretion, the Supreme Court considers (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. *Contreras v. Rubley*, 142 Idaho 573, 576 (Idaho 2006).

With this backdrop, we urge the Court to apply its discretion in reviewing the record and again applying the factors outlined in I.R.C.P. 54(e)(3) to determine that at a minimum, J-U-B is entitled to an award of attorney fees, with interest from the date of judgment, for all fees incurred from beginning of the lawsuit through the date that the Court dismissed BECO's breach of contract claim, as a reasonable award of attorney fees for defending J-U-B against BECO's

contract claim. Additionally, as the Court indicated in its *Minute Entry and Order* of June 12, 2008, J-U-B shall also be awarded attorney fees for preparing and submitting this brief.

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During the recent hearing on BECO's demand to release the cash deposit, the Court correctly pointed out to counsel for BECO that an evidentiary hearing had been conducted on the issue of attorney fees which assisted the Court in determining the award of fees to J-U-B previously. At that fee hearing, J-U-B presented expert witness, John Bailey. Mr. Bailey testified that the cost and fees incurred in defending J-U-B against BECO were reasonable. The Court questioned both Mr. Bailey and counsel for J-U-B about the nature of defending a lawsuit of this type. Mr. Bailey not only opined on the nature of defending a lawsuit of this type, but also about defending a lawsuit against this specific Plaintiff, concluding that any litigation against BECO is difficult and unreasonably time consuming.

Prior to the fee hearing, counsel for J-U-B provided the Court with detailed billing records chronicling the time incurred by counsel and the expense incurred by J-U-B in defending against BECO's complaint. Reviewing the work done by J-U-B's counsel in defending this lawsuit reveals that some of the major categories of services rendered included: (a) litigation planning, (b) marshaling and reviewing documents, (c) litigation coordination, (d) witness discovery and preparation, (e) issue identification and development, (f) Rule 16 negotiations; and (g) services directly related to this litigation, including the acquisition, review, selection, use and coordination of litigation documents and intensive motion practice. All of this work was done by J-U-B's counsel in investigating and determining the parameters of the lawsuit and researching and defending J-U-B against the unfounded allegations in the Complaint.

After hearing testimony from Mr. Bailey and argument from counsel, this Court determined that the fees incurred were reasonable given the circumstances surrounding the

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litigation and after applying the factors outlined in I.R.C.P. 54 in determining the proper amount of fees. BECO presented no evidence at the fee hearing to refute Mr. Bailey's testimony or to establish that J-U-B's fees were unreasonable. Thus, reviewing the record, especially the transcript of the fee hearing and the billing records previously provided by J-U-B's counsel, will provide the Court with ample evidence to determine that J-U-B's fees were reasonably incurred in defending against BECO's contract claim and allow the Court to make a proper award of fees to J-U-B.

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BECO will argue that J-U-B cannot recover fees for defending itself against the contract claim unless J-U-B can identify with 100% accuracy exactly what time was spent defending the contract claim, as opposed to defending the other claims. This argument is flawed. A party claiming attorney fees does not even have to submit evidence as to what is a reasonable fee.

What is a reasonable attorneys' fee is a question for the determination of the court, taking into consideration the nature of the litigation, the amount involved in the controversy, the length of time utilized in preparation for and the trial of the case and other related factors viewed in the light of the knowledge and experience of the court as a lawyer and judge; it is not necessary in this connection that he hear any evidence on the matter although it is proper that the court may have before it the opinion of experts. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 281 (Idaho 1977).

Further, it is not essential in every case that evidence must be submitted justifying the reasonableness of an attorney fee or an award thereof. *Clark v. Sage*, 102 Idaho 261, 266 (Idaho 1981). However, J-U-B did provide the Court with detailed billing records and expert witness testimony concerning both the reasonableness and justification of its fees.

Accordingly, any counsel or litigant who has been involved in complex commercial litigation knows that at the beginning of a lawsuit involving thousands of pages of documents and contracts that are hundreds of pages long, all work is being done to defend the entire lawsuit. This includes all claims. Thus, it is reasonable that all of the work done by J-U-B's counsel in

the beginning of the lawsuit and before the breach of contract claim was dismissed was done to defend against the breach of contract claim. For example, assume a lawyer is researching cases involving construction projects involving the allegation of negligence by the design professional. If during her research she discovers cases involving construction projects where the allegation is breach of contract rather than negligence, and the cases apply to the facts of the case she is working on, it is entirely reasonable that the time she spent researching these cases would be apportioned to defending against the contract claim. This would be true even if the time entry reflected that she was researching negligence cases.

So, does this allow BECO to argue that none of the work J-U-B did in the beginning of the lawsuit was done to defend the breach of contract claim because it may have been done to defend a tort claim, or determine if there should be a counterclaim, or a cross-claim, or what affirmative defenses were available. That's what BECO argued on appeal and in the recent hearing to release the cash deposit. BECO argues that because J-U-B's counsel cannot go through its billing records with 100% certainty and highlight certain entries in yellow to indicate time spent defending the contract claim, and other items in pink to indicate time spent defending the negligence claim, and finally, other items in blue to indicate time spent defending the intentional interference claim, the Court should find that J-U-B cannot recover, or at best can recover one-third of the amount of fees incurred before the Court dismissed BECO's contract claim. BECO argues essentially that the Court cannot review the record and determine and award a reasonable fee to J-U-B for defending itself against BECO's contract claim. The argument that J-U-B should not recover any fees is unreasonable and the Court does not need to follow BECO's failed logic.

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The Idaho Court of Appeals upheld a trial court's determination and award of 75% of attorney fees when the court determined that the prevailing party had spent approximately 25% of his attorney fees in defending against a certain portion of the lawsuit. This ruling was upheld even though the time itemizations in the memorandum in support of attorney fees did not clearly separate the amount of time spent on each individual issue. The appellate court concluded that the trial court judge employed the discretion accorded him in determining the prevailing party and did so in a reasonable way and affirmed the award of attorney fees. *Badell v. Badell*, 122 Idaho 442, 450 (Idaho Ct. App. 1992).

III. Conclusion

Based on the foregoing, it is clearly within the Court's discretion to go back and review the record, apply the governing factors laid out in I.R.C.P. 54, and at a minimum award J-U-B all of the fees it incurred in defending this lawsuit up to the point where BECO's contract claim was dismissed with interest from the date of judgment with the additional cost of researching and submitting this brief to the court. Furthermore, given the unreasonableness in BECO's bringing and pursuing this lawsuit, it is soundly within the Court's discretion to award the appropriate amount of fees to J-U-B as previously awarded.

DATED this 23 day of June, 2008.

