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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BECO CONSTRUCTION COMPANY, INC., an Idaho corporation,

Plaintiff/Appellant,

v.

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

Defendant/Respondent

Supreme Court No. 35873

RESPONDENT'S BRIEF

Appeal from the District Court of the Sixth Judicial District for Bannock County.

Honorable Peter D. McDermott, District Judge, presiding

Bryan D. Smith, Esq., residing at Idaho Falls, Idaho, for Appellant

C. Tom Arkoosh, Esq., and Daniel A. Nevala., Esq., residing at Boise, Idaho, for Respondent

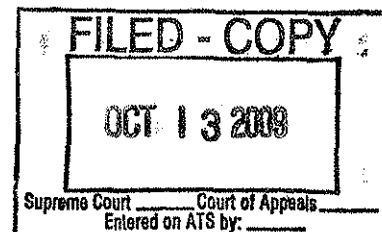


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I. STATEMENT OF THE CASE

1. NATURE OF THE CASE

This appeal asks the Court to decide whether the district court properly exercised discretion in determining and awarding attorney fees to J-U-B. BECO's conclusory allegations that the court abused its discretion are amply contradicted by the record. A reading of the district court's decision demonstrates that the court conducted a reasoned analysis of the evidence and considered the relevant factors under I.R.C.P. 54(e)(3) before awarding J-U-B attorney fees in the amount of \$41,140.

In 2008, this Court remanded the fee issue back to the district court with instructions to determine and award fees to J-U-B for defending against BECO's breach of contract claim. Even though the district court followed this Court's instructions and acted within its discretion in awarding fees to J-U-B, BECO refuses to accept the decision and argues that J-U-B is not entitled to any fees. Losing twice on summary judgment, once on appeal, and once after remand, particularly where powerful evidence supported each decision, by no means furnishes a basis for BECO to attack the credibility of the district court by alleging that it acted out of vindication for its own sense of justice in awarding J-U-B additional fees.

BECO's original lawsuit claimed that J-U-B had delayed BECO's work on a construction project, thereby subjecting BECO to liability for liquidated damages. J-U-B successfully defended itself on all claims at the district court and was awarded attorney fees in the amount of \$75,351.42 which prompted BECO's first appeal.

That appeal resulted in this Court's decision in *BECO Const. Co., Inc. v. J-U-B Engineers, Inc.* 145 Idaho 719 (2008) to affirm the district court's summary judgment order and partially remand the fee award for a determination and award of fees to J-U-B for defending against the contract claim. On remand, the district court complied with the directions from this Court by awarding J-U-B attorney fees, with interest, in the amount of \$35,600 for defending against the breach of contract claim and then awarded J-U-B an additional \$5,540 for costs and fees incurred in preparing additional briefing on the issue at BECO's insistence. In reaching its decision, the district court revisited the existing record and considered, at a minimum, the expert testimony of John Bailey, the complexity of the issues, the experience of counsel for J-U-B, the reasonableness of the hourly rate charged, the nature of the work performed, and the objections raised by BECO,¹² coupled with the briefing and oral argument of counsel. By properly considering the evidence in the record and the factors outlined in I.R.C.P. 54(e)(3), the court showed that it understood the issue as one of discretion, that it acted within the bounds of that discretion, and that it exercised reason in awarding fees to J-U-B.

2. COURSE OF PROCEEDINGS

The introduction to the district court's June 12, 2008 *Memorandum Decision and Order* provides a succinct chronology of the major events in the history of this case.³ In summary, BECO's original complaint was against the City of Pocatello and J-U-B as codefendants,

¹ See Clerk's Record After Remand, p. 65.

² Consistent with Appellant's Brief, this brief shall reference the Clerk's Record after remand as "Clerk's Record After Remand" since the Clerk's Record After Remand has no volume designation. See Appellant's Brief at footnote 1 and Clerk's Record After Remand, p. 65.