CAPITOL LAW GROUP, PLLC



Daniel A. Nevala
Attorney for J-U-B Engineers, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of June, 2008, I served a true and correct copy of the foregoing document on the person listed below, in the manner indicated:

A
Bryan D. Smith
McGrath, Smith & Associates, PLLC
Post Office Box 50731
414 Shoup Avenue
Idaho Falls, Idaho 83405
Facsimile: (208) 529-4166

United States Mail, Postage Prepaid
Overnight Courier
 Via Facsimile
 Hand Delivered

59

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FILED
BANNOCK COUNTY
CLERK OF THE COURT
08 JUN 23 PM 3:17
BY [Signature]
DEPUTY

C. Tom Arkoosh, ISB #2253
Daniel A. Nevala, ISB #6443
CAPITOL LAW GROUP, PLLC.
301 Main Street
Post Office Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

Attorneys for Defendant J-U-B Engineers, Inc.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

60
BECO CONSTRUCTION COMPANY, INC.,)
an Idaho corporation,)
Plaintiff,)
v.)
J-U-B ENGINEERS, INC.)
Defendant.)

Case No. CV 05-1355 OC
MEMORANDUM OF FEES

COMES NOW, Daniel A. Nevala, after first being duly sworn upon oath, deposes and says:

1. I am an attorney for J-U-B Engineers, Inc. (hereinafter J-U-B) in the above-entitled matter and as such, I have personal knowledge of the facts contained in this Memorandum.

2. That in its June 12, 2008, *Minute Entry and Order*, this Court ordered that Plaintiff must pay Defendant attorney fees for the time spent preparing and submitting a brief on the issue of attorney fees.

ATTORNEY FEES

3. I have attached to this memorandum as Exhibit A and incorporated by reference herein, a true copy of the hours billed for service on the specific dates provided. A description of the basis for each billing is also contained within the Exhibit.

Pursuant to Rule 54(e)(3), Idaho Rules of Civil Procedure, the following specific information is provided.

- **Dates.** The dates that the services were provided are set forth within the exhibit.
- **Services Rendered.** The services rendered on the dates in question are described within the exhibits. The major services rendered include (a) legal research, (b) reviewing the court record and other documents, (c) preparing and submitting the brief.
- **Hourly Rate.** Since approximately January 1, 2008, Tom Arkoosh's work on this case is billed at \$250.00 per hour. Daniel Nevala's work on this case is billed at \$200.00 per hour. Paralegal work is billed at \$75.00 per hour. I hereby state that the total amount of attorney's fees incurred by my clients for the preparation and submittal of this brief is \$5,540.00

CERTIFICATION

4. Pursuant to Rule 54(d)(1)(C), Idaho Rules of Civil Procedure, I hereby state that

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the costs and attorney's fees contained herein were reasonably incurred, were not incurred for purposes of harassment or delay, were not incurred in bad faith and were not incurred for the purpose of increasing the costs of attorney's fees to any other party in this litigation.

62

DATED this 23 day of June, 2008.

CAPITOL LAW GROUP, PLLC

Daniel A. Nevala
Attorney for J-U-B Engineers, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of June, 2008, I served a true and correct copy of the foregoing document on the person listed below, in the manner indicated:

Bryan D. Smith
McGrath, Smith & Associates, PLLC
Post Office Box 50731
414 Shoup Avenue
Idaho Falls, Idaho 83405
Facsimile: (208) 529-4166

X

United States Mail, Postage Prepaid
Overnight Courier
Via Facsimile
Hand Delivered

62

S

Capitol Law Group, PLLC

**P.O. Box 2598
Boise, ID 83701
(208) 344-8990**

Invoice

J-U-B Engineers, Inc.
250 South Beechwood Avenue
Suite 201
Boise ID 83709-0944

Page: 1
June 23, 2008
Account No: 1447-086M
Statement No: 48502

BECO CONSTRUCTION APPEAL

Interim Statement

Fees

		Hours	
06/13/2008	DAN		
	Obtain and review documents (memorandum decisions and order) from Court; research and review rules and caselaw	0.70	140.00
06/17/2008	DAN		
	Obtain and review documents (prior briefing, court decisions, and record) in preparation of drafting attorney fee brief	3.80	760.00
06/18/2008	DAN		
	Legal research regarding attorney fee awards	3.40	680.00
	DAN		
	Obtain and review documents (district court record and summary judgment briefing on issue of attorney fees)	3.00	600.00
	DAN		
	Obtain and review pleadings filed by opposing counsel with the supreme court	1.50	300.00
06/19/2008	DAN		
	Continued legal research regarding attorney fee awards in Idaho	1.70	340.00
	DAN		
	Begin drafting brief on determination and award of attorney fees	3.00	600.00
06/20/2008	DAN		
	Continue drafting brief on determination and award of attorney fees	4.50	900.00

63

EXHIBIT

A

S

J-U-B Engineers, Inc.

Page: 2
June 23, 2008

Account No: 1447-086M
Statement No: 48502

BECO CONSTRUCTION APPEAL

		Hours	
06/21/2008	DAN		
		3.20	640.00
06/22/2008	DAN		
		0.50	100.00
	DAN		
		1.70	340.00
	DAN		
		0.70	140.00
		<u>27.70</u>	<u>5,540.00</u>

Recapitulation

<u>Timekeeper</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
Daniel Nevala	27.70	\$200.00	\$5,540.00

Total Current Work 5,540.00

BALANCE DUE \$5,540.00

Account is due and payable twenty days after statement date.
Please make checks payable to Capitol Law Group. Checks
returned for INSUFFICIENT FUNDS will be charged a \$25.00 fee.

64

EXHIBIT

A

Page 2 of 2

S

contract claim pursued by BECO Construction.

This Court has reviewed the Memorandum of Costs filed by counsel for J-U-B and the Memorandum in Support. This court has also reviewed counsel for BECO's objections.

Due 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 in seeking an award of attorney fees on the contract claim and counsel should be compensated by BECO for this work necessitated by the pleadings filed by BECO.

J-U-B is awarded Thirty Five Thousand Six Hundred (\$35,600.00) Dollars in attorney fees for defending the contract's claim and an additional sum of Five Thousand Five Hundred Forty (\$5,540.00) Dollars in attorney fees pursuant to the memorandum of fees filed June 23, 2008, for a total attorney fee award of Forty One Thousand One Hundred Forty (\$41,140.00) Dollars.

BECO deposited a cash bond on appeal with the Bannock County Auditor in the sum of One Hundred Two Thousand Five Hundred forty one and 86/100s (\$102,541.86) Dollars.

NOW, THEREFORE, IT IS HEREWITH ORDERED the Bannock County Auditor shall, from said funds, remit a check in the sum of Forty One Thousand One Hundred Forty (\$41,140.00) Dollars to counsel for J-U-B, David A. Nevala, 301 Main Street, P.O. Box 32, Gooding, Idaho 83330, and remit the balance of said fund, including interest, to counsel for BECO, Bryan D. Smith, 414 Shoup Avenue, P.O. Box 50731, Idaho Falls, ID 83405.

IT IS SO ORDERED.

DATED this 29th day of October, 2008.


PETER D. McDERMOTT
District Judge

Copies to:

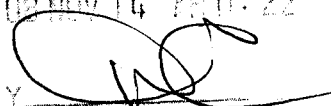
Bryan D. Smith
Tom Arkoosh/Daniel A. Nevala
Bannock County Auditor

67

Bryan D. Smith, Esq., ISBN 4411
B. J. Driscoll, Esq., ISBN 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
P. O. Box 50731
414 Shoup Avenue
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Telefax: (208) 529-4166

FILED
BANNOCK COUNTY
CLERK OF THE COURT

02 NOV 14 AM 11:22

BY 
CLERK

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

68
BECO CONSTRUCTION COMPANY,)
INC., an Idaho corporation,)
)
Plaintiff/Appellant,)
)
v.)
)
J-U-B ENGINEERS, INC., and DOES 1-15,)
whose true names are unknown,)
)
Defendants/Respondents.)
_____)

Case No. CV-05-1355 OC

NOTICE OF APPEAL

T \$15.00

TO THE ABOVE NAMED DEFENDANTS/RESPONDENTS, J-U-B ENGINEERS, INC., AND ITS ATTORNEYS, , C. TOM ARKOOSH, ESQ. and DANIEL A. NEVALA, ESQ., of the CAPITAL LAW GROUP, PLLC; AND TO THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named plaintiff, BECO Construction Co., Inc., (“BECO”) appeals to the Idaho Supreme Court from the District Court’s Memorandum Decision and Order entered October 29, 2008 in the above-entitled action, Honorable Peter D. McDermott, District Judge, presiding.

2. BECO has the right to appeal to the Idaho Supreme Court, and the Memorandum Decision and Order described in paragraph one above is subject to appeal pursuant to Rule 11(a), Idaho Appellate Rules, as an “order made after final judgment.”

3. The issues which BECO intends to assert on appeal are the following:

a. 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 totaled \$33,661.42 which amount included work defending BECO’s negligence and intentional interference with contract claims for which two claims this Court has held J-U-B could recover no attorney’s fees?

b. 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?

c. 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 delineates its work among the claims for breach of contract, negligence, and intentional interference with contract?

d. Did the district court commit reversible error when it ordered that BECO’s cash bond posted 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?

4. There has been no order entered sealing any portion of the record in this case.

5. BECO does not request that the reporter prepare any transcript. However, BECO does request that the Reporter's Transcript Volume One of One pages 1-33 for the hearing dated August 2, 2006 already prepared in connection with the first appeal be included on the record on appeal.

6. BECO requests the following documents be included in the clerk's record in addition to those automatically included under Rule 28, Idaho Appellate Rules:

- 70
- a. Volumes 1-4 of the Clerk's Record already prepared and used in connection with the first appeal;
 - ✓ b. Remittitur dated May 27, 2008;
 - ✓ c. Motion for Release of Cash Deposit dated May 28, 2008;
 - ✓ d. Affidavit of Daniel A. Nevala In Support of Memorandum In opposition to Motion for Release of Cash Deposit dated June 4, 2008;
 - ✓ e. Memorandum in opposition to Motion for Release of Cash Deposit dated June 4, 2008;
 - ✓ f. Minute Entry and Order dated June 12, 2008;
 - ✓ g. Memorandum Decision and Order dated June 12, 2008;
 - ✓ h. Brief in Opposition to An Award of Attorney's Fees dated June 20, 2008;
 - ✓ i. Memorandum in Support of Determination and Award of Attorney Fees to Defendant dated June 23, 2008;
 - ✓ j. Memorandum of Fees dated June 23, 2008.

k. Brief in Reply to Defendant's Memorandum in Opposition to Plaintiff's Petition dated September 18, 2008; and

✓ l. Memorandum Decision and Order dated October 29, 2008.

7. I certify:

a. That a copy of this notice of appeal has been served on the reporter;

b. That the reporter who reported the August 2, 2006 hearing before the district court has been paid the fee for preparation of the reporter's transcript;

c. That the estimated fee for preparation of the clerk's record has been paid;

d. That the appellate filing fee has been paid; and

e. That service has been made upon all parties required to be served

pursuant to Rule 20, Idaho Appellate Rules.

DATED this 11th day of November, 2008.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 

Bryan D. Smith
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of November, 2008 I caused a true and correct copy of the foregoing **NOTICE OF APPEAL** to be served by placing the same in a sealed envelope and depositing it in the United States Mail, postage prepaid, or by hand delivery, facsimile transmission, or overnight delivery, addressed to the following:

- 72
- U.S. Mail
 - Facsimile Transmission
 - Overnight Delivery
 - Hand Delivery
 - Courthouse Mail Box

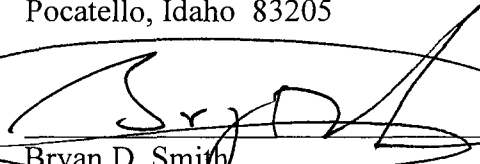
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Pocatello, Idaho 83205

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Bryan D. Smith

IN THE SUPREME COURT OF STATE OF IDAHO

BECO CONSTRUCTION COMPANY, INC.,)
 an Idaho Corporation,)
)
 Plaintiff/)
 Appellant,) Supreme Court
)
 vs.) No. 33378
)
 J.U.B. ENGINEERS INC.,)
)
 Defendant/)
 Respondent.)

REPORTER'S TRANSCRIPT ON APPEAL
 VOLUME ONE OF ONE
 PAGES 1 THROUGH 53

Appeal from the District Court
 of the Sixth Judicial District of the
 State of Idaho, in and for the County of Bannock,
 HONORABLE PETER D. McDERMOTT,
 District Judge, presiding.

--o0o-- COPY

APPEARANCES:

For the Plaintiff/
 Respondent: MCGRATH, MEACHAM & SMITH
 Attorneys at Law
 P.O. Box 50731
 Idaho Falls, Idaho 83405

For the Defendant/
 Appellant: Tom Arkoosh, Esq.
 ARKOOSH LAW OFFICE, CHTD.
 Attorneys at Law
 301 Main Street
 Gooding, Idaho 83330

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CHRONOLOGICAL INDEX

	PAGE	LINE
MONDAY, AUGUST 7, 2006	7	1
Deft's Mot. for Atty Fees & Sanctions; Plntf's Mot. to Disallow Fees & Costs; Plntf's Mot. to Strike Af. of Counsel.		
JOHN BAILEY	20	4
Direct Ex. - Mr. Arkoosh	20	11
Cross-Ex. - Mr. Smith	29	12
Further Cross - Mr. Smith	37	4
Redirect Ex. - Mr. Arkoosh	39	14
Court Reporter's Certificate	53	1

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INDEX OF EXHIBITS

PLNTF'S NO.	DESCRIPTION	PAGE	LINE
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N/A

DEFT'S NO.	DESCRIPTION	PAGE	LINE
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LODGED at the Bannock County
 Courthouse in Pocatello,
 Idaho, this _____ day of
 _____, 2007
 _____ o'clock ____ .m.