³ See Clerk's Record After Remand, pp. 37-39.

claiming breach of contract with regard to both defendants, negligence with regard to both defendants, and intentional interference against J-U-B.⁴ The City settled with and BECO shortly after the suit was filed. J-U-B then filed its first summary judgment motion and supporting memorandum prompting BECO to withdraw its breach of contract claim just before the hearing after J-U-B pointed out in the briefing that there was no direct contractual relationship between the two parties and BECO was not a third party beneficiary to the contract J-U-B had entered with the Pocatello Development Authority.⁵ As a result of that motion, the court ruled in J-U-B's favor on the negligence claim but denied summary judgment on the intentional interference with contract claim.⁶

Then, after receiving and reviewing BECO's discovery responses, J-U-B filed a second summary judgment motion and memorandum in support of the motion.⁷ After reviewing the late discovery, J-U-B learned that BECO's project notes directly contradicted the statements BECO's witness had made in his affidavit opposing J-U-B's first summary judgment motion.⁸ The court ruled in J-U-B's favor on the second summary judgment motion and then awarded J-U-B attorney fees.⁹ BECO appealed this decision and asked this Court to reverse the second summary judgment order and fee award. This Court affirmed the summary judgment order and partially vacated the fee award by remanding the issue back to the district court for a

⁴ R. Vol. I, pp. 1-23.

⁵ R. Vol. I, pp. 33-53.

⁶ R. Vol. III, pp. 481-500.

⁷ R. Vol. III, pp. 533-553.

⁸ R. Vol. III, pp. 533-553.

⁹ R. Vol. III, pp. 650-678.

determination and award of fees to J-U-B for defending against the breach of contract claim. *BECO Const. Co., Inc. v. J-U-B Engineers, Inc.* 145 Idaho 719 (2008).

Subsequently, BECO filed a motion to release its cash deposit from the district court and a hearing was held on the issue.¹⁰ At the hearing, the court expressed its perception that this Court had instructed it to determine and award attorney fees to J-U-B and that it would take the issue of releasing the cash deposit under advisement and issue a ruling.¹¹ BECO then argued that it needed to have the opportunity to prepare additional briefing on the fee issue.¹² J-U-B argued that the record was replete with evidence that would allow the court to determine and award fees to J-U-B for defending against the breach of contract claim and to require additional briefing would constitute a waste of time and resources for both the court and the parties.¹³ The court allowed BECO the chance to file a brief but informed it that it would be responsible for the cost of J-U-B's brief.¹⁴

The court then entered a decision denying BECO's request to release all of the cash deposit, ruling that it would be inappropriate to release the funds until the court had determined the appropriate award of fees to J-U-B.¹⁵ Finally, the district court entered a decision which prompted this appeal by awarding J-U-B fees in the amount of \$35,600 for defending the contract claim, \$5,540 for researching and preparing the additional briefing on the fee issue, and

¹⁰ See Clerk's Record After Remand, pp. 16.

¹¹ Tr. Vol. I, pp. 20-25.

¹² Tr. Vol. I, pp. 20-25.

¹³ Tr. Vol. I, pp. 20-25.

¹⁴ Tr. Vol. I, pp. 20-25.

¹⁵ See Clerk's Record After Remand, pp. 37-42.

ordering that J-U-B be paid from the funds on deposit with the court, the balance to be remitted to BECO.¹⁶

3. STATEMENT OF FACTS

This Court's prior decision in *BECO Const. Co., Inc. v. J-U-B Engineers, Inc.* 145 Idaho 719 (2008), partially remanded the issue of attorney fees back to the district court for a determination and award of fees to J-U-B for defending itself against BECO's breach of contract claim. The district court had previously awarded costs and fees to J-U-B in the amount of \$75,398.42.¹⁷ Prior to the award, the court had conducted a hearing on the attorney fees issue and J-U-B had presented evidence in support of the award which included billing records¹⁸, testimony from experienced Idaho attorney, John Bailey¹⁹, an affidavit of counsel in support of the award²⁰, a *Memorandum of Costs and Fees*²¹, a *Memorandum in Support of Motion for Attorney Fees and Sanctions*²², and oral argument from counsel²³. BECO filed a brief opposing the award but did not present any evidence to counter the testimony from Mr. Bailey.²⁴

After the remand, the district court held a hearing on BECO's motion to release its cash deposit. At this hearing, the court heard argument from both sides over releasing the case deposit and also about awarding attorney fees to J-U-B.²⁵ J-U-B argued that the record contained

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

¹⁷ R. Vol. IV, p. 816.