DALE HATCH
 Clerk of the Court

By _____
 Deputy

IN THE DISTRICT COURT OF THE [REDACTED] JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

--o0o--

BECO CONSTRUCTION COMPANY, INC.,)
an Idaho Corporation,)

Plaintiff,)

vs.)

J.U.B. ENGINEERS, INC.,)

Defendant.)

Case No.
CV05-13550C

The above-entitled matter came on for hearing
on the dates and times indicated herein at the
Bannock County Courthouse, Pocatello, Idaho.

BEFORE: The Honorable PETER D. MCDERMOTT

APPEARANCES:

For the Plaintiff: William Smith, Esq.
TROUT, JONES, GLEDHILL,
FUHRMAN, P.A.
Attorneys at Law
225 N. 9th Street, Ste. 820
Boise, Idaho 83701

For the Defendant: Tom Arkoosh, Esq.
ARKOOSH LAW OFFICES, CHTD.
Attorneys at Law
301 Main Street
Gooding, Idaho 83330

COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS

I N D E X

MONDAY, AUGUST 7, 2006 PAGE LINE
7 1

Deft's Mot. for Atty Fees & Sanctions;
Plntf's Mot. to Disallow Fees & Costs;
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JOHN BAILEY 20 4
Direct Ex. - Mr. Arkoosh 20 11
Cross-Ex. - Mr. Smith 29 12
Further Cross - Mr. Smith 37 4
Redirect Ex. - Mr. Arkoosh 39 14

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POCATELLO, IDAHO; MONDAY, AUGUST 7, 2006

8:30 A.M.

--o0o--

THE COURT: All right.

Let's take up BECO Construction versus
JUB Engineers.

MR. ARKOOSH: Good afternoon,
Your Honor.

THE COURT: Good afternoon.

MR. ARKOOSH: Tom Arkoosh appearing
for J.U.B.

MR. SMITH: William Smith appearing
for BECO Construction Company.

THE COURT: Yes, Mr. Smith. Thanks.

We're here for hearing on defendant's
motion for attorney's fees and sanctions and
plaintiff's motion to disallow fees and costs and
plaintiff's motion to strike the affidavit of
counsel regarding the memorandum of fees and
costs.

So, I suppose, let's take up first --
I suppose we ought to take up, first, the motion
to strike the affidavit; okay?

MR. SMITH: Thank you, Your Honor.

This is a very simple motion. We just
believe that the affidavit that was filed on or
about July 3rd, 2006, is not relevant; it doesn't
state that the billing entries are true and
correct. It doesn't state that that time was
actually incurred. It doesn't state that the
statements made in the memorandum of costs are
true and correct. And on that basis, we would
ask that the affidavit of counsel be
disregarded.

THE COURT: All right. Thank you

very much, Mr. Smith.

Mr. Arkoosh?

MR. ARKOOSH: If it please Your Honor,
counsel pointed out -- and probably correctly
so -- under Rule 54, not under 12-120 but under
Rule 54, that it had to be affied on the
memorandum of costs.

We were still within the fourteen days.
I adopted the memorandum of costs and fees in it
entirely and affied it, so its relevance -- or the
objection isn't well-taken.

THE COURT: All right. Thank you.

Mr. Smith?

MR. SMITH: We just ask that you look

1 very carefully at the affidavit counsel and
2 the statements contained therein that he did swear
3 to.

4 He swears what the basis for computation
5 of the fees were, but he doesn't say those fees
6 were incurred; that those are his billing
7 statements; that was the time expended; he just
8 says the basis for computation, and on that basis,
9 he hasn't laid the foundation for asking for all
10 of those fees, Your Honor.

11 THE COURT: All right.

12 With regard to the memorandum letter of
13 fees and costs filed with counsel, I'm going to
14 deny the motion to strike.

15 The Idaho Appellate Court has held
16 in CAMP versus JIMINEZ (phonetic) 107 Idaho 878,
17 even a failure to verify a memorandum of costs
18 and attorney's fees, it renders it on timely
19 objection, but does not render it jurisdictionally
20 defective.

21 I think the way it has been filed,
22 I guess, meets the standard so -- deny the motion
23 to strike.

24 So let's take up your motion for
25 attorney fees. And we'll take up the plaintiff's

1 the hearing.

2 The summary judgment -- there are
3 two Idaho Supreme Court cases -- I didn't realize
4 there was a question in Your Honor's
5 mind -- there are two Idaho Supreme Court cases
6 that say that if you show the contract doesn't
7 exist, that is winning a 12-120(3) claim for the
8 contract amount, Your Honor.

9 MR. SMITH: Your Honor, there is no
10 12-120(3) request in the motion for memorandum of
11 costs and fees. There is 12-123, frivolous and
12 Rule 11 and 56(g) -- but no 12-120.

13 MR. ARKOOSH: That is in the
14 memorandum of costs and fees, Your Honor. There
15 are two separate applications here. One is the
16 memorandum of costs and fees, and the other is
17 costs and fees and sanctions under a series of
18 statutes and rules that we have to --

19 THE COURT: Let me get something
20 straight here before we go too much further.

21 The Court is going to -- and it will
22 be followed up with a written decision -- the
23 Court is going to deny the Motion to Reconsider
24 filed by Beco, the plaintiff, so judgment will be
25 entered for JUB Engineers and JUB Engineers will

1 motion to disallow the fees also at the same
2 time.

3 I think before we do, though,
4 Mr. Arkoosh, on what basis are you claiming
5 attorney's fees?

6 MR. ARKOOSH: Your Honor, as set out in
7 the memorandum of costs and fees.

8 THE COURT: Yeah. I read that, but
9 under 12-120(3), how does this case fit in there,
10 do you think?

11 MR. ARKOOSH: This was a contract
12 claim, Your Honor, that we had to brief, that
13 brought it to hearing for summary judgment, and
14 it was a contract for services. And that's
15 directly under 120(3).

16 THE COURT: Now, your contract is with
17 the City of Pocatello though?

18 MR. ARKOOSH: Correct. And they sued
19 us on that contract.

20 THE COURT: But you don't have a
21 contract with them?

22 MR. ARKOOSH: We do not. They sued
23 us. And the first element they have to show
24 is contract. And we filed summary judgment
25 on that element, and they dismissed the day of

1 be the prevailing party.