¹⁸ R. Vol. IV, pp. 687-708.

¹⁹ See Clerk's Record After Remand, pp. 26-29.

²⁰ R. Vol. IV, pp. 780-782.

²¹ R. Vol. IV, pp. 681-686.

²² R. Vol. IV, pp. 709-715.

²³ See Clerk's Record After Remand, pp. 24-31.

²⁴ R. Vol. IV, pp. 739-754.

²⁵ T. Vol. I, pp. 8-25.

enough information to allow the district court to determine and award J-U-B its fees for defending against the contract claim.²⁶ J-U-B further argued that up to the point that the breach of contract claim was dismissed, the fees incurred by J-U-B were for defending against the breach of contract claim and J-U-B should be awarded such fees.²⁷ BECO argued that J-U-B needed to specifically explain and expound upon the entries in its billing records and that it needed to prepare additional briefing on the issue.²⁸ The court advised the parties to file simultaneous briefs on the attorney fees issue and advised J-U-B to also file a cost bill for the additional fees for having to file the brief.²⁹

II. DISCUSSION

1. STANDARD OF REVIEW

Attorney fees are awarded in the sound discretion of the trial court, and the party refuting the award must show an abuse of discretion by the trial court. *Graham v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 611, 613 (Idaho 2003). When this Court reviews an alleged abuse of discretion by a trial court, the sequence of inquiry is: (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 the exercise of reason. The test for abuse of discretion concerns whether the trial court correctly perceived the issue as one of discretion, acted within the boundaries of its discretion consistent with the legal

²⁶ T. Vol. I, pp. 16-17.

²⁷ T. Vol. I, pp. 22-23.

²⁸ T. Vol. I, pp. 18-21.

²⁹ T. Vol. I, pp. 24-25.

standards applicable to the specific choices available to it, and whether the trial court reached its decision by an exercise of reason. *Thomson v. Olsen*, 205 P.3d 1235, 1239 (2009), (citing *Weeks v. E. Idaho Health Servs.*, 143 Idaho 834, 837 (2007)).

2. THE DISTRICT COURT CORRECTLY PERCEIVED THE ISSUE OF DETERMINING AND AWARDING ATTORNEY FEES TO J-U-B AS ONE OF DISCRETION AND PROPERLY ACTED WITHING THE BOUNDS ITS DISCRETION BY CONSIDERING THE EVIDENCE BEFORE IT AND EXERCISING REASON IN REACHING ITS DECISION.

A. The district court satisfied all three parts of the abuse of discretion test.

As stated above, the abuse of discretion test has three parts. The first requires that the court correctly perceive the issue as one of discretion. During the June 9, 2008 hearing on *Plaintiff's Motion for Release of Cash Deposit*, the district court pointed out to counsel by quoting partly from this Court's prior decision that:

“...Idaho Code 12-120(3) does not provide the basis for the key 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. So, the issue isn't whether or not they're entitled to fees; that has already been resolved by the Idaho Supreme Court. The only issue is the amount....”³⁰

This statement shows that the district court correctly perceived the decision to determine and award attorney fees to J-U-B for defending against the breach of contract claim as not only within its discretion, but as the only reason this Court remanded the case to the district court. In taking the issue of releasing the cash under advisement and then advising the parties to submit additional briefing on the attorney fee issue, the court's actions are consistent with this perceived discretion.

³⁰ See Tr. Vol. I, p.13.

The second and third parts of the abuse of discretion test require that the court act within the boundaries of its discretion consistent with the legal standards applicable to the specific choices available to it, and reach its decision by an exercise of reason. In meeting these two parts of the test, the court properly considered the factors of I.R.C.P. 54(e)(3) and exercised reason in reaching its decision to award fees to J-U-B

In Idaho, the method of calculating reasonable attorney fees is set forth in Idaho Rule of Civil Procedure 54(e)(3). *Monsanto Co. v. PacifiCorp*, 2006 U.S. Dist. LEXIS 27565 (D. Idaho Apr. 24, 2006). I.R.C.P. Rule 54(e)(3) requires the court to consider the following factors in determining the amount of attorney fees:

In the event the court grants attorney fees to a party or parties in a civil action it shall consider the following factors in determining the amount of such fees:

- (A) The time and labor required.
- (B) The novelty and difficulty of the questions.
- (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
- (D) The prevailing charges for like work.
- (E) Whether the fee is fixed or contingent.
- (F) The time limitations imposed by the client or the circumstances of the case.
- (G) The amount involved and the results obtained.
- (H) The undesirability of the case.
- (I) The nature and length of the professional relationship with the client.

- (J) Awards in similar cases.
- (K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
- (L) Any other factor which the court deems appropriate in the particular case

The language of the court's *Memorandum Decision and Order* dated October 29, 2008 provides insight into how the court reached its decision. It shows that the court considered most, if not all, of the twelve factors laid out under this rule before reaching its decision that the fees J-U-B incurred prior to BECO withdrawing its contract claim were incurred defending against that claim.³¹

In reaching its decision, the court reconsidered the testimony of J-U-B's expert witness. At the August 7, 2006 fee hearing, the court considered the testimony of Pocatello attorney John Bailey.³² Mr. Bailey was a witness called by J-U-B. He stated, that among other things, the work done and the rate charged by J-U-B's counsel was reasonable and that the summary judgment decisions in this case were well reasoned.³³ He also stated that in his opinion BECO's complaint was not well researched.³⁴ The court questioned both Mr. Bailey and counsel for J-U-B about the nature of defending a lawsuit of this type. Mr. Bailey further opined on the nature of defending against a construction case and also about defending specifically against BECO, concluding that litigation against BECO is difficult and unreasonably time consuming.³⁵

³¹ See Clerk's Record After Remand, pp. 65-66.

³² See Clerk's Record After Remand, p. 65.

³³ See Clerk's Record After Remand, pp. 26-27 at pp. 24-27.

³⁴ See Clerk's Record After Remand, p. 27 at pp. 25-26.

³⁵ See Clerk's Record After Remand, pp. 26-27 at pp. 24-27.

In reaching its decision, the court considered the volumes of documents J-U-B's counsel had to review in defending the case. The underlying case beneath this appeal involved a document intensive construction case which resulted in time consuming document review at the initial stages. When J-U-B was first served the complaint it had no idea why it was being sued. J-U-B knew it hadn't contracted with BECO. As explained at length in the briefing done for the first appeal, there were two separate contracts; a design contract between J-U-B and the Pocatello Development Authority and a construction contract between BECO and the City of Pocatello. J-U-B could not comprehend why BECO would sue J-U-B in contract. These concerns all had to be sorted out by J-U-B's counsel and explained to the court through summary judgment briefs.

The court also considered the billing records showing the work done by J-U-B's counsel. J-U-B presented the court with evidence to support an award 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 in any way unreasonable. *J-U-B apportioned its fees by arguing to the court that the amount of fees incurred by J-U-B prior to BECO withdrawing its breach of contract claim were all incurred to defend the breach of contract claim.* The work J-U-B's counsel did at the beginning of this case was necessary to defend the lawsuit and would have been done regardless if there was one claim or three. Regardless of whether J-U-B separated out each individual time entry and labeled it as being spent defending against the contract claim, the court was capable of reviewing the billing records and considering all of the factors outlined by I.R.C.P. 54(e)(3) and reaching a decision which is exactly what it did.