2 Okay. Now, as far as attorney fees go,
3 though, in the memorandum of fees and costs on
4 the second page, you're requesting attorney fees
5 under 12-120(3) and 12-121 in conjunction with
6 Idaho Civil Rules of Procedure 54(e)(1);
7 right?

8 MR. ARKOOSH: Yes, Your Honor.

9 THE COURT: Okay.

10 So, again, how do you believe this falls
11 into 12-120(3)?

12 MR. ARKOOSH: The first count in
13 the Complaint was for contract, 12-123 states
14 that if you prevail in a contract claim and
15 it is a collection contract for services, leaving
16 out the intervening language, which this was
17 precisely, then it's under 12-120.

18 The cases go on to state that if
19 the gravamen of the case is contract, then
20 you're entitled to recovery of fees under
21 12-120(3).

22 THE COURT: Well, this isn't a case
23 that would recover on a contract, though,
24 is it?

25 MR. ARKOOSH: Yes, Your Honor.

1 We were sued in contract for interference.
 2 THE COURT: Well, you were sued
 3 for intentional interference with contract.
 4 MR. ARKOOSH: We were sued in three
 5 counts -- contract negligence and intentional
 6 interference in contract --
 7 THE COURT: But that's the contract
 8 that BECO had with the City of Pocatello?
 9 MR. ARKOOSH: Correct. It was the
 10 wrong plaintiff. We didn't have a contract,
 11 but we were, indeed, sued upon contract.
 12 THE COURT: Well, so you got anything
 13 else you want to say on that?
 14 MR. ARKOOSH: Not on the contract
 15 claim, Your Honor.
 16 THE COURT: Okay.
 17 Then on 12-121, in order to be
 18 entitled to -- in order to be entitled to attorney
 19 fees under that statute or provision, this Court
 20 would have to find that BECO brought -- pursued
 21 the lawsuit frivolously, without foundation,
 22 before you would be entitled to attorney fees
 23 under that section; right?
 24 MR. ARKOOSH: That's correct,
 25 Your Honor.

1 THE COURT: So you're asking for
 2 attorney fees under both sections?
 3 MR. ARKOOSH: Only on the contract
 4 portion. And I haven't divided the fees, but we
 5 did ask for that because up to the first summary
 6 judgment, that was part and parcel under 12-121
 7 under the memorandum of costs and fees.
 8 And under Rule 54, it's for a frivolous
 9 action, Your Honor. And for the affirmative
 10 motion for sanctions in this case, we have asked
 11 for attorney fees and sanctions against both the
 12 party and counsel under 12-123 and Rule 11,
 13 Your Honor.
 14 And I think that the showing is
 15 very, very similar for 12-121 and the
 16 affirmative claim for sanctions. The only
 17 difference that I can see in 123 is you can
 18 also collect sanctions for failure to properly
 19 investigate.
 20 THE COURT: Well, I guess, first of
 21 all, as the prevailing party, you're entitled
 22 to your costs. And the way your costs were set
 23 out, I can't make heads or tails out of whether
 24 you're asking -- which ones are costs as a matter
 25 of right, which are discretionary costs -- other

1 than your filing fee.
 2 MR. ARKOOSH: I concur with that,
 3 Your Honor. I think there has been a failure to
 4 itemize those. And I think they got backwards in
 5 the memorandum what was discretionary and what
 6 was nondiscretionary. I think that's
 7 backward.
 8 THE COURT: Okay.
 9 So -- going to award you your costs
 10 incurred as a matter of right for filing fee of
 11 \$47 and that's it.
 12 And the others were not set out
 13 properly, I don't think. I don't have a clue
 14 what the Litigation Document Group is. You're
 15 asking for payment on that. Must be -- I don't
 16 know what it is -- but copies and postage and
 17 all of that stuff. I'm not going to award you
 18 costs on that.
 19 MR. ARKOOSH: Yes, Your Honor.
 20 THE COURT: So give you \$47 bucks.
 21 MR. ARKOOSH: Yes, Your Honor.
 22 THE COURT: But you should -- in your
 23 cost bill, you should put out costs incurred as a
 24 matter of right and state what they are, and then
 25 you should put discretionary costs and state what

1 they are.
 2 MR. ARKOOSH: I agree. That was not
 3 correctly set out.
 4 THE COURT: All right.
 5 So we'll give you \$47 for a filing
 6 fee.
 7 And another thing before you get into
 8 a filing fee, you got a bunch of fees here
 9 charged to the litigation with BECO and the City
 10 of Pocatello, which was settled, but I don't think
 11 it should be in this, should it?
 12 MR. ARKOOSH: We were not involved
 13 in this case, Your Honor. Those are charged to
 14 this case. BECO versus the City of Pocatello is
 15 not an action in which JUB was involved.
 16 THE COURT: Well, let's see, there's
 17 quite a few of them here. You got 5/26 letter
 18 to Pocatello counsel. There is no Pocatello
 19 counsel, is there?
 20 MR. ARKOOSH: If I might explain?
 21 THE COURT: Then on the next page
 22 you got -- telephone call to attorney, City of
 23 Pocatello.
 24 MR. ARKOOSH: Correct.
 25 THE COURT: E-mail Bybee and

1 RE: City/BECO settlement.
 2 Next down, correspondence with clients.
 3 Telephone call for City of Pocatello.
 4 Next down little bit -- phone call with
 5 client, Kirk Bybee, City. And --
 6 MR. ARKOOOSH: Correct.
 7 THE COURT: Okay.
 8 How do you figure that out to be charged
 9 to these guys in this lawsuit?
 10 MR. ARKOOOSH: Your Honor, in the
 11 memorandum in opposition to attorney fees filed,
 12 one of the things cited by counsel for BECO is the
 13 fact they were able to settle their case with
 14 Pocatello. And they used that as an argument
 15 that this was not a frivolous lawsuit.
 16 We did a great deal of investigation
 17 with the Pocatello Development Authority, with the
 18 City of Pocatello, and discovery to try and figure
 19 out why we were being sued.
 20 Those calls were on this case.
 21 We're not in the BECO versus Pocatello case or
 22 vice-versa. We were just trying to learn what
 23 was going on, and we couldn't tell that from the
 24 Complaint. And we didn't get discovery as
 25 Your Honor knows, until later in this case.