In the alternative, if this Court disagrees with the district court's decision that the work done by J-U-B was done defending against the contract claim, the Court could hold that the same result could have been reached if the district court had held that BECO's unjustifiable claims were made and pursued frivolously. This Court chose to apply the "right result/wrong reason" test in its previous opinion in this case by holding that because J-U-B was not a stranger to the construction contract between BECO and the City of Pocatello, J-U-B could not have interfered with the contract. *Beco Constr. Co. v. J-U-B Eng'rs, Inc.*, 145 Idaho 719, 724 (2008). It is clear that J-U-B's billing records did not change from when they were first submitted to the court. It is also clear that Mr. Bailey's testimony that BECO's complaint was not well researched and that the case was brought and pursued frivolously did not change. The district court considered both of these pieces of evidence, along with the rest of the record, before reaching its decision.

In addition to the testimony of Mr. Bailey and the billing records, the court also reviewed the Memorandum of Costs filed by counsel for J-U-B, the Memorandum in Support, and BECO's objections.³⁶ In support of the Memorandum of Costs, J-U-B filed an *Affidavit of Counsel Regarding Memorandum of Costs and Fees* which further supported the claim that the attorney's fees incurred by J-U-B were incurred at a reasonable rate and in accordance with the fees charged by attorneys with similar skill and experience, and the other factors laid out in I.R.C.P. 54(e)(3).³⁷ Adding all of this together, BECO's argument that J-U-B provided the court with no evidence or that the court had no evidence to consider before making its decision to

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

³⁷ R. Vol. IV. p. 781.

award fees to J-U-B is baseless. The court properly considered the evidence and made a reasoned decision. Thus, this Court should uphold the district court's resulting decision.

B. The district court did not award additional fees to “vindicate its own sense of justice” as BECO argues.

At the hearing on BECO's motion to release the cash deposit, BECO argued that J-U-B was not entitled to any fees because the record contained inadequate evidence to support an award. J-U-B argued that the court had ample evidence to determine and make an award of fees. BECO wanted to have a separate hearing on the fee issue and insisted on having the opportunity to file additional briefing on the issue over the objection by J-U-B.³⁸ The court allowed BECO the opportunity to brief the issue and ordered J-U-B to submit additional briefing on the issue along with a cost bill that would be paid by BECO.³⁹ Thus, the court determined that J-U-B was the prevailing party and acted within its discretion in awarding the additional fees to J-U-B.

All the court did by allowing additional briefing was give BECO an opportunity to establish its failing claim. BECO paid lip service to both the court's authority and the fact that it was really only arguing about the amount of fees, but in reality, it was raising the issue of J-U-B's entitlement to the fee and advising the court that any decision other than one that satisfied BECO would likely be appealed.

J-U-B, on the other hand, argued that sufficient evidence existed in the record to support an award of reasonable fees. A party claiming attorney fees does not even have to submit evidence as to what is a reasonable fee.

³⁸ T. Vol. I, p. 11.

³⁹ T. Vol. I, p. 24

What is a reasonable attorneys' fee is a question for the determination of the court, taking into consideration of 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 the 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 (1977).

The court clearly understood its role in all of this. It understood that it was directed to determine and award fees to J-U-B for defending against the contract claim by this Court. And because J-U-B claimed that it could do that by looking back at the evidence contained in the record and making a decision that meant that the court should go back and review the evidence in the record and attempt to make such a determination and award. However, because BECO was arguing that it needed the opportunity to file additional briefing, the court allowed BECO that opportunity at the cost of the work incurred by J-U-B. Allowing the parties to file additional briefing, then reviewing the existing record to determine and award fees to J-U-B was not done with any vindictive intent of punishing BECO; rather, it was squarely within the courts discretion and should be upheld.