1 THE COURT: Well, let me ask you this:
 2 On page three, the third item down,
 3 initial research and review regarding City of
 4 Pocatello tax increment financing and community
 5 development commission.
 6 MR. ARKOOOSH: Yes, Your Honor.
 7 THE COURT: \$112 bucks -- what is that
 8 for?
 9 MR. ARKOOOSH: That is to learn about
 10 the three-way contract that we were being sued
 11 under.
 12 We were trying to figure out why
 13 this contract was with Pocatello Development
 14 Authority, who Pocatello Development Authority
 15 was, and we were trying to learn whether or not
 16 the allegations in the Complaint were true -- that
 17 we had a contract with the contractor. Because
 18 that is the usual way --
 19 THE COURT: Well, you had a copy of
 20 the contract, didn't you?
 21 MR. ARKOOOSH: We did, Your Honor.
 22 THE COURT: I mean the contract says
 23 what it says; right?
 24 MR. ARKOOOSH: It does, Your Honor.
 25 THE COURT: So what difference does

1 all of that other stuff make?
 2 MR. ARKOOOSH: Well, at the time we
 3 felt it was important, Your Honor. We were
 4 trying to learn the parameters of the case based
 5 upon what was going on in the allegations of the
 6 Complaint.
 7 We didn't bring this Complaint.
 8 We didn't raise this confusion. We just had
 9 to sort it out. That's why we're here asking for
 10 fees.
 11 It may look broader than it needs to
 12 be, Your Honor. But Your Honor has to remember,
 13 we got sued and couldn't make heads or tails
 14 with our understanding of what had happened;
 15 why on earth we were being sued. And we couldn't
 16 get discovery timely.
 17 THE COURT: Well, okay.
 18 So you're standing on the memorandum of
 19 fees you submitted then?
 20 MR. ARKOOOSH: Yes, Your Honor.
 21 THE COURT: Okay.
 22 Well, let's go ahead then.
 23 MR. ARKOOOSH: Your Honor, I have
 24 some evidence to present, if I may.
 25 THE COURT: Okay.

1 MR. ARKOOOSH: I would call
 2 Mr. John Bailey.
 3
 4 JOHN BAILEY
 5
 6 a witness called on behalf of Defendant
 7 herein, after having been first duly and
 8 regularly sworn, testifies as hereinafter
 9 follows:
 10
 11 D I R E C T E X A M I N A T I O N
 12
 13 BY MR. ARKOOOSH:
 14 Q. Would you state your name,
 15 please, sir.
 16 A. John Bailey.
 17 Q. And spell your last.
 18 A. B-a-i-l-e-y.
 19 Q. And what is your work address,
 20 Mr. Bailey?
 21 A. 201 East Center. Pocatello,
 22 Idaho.
 23 Q. And by whom are you
 24 employed?
 25 A. Racine, Nye, Olson, Budge, and

1 Bailey.

2 Q. What does that firm do?

3 A. We're a firm involved in -- at

4 least in my part of the world -- in litigation

5 and defense and plaintiff's work here in

6 Pocatello.

7 Q. So you're a firm of

8 lawyers?

9 A. Yes. Easy answer.

10 Q. Mr. Bailey, did you review

11 materials in preparation for giving testimony in

12 this motion here today?

13 A. Yes, I did.

14 Q. What did you review?

15 A. I reviewed -- in varying degrees --

16 the bulk of this file that you have involved in

17 the litigation with JUB and with BECO.

18 Q. And why did you --

19 A. Some in greater detail than

20 others.

21 Q. Why did you do that?

22 A. In an effort to be able to voice

23 an opinion as to whether or not the fees were

24 reasonable and whether or not the work was

25 incurred.

1 Q. Okay.

2 How long have you practiced law,

3 Mr. Bailey?

4 A. Twenty-six years.

5 Q. Okay.

6 And in what courts are you licensed

7 to practice?

8 A. All the state courts of Idaho,

9 and the federal court in the Ninth Circuit Court

10 here.

11 Q. Okay.

12 And, again, wasn't listening closely

13 enough, what kind of practice do you have in the

14 firm?

15 A. Primarily a litigation practice.

16 Q. Are you familiar with memorandums

17 of costs and fees similar to the ones filed

18 here?

19 A. Yes.

20 Q. Have you done the type of

21 litigation that this case, BECO versus JUB,

22 entails?

23 A. Yes. In fact, several cases

24 involving BECO -- on the opposite side.

25 Q. Could you tell me your experience

1 with litigation and BECO.

2 A. It usually is more time consuming.

3 My first case was one that, ultimately, went to

4 the Supreme Court -- Bannock Paving versus

5 BECO.

6 Since that experience -- and, in fact,

7 just recently, we had one that we took over

8 from Mike Gaffney involving Mickey Ross-Kelly and

9 BECO.

10 And we told Mr. Ross-Kelly that he could

11 expect this to be about twice as expensive as any

12 other defendant normally is.

13 Q. Why is that?

14 A. It's just because of the

15 difficulties we have with the BECO group and

16 trying to get things done expeditiously. They

17 don't like to agree to anything. They won't

18 agree to anything. And it just takes more

19 time.

20 Q. You've done representation

21 of either construction companies or

22 design professionals in construction

23 cases?

24 A. Yes.

25 Q. Okay.

1 When there is an allegation, in your

2 experience, that the design professional or the

3 construction company committed professional

4 malpractice, what is the usual response?

5 A. Well, I mean, they're concerned

6 about the repercussions on their reputation --

7 as is any professional. They get worried

8 about -- what is this going to do to the business,

9 whether it's justified or not. And what is it

10 going to do to their ability to earn a living in

11 the future.

12 So it's a -- it's a heightened reaction,

13 I guess, to what most defendants experience.

14 Q. Is "zeal" a fair label?

15 A. Well, that's what is expected

16 of us as representing them a lot of times,

17 yeah.

18 Q. Okay.

19 Did you, in review of the materials

20 that concerned this case, form an opinion

21 regarding whether -- there were pleadings and

22 filings in this case, whether the pleadings and

23 filings in this case followed upon a reasonable

24 inquiry into the facts and law?

25 A. I did form an opinion on

1 that.

2 Q. Would you state that opinion,
3 please.

4 A. I felt that it was a reasonable
5 approach. Unfortunately, these things --
6 especially when you're dealing with large
7 construction projects -- just have an awful lot
8 of detail involved in them and they are more
9 time consuming.

10 And, as I say, I do have to say
11 from prior experience in dealing with BECO,
12 that gets heightened or magnified because of the
13 way they approach the litigation -- that I have
14 been involved in with them.

15 Q. And the converse, did you form
16 an opinion regarding whether this Complaint was
17 reasonably investigated prior to the time it was
18 filed?

19 A. I did.

20 Q. What is that opinion, please.

21 A. I didn't believe that it was.
22 It was apparent to me that they didn't even
23 realize that there wasn't a contract between
24 JUB and the plaintiff.

25 Q. Did you believe that the

1 regarding whether the fee rate expressed as
2 \$125 to \$200 an hour is reasonable in this area
3 for this type of litigation?

4 A. It is. And consistent, again, with
5 cases that the federal court has just awarded us
6 fees on.

7 Bill Parsons and myself recently had
8 a case, again, recently had a case against the
9 federal government wherein the fee was ultimately
10 compromised, but we charged \$175 an hour. That
11 was the basis from which we negotiated with the
12 United States Government.

13 MR. SMITH: Objection, Your Honor.
14 Nonresponsive to the question that was
15 proffered.

16 THE COURT: Objection is noted.
17 Answer will stand.

18 Go ahead.

19 MR. ARKOOOSH: I have nothing further.

20 Thank you.

21 THE COURT: All right.

22 Go ahead, sir.

23 MR. SMITH: Your Honor, we object
24 and move to strike this entire line of
25 testimony.

1 Complaint in this action was warranted by the
2 underlying facts after having read the two summary
3 judgment opinions?

4 A. I thought those were very
5 well-decided decisions.

6 No, I didn't think it was, frankly.

7 Q. And did you believe that the
8 Complaint in pursuing that action was warranted
9 by existing law?

10 A. You know, I didn't do -- I have
11 to be a bit limited in how I answer that. I
12 didn't do any research beyond what was presented
13 in the briefing by both sides. But based upon
14 that, no, I didn't.

15 Q. Overall, given your review of
16 the file and the amount of material involved
17 in discovery and the necessity to bring a second
18 summary judgment motion, do you have an opinion
19 whether the overall fee charged in this case
20 was reasonable in your experience?

21 A. I do -- and consistent with
22 similar cases that we have had involving other
23 contractors, as well as the cases I have referred
24 to involving BECO.

25 Q. And do you have an opinion

1 Apparently, Mr. Bailey is an expert
2 witness who has never been disclosed. We have
3 never had any notice of intent to produce this
4 testimony. Never disclosed in the discovery
5 response, which we served well over a year ago.
6 Certainly, notice, at the very least, is proper
7 in this situation, Your Honor.

8 THE COURT: All right.

9 Objection is noted for the record
10 and denied. If you want to cross-examine him,
11 you may do so.

12 I think this is a separate hearing
13 as opposed to the litigation itself.

14 You had no idea he was going to be
15 called?

16 MR. SMITH: Not until he just called
17 him, Your Honor.

18 THE COURT: Okay. Well --

19 MR. ARKOOOSH: Your Honor, I will
20 say that I canceled the hearing with counsel's
21 firm and expressed to them the purpose for
22 canceling was to be sure that Your Honor had
23 time to hear evidence.

24 It may not have gotten to this
25 counsel, but I did -- we reset this

1 hearing.

2 THE COURT: Well, I do think you
3 said at the last hearing it might be a couple
4 of hours long because you were going to call
5 witnesses but -- anyway, Mr. Smith, your
6 objection is certainly noted but -- going to
7 deny it.

8 You can go ahead and cross-examine
9 Mr. Bailey; okay.

10 MR. SMITH: Thank you, Your Honor.

11

12 C R O S S - E X A M I N A T I O N

13

14 BY MR. SMITH:

15 Q. Mr. Bailey, you recall referencing
16 a "BECO group"?

17 A. I did.

18 Q. And who -- exactly who or what
19 exactly is entailed in the BECO group?

20 A. Well, really, that was loose
21 language on my part. I have dealt with
22 Doyle Beck, both as an expert witness in
23 cases where he has appeared, and I have dealt
24 with his construction company, BECO, Inc., in
25 at least three cases that come to mind right

1 pleadings, I spent a fair amount of time with
2 those.

3 Q. Who is Billy Berry?

4 A. He was an expert that you
5 provided -- I think at least two affidavits
6 from in an attempt to discuss the testing of
7 the asphalt

8 Q. And did you --

9 A. -- as I recall.

10 Q. And did you review those
11 affidavits?

12 A. I did, yes.

13 Q. Did you review the Complaint?

14 A. I did.

15 MR. SMITH: That's all I have,
16 Your Honor. Thank you.

17 THE COURT: All right, Mr. Smith.

18 Mr. Arkoosh?

19 MR. ARKOOSH: No redirect, Your Honor.

20 Thank you.

21 THE COURT: Okay.

22 Mr. Bailey, just going to ask you a
23 question here, if you don't mind.

24 THE WITNESS: Sure, Judge.

25 THE COURT: Have you reviewed the

1 away.

2 Q. And were you always in opposition
3 to the BECO group?

4 A. Yes, sir.

5 Q. Is it possible that you have some
6 type of prejudice based on your history with the
7 BECO group?

8 A. Well, no. I mean, it's possible --
9 certainly, anything is possible -- but I don't
10 think I really have a problem.

11 We have been on the better side of
12 all three of the cases.

13 Q. What precisely did you review
14 in preparing for your testimony today?

15 A. As I say, in greater or lesser
16 degree, I reviewed the whole file. There is --
17 I think I concentrated most probably on the
18 summary judgments, both the briefing and the
19 decision, and the two summary judgments and
20 the affidavits and supporting information
21 there. Reviewed the Complaint and Answer,
22 of course.

23 You know, the correspondence was --
24 I did not spend any significant time with that
25 aspect of it. But with regard to the

1 memorandum of costs filed in this case?

2 THE WITNESS: I did, Judge,
3 yes.

4 THE COURT: And do you have any
5 comments regarding the memorandum of costs with
6 respect to whether or not you believe they're
7 reasonable?

8 And I know you have already been
9 asked an hourly rate, so I don't want to ask you
10 that, but it seems like a lot of time and a lot of
11 money.

12 THE WITNESS: Absolutely, Judge.

13 I mean, I understand the Court's concern. And I
14 understand that it is -- maybe by way of
15 comparison, I can tell you that the other case
16 referred to of Sheriff Ross Kelly's case with
17 BECO, that got through one summary judgment and
18 was still pending -- hadn't had a trial. I think
19 it only had one deposition, and the costs that
20 Mr. Gaffney's firm had run up, costs and fees,
21 had run up on that case to that point were some
22 \$45,000 when we took it over. And that was, as I
23 said, one deposition and only one summary judgment
24 hearing.

25 And that was part of the Complaint

1 that Mr. Gaffney had was defer to counsel -- and
2 I have to say this for Mr. Smith's benefit, it was
3 not his firm. So I'm not pointing at their firm
4 for this, Judge. But the problem, I think, has
5 been with the approach that BECO takes to
6 litigation. And, doggone it, in any one of
7 these cases, it has been very arduous.

8 It's surprising how much time does
9 get to be involved. I guess, you kind of asked
10 me and open-ended question, if I might, Judge,
11 I might comment on a couple of questions that
12 you asked counsel about.