C. The district court properly considered the factors of I.R.C.P. 54(e)(3).

The court's decision to award fees to J-U-B also stated that due to the objections raised by counsel for BECO and BECO's Petition for a Writ of Mandate against the court it was necessary for J-U-B to incur additional attorney fees in seeking an award on the contract claim for which J-U-B should be compensated in the amount of \$5,540.⁴⁰ Again, the court made this

⁴⁰ See Clerk's Record After Remand, p. 66.

decision by employing the factors laid out in I.R.C.P. 54(e)(3) and exercising its discretion. The district court's decision clearly demonstrates that it considered at least some of the twelve factors laid out under Rule 54(e)(3). It is well settled by this Court that I.R.C.P. 54(e)(3) does not require the district court to make detailed findings on each listed factor. The rule merely provides that the district court shall consider the factors, but does not require a finding on each one, as a particular listed factor may or may not be relevant to the outcome. *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 786 (2003) *U.S. Bank Nat'l Ass'n v. Kuenzli*, 134 Idaho 222, 228-29, 999 P.2d 877, 883-84 (2000); *Perkins v. U.S. Transformer West*, 132 Idaho 427, 431-32, 974 P.2d 73, 77-78 (1999); *Post Falls Trailer Park v. Fredekind*, 131 Idaho 634, 638, 962 P.2d 1018, 1022 (1998); *Empire Fire and Marine Ins. Co. v. North Pacific Ins. Co.*, 127 Idaho 716, 720, 905 P.2d 1025, 1029 (1995); *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 351, 766 P.2d 1227, 1232 (1988); *Irwin Rogers Ins. Agency, Inc. v. Murphy*, 122 Idaho 270, 277, 833 P.2d 128, 135 (Ct.App. 1992). This Court has further held that a trial court need not make specific findings demonstrating how it employed any of the factors listed in Rule 54(e)(3) but it should provide a record establishing that it considered the factors under the rule. *Pinnacle Eng'rs v. Heron Brook, LLC.*, 139 Idaho 756, 760 (2004), See also *Perkins v. U.S. Transformer West*, 132 Idaho 427 (1999), and *Elliot v. Darwin Neibaur Farms*, 138 Idaho 774, 2003 Ida. Lexis 60 (2003). In the *Pinnacle* case, the Court also cited its decision in *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 786 (2003) where it held that it is sufficient if the trial court states that it has taken into consideration the factors listed in I.R.C.P. 54(e)(3). In *Pinnacle*, the district court's written order simply stated, "The court awards attorney's fees in the amount of \$61,846.38." *Pinnacle Eng'rs*

v. Heron Brook, LLC., 139 Idaho 756, 760 (2004). Here, the district court specifically mentioned I.R.C.P. 54(e)(3) factors in its decision to award fees to J-U-B.

This Court has previously upheld awards of attorney fees where the record indicates that the trial court considered the relevant factors even though it did not make any reference to the rule when making the award. In *Brinkman v. Aid Insurance Co.*, 115 Idaho 346, 766 P.2d 1227 (1988), the trial court awarded attorney fees in an amount roughly equal to the contingent fee the prevailing party had contracted to pay his attorneys. When making the award in *Brinkman*, the trial court mentioned only that the attorney fee was contingent and did not make any reference to Rule 54(e)(3) or to the other factors listed in that rule. This Court upheld the award, however, "because the record establishes that several of the eleven factors were argued and briefed to the court and there is no basis to conclude the court failed to consider each of the factors." *Id.* This Court has further added that the profile of the record provided enough information to presume that the trial judge considered the other pertinent factors enumerated in the [rule]." *Pinnacle Eng'rs v. Heron Brook, LLC.*, 139 Idaho 756, 760 (2004). These holdings are consistent with how the U.S. District Court for the District of Idaho has applied the factors of I.R.C.P. 54(e)(3) when applying Idaho state law. That court held that "although these factors must be considered, it is not required that specific findings be made as to how the factors were employed or applied in making an award of fees. *SemMaterials, L.P. v. Alliance Asphalt, Inc.*, 2007 U.S. Dist. LEXIS 15470 (D. Idaho Mar. 1, 2007). These cases show that the district court in this case properly exercised its discretion and explained its findings adequately.

Here, the district court clearly demonstrated that it properly considered the Rule 54(e)(3) factors in reaching its decision by explicitly mentioning them in its decision. This provides convincing evidence that the court properly viewed its decision to determine and award fees to J-U-B as within its discretion, that it properly acted within the bounds of that discretion, and certainly exercised reason it reaching its decision to award J-U-B fees in the amount of \$41,140. Therefore, this Court should uphold the district court's decision.

3. THE DISTRICT COURT CORRECTLY DENIED BECO'S MOTION FOR RELEASE OF THE CASH DEPOSIT AND CORRECTLY ORDERED THAT RELEASING IT BEFORE DETERMINING A PROPER FEE AWARD WOULD BE INAPPROPRIATE UNDER THE APPLICABLE RULES.

A. The district court properly interpreted I.A.R. 13(b)(15), and I.R.C.P. 67 and 79(e) in making its decision to retain the cash deposit, determine and make an award of fees to J-U-B as required by this Court, and then returning the balance of the deposit to BECO.

In its June 12, 2008 *Memorandum Decision and Order* the district court properly considered and denied BECO's motion to release the cash deposit. In ruling on the motion, the court looked to I.A.R. 13(b)(15), I.R.C.P. 67 and I.R.C.P. 79(e). While the application of a procedural rule is a question of law over which this Court exercises free review, in this case the district court's application of the applicable rules does not reach the level of reversible error. *Zenner v. Holcomb*, 210 P.3d 552, 558 (2009).

Rule 13(b) of the Idaho Appellate Rules governs the powers of the district court during the pendency of an appeal. The district court stated that I.A.R. 13(b)(15) is the subsection relevant to this action and 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.

I.R.C.P. 67 provides for the making of cash deposits with the court and 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, I.R.C.P. 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 an 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....

The court correctly understood that the directive from this Court was limited to determining and awarding fees to J-U-B for defending against BECO's contract claim. I.R.C.P. 79(e) allows the district court discretion in granting or denying orders permitting reclamation of property in connection with an action "under such circumstances as it deems appropriate". Thus, the court's prerogative that it was inappropriate to release the cash deposit until after it determined the proper award of attorney fees and released those fees to J-U-B with the remaining balance to BECO was properly aligned with the court's goal of adhering to this Court's directive.

4. ATTORNEY FEES ON APPEAL

BECO brought and pursued this appeal frivolously, unreasonably, and without foundation by attacking the credibility and ability of the district court to make its decision without abusing its discretion. Therefore, J-U-B respectfully requests costs and fees pursuant to I.A.R. 40 and I.A.R. 41 and Idaho Code §12-120(3) and Idaho Code §12-121. Idaho Code §12-121 provides that "[i]n any civil action, the judge may award reasonable attorney's fees to the prevailing party...." This Court has interpreted I.C. §12-120(3), to mandate the award of attorney fees on appeal as well as a trial. *J.R. Simplot Co. v. Chemetics Int'l*, 130 Idaho 255 (1997). As the prevailing party on appeal, J-U-B requests an award of costs and fees on appeal.

III. SUMMARY AND CONCLUSION

The district court was given very specific instructions from this Court. Those instructions were to determine and award attorney fees to J-U-B for defending itself against BECO's breach of contract claim. In order to do that the court had to consider the factors outlined in I.R.C.P. 54(e)(3). The court reached its decision by considering the record before it and argument from


both sides. The court was intimately familiar with the facts of the case and had already considered the attorney fee issue once. Thus, after reconsidering the prior award in light of this Court's instruction, the court properly exercised its discretion and made a reasonable award to J-U-B which should be upheld in its entirety with an award of costs to J-U-B.

For all the reasons outlined above, J-U-B respectfully requests that this Court uphold the judgment for attorney's fees.

RESPECTFULLY SUBMITTED this 13th day of October, 2009.

CAPITOL LAW GROUP, PLLC

By:




Daniel A. Nevala
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2009, I served a true and correct copy of the foregoing document(s) on the person(s) listed below, in the manner indicated:

Bryan D. Smith
Smith, Driscoll & Associates, PLLC
Post Office Box 50731
Idaho Falls, ID 83405

<input checked="" type="checkbox"/>	United States Mail, Postage Prepaid
<input type="checkbox"/>	Overnight Courier
<input type="checkbox"/>	Via Facsimile
<input type="checkbox"/>	Hand Delivered



Daniel A. Nevala