13 One of the things, at least that
14 occurred to my mind, is I would have been talking
15 to the City as well on this thing early on. And I
16 think I'd have been trying to get a chance to
17 visit with their witnesses. But I don't think
18 either of these counsel would dare have gone to
19 the witnesses directly where they were represented
20 or sued in the beginning. They probably did have
21 to work through counsel's office over there at the
22 City.

23 THE COURT: I think you said
24 something earlier about -- let's see, maybe I
25 misunderstood you -- I think you said that the

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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

Entered on ATS

BECO CONSTRUCTION COMPANY,)
INC., an Idaho Corporation,)
)
Plaintiff-Appellant,)
)
Vs.)
)
J-U-B ENGINEERS, INC., and DOES)
1-15, whose true names are unknown,)
)
Defendant-Respondents,)
)
)

Supreme Court No. **35873-2008**

CLERK'S CERTIFICATE
OF
APPEAL

Appealed from: Sixth Judicial District, Bannock County

Honorable Peter D. McDermott, presiding.

Bannock County Case No: CV-2005-1355-OC

Order of Judgment Appealed from: Memorandum Decision and Order filed the 3rd day of November, 2008.

Attorney for Appellant: Bryan D. Smith, ESQ., **SMITH, DRISCOLL & ASSOCIATES, PLLC, Idaho Falls**

Attorney for Respondent: Daniel A. Nevala, Esq. **CAPITOL LAW GROUP, PLLC Gooding**

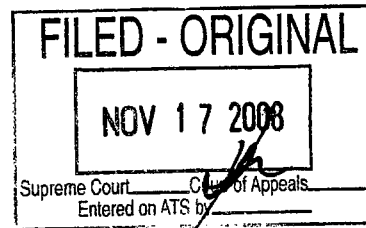
Appealed by: Appellant

Appealed against: Respondent

Notice of Appeal filed: 11-14-08

Notice of Cross-Appeal filed: No

Appellate fee paid: No (Counsel is sending new check in the mail as of 11-14-08)



Request for additional records filed: Yes

Request for additional reporter's transcript filed: No

Name of Reporter: N/A

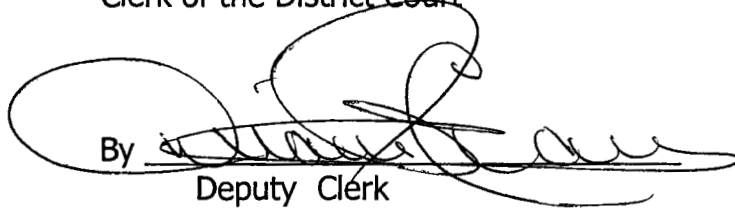
Was District Court Reporter's transcript requested? No

Estimated Number of Pages: N/A

Dated Nov. 14, 2008

DALE HATCH,
Clerk of the District Court

(Seal)

By 
Deputy Clerk

108

TITLE OF COURT AND CAUSE:

CLERK'S CERTIFICATE

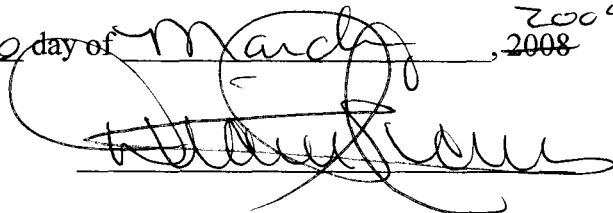
Supreme Court Case No. 35873

STATE OF IDAHO)
)
County of Bannock)

I, DALE HATCH, Clerk of the District Court of the Sixth Judicial District, of The State of Idaho, in and for the County of Bannock, do hereby certify that the above and foregoing Clerk's Transcript on Appeal in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct Clerk's Transcript on Appeal of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

I do further certify that all exhibits, offered or admitted in the above entitled cause, will be duly lodged with the Clerk of the Supreme Court along with the court reporter's transcript and the clerk's record as required by Rule 32 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Pocatello, Idaho this 26 day of March, ~~2008~~ ²⁰⁰⁹



CLERK OF THE DISTRICT COURT
In and for Bannock County, Idaho

(SEAL)

CLERK'S CERTIFICATE

TITLE OF COURT AND CAUSE:

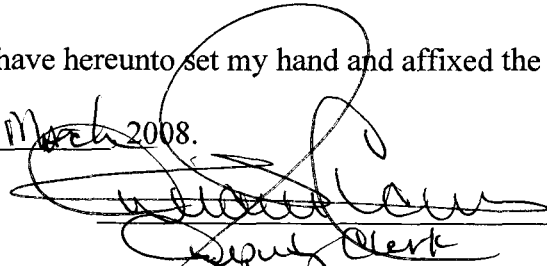
CERTIFICATE OF CLERK
TO ORIGINAL EXHIBITS

Supreme Court Case No. 35873

110
I, DALE HATCH, the duly elected, qualified and acting Clerk of the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock, do hereby certify that the following are the original exhibits marked for identification and introduced in evidence at the trial of the above and foregoing cause; to-wit:

THERE ARE NO EXHIBITS

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this the 26 day of March 2008.



DALE HATCH, Clerk

DALE HATCH, Clerk of the District Court, Bannock County, State of Idaho

(SEAL)

CERTIFICATE OF CLERK
TO ORIGINAL EXHIBITS

TITLE OF COURT AND CAUSE:

CERTIFICATE OF SERVICE

Supreme Court Case No. 35873

I, DALE HATCH, Clerk of the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock, do hereby certify that I have personally served or mailed, by United States Mail, one copy of the Clerk's Record to each of the Attorneys of Record in this cause as follows:

Bryan D. Smith
P. O. Box 50731
Idaho Falls, Idaho 83405

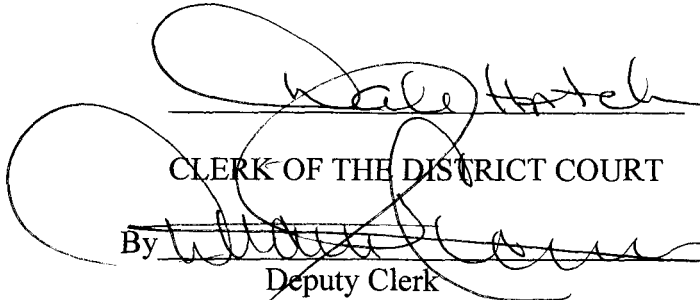
Attorney for Appellant

C. Tom Arkoosh
P. O. Box 32
Gooding, Idaho 83330-0032

Attorney for Respondent

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 9th day of June, 2008^{dpc}


CLERK OF THE DISTRICT COURT

By 
Deputy Clerk

CERTIFICATE OF SERVICE

86